

The Migration Crisis?



THE MIGRATION CRISIS?

CRIMINALIZATION, SECURITY AND SURVIVAL

DINA SIEGEL AND VERONIKA NAGY (Eds.)

eleven
international publishing

Published, sold and distributed by Eleven International Publishing

P.O. Box 85576

2508 CG The Hague

The Netherlands

Tel.: +31 70 33 070 33

Fax: +31 70 33 070 30

e-mail: sales@elevenpub.nl

www.elevenpub.com

Sold and distributed in USA and Canada

International Specialized Book Services

920 NE 58th Avenue, Suite 300

Portland, OR 97213-3786, USA

Tel.: 1-800-944-6190 (toll-free)

Fax: +1 503 280-8832

orders@isbs.com

www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-839-2

ISBN 978-94-6274-839-2 (e-book)

© 2018 The authors | Eleven International Publishing

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Printed in The Netherlands

ACKNOWLEDGEMENTS

This volume is a result of a two-year-long intensive work of the international consortium that would not be complete without a full acknowledgement of all our colleagues who were engaged in activities organized around the topic of migration. Since the first seminar, in Utrecht in 2015, we have organized several academic events, at which this multi-disciplinary group of researchers discussed the current issues around migration and a so-called refugee crisis. Each seminar and workshop in Utrecht and in Barcelona engaged new members from different disciplines, which slowly extended this network into an international cooperation of members who are leading experts in the area of migration, mobility, crime and security. During the workshops, organized with the support of Renforce, Utrecht University and the Barcelona City Council, the consortium identified the core topic of this book, namely critical reflections on the so-called refugee crisis in the EU during the period 2015-2017. In this volume each contributor peels back the barriers to reveal mostly concealed and therefore under-researched refugee policies and practices.

We are grateful to all the authors who contributed to this book. We thank Renforce for their support, without which the events that were organized in the past two years could not have taken place. The secretariat of the Willem Pompe Institute, and especially Carin Schnitger, helped a lot with practical arrangements around our activities. Our student assistants Lene Swetzer and Anna Merz contributed greatly to the organization of the consortium meetings and preparations of this volume. Last, but not least, Dr. Nilay Kavur has to be singled out as the final word on all matters pertaining to communication with the authors, readability and style. We thank Nilay for her patience and optimism throughout the whole process of creating the consortium of researchers and during the production of this book.

Utrecht, December 2017

Dina Siegel and Veronika Nagy



TABLE OF CONTENTS

1 Introduction	1
<i>Dina Siegel and Veronika Nagy</i>	
Part I EU Policies and ‘Refugee Crisis’ in Transit Countries	25
2 The ‘Refugee Crisis’: A Crisis of Law, Will or Values?	27
<i>Hanneke van Eijken, Barbara Safradin and Linda A.J. Senden</i>	
3 The EU–Turkey Statement or the ‘Refugee Deal’: The Extra-legal Deal of Extraordinary Times?	61
<i>Narin Idriz</i>	
4 The EU, Turkey and the Refugee Crisis: The Externalization of Migration Management and Human Smuggling	85
<i>Ayşem Biriz Karaçay</i>	
5 Will Tailor-Made Migration Deals Help to Solve the European Migration ‘Crisis’?	105
<i>Annelies Zoomers, Femke van Noorloos and Ilse van Liempt</i>	
6 Albanian Mass Migration: Identifying Policy and Legal Gaps	131
<i>Irina Kotenko and Ildir Peçi</i>	
7 What Is Left from ‘Off the Record’: Politics about ‘Refugee’ Children in Turkey in the Midst of the EU, the UN, the State, NGOs and Donors	151
<i>Nilay Kavur</i>	
8 Frontex Rebooted – The Securitization of Migration in the EU by the European Border and Coast Guard and Its Legal Implications in Terms of EU Competences and Social Legitimacy	183
<i>Mairi Zoi</i>	
9 Let Sleeping Dogs Lie: The Doctrine of Temporary Protection in EU Asylum Law	219
<i>Salvatore Nicolosi</i>	

TABLE OF CONTENTS

Part II ‘Refugee Crisis’ in Destination Countries	241
10 Crimes of Solidarity in Times of a ‘Migrant Crisis’ <i>Dina Siegel</i>	243
11 Countering ‘Crisis’: Identifying the Components of the Refugee Crisis in Greece <i>Vassilis Gerasopoulos</i>	265
12 Securitization and Militarization of Migration Management in Europe: The Case of Refugee Migration through Slovenia in 2015/2016 <i>Aleš Bučar Ručman</i>	293
13 ‘Welcoming Distant Refugees, Barring the Arrival of Neighbouring Migrants’ – Has the So-Called Refugee Crisis Shifted Spanish Migration Control Policies? <i>Cristina Fernández-Bessa and Jose A. Brandariz-García</i>	321
14 The Refugee Crisis as a Window of Opportunity for Urban Experiments in the Netherlands <i>Karin Geuijen</i>	345
15 The Securitization of Asylum Seeking in Sweden after 2015 in Light of Experiences of Asylum-Seeking Adolescent Girls with Roots in Afghanistan <i>Ildikó Asztalos Morell and Mehrdad Darvishpour</i>	363
About the Editors	389
About the Authors	391

1 INTRODUCTION

Dina Siegel and Veronika Nagy

Was there a ‘migrant crisis’ in 2015-2017? What exactly does the term mean, and what socio-economic, political or cultural aspects and/or emotional reactions caused us to consider this period in terms of a ‘crisis’? Who was interested in presenting the recent flow of migrants in these terms? And do the researchers from different disciplines link and associate this concept with the same phenomenon? In other words, was it a crisis of legitimacy, of migration policy, of solidarity or perhaps of humanity? Was this crisis a consequence of other urgent problems and situations, such as ‘economic crisis’, ‘ethnic crisis’, ‘crisis of globalization’ or perhaps ‘crisis of democracy’? These are some of the selected issues that will be explored and challenged in this book.

In the period 2015-2017, which was called a ‘migrant crisis’, or, more specifically, a ‘refugee crisis’, we were continuously confronted with the heartbreaking images and accounts in the (social) media of people who desperately tried to reach the coasts of Europe. We witnessed political and public debates, often based on stereotypes and full of emotional explosions; different and sometimes controversial decision-making processes of how to manage this mass migration; and concrete practical responses from aid-providing organizations and local entrepreneurs. And there was academic research, which tried to identify the motives and causes of this migration and to apply various theoretical approaches to a newly collected empirical data. The ‘root causes’ of the allegedly ‘unexpected’ arrival of hundreds of thousands of migrants in the European countries included general states of insecurity and outright danger because of war and conflicts; severe human rights violations, such as violations of the freedom of speech, religion and association; persecution or discrimination because of ethnicity, sexual preference or a political status; as well as severe economic problems, such as high levels of unemployment and low levels of investment in the country of origin. These root causes divided the migrants into two general categories: ‘good’ and ‘bad’. The ‘good’ ones were refugees, victims of war and violence, who needed an immediate response from the international community to save their lives. The ‘bad’ ones were those who migrated for economic reasons and were perceived as a potential threat to the working population and tax payers of the host countries.

1.1 RISKS AND FEARS

The mass migration of unwanted ‘others’¹ always causes fears at the societal and political levels.² The 2015-2017 migration crisis also brought with it fears that existing security measures will not be able to control and regulate the large numbers of refugees; that among the migrants there may be war criminals, jihadists and terrorists; and that political, social and ethnic conflicts in migrants’ countries of origin might spill over in Europe. In addition to the fears connected to security, there were also sociocultural and economic fears concerning people from different cultures that supposedly clash with the receiving cultures and with liberal Western democratic systems based on the rule of law (pointing at, for example, inequality between men and women, child abuse, forced marriages/child brides), and fears of a clash between different cultures (norms and values). There were fears of growing dissatisfaction among the local population receiving unlimited numbers of migrants imposing heavy financial burdens (on housing and social security), leading to anti-immigration sentiments and fears that immigrants might take over the job opportunities of the local population or cause strong competition resulting in lower wages. There were fears that transnational organized crime would expand with the migration wave (especially as a result of the activities of human smuggling networks) across Europe, that criminality would increase with an influx of migrants from poorer countries (resulting in property crimes and human trafficking) and that the local population would react with violence against the ‘unwanted others’ (hate crimes). There were also medical and demographic fears: that immigrants from outside Europe would bring new epidemics or cause the spread of contagious diseases that had already been eradicated by the public health system in the receiving countries, that the ongoing influx of migrants would be a major challenge for the healthcare systems of the receiving countries and that there would be a huge spurt in the population because of the large number of children in non-Western migrant families.

1.2 SOCIAL REACTIONS

These fears of a new influx of migrants shape both the social reactions (rejection, criminalization, acceptance, philanthropy or financial support) and the social and economic behaviour of the very actors directly involved (migrants, the families they left behind, policymakers, private actors, etc.).

1 J. Young, *The vertigo of late modernity*, London, Sage, 2007; K. F. Aas, “Beyond ‘the desert of the real’: crime control in a virtual (ised) reality” in Y. Jewkes (ed.), *Crime online*, Cullompton, Willan Publishing, 2007.

2 F. Furedi, *Population and development: a critical introduction*, New York, St. Martin’s Press, 1997; D. L. Altheide, *Creating fear: News and the construction of crisis*, New York, Transaction Publishers, 2002.

Media around Europe have emphasized the large scale of political responses, ranging from ‘Wir schaffen es’ (‘We can do it’) (by the German Chancellor, Angela Merkel) and ‘we have to show hospitality towards people escaping the war’ (by the Mayor of Barcelona, Ada Colau) to ‘we are flooded by a tsunami of immigrants’ (by the right-wing politician Geert Wilders in the Netherlands) and the “swarm” of migrants coming across the Mediterranean’ (by the former UK prime minister David Cameron). The EU countries on the Balkan route (Slovenia, Croatia) feared they would become a ‘pocket for unwanted immigrants’ and of being excluded from the internal free movement area and placed on the other side of a ‘mini Schengen’.

In the course of 2015-2016 the images of migrants crossing the borders of Europe in their attempt to reach West Europe changed. The EU started to close its doors, first, by blocking the Balkan route (the border between Greece and Macedonia); second, by creating a ‘line of defence’ on the fenced Hungarian and Slovenian border; and third, by signing an agreement with Turkey. These steps led to an essential decrease in the number of migrants in 2016 (around 363,000 migrants arrived by sea and land in the EU in 2016, compared with more than 1 million in 2015, according to data provided by the International Organization for Migration.³ The number of migrants arriving on the Greek islands started to decline from 20 March 2016, the day on which the pact with Turkey came into force. However, with the closure of the Aegean Sea route, the number of migrants arriving through the Central Mediterranean route to Italy increased to a record figure of more than 180,000 people.⁴

With the policies having been implemented, the European Union has managed to reduce the flow of migrants, although it has failed to find a common solution to these flows. The relocation of the 160,000 immigrants that had to be achieved within two years appeared to be ‘wishful thinking’. By December 2017 European countries had accommodated only 9,700 refugees.⁵ Although the number of refugees has considerably declined, Germany, Austria, Sweden, France, Denmark and Norway have continued to intensify controls at their borders, so that free movement in the Schengen area has been compromised. Physical restrictions have also been imposed in other countries. Hungary has built a fence on its borders with Serbia and Croatia, and has accompanied this measure with the implementation of changes to the penal code and harsh punishment for violations of immigration rules.

The migration in 2015-2017, which affected all European societies, has exposed the structural limitations of the EU migration policies and the tools for their implementation.

3 See International Organization of Migration, 2016. Migratory Routs Map. Retrieved on 1 June 2016 from <http://frontex.europa.eu/trends-and-routes/migratory-routes-map>.

4 Report of the United Nations High Commissioner for Refugees, editions ranging from 1982-9, 2002. 2; USCR WRS from 1987, 92.

5 A. Geddes, & P. Scholten, *The politics of migration and immigration in Europe*, London, Sage, 2016, p. 1.

Despite several successes and attempts to manage migration flows from the Mediterranean, the fragility of the solidarity and commitment across and within the EU became clear. The questions about the migration to and within Europe, its normative basis, scope, boundaries, and premises, but mainly the human lives involved, became particularly urgent. The old phenomenon of international migration has appeared in a new guise. The inability of the EU to effectively address immigration led to individual (national) responses, which threatened the coherence of the EU, victimized the migrants and, in the end, left the EU dependent on external partners.

The present volume includes research articles referring critically to the social construction of a so-called migrant crisis in the European Union between 2015 and 2017. They approach the subject from different disciplines, focusing on different aspects of the phenomenon, but have several features in common.

First, migration is not considered an abstract phenomenon, but a lived experience embedded in legal, political, social, economic and cultural settings and reflected in public attitudes and individual experiences. It is a component of international mobility, caused by sharp differentials in economic, political and/or demographic conditions. Migration presents opportunities, as well as problems, while attempts to manage migration flows in the form of migration policies and socio-economic initiatives do not always appear to solve the inherent problems, and sometimes even create new ones.

Second, migration is a politically contested phenomenon, which leads to political conflicts and decisions regarding the management of these migration flows. Within the EU framework migration policy is contested as the current design of EU migration policy; it imposes higher burdens on member states located at the EU's external borders compared with the others, which has led to various political arguments between the member states, especially in terms of solidarity. Cooperation between the EU and third countries depends on the political situation. This political element is also crucial for the individual decision-making process by migrants and their trajectories from the sending to the receiving countries. Local political struggles within these third countries therefore have global consequences for migration policies.

Third, only a multidisciplinary approach can provide academics with an in-depth understanding of the migration processes in the 21st century. In most of the research on migration, the approach is either sociological or normative. In this book, we combine approaches from different disciplines, namely sociology, anthropology, social geography, development studies, law and criminology. This allows us to compose a multifaceted picture of migration and migration policies.

1.3 THEORETICAL APPROACHES TO MIGRATION

Most of the early migration studies were initiated by policymakers, who mainly framed migrants according to legal, economic or demographic objectives. Transnational conflict-related mobility was generally not considered.⁶ Dominant migration theories focused on migration processes based on economic push and pull factors⁷ and on migrants' integration in the receiving society.

Macroeconomic theories on migration mainly analysed the impact of financial flows and international labour on national economies.⁸ According to the neoclassical macro-theory of migration,⁹ the unbalanced distribution of capital and labour causes inequality in wages and living conditions, leading to migration. This theory also emphasizes the importance of the financial transfers of migration in the context of socio-cultural changes. Ravenstein's theory of migration highlighted the concept of being in 'search of opportunity' as the main motive for migration.¹⁰ The theory asserts that the root cause of migration is the existence of unequal development between the central developed countries and the peripheral agricultural countries. The central countries therefore develop by exploiting the peripheral countries. Lee¹¹ added the Situation-Oriented Approach (Push-Pull Hypothesis), which also considers a rational choice by migrants based on opportunist considerations.

There were also attempts to link economic and social theories. Appadurai¹² laid out his meta-theory of disjuncture, according to which the 'new global cultural economy has to be seen as a complex, overlapping, disjunctive order' composed of different interrelated, yet disjunctive cultural flows, the so-called scapes: the migration of people across cultures and borders. Massey followed this idea with his migration network theory,¹³ focusing on the elements that perpetuate migration. Migrants in countries of destination and possible future migrants are interconnected, and these social networks play a crucial role in providing employment and accommodation for new immigrants, lowering their costs and risks, and

6 J. F. Holliefield, "The politics of international migration", in C. B. Brettell, & J. Holliefield (eds.), *Migration theory: Talking across disciplines*, New York, Routledge, 2000, pp. 137-185.

7 A. Portes, "Conclusion: Towards a new world-the origins and effects of transnational activities", *Ethnic and Racial Studies*, Vol. 22, No. 2, 1999, pp. 463-477.

8 B. R. Nayar, *India's globalization: evaluating the economic consequences*, Vol. 22, Washington, East-West Center, 2006.

9 S. Castles, H. De Haas, & M. J. Miller, *The age of migration: International population movements in the modern world*, New York, Palgrave Macmillan, 2013.

10 E. G. Ravenstein, "The laws of migration", *Journal of the Royal Statistical Society*, Vol. 52, No. 2, 1889, pp. 241-305.

11 E. S. Lee, "A theory of migration", *Demography*, Vol. 3, No. 1, 1966, pp. 47-57.

12 A. Appadurai, "Disjuncture and difference in the global cultural economy", *Public Culture*, Vol. 2, No. 2, 1990, p. 32.

13 D. S. Massey, J. Arango, G. Hugo, A. Kouaouci, A. Pellegrino, & E. Taylor, "Theories of international migration: A review and appraisal", *Population and Development Review*, Vol. 19, No. 3, 1993, pp. 431-466.

providing newcomers with information about migration and even with financial resources.¹⁴ This theory is extended by the migration system theory, which focuses on the migration flows between countries that are linked through historical, political, economic and cultural ties.¹⁵ The advantage of the migration system approach is that it enables the conceptualization of migration to move beyond a linear, unidirectional, push–pull movement to a circular, multicausal and interdependent movement, with the effects of change in one part of the system being traceable through the remainder of the system.¹⁶ For the existence of migration flows it is not necessary for countries to be in direct geographical proximity. What is more important is the overall societal, political and cultural connection between the countries. This theory explains why immigrants from a specific country travel long distances and settle in the selected destination country and not just in the closest country with better socio-economic conditions.

From a micro-perspective, there is emerging literature that focuses on migrants' constructions of their own identities in relation to different places, groups and countries.¹⁷ Classical sociological theories, such as Fitzgerald's approach to the 'homeland dissimulation',¹⁸ which refer to the processes of becoming different (opposite to assimilation), have been contributing to new perspectives concerning assimilation, integration, segmentation, selectivity and dissimulation. Brettel and Hollifield¹⁹ discussed cultural and social dimensions in the theoretical field of migration studies by creating stratified typologies, new objectives for the explanation of migrants' social organization, ethnicity, identity and gender. This made their approach critical of world system theories and the globalization arguments.²⁰

-
- 14 K. Koser, *International migration: A very short introduction*, Oxford, Oxford University Press, 2007; D. S. Massey, J. Arango, G. Hugo, A. Kouaouci, A. Pellegrino, & J. E. Taylor, "An evaluation of international migration theory: The North American case", *Population and Development Review*, Vol. 20, No. 4, 1994, pp. 699-751.
- 15 S. Castles, & M. J. Miller, Migration in the Asia-Pacific region, *Migration Information Source*, Oxford, MPI, 2009.
- 16 T. Faist, "The crucial meso-level" in T. Hammar, G. Brochmann, K. Tamas, & T. Faist (eds.), *International migration, immobility and development: Multidisciplinary perspectives*. Oxford, Berg, 1997, pp. 187-218, p. 193.
- 17 For example, J. A. Rummens, "Conceptualising identity and diversity: Overlaps, intersections, and processes", *Canadian Ethnic Studies Journal*, Vol. 35, No. 3, 2003, pp. 10-26; H. Sicakkan, & Y. Lithman, *Envisioning togetherness. Politics of identity and forms of belonging*, New York, Edwin Mellen Press, 2004.
- 18 D. Fitzgerald, "A comparativist manifesto for international migration studies", *Ethnic and Racial Studies*, Vol. 35, No. 10, 2012, pp. 1725-1740.
- 19 C. B. Brettell, & J. F. Hollifield, *Migration theory: Talking across disciplines*, New York, Routledge, 2014.
- 20 J. F. Hollifield, "The emerging migration state", *International Migration Review*, Vol. 38, No. 3, 2004, pp. 885-912; T. Faist, "From common questions to common concepts", in T. Hammar, G. Brochmann, K. Tamas, & T. Faist (eds.), *International migration, immobility and development: Multidisciplinary perspectives*, Oxford, Berg, 1997, pp. 247-276; S. Sassen, "New employment regimes in cities: the impact on immigrant workers", *Journal of Ethnic and Migration Studies*, Vol. 22, No. 4, 1996, pp. 579-594.

Studying networks remains a key feature of anthropological research focusing on internal and international migrant populations across the globe.²¹ Theories of network-mediated migration²² are quite different from the rational-choice theoretical models favoured in the approaches of behaviourist economists and political scientists. Cultural anthropologists are interested in networks not only from the point of view of how they operate as part of the migration process,²³ but also as a form of social capital that facilitates settlement and incorporation, exploring not only the structural dimensions of the migration process and the immigrant community, but also the impact of migration on the lives of those who remain behind. This can include analyses of the social remittances (ideas and practices) that flow back to the sending communities. These social remittances may not only change gender, class, ethnic, political and/or institutional relations at home but also generate new migrations. While the micro- and meso-levels of analysis tend to be pervasive in the anthropology of migration, the discipline is also rooted in a cross-cultural comparison not only across space but also across time.²⁴ Cultural anthropologists are mainly interested in the daily experiences of migrants, their interrelationships with officials and other migrants or migrants from other ethnic groups. They apply the emic perspective of a thick description of the lived experiences of their informants and try to create a theoretical explanation from within the community²⁵ and the social and economic position and cultural values of different migrant communities in general.²⁶

Recently researchers have shown increasing interest in mobility²⁷ and how ethnic affiliations and religious belongings are changing along with migrant transnationalism.²⁸ Most of these studies pay attention to social formations, spanning borders, often linked to ethnic diaspora. At the same time, more attention is focused on online activities and dense networks of social media that are cutting across borders and creating forms of solidarity and identity that do not rest on contiguity and face-to-face contacts. Debates on the concepts of ‘multiple ethnic belongings’ and ‘parallel identities’, ‘situational ethnic identifications’ as well as various forms of ‘ethnic hybridity’ and ‘in-betweenness’ have led to

-
- 21 C. B. Brettell, “The social construction of networks, identities, communities, and globalscapes”, in C. B. Brettell, & J. F. Hollifield (eds.), *Migration theory: Talking across disciplines*, New York, Routledge, 2008, pp. 113-160.
- 22 T. D. Wilson, *Women’s migration networks in Mexico and beyond*, Albuquerque, University of New Mexico Press, 2009.
- 23 T. Modood, & F. Bovenkerk, *Multiculturalism – How can society deal with it? A thinking exercise in Flanders*, Brussels, KVAB, Standpunt 51, 2017.
- 24 N. Foner, *In a new land: A comparative view of immigration*, New York, New York University Press, 2005, p. 3.
- 25 D. Siegel, *The great immigration. Russian Jews in Israel*, Oxford, Berghahn Publications, 1998.
- 26 E. Kállai, *The Gypsies/The Roma in Hungarian society*, Budapest, Teleki László Foundation, 2002.
- 27 N. G. Schiller, & N. B. Salazar, “Regimes of mobility across the globe”, *Journal of Ethnic and Migration Studies*, Vol. 39, No. 2, 2013, pp. 183-200.
- 28 Š. Ripka, “Being ‘one of them’: Hierarchy and institutionalization of charisma of an ethnic pastor in a Romani congregation”, *Social Compass*, Vol. 62, No. 2, 2015, pp. 147-158.

policy-oriented definitions in which ‘new ethnicities’ have emerged, characterized by the concept of transnational migrants who have been socialized between or across different cultural fields.²⁹

The majority of migration theories focus on predominantly voluntary migration. On the other hand, there is also forced migration, when people have to leave a specific place because their life, health, well-being or even their very existence is endangered. Criminologists focus on irregular (or illegal) migration. Borrowing from Weerman,³⁰ this refers to ‘greater criminal punitiveness’ within a formally administrative system of immigration regulation.³¹

The accent on the integration of security and immigration issues is a result of the blurring of the line between internal and external security in the European space, as part of the development of new surveillance processes in the European Union. The Single European Act (1986) guaranteed the free movement of people and set the One Market objective, but it simultaneously made governments more concerned about the risks associated with the breakdown of internal borders.³² After the Declaration on Measures to Eliminate International Terrorism, governments felt increasingly uneasy about the protection of national security. This resulted in control and crime prevention practices that expanded their geographical scope, de facto deterritorializing the European border control, justified by the perceived threats of crime and mobility.³³ This general securitization tendency includes shifting borders and new profiling security technology that tends to disregard the counteractions of the securitized individuals. In these geopolitical changes, states are usually the main agents of criminalization. However, since their interests depend on their geopolitical decisions, they are adapting surveillance measures unequally.³⁴ Forced migration needs to be analysed as a social process in which human agency and social net-

29 Humphris, R. Practising integration in the EU: Mapping initiatives and innovations by local institutions and civil society, IRiS Working Paper Series, No. 3/2014. Retrieved from www.academia.edu/7476960/Practising_integration_in_the_EU._Mapping_initiatives_and_innovation_by_local_institutions_and_civil_society.

30 F. Weerman, A. van der Laan, I. H. Marshall, & L. Pauwels, “De bestudering van criminaliteit op macroniveau: een inleiding”, *Tijdschrift voor Criminologie*, Vol. 57, No. 2, 2015, p. 149.

31 V. Mitsilegas, The EU as a Global Security Actor: Constitutional Aspects of the External Dimension of the Area of Freedom, Security and Justice. Multi-Disciplinary Perspectives. In 20th International Conference of Europeanists-Crisis & Contingency: States of (In) Stability. Ces, June, 2013, I. Majcher, “Crimmigration” in the European Union through the Lens of Immigration Detention, Global Detention Project Working Paper No. 6, September 2013.

32 T. A. Miller, “Citizenship & severity: Recent immigration reforms and the new penology”, *Georgetown Immigration Law Journal*, Vol. 17, 2003, pp. 611-666; T. A. Miller, “Blurring the boundaries between immigration and crime control after September 11th”, *Boston College Third World Law Journal*, Vol. 25, No. 1, 2005, pp. 81-124.

33 K. F. Aas, “‘Crimmigrant’ bodies and bona fide travellers: Surveillance, citizenship and global governance”, *Theoretical Criminology*, Vol. 15, No. 3, 2011, pp. 331-346.

34 P. Andreas, & E. Nadelmann, *Policing the globe: Criminalization and crime control in international relations*, Oxford, Oxford University Press, 2006.

works play a major part. It gives rise to fears of losing state control, especially in the context of recent concerns about migration and security. In this regard, it is essential to question earlier sociological approaches that have been based on the principle of relatively autonomous national societies.

The structural-functionalist image of society as a closed system has hampered the study of migration. In the last few decades we have moved towards an image of an unbounded world society, or 'liquid society'.³⁵ In such a society, every person becomes the centre of a 'social world',³⁶ or a 'social field',³⁷ which consists of relationships and forces that shape his/her life. These concepts are not confined to a particular place or limited by territorial boundaries. Some of the relationships may be significant, but physically distant, while others may not be important, but located close by.³⁸ The importance of communication technology and social media must be emphasized in this context.

1.4 TRANSIT AND DESTINATION COUNTRIES

In our book, we have chosen to focus on transit and destination countries, recognizing that this distinction is not always clear. Some countries, such as Turkey and Greece, were often not considered final destination by migrants, who dreamt of settling in West European countries. However, in many cases (especially owing to the strict Dublin regulation), they decided to stay in transit countries, voluntarily or not, for a longer time, if not permanently.

The first stages of the migrants' experience – the sensation of loss, disorientation and numbness – have remained etched in the memories of many.³⁹ The efforts of the managers to apply the regulations on a permanent basis, to treat migrants as completely lacking in power, continue unabated, even when they eventually begin to establish relationships outside of the official settings and institutions. The competent authorities rarely concede that the helpless migrants they meet on arrival gradually acquire some power of their own, and that they integrate into society and create their own networks. The organizations try to hold on to their powers and to treat them as migrants for as long as they can, even if this means denying them such basic rights as mobility, work, education and housing. Faced with these conditions, the better the migrants can adapt to the new environment, the more non-obedient or even 'illegal' they are considered to become.⁴⁰

35 Z. Bauman, *Liquid modernity*, Cambridge, John Wiley & Sons, 2013.

36 E. Marx, "The social world of refugees: A conceptual framework", *Journal of Refugee Studies*, Vol. 3, No. 3, 1990, pp. 189-203.

37 K. Levin, *Field theory in social science: selected theoretical papers* (Edited by Dorwin Cartwright.), 1951, p. 44.

38 Marx, *supra* note 36.

39 J. Appe, *Flight and other stories*, London, Akira Press, 1987; S. S. Willen, "Exploring 'illegal' and 'irregular' migrants' lived experiences of law and state power", *International Migration*, Vol. 45, No. 3, 2007, pp. 2-7.

40 Marx, *supra* note 36.

At the national and EU levels, debates on migration issues tend to become entrenched in a deadlock. The debate usually has two discourse coalitions competing with each other: on the one hand, there are people advocating that the human rights of refugees and migrants must be protected; on the other hand, there are those who want to protect national interests, which are generally defined as economic, socio-cultural and/or security related. The latter discourse has tended to dominate in recent debates within European states. It seems impossible to escape from this deadlock through debate in European societies, but it is still necessary for societies to deal with the migration issue. In some places, we now see all kinds of initiatives being organized at the local level that deal with migration-related issues that do not seem to be dealt with at the national and EU levels. One example is Hotel Cosmopolis in Augsburg, where local artists and other citizens live and work together with refugees and tourists. In Utrecht – a major city in the Netherlands – the local government has established a reception centre for asylum seekers in which they live together with youngsters from the (deprived) neighbourhood in which the centre is located. They also follow courses together, for example on entrepreneurship. Crowdfunding often helps different initiatives to become a success. Local initiatives are organized by local government together with local organizations, by local organizations themselves without assistance from the local government and by refugees themselves together with other citizens. This is an example of what is more broadly called ‘experimental governance’.⁴¹ When these local initiatives are successful, they may help broaden the legitimacy of refugees in societies as well as in the European Union, resulting in a more balanced debate in national societies and at the EU level.

On the other hand, in 2016 the EU Parliament announced that ‘it is very concerned with the increased phenomenon of violence against migrants in Europe, which manifests itself in forms such as physical violence, labor exploitation, and trafficking, as well as sexual harassment and abuse, discrimination and hate speech’.⁴² In different countries, groups of right-wing supporters and neo-fascist political movements manifest their protest against migrants by attacking asylum seekers and refugee centres (e.g. arson attacks in Germany), setting fire to vehicles and rubbish containers, chasing immigrants and setting up street blockades in their neighbourhoods,⁴³ vigilante patrols on the streets, and different hate crimes and indirect threats (e.g. calls for the genocide and final solution of refugees on social media (public profiles) in Slovenia, and throwing the remains of butchered pigs on the construction site of a mosque in Ljubljana). Similar reports have come from Germany,

41 Cf. C. F. Sabel, & J. Zeitlin, “Experimentalist governance” in D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, New York, Oxford University Press, 2012.

42 A. Rigoni, Violence against migrants. Report. Committee on Migration, Refugees and Displaced Persons, 2016.

43 R. Selmini, “Ethnic conflicts and riots in Italy: The case of Rome, 2014”, *European Journal of Criminology*, Vol. 13, No. 5, 2016, pp. 626-638.

France and the Netherlands concerning violent reactions to the local municipalities' plans to build centres for asylum seekers.

1.5 RELEVANT LEGAL FRAMEWORK

The legal framework of the EU regarding the regulation of migration flows and the international protection of refugees through asylum policies has crystallized throughout the years in various international and European texts. Shortly after the end of World War II, in 1948, the United Nations General Assembly encapsulated, for the first time, a series of fundamental human rights in a legally binding international document, known as the Universal Declaration of Human Rights. This document recognized for the first time the international right to seek asylum. In 1951, the Geneva Convention was articulated as the main legal instrument dealing with the legal status of refugees, and it was ratified by 145 state parties. It defines the term 'refugee' and outlines the rights of the displaced as well as the legal obligations of states to protect them. Most importantly, the Geneva Convention is underpinned by two fundamental principles that have to ensure specific protection for asylum seekers and refugees: the principles of non-penalization and non-refoulement.

The Geneva Convention has had a great deal of influence on all future developments of international – and mostly European – laws and policies regarding migratory flows and refugees, thereby allowing states to grant more favourable treatment through a legal regime of greater protection. In the European context, such a regime has gradually developed through the adoption and enforcement of a series of legal documents: the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the Treaty of the European Union and the Treaty on the Functioning of the European Union, as they developed throughout the last few decades in the spirit of the relevant provisions of the Treaty of Maastricht (1992) and the Treaty of Amsterdam (1999).

The concern surrounding migratory flows had increasingly gained gravitas on the European Union agenda during the last decade of the 20th century and on the eve of the 21st. In December 2009, the Lisbon Treaty recognized the legally binding nature of the Charter of Fundamental Rights, which entrenches the rights found in the case law of the Court of Justice of the EU as well as the rights and freedoms enshrined in the European Convention on Human Rights. Its provisions are addressed not simply to the institutions and bodies of the EU but also to national authorities when they are implementing EU law. In these legal sources can be found not only the recognition of the right to asylum, but also a duty for the Union legislature to develop a common policy on asylum, subsidiary protection and temporary protection, which ensures compliance with the principle of non-refoulement. Even the scenario of pressing 'crisis' situations is foreseen in this provision,

according to which the Council of the European Union may adopt provisional measures for the benefit of the member state(s) involved.

In the Maastricht Treaty of 1992, the idea of a common asylum policy, in order to achieve the objectives of the Union regarding free movement, was for the first time introduced as a 'common interest' of the member states. As such, the policy regarding asylum was a matter of intergovernmental cooperation, meaning that the member states were free to impose their own particular legal and policy framework. This changed with the entry into force of the Treaty of Amsterdam in 1999, which 'transferred' the policies on asylum, immigration and free movement to the first 'supranational' EC pillar of the EU, in which member states share their sovereignty with the European institutions.

One of the first and most important steps which the Amsterdam Treaty envisaged was the establishment of a Common European Asylum System (CEAS), which came about by Council Regulation (EC) No. 343/2003, better known as the 'Dublin II Regulation'. The Dublin Regulation establishes those member states which are responsible for examining asylum applications. The criteria for establishing the responsibility run, in a hierarchical order, from family considerations, to the recent possession of a visa or residence permit in a member state, to whether the applicant has entered EU irregularly or regularly. Under Dublin II, the country responsible for examining the application of an asylum seeker was the one which played the major part in the applicant's entry into EU territory. Greece was, as expected, the country of first entry for many asylum seekers, but it had received fierce criticism for its unacceptable conditions for asylum claimants, the obstacles to accessing a fair procedure, the lack of protection and care for unaccompanied minors and the risk of serious human rights violations. At the same time, at a wider European level, the use of detention to enforce transfers of asylum seekers back to the country of their first entry along with the absence of an effective opportunity to appeal against the said transfers had created a negative sentiment towards the efficiency and legitimacy of Dublin II. The new Dublin III Regulation is currently one of the tenets of the CEAS mechanism in an attempt to deal with the crisis of the past two years. It has promised to improve efficiency and to create a sound procedure for asylum seekers, mainly by providing early warning, preparedness and crisis management mechanism; by a series of provisions on the protection of applicants (compulsory personal interviews, guarantees for minors and extended possibilities of reunification with relatives) and by an obligation to ensure free legal assistance upon request. In practice, the implementation of the Dublin Regulation is concomitant with the enforcement and implementation of two other legal instruments: the EURODAC (European Dactyloscopy) Regulation and the Family Reunification Directive. EURODAC establishes an EU asylum fingerprint database – when someone applies for asylum, no matter where in the EU, his/her fingerprints are transmitted to the EURODAC central system. The Family Reunification Directive aims at determining the conditions for the

exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the member states.

However, the recent crisis has put the procedures of the Dublin Regulation and EURODAC to the test. In 2015 the arrival of migrants reached 1 million, most of them in Greece and Italy. As ‘frontline’ states, these countries were faced with the daunting logistical challenge of organizing the first reception and identification of migrants. Fully implementing Dublin and EURODAC would, arguably, make the challenge even more difficult to surpass since the aforementioned states would have been burdened with the project of fingerprinting, receiving asylum claims and, in most cases, processing these claims. There has therefore been an attempt to circumvent the challenge through temporary relocation schemes when relocation was termed as a temporary emergency measure, thereby constituting a derogation from the Dublin Regulation. Under the title of ‘European Solidarity: A Refugee Relocation System’, the European Commission issued two emergency proposals. In May 2015, it proposed to relocate 40,000 people from Italy and Greece over a two-year period. In September 2015, it proposed to relocate 120,000 people from Italy, Greece and Hungary over a period of two years. The number of migrants which each EU member state should take is based on a distribution key calculated upon objective, quantifiable and verifiable criteria: the size of the population, the total GDP, the average number of asylum applications over the previous four years as well as the unemployment rates. Interestingly, only applicants in ‘clear need of international protection’ are eligible to be a part of the scheme. This means that relocation can apply only to those nationals for whom the average recognition rate of international protection at the EU level is above 75%. At the time of the initial Relocation Decisions, the three nationalities that achieved this rate were the Syrians, the Eritreans and the Iraqis. By the end of 2016 only a few thousand refugees had been relocated from Greece and Italy to other EU states. The European Asylum Support Office plays a salient part in the relocation process.

Apart from the Dublin II and then III Regulation and the EURODAC Regulation, the Asylum Procedures Directive, the Reception Conditions Directive and, most significantly, the Qualifications Directive are also a pivotal part of the CEAS. The Asylum Procedures Directive establishes common standards of safeguards and guarantees to access a fair and efficient asylum procedure. During the summer of 2016, the European Commission also proposed the replacement of the Qualification Directive with a regulation in order to ensure the further harmonization of the standards for protection and the rights granted to refugees and beneficiaries of subsidiary protection and equal treatment of asylum applications across the EU. Furthermore, the EU has decided to broaden and reinforce its mechanisms for ensuring border control by extending the powers of Frontex.

Finally, although not a part of the legal framework, the legally non-binding EU–Turkey statement that came into force in March 2016 must still be mentioned here as it has important practical, legal and political consequences. According to the statement, all new

irregular migrants who have crossed from Turkey to the Greek islands from 20 March 2016 onwards will be returned to Turkey in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. The EU–Turkey statement is intended to be a temporary and extraordinary measure necessary to restore public order.

1.6 MIGRATION AS A LIVED EXPERIENCE

Several empirical studies have been conducted on the daily lives, emotions and decision-making processes of migrants and their families and/or their experiences in local settings within local communities, which are often falling apart, thus becoming an arena for conflicts that echo wider debates on the political future of Europe. The most recent ethnographic records on the lived experiences of migrants in Italy⁴⁴ and Greece⁴⁵ show the great diversity of actors enacting what are often dissonant ideals and strategies, both frontline and backstage of the ‘receiving’ operations, the debates that revolve around humanitarian action in the region.

While much of the focus in these ethnographic studies has been on individual narratives elicited by a researcher, the stories which people as a community produce together are, as will be seen, a particularly useful area of inquiry into (forced) migration. There are also particular insights to be gained by juxtaposing collective and individual expressions. Conceptualized in this way, a narrative helps us to explore the radical discontinuities in the lives of migrants. The emic perspective (from inside the community) is important to understand the social world of migrants, their networks as well as their plans and ambitions.

Many studies discuss, measure and/or evaluate the (perceived) effect of migration experiences in European countries, mainly focusing on such aspects as labour participation, health issues, gender, children’s integration or the family.⁴⁶ Gender equality and measures against discrimination based on gender have been occupying a significant position on the European agenda and have been dominating the representation of European values for the past couple of decades. Women and LGBTIs are recognized as migrants with special needs that necessitate particular attention. In fact, a significant number of individuals become migrants due to discrimination based on the dominant gender values of their

44 Id.

45 E. Papataxiarchis, “Being ‘there’: At the front line of the ‘European refugee crisis’ – part 1”, *Anthropology Today*, Vol. 32, No. 2, 2016, pp. 5-9; E. Papataxiarchis, “Being ‘there’: At the front line of the ‘European refugee crisis’ part 2”, *Anthropology Today*, Vol. 32, No. 3, 2016, pp. 3-7.

46 R. B. Freeman, “The large welfare state as a system”, *The American Economic Review*, Vol. 85, No. 2, 1995, pp. 16-21; B. Anderson, *Us and them?: The dangerous politics of immigration control*, Oxford, Oxford University Press, 2013.

communities. Gender not only pushes some individuals to become migrants and refugees but also affects the course of their mobility, making them vulnerable to potential security threats.

Different studies on lived experiences have been conducted in the last few years regarding conflicts between migrants and the local population in transit and receiving countries,⁴⁷ including internal conflicts among different migrant groups based on gender aspects as well as ethnic tensions and violence against vulnerable minorities and children. Other ethnographic studies focus on the linkages between migration and broader processes of human development and globalization, primarily from the perspective of migrant-sending societies, on the causes and consequences of exile, focusing on either one end or the other of the migration process. Individual narratives on the journeys and moments of ‘in-betweenness’ appear much less in research reports produced on the groups of people who have undergone such experiences.⁴⁸

Criminological research on migrants’ criminalization and stigmatization experiences, often described as a ‘cimmigration process’,⁴⁹ reflects how migrants are subjected to penal law enforcement measures, mainly focusing on one particular country, legislative region or national/religious minority group. Lived experiences, shared by migrants and those who work with them, reveal the gaps between the implementation of migrant policies in sending, transit and receiving countries and the way migrants experience them in reality. ‘Law in action’ or ‘law in context’⁵⁰ can be different from ‘law in the books’. It is not just legal compliance and enforcement that matters for assessing the effectiveness of the law, but an important question is how the legal rules are understood, interpreted and applied in practice and whether they are actually contributing to the realization of the goals they strive after; are they well designed to deal with the situation at hand or not?

The idea that the ‘stranger’ is by definition a deviant, or a potential criminal, has become prevalent in the West. In Europe, scholars in many different countries have carried out

-
- 47 S. Body-Gendrot, “Urban violence in France and England: comparing Paris (2005) and London (2011)”, *Policing and Society*, Vol. 23, No. 1, 2013, pp. 6-25; H. Dilger, & K. Dohrn, *Living in refugee camps in Berlin*, Berlin, Weißensee Verlag, 2016; P. A. Noguara, Social capital and the education of immigrant students: Categories and generalizations. *Sociology of Education*, Vol. 77, No. 2, 2004, pp. 180-183.
- 48 M. R. Marrus, *The unwanted: European refugees in the twentieth century*, New York, Oxford University Press, 1985; UNHCR, “Refugees and others of concern to UNHCR: 1997 statistical overview”, Geneva, mimeograph, 1998; UNHCR, “The security and civilian and humanitarian character of refugee camps and settlements”, EXCOM Report. January 1, 1999; UNHCR “Back to basics: The right to liberty and security of person and ‘alternatives to detention’ of refugees, asylum-seekers, stateless persons and other migrants”, 2011; A. R. Zolberg, “The next waves: migration theory for a changing world”, *International Migration Review*, Vol. 23, No. 3, 1989, pp. 403-430; E. Colson, “Forced migration and the anthropological response”, *Journal of Refugee Studies*, Vol. 16, No. 1, 2003, pp. 1-18.
- 49 M. A. Woude, J. P. Leun, & J. A. A. Nijland, “Crimmigration in the Netherlands”, *Law & Social Inquiry*, Vol. 39, No. 3, 2014, pp. 560-579.
- 50 D. Nelken, “Towards a sociology of legal adaption”, in D. Nelken, & J. Feest (eds.), *Adapting legal cultures*, Oxford, Hart Publishing, 2001.

primarily statistical research on migration and crime.⁵¹ Their results have varied, but the overall conclusion of all of these studies is that the rate of criminality among immigrants is on average higher than that of the indigenous or resident population. The official data for various offences show that some migrant groups were over-represented in police and judicial statistics as well as in the prison population in almost all European countries.⁵² As Michael Tonry showed in his book *Ethnicity, Crime and Immigration*, in all Western European countries we find nationalities or ethnic minorities that are over-represented in criminal statistics, while others are under-represented.⁵³ There is unfortunately less empirical research on how and why migrants become involved in particular criminal activities.

Next to the increasing risks, fears and security issues, opportunities play an important role in the migration crisis. Up until now this 'opportunity' side of the crisis has received minimum attention: both a lack of opportunities as a root cause of migration and the ensuing risks (including high levels of unemployment and low levels of investment in the country of origin), and the role of entrepreneurial opportunities as a way of integrating refugees into host societies (with either citizens engaging in social entrepreneurship as a means to better integrate migrants or migrants engaging in productive entrepreneurship themselves).

Not only do transit and host societies, communities and individuals face risks and fears. An important characteristic of migration control and management in the last few decades is the transformation of their perception. Instead of being perceived as an economic, a social and even a political issue, they are predominantly considered to be a security matter. This change is clear when comparing the migration situation in the period 1960-1990 (the guest workers programme, the borders of Western European countries being opened for refugees from the East etc.) to the one in the 21st century. In the post-September 11 period and in this time of the 'global war on terror', migration is being firmly connected to terrorism, violence and other forms of crime, which legitimizes various repressive and security measures. This is especially characteristic of illegal, uncontrolled or unmanaged migration flows.

51 For example, J. Junger-Tas, *Young immigrants in the Netherlands and their contacts with the police*, The Hague, Ministry of Justice, Research and Documentation Centre, 1985; M. Junger, "Discrepancies between police and self-report data for Dutch racial minorities", *British Journal of Criminology*, Vol. 29, 1989, pp. 273-284; P. L. Martens, "Immigrants, crime, and criminal justice in Sweden", *Crime and Justice*, Vol. 21, 1997, pp. 183-255; M. Killias, "Immigrants, crime, and criminal justice in Switzerland", *Crime and Justice*, Vol. 21, 1997, pp. 375-405; L. M. Solivetti, *Immigration, social integration and crime: A cross-national approach*, Abingdon, Routledge, 2010; D. Melossi, "Il diritto della canaglia: teoria del ciclo, migrazioni e diritto", *Studi sulla Questione Criminale*, Vol. 5, No. 2, 2010, pp. 51-73.

52 Solivetti, *supra* note 51, p. 20.

53 M. Tonry, "Ethnicity, crime, and immigration: Comparative and cross-national perspectives", *Crime and Justice*, Vol. 21, 1997, pp. 1-29.

1.7 ABOUT THIS BOOK

This book is structured around two main objectives based on experiences with the current refugee influx in transit and destination countries. The first part contains eight contributions discussing EU policies and the ‘refugee crisis’ in transit countries. The first chapter, by Hanneke van Eijken, Barbara Safradin and Linda Senden, ‘The “Refugee crisis”: Crisis of Law, Will or Values?’, serves as a starting point for a legal approach on the definition of ‘crisis’ and questions the existence of a refugee crisis. The authors provide a critical overview of the existing EU legal framework preceding the ‘crisis’ by examining the EU–Turkey deal of 18 March 2016; they discuss whether the deal constitutes a ‘turning point’ (an element that seems to be inherent to the definition of a ‘crisis’) in EU migration policy. Following this chapter, Narin Idriz focuses on the EU–Turkey agreement, considering it as ‘the extra-legal deal of extraordinary times’. She argues that the declaration of a ‘crisis’ not only evokes an atmosphere of threat and uncertainty, but also creates an environment which is conducive for taking measures that were previously seen far beyond what is politically (and legally) possible. In other words, the crisis discourse sets the scene for the maxim ‘extraordinary times require extraordinary measures’. The next two chapters also analyse the EU–Turkey deal. Biriz Karaçay reflects on the externalization of migration management related to human smuggling. Her chapter sheds light on the changing political discourse between Turkey and the EU, by critically discussing current European border control practices and presenting steps taken towards implementing better integration policies in Turkey. Annelies Zoomers, Femke van Noorloos and Ilse van Liempt reflect on outcomes of current restrictive migration laws, arguing that the refugee crisis is not about the inflow of refugees, but about Europe’s internal sense of a crisis. Building fences and investing in border control are symbolic manifestations that sent out the message that Europe is in control.

Not only in Turkey but also in other transit countries one can find legal gaps in policy and its implementation. Irina Kotenko and Ildir Peçi present the case of Albania and the limitations of the legal and socio-economic framework of migration in this country along with its potential deficiencies with respect to EU standards and *acquis communautaire*.

Based on her empirical study with NGOs in Turkey, Nilay Kavur focuses on the challenges of guaranteeing the so-called *universal* rights of ‘refugee’ children in the midst of the diplomatic relations and financial agreements between and within the EU, the UN, the Turkish state, the NGOs and private donors. She argues that actions taken within the discourse of ‘refugee crisis’, which situate the existence of ‘refugee’ children as a temporary phenomenon, lead to ad hoc, short-term implementations and eventually to issues such as the danger of statelessness, unaccompanied children, low access to education and language, undocumented-cheap child labour, child marriage, trafficking and radicalization. Her chapter is followed by the one by Mairi Zoi, who refers to the physical protection of

EU borders and how the so-called refugee crisis fuelled the securitization of migration. In her chapter, Mairi analyses legal aspects of the border control measures provided by Frontex, and how these reflect EU competences and the current securitization practices, in particular the recently established EU agency for the external border control, the European Border and Coast Guard. The closing chapter of the first part of the book is written by Salvatore Nicolosi, who provides a comparative analysis of the concerns of Temporary Protection in EU Asylum Law and how these justify the lack of political legitimacy for long-term solutions in the member states.

The second part of the book takes a different stake by discussing the so-called refugee crisis in destination countries. With her chapter on crimes of solidarity, Dina Siegel opens a discussion on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, while focusing on the debate on the right of citizens to assist irregular migration. She describes the criminalization of civilians such as volunteers, philanthropists, fishermen as well as NGOs and other aid groups, who help migrants by providing transportation, shelter, food or other practical assistance. Following her chapter with the examples of Greece, Vassilis Gerasopoulos reflects on the growing responsibilities of Greek authorities to control the massive influx of refugees towards the EU. Based on a concept of 'chain exclusion', he argues that local enforcement of migration policies has become a pressing issue while their inefficiency in service provisions feeds a growing distrust towards the state and solidifies the impression among Greek people that the refugee crisis is an unsolvable problem. Another case study is presented by Aleš Bučar Ručman covering a securitization phenomenon based on the case of refugees passing through Slovenia in 2015/2016. He focuses on the political, media and civil society discourse and analyses the shift of perceptions of the refugees' situation from the humanitarian and democratic approach towards a national security threat. He argues that this shift coincided to militarization and the use of restrictive and authoritarian measures by the government, exploited by various political decision makers and by the media. The chapter by Cristina Fernández-Bessa and Jose A. Brandariz-García provides the opposite argument, based on a case study of Spain. The authors argue that though the society expresses its solidarity with Syrian refugees, national border control continues the prevention of migration and the deportation apparatus endures targeting some groups of migrants. Their empirical data on detention and deportation of migrants shows the rationale of the whole apparatus of migration control in Spain. Citing the Dutch example, Karin Geuijen provides a more optimistic approach on 'the refugee crisis, as a window of opportunity'. In her chapter, Karin explains multi-sector networks of local initiatives assisting refugees in the integration process in the Netherlands. She presents some projects initiated by citizens, often co-produced with formal civil society establishments, social enterprises, business and local government. In the last chapter, based on case studies in Sweden, Ildikó Asztalos Morell and Mehrdad Darvishpour highlight the importance of gender and integration of unaccompa-

nied children in the discussion of the refugee crisis. They close this editorial volume with life stories of migrants and explain the effects of securitization of the asylum process, in particular how this adversely impacts the considerations and opportunities of unaccompanied asylum-seeking children in Sweden.

REFERENCES

Aas, K. F., "Beyond 'the desert of the real': Crime control in a virtual (ised) reality" in Y. Jewkes (ed.), *Crime Online*, Cullompton, UK, Willan Publishing, 2007.

Altheide, D. L., *Creating fear: News and the construction of crisis*, New York, Transaction Publishers, 2002.

Anderson, B., *Us and them? The dangerous politics of immigration control*, Oxford, Oxford University Press, 2013.

Andreas, P., & Nadelmann, E., *Policing the globe: Criminalization and crime control in international relations*, Oxford, Oxford University Press, 2006.

Appadurai, A., "Disjuncture and difference in the global cultural economy", *Public Culture*, Vol. 2, No. 2, 1990, pp. 1-24.

Appel, J., *Flight and other stories*, London, Akira Press, 1987.

Bauman, Z., *Liquid modernity*, Cambridge, John Wiley & Sons, 2013.

Body-Gendrot, S., "Urban violence in France and England: Comparing Paris (2005) and London (2011)", *Policing and society*, Vol. 23, No. 1, 2013, pp. 6-25.

Brettell, C. B., & Hollifield, J. F., *Migration theory: Talking across disciplines*, London, Routledge, 2014.

Brettell, C. B., "The social construction of networks, identities, communities, and globescapes" in C. B. Brettell, & J. F. Hollifield (eds.), *Migration theory: Talking across disciplines*, New York, Routledge, 2008, pp. 113-160.

Castles, S., & Miller, M. J., "Migration in the Asia-Pacific region" in Castles, S., De Haas, H., & Miller, M. J. (2013). *The age of migration: International population movements in the modern world*. Palgrave Macmillan.2013, pp. 147-172.

Castles, S., de Haas, H., & Miller, M. J., *The age of migration: International population movements in the modern world*, Basingstoke, Palgrave Macmillan, 2013.

Colson, E., "Forced migration and the anthropological response", *Journal of Refugee Studies*, Vol. 16, No. 1, 2003, pp. 1-18.

Dilger, H., & Dohrn, K., *Living in refugee camps in Berlin*, Berlin, Weißensee Verlag, 2016.

Faist, T., "From common questions to common concepts", in T. Hammar, G. Brochmann, K. Tamas, T. Faist (eds.), *International Migration, Immobility and Development. Multidisciplinary Perspectives*, Oxford, Berg, 1997b, pp. 247-276.

Faist, T., "The crucial meso-level" in T. Hammar, G. Brochmann, K. Tamas, & T. Faist (eds.), *International migration, immobility and development. Multidisciplinary perspectives*. Oxford, Berg, 1997a, pp. 187-218.

Fitzgerald, D., "A comparativist manifesto for international migration studies", *Ethnic and Racial Studies*, Vol. 35, No. 10, 2012, pp. 1725-1740.

Foner, N., *In a new land: A comparative view of immigration*, New York, NYU Press, 2005.

Freeman, R. B., "The large welfare state as a system", *The American Economic Review*, Vol. 85, No. 2, 1995, pp. 16-21.

Furedi, F., *Population and development: A critical introduction*, New York, St. Martin's Press, 1997.

Geddes, A., & Scholten, P., *The politics of migration and immigration in Europe*, London, Sage, 2016, p. 1.

Glick Schiller, N., & Salazar, N. B., "Regimes of mobility across the globe", *Journal of Ethnic and Migration Studies*, Vol. 39, No. 2, 2013, pp. 183-200.

Hebberecht, P., "Van preventiecontract tot veiligheids-en samenlevingscontract of de logica van een veiligheidsstaat", *Panopticon*, Vol. 2, 1997, pp. 101-110.

Holliefield, J. F., “The emerging migration state”, *International Migration Review*, Vol. 38, No. 3, 2004, pp. 885-912.

Holliefield, J. F., “The politics of international migration”, *Migration theory: Talking across disciplines*, 2000, 137-185.

Humphris, R., *Practising integration in the EU: Mapping initiatives and innovations by local institutions and civil society*, IRiS Working Paper Series, No. 3/2014. Retrieved from www.academia.edu/7476960/Practising_integration_in_the_EU._Mapping_initiatives_and_innovation_by_local_institutions_and_civil_society International Organisation of Migration. Retrieved on 1 June 2016 <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

Junger, M., “Discrepancies between police and self-report data for Dutch racial minorities”, *British Journal of Criminology*, Vol. 29, 1989, pp. 273-284.

Junger-Tas, J., *Young Immigrants in the Netherlands and their Contacts with the Police*, The Hague, Ministry of Justice, Research and Documentation Centre, 1985.

Kállai, E., *The Gypsies/The Roma in Hungarian Society*, Budapest, Teleki László Foundation, 2002.

Killias M., “Immigrants, crime, and criminal justice in Switzerland”, *Crime and Justice*, Vol. 21, 1997, pp. 375-405.

Koser, K., *International migration: A very short introduction*, Oxford, Oxford University Press, 2007.

Lee, E. S., “A theory of migration”, *Demography*, Vol. 3, No. 1, 1966, pp. 47-57.

Levin, K., *Field theory in social science: Selected theoretical papers* (Edited by Dorwin Cartwright.), 1951, p. 44.

Majcher, I., “Crimmigration” in the European Union through the Lens of Immigration Detention, Global Detention Project Working Paper No. 6, September 2013.

Marrus, M. R., *The unwanted: European refugees in the twentieth century*, Oxford, Oxford University Press, 1985.

Martens, P. L., "Immigrants, crime, and criminal justice in Sweden", *Crime and Justice*, Vol. 21, 1997, pp. 183-255.

Massey, D. S. et al., "An evaluation of international migration theory: The North American case", *Population and development Review*, Vol. 20, No. 4, 1994, pp. 699-751.

Massey, D. S. et al., "Theories of international migration: A review and appraisal", *Population and Development Review*, Vol. 19, No. 3, 1993, pp. 431-466.

Melossi, D., "Il diritto della canaglia: teoria del ciclo, migrazioni e diritto", *Studi sulla Questione Criminale*, Vol. 5, No. 2, 2010, pp. 51-73.

Miller, T. A., "Blurring the boundaries between immigration and crime control after September 11th", *Boston College Third World Law Journal*, Vol. 25, No. 1, 2005, pp. 81-124.

Miller, T. A., "Citizenship & severity: Recent immigration reforms and the new penology", *Georgetown Immigration Law Journal*, Vol. 17, 2003, pp. 611-666.

Mitsilegas, V., "The EU as a global security actor: Constitutional aspects of the external dimension of the area of freedom, security and justice. Multi-disciplinary perspectives" in *20th International Conference of Europeanists-Crisis & Contingency: States of (In) Stability*, Amsterdam, Netherlands, June, 2013.

Modood, T., & Bovenkerk, F., *Multiculturalism: How can society deal with it? A thinking exercise in Flanders*, Brussels, KVAB, Standpunten 51, 2017.

Nayar, B. R., *India's globalization: Evaluating the economic consequences*, Vol. 22, Washington, Sage, 2006.

Nelken, D., "Towards a Sociology of Legal Adaption", in D. Nelken, J. Feest (eds.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 2001.

Noguera, P. A., "Social capital and the education of immigrant students: Categories and generalizations", *Sociology of Education*, Vol. 77, No. 2, 2004, pp. 180-183.

Papataxiarchis, E., "Being 'there': At the front line of the 'European refugee crisis'—Part 1", *Anthropology Today*, Vol. 32, No. 2, 2016a, pp. 5-9.

Papataxiarchis, E., "Being 'there': At the front line of the 'European refugee crisis' part 2", *Anthropology Today*, Vol. 32, No. 3, 2016b, pp. 3-7.

Portes, A., "Conclusion: Towards a new world-the origins and effects of transnational activities", *Ethnic and Racial Studies*, Vol. 22, No. 2, 1999, pp. 463-477.

Ravenstein, E. G., "The laws of migration", *Journal of the Royal Statistical Society*, Vol. 52, No. 2, 1889, pp. 241-305.

Rigoni, A., *Violence against migrants. Report*. Committee on Migration, Refugees and Displaced Persons, Italy, ALDE, 2016.

Ripka, Š., "Being 'one of them': Hierarchy and institutionalization of charisma of an ethnic pastor in a Romani congregation", *Social Compass*, Vol. 62, No. 2, 2015, pp. 147-158.

Rummens, J. A., "Conceptualising identity and diversity: Overlaps, intersections, and processes", *Canadian Ethnic Studies Journal*, Vol. 35, No. 3, 2003, pp. 10-26.

Sabel, C. F., & Zeitlin, J., "Experimentalist governance", in D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, Vol. 1, Oxford, Oxford University Press, 2012.

Sassen, S., "New employment regimes in cities: The impact on immigrant workers", *Journal of Ethnic and Migration Studies*, Vol. 22, No. 4, 1996, pp. 579-594.

Selmini, R., "Ethnic conflicts and riots in Italy: The case of Rome, 2014" *European Journal of Criminology*, Vol. 13, No. 5, 2016, pp. 626-638.

Sicakkan, H., & Lithman, Y., *Envisioning togetherness. Politics of identity and forms of belonging*, New York, Edwin Mellen Press, 2004.

Siegel, D., *The Great Immigration: Russian Jews in Israel*, Oxford, Berghahn Publications, 1998.

Solivetti, L. M., *Immigration, social integration and crime: A cross-national approach*. Abingdon, Routledge, 2010.

Tonry, M., "Ethnicity, crime, and immigration: Comparative and cross-national perspectives", *Crime and Justice*, Vol. 21, 1997, pp. 1-29.

DINA SIEGEL AND VERONIKA NAGY

UNHCR, Back to basics: The right to liberty and security of person and “alternatives to detention” of refugees, asylum-seekers, stateless persons and other migrants, 2011.

UNHCR, Refugees and others of concern to UNHCR: 1997 Statistical Overview, Geneva, UNHCR, mimeograph, 1998.

UNHCR, The security and civilian and humanitarian character of refugee camps and settlements. EXCOM Report. January 1, 1999.

Weerman, F. et al., De bestudering van criminaliteit op macroniveau: een inleiding. *Tijdschrift voor Criminologie*, Vol. 57, No. 2, 2015, p. 149.

Willen, S. S., “Exploring “illegal” and “irregular” migrants’ lived experiences of law and state power”, *International Migration*, Vol. 45, No. 3, 2007, pp. 2-7.

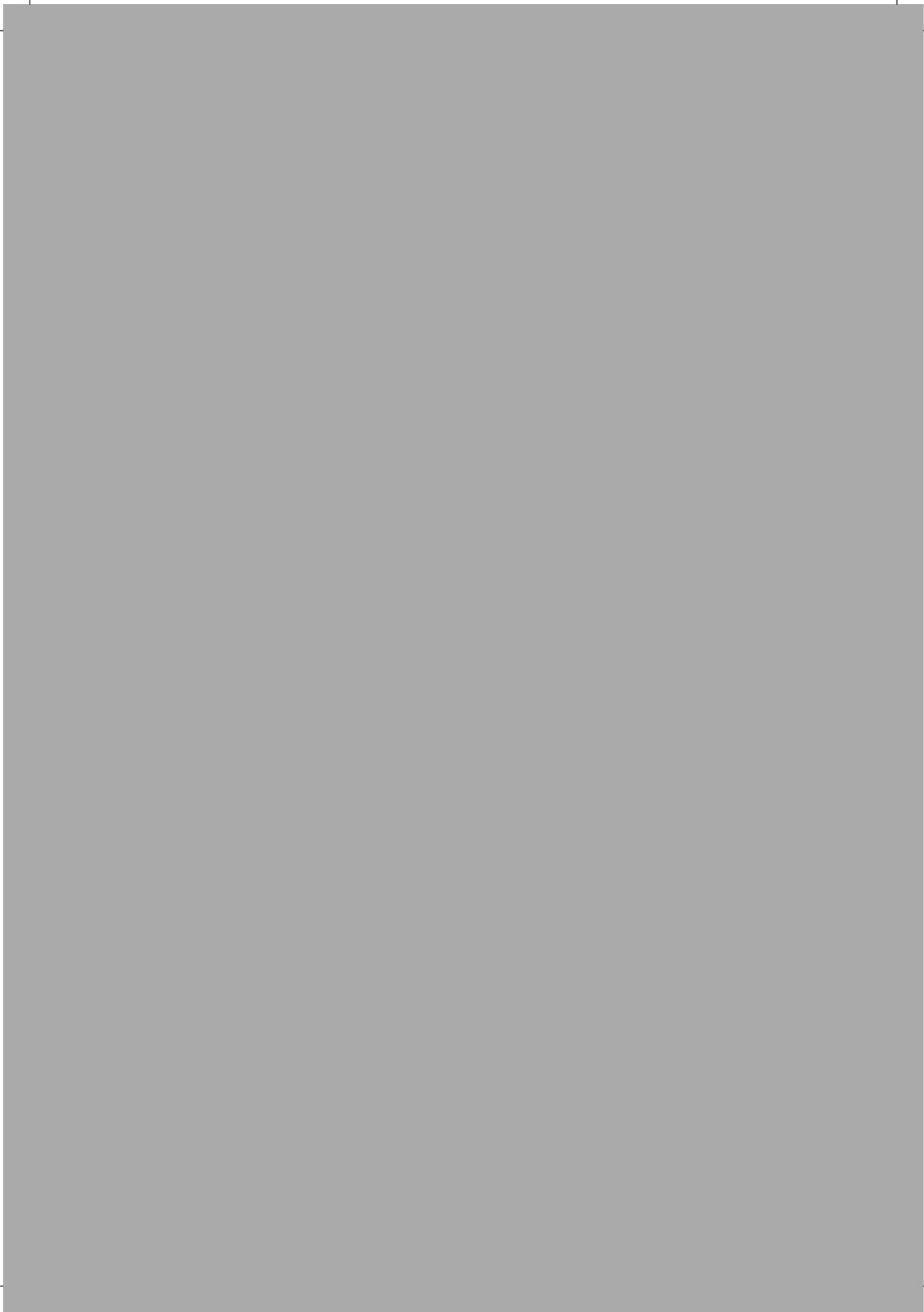
Wilson, T. D., *Women’s Migration Networks in Mexico and Beyond*, Albuquerque, University of New Mexico Press, 2009.

Woude, M. A., Leun, J. P., & Nijland, J. A. A., “Crimmigration in the Netherlands”, *Law & Social Inquiry*, Vol. 39, No. 3, 2014, pp. 560-579.

Young, J., *The vertigo of late modernity*, London, Sage, 2007.

Zolberg, A. R. et al., “The next waves: Migration theory for a changing world”, *International Migration Review*, 1989, pp. 403-430.

PART I
EU POLICIES AND 'REFUGEE CRISIS' IN
TRANSIT COUNTRIES



2 THE ‘REFUGEE CRISIS’: A CRISIS OF LAW, WILL OR VALUES?

Hanneke van Eijken, Barbara Safradin and Linda A.J. Senden

2.1 INTRODUCTION

This volume critically considers whether a ‘refugee crisis’ occurred in 2015. Framing the influx of migrants in the European Union (hereafter EU) in these terms in the political and societal debate and in the media put this issue already in a particular light, also evoking certain reactions on the local, national and EU levels. But what makes a situation such as to speak of a ‘crisis’, what meaning does this term actually carry? Definitions vary from describing it as ‘a time of great disagreement, confusion, or suffering’ or ‘an extremely difficult or dangerous point in a situation’,¹ as ‘a time of intense difficulty or danger’ or ‘a time when a difficult or important decision must be made’.² The latter definition seems to be closest to the Greek origin of the word ‘crisis’, meaning ‘decision’. Other elements that are emphasized in its definition concern suddenness, instability and a turning point or crucial stage in the course of something, especially in the sequence of events.³

In this chapter, we will consider the ‘refugee crisis’ framing or narrative from a predominantly legal perspective. More in particular, we will focus on the question: To what extent or in what respects the applicable EU legal framework has been contributing to create such a time of great disagreement, instability and suffering and pushing – or not – for making effective decisions to change the course of events. Yet, such a question cannot be answered without taking into account the political context, as law and politics are heavily dependent upon one another in the European context. To this end, we will first set out the development of the EU legal framework for the protection of refugees and then identify flaws in this framework that have contributed to the refugee crisis and the political responses and legal changes to address these (Section 2.2). Upon that basis, we will further reflect on the political (un)willingness to actually make fundamental changes to the legal system as well as the effective implementation of the measures that have been adopted in EU member states. The divergent political willingness actually reveals a more troublesome concern, namely a divergent understanding of and insufficient commitment to not only the European

1 *Cambridge English Dictionary.*

2 *Oxford Dictionary.*

3 *Collins Dictionary.*

principle of solidarity but also human dignity as a result of that (Section 2.3). This will actually lead us to the conclusion that the refugee crisis is foremost a crisis of European values (Section 2.4). In particular, we argue that this is predominantly a crisis of solidarity since member states have demonstrated that they are incapable of finding a common approach in sharing the burden in terms of sheltering asylum seekers in the EU.

2.2 THE LEGAL MIGRATION AND ASYLUM FRAMEWORK

The legal framework of the EU regarding the regulation of migration flows and the international protection of refugees through migration and asylum policies has crystallized throughout the years in various international and European texts. In this section, the most salient points of the legal and policy framework that are pertinent to the current European migration and refugee flows are identified, in addition to the issues that may be considered particularly problematic with a view to their practical application.

Before engaging in this analysis, the following preliminary observation is in place. From a legal perspective, it is in fact slightly misleading to frame the narrative exclusively in terms of a ‘refugee’ crisis. According to the law, a ‘refugee’ concerns an individual in need of international protection because of an armed conflict or persecution in their country of origin, if their own country does not offer protection. But clearly, this is not the situation of all people⁴ fleeing to Europe. The term ‘migrant’ is a broader one, including all individuals migrating for various reasons (e.g. for economic reasons).⁵ The terms ‘asylum seeker’ and ‘applicants for international protection’ refer to persons that apply for international protection, but have not been qualified as being entitled to that protection. It is important to note that these terms are used interchangeably in media, policy documents etc., but that they actually refer to different categories of people for the purpose of the law and the protection that it offers to them.

4 The Qualifications Directive defines a refugee as a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it (Art. 2 (c)).

5 See the definitions used in the Qualifications Directive and the Geneva Convention, Art. 2(c) and 2(g). Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. On this matter, *see also*: UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right? 11 July 2016. Retrieved on 10 November 2017 from www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html.

2.2.1 *The international legal corpus; core principles regarding refugee protection*

We start with the relevant international legal corpus since these international rights, principles and obligations are crucial for the current European system in the domain under consideration and the debate we will elaborate on. Shortly after the end of World War II in 1948, the United Nations General Assembly adopted the binding international document known as the Universal Declaration of Human Rights (hereafter UDHR). This document recognized for the first time the international right to seek asylum. In 1951, the Geneva Convention was articulated as the main legal instrument dealing with the legal status of refugees, ratified by 145 state parties. It defines who may request for international protection as a 'refugee' and outlines the rights of the displaced, as well as the legal obligations of states to protect them. In the light of today's tensions between EU member states, it is noteworthy that the preamble of the Geneva Convention explicitly expresses the wish that all states, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states'. The Convention, as amended by the Protocol of 1967, consolidates previous legal instruments concerning specific groups of refugees, and its provisions represent a comprehensive codification of refugees' rights, which was granted universal coverage that is still in effect today. Most importantly, two fundamental principles underpin the Geneva Convention that have to ensure specific protection to asylum seekers and refugees: the principles of non-penalization and non-refoulement.

Article 31 of the Geneva Convention provides that states shall not impose penalties on refugees on account of illegal entry or presence, or on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1 of the Convention, enter or are present in their territory without authorization. Refugees can avail themselves of this protection when complying with two conditions: They present themselves without delay to the authorities and show good cause for their illegal entry or presence. The principle of non-refoulement is contained in Article 33 of the Convention.⁶ According to the principle, states are prohibited from returning or expelling refugees to a territory where their freedom or life is at risk because of race, religion, nationality or membership of a social group or political opinion. These principles are confirmed in EU law, in specific EU legislation, as will be seen in Section 2.3, but also in the Charter of Fundamental Rights of the European Union (hereafter Charter). Article 19 of the Charter implements, amongst others, the principle of non-refoulement. As will be discussed later, the international legal standards had a major impact on the European asylum system.

⁶ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, *Treaty Series*, Vol. 189, p. 137. Retrieved on 20 November 2017 from www.refworld.org/docid/3be01b964.html.

2.2.2 *Refugee protection according to the European Convention of Human Rights*

The Geneva Convention has had much influence on all future developments of international, and mostly European, laws and policies regarding migratory flows and refugees. Yet, the Convention allows states to grant a more favourable treatment through a legal regime of greater protection. In the European context, such a regime has gradually developed through the adoption and enforcement of a series of legal documents: the European Convention of Human Rights (hereafter ECHR), the Charter, the Treaty of the European Union (hereafter TEU) and the Treaty on the Functioning of the European Union (hereafter TFEU), as they developed throughout the last decades in the spirit of the relevant provisions of the Treaty of Maastricht (1992) and the Treaty of Amsterdam (1999).

Even though the ECHR lacks a specific provision directly referring to refugees, the European Court of Human Rights (hereafter ECtHR) has managed to circumvent this vacuum through the application of other provisions of the ECHR – most notably Article 1, which contains the obligation to respect human rights ('The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'), and Article 3, which prohibits torture ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment'). Notwithstanding the fact that the ECHR does not explicitly grant the right to entrance or residence in the territory of member states – thus recognizing the states' full sovereignty in matters of presence of migrants and refugees in national territories – it thus provides for an obligation of the contracting states to not subject anyone to torture or to inflict inhuman or degrading treatment or punishment. The combination of the aforementioned provisions allowed the ECtHR to use this line of reasoning repeatedly in several cases in previous decades.

Another important provision is the prohibition of collective expulsion, as prohibited by Article 4 of the 1963 Protocol of the ECHR.⁷ This provision stipulates that 'collective expulsion of aliens is prohibited'. In the *Čonka v. Belgium* case (2002) the ECtHR defined the meaning of 'collective expulsion'. That case concerned a family of Slovak nationals from Roma origin, who requested Belgium for international protection, since, according to them, they were not protected by the police for assault by skinheads. The Belgian authorities refused their application and ordered their expulsion. In five days they were deported, together with a group of other Slovaks. The court held that there were in that specific case 'no sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'.⁸ The

⁷ See Art. 4 Protection No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, as amended by Protocol No. 11.

⁸ ECtHR Case *Čonka v. Belgium*, Application no. 51564/99, 5 February 2002, para. 63.

judgement implies that if such considerations were taken into account, there would be no collective expulsion. Hence, the key element of the prohibition of collective expulsion is that the individual circumstances are taken into account.

The system of the ECHR has specific rights and prohibitions that protect refugees and applicants for international protection, even though it does not cover a specific right to asylum. The ECHR has been of importance for the legal system at the EU level. It is important, in that context, to keep in mind that the ECHR is part of the general principles of European Law and that its institutions are bound by it, as well as by its member states, whenever they act within the scope of EU law.⁹

2.2.3 *Development of the Common European Asylum System*

The concern on migratory flows and the handling of pertinent interests had increasingly gained gravitas in the EU agenda during the last decade of the 20th century and the eve of the 21st. Indeed, the protection granted by the ECHR along with the case law of the ECtHR and the Court of Justice of the European Union (hereafter CJEU) led to the articulation of the Charter, which was signed in 2000 although with no binding effect for the member states. In December 2009, the Lisbon Treaty came into force and recognized the legally binding nature of the Charter as EU law binding on the EU institutions and on the member states. The Charter entrenches the rights found in the case law of the CJEU as well as the rights and freedoms enshrined in the ECHR. Its provisions are addressed not just to the institutions and bodies of the EU, but also to national authorities when they act within the scope of EU law.¹⁰ This can entail either situations in which member states implement or enforce EU legislation or in which they derogate from Union law.¹¹

These legal sources imply not only recognition of the right to asylum, but also a duty for the EU legislature. The legislature has to ensure that the right to asylum shall be guaranteed according to the Geneva Convention. The Geneva Convention can be called the backbone of the current Common European Asylum System (hereafter CEAS), in which member states have to guarantee minimum norms to deal with refugees. In Article 3(2) of the TEU, the objective is formulated that '(t)he Union shall offer its citizens an area of freedom, security and justice without internal frontiers ... with respect to external border controls, asylum, immigration and the prevention and combating of crime'.¹² The TFEU, in its Article 78(1), addresses issues on asylum and refugees in a more comprehensive manner, stating that '(t)he Union shall develop a common policy on asylum, subsidiary

⁹ Art. 6 TEU.

¹⁰ Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para. 21.

¹¹ Id. See also Case 260/89 *ERT* [1991] ECLI:EU:C:1991:254, para. 43.

¹² Art. 3 Consolidated version of the Treaty on European Union. Retrieved on 20 November 2017 from <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT>.

protection and temporary protection, which ensures compliance with the principle of non-refoulement'. Even the scenario of pressing 'crisis' situations is foreseen in paragraph 3 of this provision, according to which in case of 'an emergency situation characterised by a sudden inflow of nationals of third countries', the Council may adopt provisional measures for the benefit of the member state(s) that are confronted with such a situation of 'crisis'. As will be discussed in Section 3, Article 78(3) has been used as a legal basis for the Council Decision of 22 September 2015, aimed to assist Italy and Greece in dealing with the massive inflow of asylum seekers reaching their borders on a daily basis.¹³

In the Maastricht Treaty of 1992, the idea of a common asylum policy, in order to achieve the objectives of the Union regarding free movement, was for the first time introduced as a 'common interest' of the member states. As such, the policy regarding asylum was still a matter of intergovernmental cooperation (part of the so-called third pillar of the EU), which gave the member states some leeway to apply their own legal rules and policies. This changed with the entry into force of the Treaty of Amsterdam in 1999, which proclaimed the maintenance and development of the Union as an area of freedom, security and justice as a central objective, ensuring the free movement of people in conjunction with appropriate measures with respect to asylum and immigration. Such a provision 'transferred' the policies on asylum, immigration and free movement to the first 'supranational' EC pillar of the EU, in which member states share their powers with the EU and EU legislation can be adopted even with qualified majority. It meant that the EU could strengthen its policies and legal framework on asylum matters, especially where cast in regulations.

One of the first and most important steps the Amsterdam Treaty envisaged was the establishment of CEAS, which came about by Council Regulation (EC) No. 343/2003, better known as the 'Dublin II Regulation'.¹⁴ Before the Dublin II Regulation, the Dublin Convention was into force (from 1997 to 2003). The Dublin Convention, signed in Dublin, was an agreement between 12 member states. In the Convention, the one-stop-shop principle was introduced, in the sense that only one member state would be responsible for the application for asylum. The basic idea that one member state is responsible remained in the 'Dublin legal system' in the subsequent regulations, by which the Dublin Convention

13 This provision has also been used for the first Council Decision of 14 September 2015 proposed to relocate 40,000 asylum seekers from Greece and Italy. Note that Art. 78(3) has never been triggered before these relocation decisions. Until now, member states confronted with situations of emergency and pressure have been supported via the provision of financial assistance (emergency assistance under the European Refugee Fund until 2014, and the Asylum, Migration and Integration Fund since 2014) and operational support through the European Asylum Support Office (EASO). See European Commission factsheet 2015. Retrieved on 17 November 2017 from http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm.

14 Council Regulation 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 2003, L 050, 25/02/2003.

was converted into EU legislation.¹⁵ The basic idea behind this is that secondary movements can be prevented and that for asylum seekers there can be a clear procedure in one member state. The Dublin II Regulation established the member state responsible for the examination of the asylum application. The criteria for establishing the responsibility run, in a hierarchical order, from family considerations, to recent possession of visa or residence permit in a member state, to whether the applicant has entered the EU irregularly or regularly. Hence, whenever a minor has family members in another member state, that specific member state is responsible for the request for asylum. However, if no specific circumstances point at a member state, the member state of first entry is responsible. Greece was, expectedly, the country of first entry for many asylum seekers, but it had received heavy criticism by both the ECtHR and the CJEU over the unacceptable conditions for asylum claimants, the obstacles to accessing a fair procedure, the lack of protection and care for unaccompanied minors and the risk of serious human rights violations.¹⁶ At the same time, at a wider European level, the use of detention to enforce transfers of asylum seekers back to the country of first entry, along with the absence of an effective opportunity to appeal against said transfers, had created a negative sentiment towards the efficiency and legitimacy of the Dublin II system.¹⁷

The Dublin II Regulation was followed by a new regulation, Dublin III, which has a similar approach. The Dublin III Regulation¹⁸ is, currently, one of the tenets of the CEAS mechanism in the attempt to deal with the crisis of the past three years. It promised to improve efficiency and sound procedure for asylum seekers, mainly by providing an early warning, preparedness and crisis management mechanism; a series of provisions on the protection of applicants (compulsory personal interview, guarantees for minors and extended possibilities of reunification with relatives) and an obligation to ensure free legal assistance upon request. In practice, the implementation of the Dublin Regulation is concomitant with the implementation and enforcement of two other legal instruments: the

15 M. Mouzourakis, "We need to talk about Dublin' Responsibility under the Dublin system as a blockage to asylum burden-sharing in the European Union", *Refugee Studies Centre Working Paper Series*, Vol. 105, 2014, p. 12.

16 ECtHR Case *M.S.S. v. Belgium and Greece*, Application no. 30696/09 and *N. S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.

17 Amnesty International, Europe's gatekeeper: Unlawful detention and deportation of refugees from Turkey, 16 December 2015. Retrieved from www.amnesty.org/en/documents/eur44/3022/2015/en/; see also M. den Heijer, J. J. Rijpma, & T. Spijkerboer, "Coercion, prohibition and great expectations: the continuing failure of the common European Asylum System", *Common Market Law Review*, Vol. 53, 2016, p. 641.

18 Council Regulation 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 (recast), OJ L 180, 29 June 2013.

EURODAC Regulation¹⁹ and the Family Reunification Directive.²⁰ EURODAC establishes an EU asylum fingerprint database – when someone applies for asylum, no matter where in the EU, their fingerprints are transmitted to the EURODAC central system. The Family Reunification Directive aims at determining the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the member states.

While Europe has leaned on this legal and institutional framework in its attempt to deal with the migration crisis, there are a number of other legislative measures and institutional mechanisms instrumental in this attempt. Apart from the Dublin II and then III Regulation and the EURODAC Regulation, the Asylum Procedures Directive,²¹ the Reception Conditions Directive²² and, most significantly, the Qualifications Directive²³ are also a pivotal part of the CEAS. In 2004, an EU agency – Frontex – was set up, with a view to manage operational cooperation at the external borders of the member states. In addition, in 2010 the European Asylum Support Office (EASO) was established with the purpose to enhance the implementation of the CEAS, to strengthen practical cooperation between member states on asylum and to provide and coordinate operational support to member states subject to particular pressure on their asylum and reception systems. However, the course of events regarding the increasing influx of migrants into the EU ever since 2015 put not only the procedures of the Dublin Regulation and EURODAC to the test but also the whole framework of the CEAS.

2.2.4 *Problems in applying the CEAS and their solution*

During 2015, the number of migrants arriving in the EU reached 1 million, most of them concentrated in camps in Greece and Italy. This situation has revealed serious problems

19 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 for establishing a European agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29 June 2013.

20 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

21 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.

22 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.

23 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.

in both the design and the effective application and functioning of the CEAS and triggered two different types of responses: one of a more incidental, temporary 'crisis-management' type of response and the second one seeking to address the problem in a more structural way by adapting the legal and institutional framework of the CEAS. Below we will address some of the major problems of the CEAS²⁴ in conjunction with the actions taken.

2.2.4.1 'Crisis-management' response

As 'frontline' states of first entry, Greece and Italy were faced with the daunting logistical challenge of organizing the first reception and identification of migrants on the basis of the Dublin Regulation. As observed, most asylum seekers were appointed to the member state of first entry, which burdened the border member states. Fully implementing this regulation and EURODAC would, arguably, make the challenge even more difficult to face, since the aforementioned states would have been burdened with the project of fingerprinting, receiving asylum claims and, in most cases – given the responsibility of the state of first entry under the current legal framework – processing these claims. As such, the Dublin system entails in fact the risk of an imbalanced burden-sharing between the member states in the case of a massive influx of migrants. Facing such an influx in 2015, it has been sought to overcome this consequence through temporary relocation schemes.

Put simply, relocation is the transfer of persons who are in need of international protection from one EU member state to another. Such a relocation scheme is an exception to the Dublin rules, according to which member states themselves are held responsible for applications for asylum. Under the title of 'European Solidarity: A Refugee Relocation System', the European Commission issued two emergency proposals. In May 2015, it proposed to relocate 40,000 people from Italy and Greece over two years.²⁵ In September of the same year, it proposed to relocate 120,000 people from Italy, Greece and Hungary over two years (until September 2017).²⁶ The number of migrants each EU member state should take in is based on a distribution key calculated upon objective, quantifiable and verifiable criteria: size of population, total GDP, average number of asylum applications over the previous four years as well as unemployment rates. Interestingly, only applicants in 'clear need of international protection' are eligible to be part of the scheme (Art. 3(2)

24 For a more elaborate account thereof, see D. Thym, "The 'refugee crisis' as a challenge of legal design and institutional legitimacy", *Common Market Law Review*, Vol. 53, 2016, pp. 1545-1574.

25 Press Release 9 September 2015 European Commission Press, Refugee Crisis: European Commission takes decisive action. Retrieved on 13 November 2017 from http://europa.eu/rapid/press-release_IP-15-5596_en.htm

26 Press Release 17 September 2015 European Commission Statement following the vote of the European Parliament in favour of an emergency relocation mechanism for a further 120,000 refugees. Retrieved on 13 November 2017 from http://europa.eu/rapid/press-release_STATEMENT-15-5664_en.htm.

of Relocation Decision).²⁷ This means that relocation can apply only to those nationals for whom the average recognition rate of international protection at the EU level is above 75%, according to the latest available updated quarterly Union-wide average Eurostat data.²⁸ At the time of the initial Relocation Decisions the three nationalities that achieved this rate were the Syrians, the Eritreans and the Iraqis. Furthermore, in order to be eligible, the process of fingerprinting was still mandatory while the relocation state would receive a sum of €6.000 per migrant (Arts. 5(5) and 10 of Relocation Decisions). However, by the end of 2016, only a few thousand refugees were relocated from Greece and Italy to other EU states. In September 2017, the European Commission recommended a new resettlement scheme for at least 50.000 refugees in the EU. The Commission hereby has presented next steps towards a stronger, more effective and fairer EU migration and asylum policy. In this context, the Commission has reserved €500 million to support member states' resettlement efforts and has thereby shown its willingness to provide financial support to member states.²⁹

The EASO plays a salient part in the relocation process. The duties of the EASO revolve around supporting practical cooperation on asylum (Arts. 3-7 of EASO Regulation) and supporting member states subject to particular pressure (Arts. 8-10 of EASO Regulation).³⁰ Most notably, under Article 5, EASO undertakes the duty to support the relocation process of beneficiaries of international protection within the Union. Therefore, the EASO has been involved in the temporary relocation scheme of the past two years with its role proclaimed in Article 7 of the Relocation Decisions. EASO's activities now include amongst others the deployment and coordination of Special Support Teams and Asylum Support Teams to Italy and Greece, the facilitation of direct cooperation and information exchange between National Contact Points of the states of relocation and Greece/Italy and also information provision as well as the monitoring of the overall relocation process.

Besides relocation, the EU-Turkey deal has been an important emergency response to deal with the refugee influx. According to the deal, which was published as a statement, *all* new irregular migrants crossing from Turkey into Greek islands from 20 March 2016 will be returned to Turkey – in exchange for the liberalization of EU visa requirements for Turkish citizens, financial aid and a resettlement program for Syrians from Turkey to the

27 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 September 2015.

28 See Eurostat data, Asylum Quarterly Report. Retrieved from http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report and resettlement, 2017. Retrieved on 13 November 2017 from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_en.pdf.

29 European Commission – Press Release, State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy, 27 September 2017. Retrieved on 18 October 2017 from http://europa.eu/rapid/press-release_IP-17-3406_en.htm.

30 See Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing an EASO.

EU. The latter resembles the idea that for every Syrian who irregularly entered Greece and is being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU. These measures will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and with the principle of non-refoulement. Yet, according to the General Court of Justice of the EU and the Council, of the European Union it is not a treaty, but a political international agreement concluded by the member states³¹ although scholars have expressed doubts on this.³² The EU–Turkey agreement is intended to be a temporary and extraordinary measure and is considered necessary to restore public order.

The assumption underlying the EU–Turkey deal is that Turkey can be regarded a safe third country according to the Asylum Procedures Directive. The directive provides that if a person requests asylum on the territory of one of the member states, the member state has to guarantee access to the asylum procedure. So, basically, as soon as a person requests asylum in territorial waters, in transit zones or on the territory of a member state, the person has access to an EU asylum procedure. Moreover, the Asylum Procedures Directive provides that an applicant for asylum can be sent to a safe third country. A safe third country has to comply with several principles and obligations of the Geneva Convention, including the principle of non-refoulement (Art. 38 of the Asylum Procedures Directive). Whereas the EU–Turkey deal is based on the idea that Turkey is a safe third country, doubts have been expressed on whether this is actually the case. The agreement has thus been heavily criticized by NGOs and academics.³³ Human Rights Watch, for instance, has expressed worries that Turkey does not respect the principle of non-refoulement.³⁴ EU law prohibits indirect refoulement, in the sense that a member state of the EU returns people to a country that in turn violates the non-refoulement principle. Another issue is that Turkey does not apply the Geneva Convention standards for non-Europeans. Turkey

31 Case T-193/16, General Court of Justice, *NG v. European Council*, ECLI:EU:T:2017:129, paras. 27 and 71. In this case an action for annulment brought under Art. 263 TFEU was made, but the General Court argued that it does not have the jurisdiction to rule on the lawfulness of an international agreement, such as the EU–Turkey statement, concluded by the member states. *See also* Press Release 144/16 European Commission, EU–Turkey Statement, 18 March 2016. Retrieved from www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf.

32 S. Peers, The final EU/Turkey refugee deal: A legal assessment. Retrieved on 15 November 2017 from <http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>.

33 The International Rescue Committee (IRC), Norwegian Refugee Council (NRC) and Oxfam have, for example, argued that the deal exposed refugees to risk and abuse, and have accused the EU of creating a dangerous precedent: *see* Aljazeera. Retrieved on 13 November 2016 from www.aljazeera.com/news/2017/03/ngos-criticise-turkey-eu-deal-refugees-170317065406849.html; *see also* Human Rights Watch, Questions and answers: the EU–Turkey deal on migration and refugees, 2016. Retrieved on 13 November 2017 from <https://www.hrw.org/news/2016/03/03/qa-eu-turkey-deal-migration-and-refugees>; Den Heijer *et al.*, *supra* note 17, p. 618; Thym, *supra* note 24.

34 Human Rights Watch, *supra* note 33.

made a geographical limitation with regard to the Geneva Convention, in the sense that it declared to apply the Convention only to persons who are refugee as a result of events in Europe.³⁵ It has been argued, however, that Turkey applies a similar level of international protection as the Geneva Convention required and that this is sufficient to be recognized as a third safe country.³⁶ There are, therefore, many points of criticism regarding the EU–Turkey deal.³⁷ The deal is, however, still in place today, even though the number of Syrian asylum seekers resettled in the EU is very low.

2.2.4.2 Changes to the CEAS

The Asylum Procedures Directive establishes common standards of safeguards and guarantees to access a fair and efficient asylum procedure. It was revised in 2015 to ensure fairer, quicker and better quality asylum decisions. The previous directive was the lowest common denominator between member states at the time. The rules were often too vague and derogations allowed member states to keep their own rules, even if these went below the basic agreed standards. Under the revised version of the directive, asylum seekers with special needs receive the necessary support to explain their claim while there is greater protection of unaccompanied minors and victims of torture. Similarly, a revised version of the Reception Conditions Directive also entered into force in 2015, ensuring that there is humane material reception for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It establishes common standards of conditions of living of asylum applicants and ensures that applicants have access to housing, food, health care and employment, as well as medical and psychological care.

The Qualifications Directive is a very significant piece of legislation since it ‘transposed’ the 1951 Geneva Convention’s provisions (along with the 1967 Protocol’s provisions) in EU legislation. As such, it establishes common ground for granting international protection and foresees a series of rights for its beneficiaries, including protection from refoulement, residence permits, travel documents, access to employment and education, social welfare and health care as well as specific provisions for children and vulnerable people. Before the adoption of this directive in 2011, the minimum standards for international protection were, to a certain extent, vague, which maintained divergences in national asylum legislation

35 Protocol relating to the status of refugees, 31 January 1967, New York. Retrieved on 14 November 2017 from www.unhcr.org/protection/convention/4dac37d79/reservations-declarations-1967-protocol-relating-status-refugees.html.

36 See, e.g., European Commission Fact Sheet, EU–Turkey statement: questions and answers. Retrieved on 14 November 2017 from http://europa.eu/rapid/press-release_MEMO-16-963_en.htm; http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm.

37 See, among others, the analysis: S. Peers, ‘The final EU-Turkey refugee deal: a legal analysis’, available at <http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html> [accessed on 13 November 2017]; Human Rights Watch, ‘Why EU Turkey Migration Deal is no Blueprint’, available at <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint> [accessed on 13 November 2017].

and practices. The chances of a person to be granted international protection could vary tremendously, depending on the member state processing the asylum application. However, during the summer of 2016, the Commission also proposed the replacement of the Qualifications Directive with a Regulation in order to ensure further harmonization of the standards for protection and the rights granted to refugees and beneficiaries of subsidiary protection and equal treatment of asylum applications across the EU. As regulations are directly applicable, these norms are no longer dependent on their implementation in national law and can be directly invoked before a national court. The proposed regulation, which is still under discussion in the legislative process, is aimed to establish full harmonization of the procedures, ensuring same steps, timeframes and legal safeguards across all EU member states.³⁸

At the same time, the EU has decided to broaden and reinforce its mechanisms for ensuring border control, by extending the powers of Frontex.³⁹ In September 2016, Frontex was given tasks as a European Border and Coast Guard, but the new agency did not change its name.⁴⁰ An important change with regard to the previous system in which Frontex worked is that member states are not solely responsible anymore for border control, but that responsibility and competence is shared with Frontex. Hence, although the member states are still primarily responsible, the responsibility is not exclusive anymore.⁴¹ Moreover, Frontex has been given a supportive role in the hotspots. Frontex could, for instance, support screening of migrants at the hotspots.⁴²

38 Proposal for a regulation of the European Parliament and the Council establishing a common procedure for international protection and repealing Directive 2013/32/EU, COM (2016) 467.

39 See for a critical analysis of the new agency. Retrieved on 14 November 2017 from <http://eulawanalysis.blogspot.nl/2016/10/establishing-european-border-and-coast.html>.

40 Press Release European Commission, 6 October 2016, Securing Europe's external borders: Launch of the European Border and Coast Guard Agency. Retrieved on 13 November 2017 from http://europa.eu/rapid/press-release_IP-16-3281_en.htm. See para. 11 of the preamble of Regulation 2016/1624: 'The tasks of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union should therefore be expanded. To reflect those changes, it should be renamed the European Border and Coast Guard Agency, which will continue to be commonly referred to as Frontex.'

41 Art. 5 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

42 Art. 18 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

2.2.5 A 'crisis' of law?

Can one conclude on the basis of the above analysis that there is question of a 'crisis' in the EU legal system in dealing with the refugee influx, in the sense that the CEAS has features that do not sufficiently enable or force member states to overcome their disagreement, whilst it is hugely important to make decisions that contribute to dealing in an effective and legitimate way with this influx of people? Here one can observe first of all that the CEAS indeed seems to have systematic defaults. It is based on minimum harmonization, giving member states opportunities to still apply different levels of protection.⁴³ It also grants them the possibility to return asylum seekers to a country they consider as a safe third country. Yet, at the same time the system has guarantees. Asylum seekers have the right to an individual assessment of their case, before they are sent to a safe third country. Moreover, access to national courts and remedies has to be guaranteed. One of the important flaws in the current system is the principle of first entry in the Dublin system. The underlying idea that asylum seekers can – and have to – apply only in one member state makes sense. However, the criteria that establish which member state is responsible lead to a situation in which certain member states (Italy and Greece) have a heavier burden to carry than other member states. The fact that by relocation schemes this 'Dublin principle' was set aside temporarily was therefore to be praised. However, since the relocation schemes were not effective in practice, as member states did not follow up on these obligations, the burdened member states were hardly relieved. The new proposal of the European Commission to reform the Dublin Regulation, however, still contains the first-entry principle. In that sense, the key flaw, in terms of mutual solidarity between member states, will – probably – remain.

The most problematic issue with regard to the legal system is that there is a gap between the law in the books and the law in action. While the EU–Turkey deal may be argued to be in line with the international obligations and the EU framework of protection, the deal proved to be mostly effective in preventing people to travel to Greece. The second part of the deal, where refugees from Syria would be relocated in the EU, has still not been made effective.⁴⁴ Member states seem to hide behind each other's policy, and Greece and Italy are still member states with a heavy burden, the other member states not being interested to relieve that burden. As such, the 'crisis' has exposed the limits of EU cooperation, shared burden and predominantly the principle of solidarity between the member states. The principle once comprised the fundamental values upon which the Union was built, based

43 See Den Heijer *et al.*, *supra* note 17.

44 See recent EU data on relocation in EU member states, dating from 3 November 2017, which show significant differences in what member states have pledged to do in the area of relocation and what is actually done in practice. Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

on sharing both the advantages (i.e. prosperity) and the burdens equally and justly among member states; however, it has proven to be problematic in terms of its cognitive recognition and acceptance by some member states in asylum matters.

The European Commission proposed a new Dublin Regulation in May 2016.⁴⁵ The regulation proposed that if a member state takes more than 150% of a certain reference number (based on GDP and inhabitants), it could be relieved from the Dublin system, by a so-called corrective allocation mechanism. This means that if that regulation is adopted, Greece and Italy could get support from other member states only when they would have half more the number of asylum seekers than they could deal with. Hence, the burdened member state has to reach well beyond the number of refugees than it could deal with, before being relieved in any way. Moreover, member states who refuse to receive asylum seekers have to pay a fine/solidarity fee of two hundred fifty thousand euro for each asylum seeker they refuse, for a period of 12 months. That means that Member States would get the possibility to buy out on their obligation to handle asylum requests. The proposal is under criticism by NGOs.⁴⁶ The proposal has not been adopted yet and it is expected that it will be difficult to reach a political agreement. Neither did the relocation schemes work in practice so far, nor did the idea of creating 'hotspots', where refugees could apply for international protection, have an effective follow-up.⁴⁷ In a similar vein, the relocation schemes are not implemented by the member states, which reveals the discrepancy between the legal instruments and their effectiveness in times of 'political crisis'. As will be shown in the next sections, if a political will and hence solidarity between the member states is lacking, the CEAS is unlikely to function effectively in practice.

We now turn to considering in somewhat more detail the political context within which the legal framework operates and develops, in particular how they interact with one another when it comes to the relocation of asylum seekers to the member states.

2.3 RELOCATION OF ASYLUM SEEKERS TO EU MEMBER STATES: SIGNS OF A POLITICAL AND INSTITUTIONAL CRISIS

As seen already, the arrival of hundreds of thousands of asylum seekers in Europe's external border states – Greece and Italy – has challenged the EU's response to this major influx of people since 2015. The disorderly movement of asylum seekers to member states that apply higher protection standards has put the European asylum system in jeopardy. Moreover, it has questioned the ability and political commitment of member states to

⁴⁵ See <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-270-EN-F1-1.PDF>.

⁴⁶ For instance, Amnesty International. Retrieved from www.amnesty.eu/content/assets/AI_position_paper_on_Dublin_IV_proposal.pdf.

⁴⁷ See [www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).

respond to their responsibilities towards this vulnerable group of people. What political efforts of member states can be seen in dealing with the relocation of asylum seekers and what reasons can be identified behind particular national choices in this area? This section will shed light on these questions.

2.3.1 *National differences in supporting asylum relocation*

Concerns about cultural identity, social cohesion and security have dominated popular public opinions and policy debates on asylum matters in a majority of EU member states.⁴⁸ Despite the fact that EU minimum harmonization in the form of directives⁴⁹ reduces to some extent secondary disorderly movement of refugees,⁵⁰ a lack of political will at the national level has translated itself into a ‘race to the bottom’ in which member states aspire to level down as much as possible the protection standards for asylum seekers.⁵¹ Recognition rates, that is the share of positive decisions on asylum applications in the total number of asylum decisions at the first instance, differ significantly within each member state, as well as procedural standards, shelter conditions and substantial protection for refugees.⁵²

A clear distinction is also visible between the attitudes of member states towards the relocation of asylum seekers. While Germany warmly welcomed this group within its society under the slogan ‘wir schaffen das’, the Visegrad countries (comprising the Czech Republic, Hungary, Poland and Slovakia) adopted common positions hostile to the relocation of asylum seekers in their territories.⁵³ Hungary, for example, built fences against the influx of asylum seekers and detained thousands of them in border camps. Poland has refused to relocate any individuals, while the Czech Republic has stopped complying with

48 J. Sunderland, For Europe, integrating refugees is the next big challenge, 2016. Retrieved on 1 September 2017 from <https://www.hrw.org/news/2016/01/13/europe-integrating-refugees-next-big-challenge>.

49 See in particular Directive 2011/95 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 protection granted; Directive 2013/32 on common procedures for granting and withdrawing international protection; Directive 2013/33 laying down standards for the reception of applicants for international protection OJ L 337, 20 December 2011.

50 Commonly referred to as ‘asylum shopping’ by people who had already claimed protection in another member state.

51 Den Heijer *et al.*, *supra* note 17, p. 609.

52 Id. See also Eurostat News Release, EU Member States granted protection to more than 700 000 asylum seekers in 2016, 27 April 2017. Retrieved on 16 November 2017 from www.europeanmigrationlaw.eu/documents/Eurostat-AsylumDecisions-2016.pdf.

53 See C. Postelnicescu, “Europe’s new identity: The refugee crisis and the rise of nationalism”, *Europe’s Journal of Psychology*, Vol. 12, No. 2, 2016, p. 205. In July 2017, French president Macron proposed the idea to initiate hotspots in Libya, with the idea to prevent asylum seekers from taking dangerous risks when they are not all eligible for asylum. See Aljazeera. Retrieved on 20 November 2017 from www.aljazeera.com/news/2017/07/emmanuel-macron-hot-spots-asylum-seekers-libya-170727104815101.html.

the refugee allocation scheme since 2016.⁵⁴ Hungary's asylum policy has recently been challenged before the ECtHR in the case *Ilias and Ahmed v. Hungary*. The ECtHR found in this case that the detainment of asylum seekers in the transit zone without any formal procedure and access to judicial remedy is unlawful.⁵⁵

Since EU member states, in particular Eastern European countries, have been highly reluctant to take in asylum seekers at any cost, the Council of the European Union (hereafter the Council) decided to adopt a binding decision through a qualified majority voting in September 2015, before the EU–Turkey deal entered into force, pertaining to the relocation of asylum seekers in the EU.⁵⁶ Since Hungary did not want to be classified as a 'frontline member state' and did not wish to be among the member states benefitting from relocation (i.e. Italy and Greece), the final version of the proposal for a Council decision⁵⁷ mentioned only Greece and Italy as member states from where the 120,000 asylum seekers could be relocated.⁵⁸ The so-called Visegrad countries, comprising the Czech Republic, Hungary, Romania and the Slovak Republic, voted against the adoption of the proposal, while the Republic of Finland abstained.⁵⁹

The aim of the Council's relocation decision is to assist Italy and Greece in dealing with the massive inflow of asylum seekers reaching their borders on a daily basis. It specifically provided for the relocation of 120,000 people in clear need of international protection from Italy and Greece and other member states directly affected by the major refugee inflow since 2015. The legal basis for this decision can be found in Article 78(3) TFEU, which stipulates that '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 State(s) concerned. It shall act after consulting the European Parlia-

54 *The Economist*, Most EU Countries are happy to welcome other Europeans. Retrieved on 20 November 2017 from <https://www.economist.com/news/special-report/21719191-they-are-less-keen-refugees-outside-most-eu-countries-are-happy-welcome-other>.

55 ECtHR Case *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 14 March 2017, paras. 124-125. The case concerned two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they immediately applied for asylum and were held in a transit zone for 23 days. Hereafter, they were expelled to the Serbian border. The court ordered Hungary to pay each applicant €10,000 in respect of non-pecuniary damage and €8,705 for costs and expenses. The case is still open to appeal.

56 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 2015 L 248, 24 September 2015, p. 80.

57 That is, the proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (COM(2015) 451; 'the Commission's initial proposal'.

58 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* ECLI:EU:C:2017:631, para. 10.

59 *Id.*, para. 11. Note that the associated states (i.e. Norway, Iceland, Switzerland and Liechtenstein) do not automatically participate in the relocation scheme, but the Council Decision of 22 September 2015 allows Italy and Greece to conclude bilateral agreements with these states.

ment'.⁶⁰ The European Commission, consistently and continuously working for a coordinated European response in asylum matters, agreed to organize together with the EU agencies and member states the necessary coordination to implement the mechanism on the ground.⁶¹ Following the EU–Turkey deal, the Council made a new decision on 29 September 2016, in which it argued that the number of Syrians admitted from Turkey by a member state should be deducted from the number of persons to be relocated to that member state under the Council Decision of 22 September 2015.⁶²

In a press release of July 2017 on the progress of the relocation scheme, the EU Migration Commissioner Dimitris Avramopoulos argued that:

relocation works if the political will is there. What we need now is a final push to achieve our common goal of relocating the vast majority of the asylum seekers present and eligible in Greece and Italy by September. ... The EU won't leave countries with an external border alone and the Commission will continue to ensure that all Member States comply with their legal obligations when it comes to relocation.⁶³

Despite the commissioner's encouraging statement, the EU relocation scheme has not proven to be successful in practice. A report of Human Rights Watch in fact indicated that Greece is still facing a disproportionate amount of asylum seekers, with poor reception conditions and no facilitated access to asylum procedures.⁶⁴ Moreover, latest EU data indicate that not a single relocation has taken place to Poland and Hungary.⁶⁵ The Czech Republic relocated only 12 asylum seekers from Greece, and it has not proposed any new offer to relocate more individuals since August 2016.⁶⁶ Besides, only 16 asylum seekers

60 See Art. 78 for the consolidated version of the Treaty on the Functioning of the European Union. Retrieved on 14 November 2017 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

61 European Commission Statement 22 September 2015 following the decision at the Extraordinary Justice and Home Affairs Council to relocate 120,000 refugees. Retrieved on 13 November 2017 from http://europa.eu/rapid/press-release_STATEMENT-15-5697_en.htm.

62 Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1 October 2016, Recital 5.

63 European Commission Press Release 26 July 2017. Retrieved on 14 November 2017 from http://europa.eu/rapid/press-release_IP-17-2104_en.htm.

64 Human Rights Watch Report 2016. Retrieved on 14 November 2017 from <https://www.hrw.org/world-report/2017/country-chapters/european-union>.

65 See recent EU data on relocation in EU member states, 3 November 2017. Retrieved on 14 November 2017 from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

66 Id.

were transferred from Greece to Slovakia, while the country had proposed to take in 60 asylum seekers initially.⁶⁷

The political unwillingness of Eastern European member states to implement the relocation measures resulted in infringement proceedings⁶⁸ in the summer of 2017 initiated by the European Commission against Poland, the Czech Republic and Hungary, for refusing to provide shelter to asylum seekers under the 2015 refugee-sharing scheme adopted by the Council to ease the burden on Greece and Italy. The Commission thereby subjected the member states to high fines if not complying with these measures.⁶⁹ In response, Poland asked the Commission to withdraw the infringement procedure, threatening it to bring the case before the CJEU if it did not do so.⁷⁰ As things stand, no case has (yet) been referred to the CJEU by the Commission concerning the infringement procedures of the Commission against Hungary, Poland and the Czech Republic. However, as will be shown later, Hungary and Slovakia have recently challenged the Council's decision on asylum relocation before the CJEU, which led to the case *Hungary and Slovakia v. Council*.⁷¹

2.3.2 The CJEU's assessment of the Council Relocation Decision

Given the antipathy already visible in Eastern Europe towards the protection of refugees, it did not come as a surprise that Hungary and Slovakia challenged the Council's 2015 asylum seekers' relocation decision.⁷² The two member states filed an action for annulment before the CJEU under Article 263 TFEU to annul the Council's decision to relocate 120,000 Syrian and other asylum seekers in their territories.⁷³ Hungary, which received international criticism after erecting controversial fences on its border with Serbia and Croatia, has refused to take in a single asylum seeker under the scheme, claiming that the migration policy falls under the discretion of the state itself to decide who is allowed to enter its territory.⁷⁴ Hungary's president Orbán also argued that the large influx of – mainly Muslim –

⁶⁷ Id.

⁶⁸ Under "infringement" proceedings, the European Commission sends a letter to national governments demanding legal explanations over certain issues, before possibly referring the member states at issue to the CJEU.

⁶⁹ Politico, Commission tells Poland to comply with refugee rules. Retrieved on 27 October 2017 from <https://www.politico.eu/article/commission-tells-poland-to-comply-with-refugee-rules/>.

⁷⁰ Id.

⁷¹ CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631.

⁷² Id.

⁷³ On Wednesday, 2 December 2015, Slovakia challenged the legality of the Council's decision. Just one day later, on Thursday, 3 December, Hungary did the same.

⁷⁴ *Financial Times*, Orbán: EU's 'Christian identity' under threat from Muslim migrants. Retrieved on 28 October 2017 from <https://www.ft.com/content/7ecde2c2-af12-329a-9133-29a7bee08e31>.

migrants threatens both the EU's and Hungary's cultural identity.⁷⁵ In addition, the rejection of the relocation decision has an important national-political motive, as Hungary aims to send a clear message that it refuses to recognize the right of residence for refugees through a binding mechanism decided by the EU.⁷⁶

In reinforcing their actions, the applicants asserted on the basis of two pleas that the decision of the Council should be annulled: (1) the adoption of the decision can be considered as invalid due to errors of a procedural nature or arising from the choice of an inappropriate legal basis⁷⁷; (2) the decision was not suitable to the prescribed aim nor was it proportional to the aim – that is, less restrictive measures could have been adopted to achieve the main objective.⁷⁸ The Czech Republic, Romania and Poland supported the action for annulment by Hungary and Slovakia, while Germany, Greece, Italy, France, Sweden and Luxembourg backed the Council. The division between the member states in this case is highly political and also explains why the Court's judgement is extensive and detailed.⁷⁹ The case is also telling in terms of institutional and political tensions. Interesting in this context is also the opinion of Advocate General (hereafter AG) Bot, in which he rejected the claims as brought forward by Hungary and Slovakia as unfounded and recommended the CJEU to dismiss the case.⁸⁰ In doing so, he emphasized on the binding nature of the solidarity principle as enshrined in Article 80 TFEU.⁸¹ The AG thereby argued that 'solidarity is among the cardinal values of the Union and is even among the foundations of the Union'.⁸² Despite the fact that opinions of AGs are not binding as such, the CJEU follows their views in most cases. It in fact did so in the case *Hungary and Slovakia v. Council*, which will be discussed below as a prime example that symbolizes the political and institutional crisis pertaining to the challenges concerning asylum relocation in EU member states.⁸³ While the case encompasses 16 pleas on the part of Hungary and Slovakia, the next section focuses mainly on those arguments of the CJEU that concern specifically

75 Id.

76 See K. Groenendijk, & B. Nagy, The Hungarian parliament adopts an Act calling for a review of the legality of Council Decision (EU) 2015 1601. Retrieved on 14 November 2017 from <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>.

77 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 40.

78 Id. Note that Poland has intervened in support of Slovakia and Hungary, while Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden and the Commission have intervened in support of the Council.

79 H. Labayle, Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice, 11 September 2017. Retrieved on 14 November 2017 from <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>.

80 Advocate General Yves Bot's Opinion in Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631.

81 Id., para. 18.

82 Id., para. 17.

83 Id.

the issues related to the relocation of asylum seekers in the EU and the principle of solidarity in this matter.

On 6 September 2017, the CJEU dismissed the legal challenges to the relocation decision in their entirety.⁸⁴ Both Hungary and Slovakia have put forward different reasons to argue that Article 78(3) TFEU does not serve as a proper legal basis for the contested relocation decision. CJEU first dismissed the argument that a legislative procedure should have been followed in which national parliaments should have been consulted.⁸⁵ It held that since Article 78(3) TFEU does not expressly refer to a legislative procedure (i.e. an ordinary legislative procedure or a special legislative procedure as defined under Article 289 TFEU⁸⁶), the contested decision of the Council could be adopted in a non-legislative procedures.⁸⁷ It thereby argued that measures that are adopted on the basis of Article 78(3) TFEU 'must be classified as 'non-legislative acts' because they are not adopted at the end of a legislative procedure'.⁸⁸ As such, requirements relating to the participation of national parliaments (including compliance with the principle of subsidiarity as enshrined in Art. 5(3) TFEU) and to the public nature of the deliberations and vote in the Council as required under Article 289 TFEU do not have to be fulfilled.⁸⁹ The latter applies *only* when draft legislative acts are adopted.⁹⁰

Secondly, CJEU rejected the argument brought forward by Hungary and Slovakia that Article 78(3) TFEU did not serve as a proper legal basis for the contested decision because the decision constitutes a non-legislative act which derogates from a number of legislative acts (in particular the Dublin III Regulation as discussed above), while only legislative acts can derogate from other legislative acts.⁹¹ CJEU argued here that provisional measures in the context of the contested decision could derogate from legislative acts, provided that their material and temporal scope is circumscribed.⁹² The Council set the period of application of the measures in its decision since it stipulated clearly in Recital 22 that 'a period of 24 months is reasonable in view of ensuring that the measures provided for in this

84 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631. The ruling came on the same day the CJEU agreed that Austria and Slovenia could send refugees back to Croatia to have asylum cases determined there.

85 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 55.

86 See Art. 289 for a consolidated version of the Treaty on the Functioning of the European Union. Retrieved on 14 November 2017 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

87 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 65.

88 *Id.*, para. 66.

89 *Id.*, para. 193.

90 *Id.* See also Labayle, *supra* note 79.

91 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 68.

92 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 79.

Decision have a real impact in respect of supporting Italy and Greece in dealing with the significant migration flows on their territories'.⁹³ Moreover, Article 78(3) TFEU does not define the specific nature of 'provisional measures' and does not suggest a restrictive interpretation of this concept.⁹⁴ This provision also does not mention any specific time limit, and the discretion left to the Council in this matter is justified by an unprecedented and complex emergency situation, such as the sudden influx of migrants in 2015.⁹⁵

Thirdly, CJEU considered it convincing enough that the European Parliament was duly informed of the amendments to the initial proposal before the final decision was made.⁹⁶ Hence, it considered the arguments of Hungary and Slovakia that a formal resolution of the Parliament adopted in a plenary session was needed as unfounded.⁹⁷

In addition, the CJEU held that the conclusions of the Council of 25 and 26 June 2015, which stated that the member states should agree 'by consensus' on the distribution of persons that are in clear need of international refugee protection and should do this by means of 'reflecting the specific situations of Member States', could not prevent the adoption of the contested Council decision on relocation of asylum seekers.⁹⁸ In fact, those conclusions applied to another relocation plan, which in response to the refugee influx in the first six months of 2015, aimed to allocate 40,000 persons between the member states. The latter plan was the main subject matter of Decision 2015/1523 and not of the contested decision.⁹⁹ Hungary and Slovakia have pledged that this decision was adopted by qualified majority voting, and despite the fact that it followed from the European Council's conclusions of 25 and 26 June 2015 that the contested decision had to be adopted 'by consensus' in a way 'reflecting the specific situations of Member States', the Council violated Article 68 TFEU¹⁰⁰ and thus infringed essential procedural requirements of EU law.¹⁰¹ CJEU responded here by stating that Article 78(3) TFEU does allow the Council to adopt measures by a qualified majority, which it in fact did when it adopted the contested relocation decision.¹⁰² Moreover, it held that the principle of institutional balance prevents the Council

93 Id., para. 96.

94 Id., para. 71.

95 Id.

96 Id., para. 155.

97 Id., paras. 168-170.

98 Id., para. 136.

99 Id., paras. 144-146.

100 Art. 68 of TFEU stipulates that "the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice", see the consolidated version of the Treaty on the Functioning of the European Union. Retrieved on 14 November 2017 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

101 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 136.

102 Id., para. 148.

to alter the voting rules as enshrined in the treaties by means of the conclusions adopted according to Article 68 TFEU, a rule that requires unanimity.¹⁰³

Furthermore, the CJEU argued that the relocation mechanism as provided in the contested decision is not a measure that is manifestly unsuitable for contributing to achieve the objective. It argued that the mechanism in fact assists Greece and Italy to manage the impact of the 2015 major inflow of asylum seekers and is hence necessary and proportional to achieve that vital objective.¹⁰⁴ The legality of the decision cannot be called into question either, given that the Council carried out, on the basis of a detailed examination of the statistical data available to it at the time, an objective analysis of the real impact of the measure on the emergency situation in question.¹⁰⁵

Finally, the applicants argued that the Council made a manifest error of assessment when it considered in view of the particular urgency of the situation that it had to take, on the basis of Article 78(3) TFEU read in the light of Article 80 TFEU, provisional measures imposing a binding relocation mechanism.¹⁰⁶ The CJEU responded that this argument is not valid as the Council was in fact obliged to, as stipulated in Recital 2 of the decision, to give effect to the principle of solidarity and fair sharing of responsibility.¹⁰⁷

2.3.3 *A political and institutional crisis?*

This ruling has clearly reinforced the general principle of shared responsibility between the member states, which ensures the CJEU's backing of member states that support and comply with the decisions pertaining to the relocation of asylum seekers in the EU. It hereby acknowledges a shared burden between member states in dealing with the large influx of asylum seekers. Yet, therewith, the ruling reveals – or rather confirms – at the same time the political and institutional divide that has emerged on this issue. The CJEU's judgement was thus met with mixed reactions by the complaining member states. The Visegrad states have argued that EU membership does not oblige them to solve the asylum problems in other countries such as Greece and Italy and that solidarity cannot be imposed upon them.¹⁰⁸ Soon after CJEU's ruling, the Slovak prime minister Robert Fico argued that his country respects the CJEU's decision to reject their complaints despite its scepticism

103 Id.

104 Id., para. 96.

105 Id.

106 Id., para. 253.

107 Id., para. 252.

108 Note that in September 2016, the president of the European Commission, Jean-Claude Juncker, argued that 'when it comes to managing the refugee crisis, we have started to see solidarity. I am convinced much more solidarity is needed. But I also know that solidarity must be given voluntarily. It must come from the heart. It cannot be forced'. Cf. J. C. Juncker, State of the Union Speech, 14 September 2016. Retrieved on 17 December 2017 from http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm.

about the feasibility of such compulsory quotas for asylum relocation in practice.¹⁰⁹ The Hungarian government, however, explicitly made clear to continue fighting refugee quotas following the CJEU's decision, but it did not specify new legal measures, arguing that this will depend on what the European Commission will do in the future.¹¹⁰ The Polish position was also that this ruling would not change in any way the government's position in these matters.¹¹¹ At the same time, this judgement sends a clear signal to the member states that if they are under the European Commission's investigation and do not change their approach rapidly, infringement procedures are very likely to be started against them. In fact, as has been discussed above, the Commission has already launched infringement proceedings against Poland, the Czech Republic and Hungary, for refusing to provide shelter to asylum seekers under the 2015 relocation scheme.¹¹² Although no case has (yet) been referred to the CJEU by the Commission against these member states, the *Hungary and Slovakia v. Council* case clarifies that CJEU is ready to oblige member states to adhere to the asylum relocation measures of the Council. However, it still remains to be seen to what extent there is a political will to fully adhere to these responsibilities in practice.

Hence, while the Commission and the CJEU seem to share similar views on the need of a balanced relocation of asylum seekers between the member states, the latter themselves are in fact far more divided on the issue than the Council Relocation Decisions as such would suggest. The fact that these have been adopted by qualified majority vote conceals the disagreement of the Visegrad countries, in particular, with the approach taken. The countries bringing or supporting the case for annulment of the relocation decisions before the CJEU is very telling of this fundamental disagreement, signalling indeed an institutional and political crisis in the sense that it appears increasingly difficult to overcome this divide by the member states taking jointly effective, fully agreed upon and supported action within the framework of the Council.

To conclude, this section has confirmed that EU member states are not in a position to simply ignore their duties within the EU asylum system without being held accountable for it. But CJEU's ruling has also put emphasis on an even more fundamental question; that is, what relevance do core European values pertaining to asylum matters, such as solidarity and equality, actually bear in practice in European decision and policy making in

109 EU Observer, Hungary and Slovakia defiant after EU Court rebute. Retrieved on 22 October 2017 from <https://euobserver.com/migration/138913>.

110 Politico, Hungary says refugee ruling 'raped' EU law. Retrieved on 1 November 2017 from <https://www.politico.eu/article/hungary-says-ecj-ruling-on-refugee-quotas-has-raped-eu-law-asylum-seekers-italy-greece-relocation-scheme/>.

111 See H. Nguyen, Divided reactions to ECJ ruling on mandatory refugee relocation schemes. Retrieved on 15 November 2017 from <https://www.maastrichtuniversity.nl/blog/2017/09/divided-reactions-ecj-ruling-mandatory-refugee-relocation-schemes>.

112 Politico, *supra* note 69.

this field? The next section will thus focus on whether a 'crisis of values' can be witnessed and leads to the construction of the EU refugee 'crisis'.

2.4 THE AFTERMATH OF ASYLUM RELOCATION IN THE EU: WHAT IS LEFT OF EUROPEAN CORE VALUES?

The *Slovakia and Hungary v. the Council* case enabled the CJEU to re-emphasize fundamental values on which the Union is built. In fact, the proportionality argument as brought forward by Poland in its intervention to support Hungary's argument – that is, that the imposition of binding quotas has disproportionate effects on it – has been rejected by the CJEU.¹¹³ Poland argued that some member states bear far heavier burdens than other host member states, in particular those which are 'virtually ethnically homogeneous, like Poland' and whose populations are different, from a cultural and linguistic point of view, from that of the refugees on their territory.¹¹⁴ The CJEU responded by stating that these arguments are not compatible with Union law, in particular Article 21 of the Charter on Fundamental Rights, which guarantees the principle of non-discrimination.¹¹⁵ The CJEU hereby clarified that also within asylum matters, member states have the duty to respect EU fundamental rights as enshrined in the Charter.¹¹⁶ The CJEU specifically stipulated in this context that

if relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU¹¹⁷ and, consequently, the adoption of a binding relocation mechanism would be impossible.¹¹⁸

The binding nature of the principle of solidarity within the EU's migration policy is also clearly established here, which is pivotal in the CJEU's judgement and sends a clear signal

113 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* ECLI:EU:C:2017:631, para. 304.

114 *Id.*

115 *Id.*, para. 305.

116 *Id.*

117 Art. 80 of TFEU reads: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle. *See also* Art. 67 TFEU."

118 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 304.

to member states that solidarity is a key principle in the CEAS. In addition, this case enabled CJEU to state something about the practical scope of solidarity in the Union. The obligation to relocate asylum seekers with an impact on all states requires that ‘a balance be struck between the different interests involved, account being taken of the objectives which that decision pursues’.¹¹⁹ At the same time, with respect to situations in which one or more member states find themselves in an emergency situation within the meaning of Article 78(3) TFEU, it also stated that

the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States.¹²⁰

The CJEU explicitly clarified that solidarity between the member states cannot be fragmented or divided, except by an adjustment mechanism applied to other states – enabling a member state to request that its relocation obligations be suspended in the event of a sharp shift of migration flows – with the CJEU’s permission.¹²¹ The latter ‘enables account to be taken, in a proportionate manner, of the particular situation of each Member State in this regard’.¹²² The Commission also continues to emphasize solidarity between member states and ‘stands ready to provide **financial support to Member States** who sustain their relocation efforts beyond the current schemes’.¹²³ However, the implementation of these new proposed reforms will all depend on the political efforts and commitment of member states to move forward in this area.

As things stand now, solidarity between EU member states does not appear that self-evident in asylum matters. As already argued in Section 2.2, the Dublin system itself does not support the solidarity principle among member states, given the continued support of the majority of member states for the application of the first-entry rule. This rule in itself is difficult to reconcile with the principle of solidarity, at least when it is not accompanied with measures that provide for more balanced burden sharing in the case of a massive inflow of people.

119 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 290.

120 *Id.*, para. 291.

121 CJEU Judgement in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631, para. 282.

122 *Id.*, para. 298.

123 European Commission Press Release, *supra* note 29. 27 September 2017, ‘State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy’. Retrieved on 20 October 2017 from http://europa.eu/rapid/press-release_IP-17-3406_en.htm.

The above analysis reveals in fact a mismatch between some member states' vision and the CJEU's and Commission's vision on what the principle of solidarity implies in this particular domain. Indeed, it is not clear upfront what legal obligations this principle actually entails,¹²⁴ even if one can witness the increasing legal relevance this principle has gained in the wake of the entry into force of the Treaty of Lisbon. At the treaty level, solidarity is now mentioned as a characteristic of the European society (Art. 2 TEU). It is also one of the aims of the EU 'to promote solidarity between the Member States', especially with regard to economic, social and territorial cohesion,¹²⁵ and 'between generations' (Art. 3 TEU). Besides Article 80 TFEU in the migration and asylum domain, solidarity between the member states is also referred to in the context of the external policies of the Union,¹²⁶ the common foreign and security policy,¹²⁷ economic policy¹²⁸ and energy policy.¹²⁹ There is also a so-called solidarity clause.¹³⁰ The Charter of Fundamental Rights of the EU dedicates even a full chapter to 'solidarity', emphasizing in particular the relevance of this principle in terms of social protection of citizens as regards its social and labour-related rights, but also in relation to public health, environmental and consumer protection.¹³¹ Finally, solidarity can actually also be seen as being part of other important Union principles. It can thus be considered an important component of the principle of loyal cooperation, which applies not only to the relationship between the member states and the Union institutions but also between the member states.¹³² Furthermore, in the legal doctrine it has been considered that European citizenship is a mirror of solidarity.¹³³

On the one hand, in the 'books', the member states in their capacity of treaty drafters have recognized very much the relevance of solidarity. On the other hand, however, when it comes to the legal substantiation of this principle in a politically sensitive policy area like migration and asylum in practice, it appears that there is still quite a problem in terms of its cognitive recognition and acceptance. That is to say, not all member states consider adherence to this principle as being intrinsic to European society and the only natural thing to do.¹³⁴

124 I. Domurath, "The three dimensions of solidarity in the EU legal order: limits of the judicial and legal approach", *Journal of European Integration*, Vol. 35, No. 4, 2013.

125 Cf. also Art. 174 of TFEU.

126 Art. 21 of TEU.

127 Arts. 24 and 31 of TEU.

128 Art. 122 of TFEU.

129 Art. 194 of TFEU and in the so-called solidarity clause.

130 For the case of a terrorist attack, natural disaster or disasters caused by humans (Art. 222 of TFEU).

131 See Title IV 'Solidarity' Arts. 27 to 38 Charter of Fundamental Rights of the European Union. Retrieved on 20 November 2017 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>

132 Art. 4(3) of TEU and more explicit in, for example, Art. 24(2) of TEU.

133 Domurath, *supra* note 124, p. 462.

134 W. R. Scott, *Institutions and organizations: Ideas, interests and capabilities*, Thousand Oaks, Sage Publishing, 2014.

Having said that, it must also be acknowledged that the principle of solidarity is of fundamental importance for securing the protection of asylum seekers, in conformity with the Union's commitment to other core values, in particular fundamental rights. At stake are particularly the principles of equality, human dignity, protection against torture and the like. In that sense, the Charter's understanding of solidarity in itself is framed in a rather narrow way as it merely focuses on solidarity in matters related to labour, health, consumer and environmental protection. But most importantly, one can observe that where solidarity between member states is lacking in hosting asylum seekers, it is this group of people paying the bill for that. This is the case in particular where the countries of first entry, especially Greece and Italy, have not appeared capable of providing them with decent human conditions of living.¹³⁵

2.5 CONCLUSION: A DEFAULTING LEGAL SYSTEM, POLITICAL CRISIS OR A CRISIS OF VALUES?

The 'refugee crisis' has challenged the EU in both institutional and political terms. In fact, den Heijer et al. have argued that the number of asylum seekers finding shelter on European soil might not be the core problem in the EU refugee debate, but the way in which its member states have dealt with these numbers has proven to be more problematic.¹³⁶ The EU has been strongly criticized in how it has handled the major inflow of refugees since 2014, but this chapter has shown that its member states are also to blame for their inadequate action and political unwillingness to respond adequately to the refugee influx. The political turmoil between member states had its origin, partly, in the legal framework. Although the principles, rights and obligations as enshrined in the CEAS stem from the Geneva Convention, the system does not contribute to a fair share of asylum requests between the member states. Because the country of first entry is mostly the member state responsible for the asylum request, Greece and Italy have been the member states that faced the 'refugee crisis' in the eye of the storm, while other member states could often turn away from the problem. This in turn has created inequality between the member states, in which, ironically, the member states that were financially weak and not very stable had the responsibility to guarantee procedures, facilities and health care for many asylum seekers. This contributed to a political crisis, in which the member states were unable to reach consensus on how to handle this influx of refugees. At the same time, the CJEU used its competence to oblige member states to play their equal part in the relocation of refugees, emphasizing that also within asylum matters, member states have the duty to respect EU fundamental principles such as solidarity and equality. Yet, it has appeared that the funda-

¹³⁵ Thym, *supra* note 24, p. 1547; see also Human Rights Watch Report, 2016, *supra* note 64.

¹³⁶ Den Heijer et al., *supra* note 17, p. 641.

mental problem underlying the political and legal tensions concerns, in fact, the true commitment to the values on which the EU is built and its translation into day-to-day EU and member state policy to secure the fundamental rights of migrants, including asylum seekers and refugees. Instead of showing solidarity with asylum seekers, the claim for solidarity in the member states (in particular the Central and Eastern European member states) is mainly constructed to justify security measures at the national borders, resulting in strict border surveillance preventing asylum seekers from entering their territories. The lack of support for putting solidarity to practice by a number of member states can thus be considered to be at the heart of the refugee 'crisis', which may be the hardest issue to address in the future.

REFERENCES

Aljazeera, Retrieved on 13 November 2016 www.aljazeera.com/news/2017/03/ngos-criticise-turkey-eu-deal-refugees-170317065406849.html.

Amnesty International, "Europe's gatekeeper: Unlawful detention and deportation of refugees from Turkey", 16 December 2015. Retrieved on 16 November 2017 www.amnesty.org/en/documents/eur44/3022/2015/en/.

Domurath, I., "The three dimensions of solidarity in the EU legal order: Limits of the judicial and legal approach", *Journal of European Integration*, Vol. 3, 2013, pp. 459-475.

European Commission Fact Sheet 2015. Retrieved on 17 November 2017 http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm.

European Commission Fact Sheet, EU-Turkey statement: Questions and answers. Retrieved on 14 November 2017 http://europa.eu/rapid/press-release_MEMO-16-963_en.htm; http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm.

European Commission Press Release, 26 July 2017. Retrieved on 14 November 2017 http://europa.eu/rapid/press-release_IP-17-2104_en.htm.

European Commission Statement, European Commission Statement following the decision at the Extraordinary Justice and Home Affairs Council to relocate 120,000 refugees, 22 September 2015. Retrieved on 13 November 2016 http://europa.eu/rapid/press-release_STATEMENT-15-5697_en.htm.

European Commission-Press Release, State of the Union 2017: Commission presents next steps towards a stronger, more effective EU migration and Asylum policy, 27 September 2017. Retrieved on 18 October 2017 http://europa.eu/rapid/press-release_IP-17-3406_en.htm.

European Commission-Press Release, Refugee Crisis: European Commission takes decisive action, 9 September 2015. Retrieved on 13 November 2017 http://europa.eu/rapid/press-release_IP-15-5596_en.htm.

European Commission-Press Release, Securing Europe's external borders: Launch of the European Border and Coast Guard Agency, 6 October 2016. Retrieved on 13 November 2017 http://europa.eu/rapid/press-release_IP-16-3281_en.htm.

European Commission-Statement, European Commission Statement following the vote of the European Parliament in favour of an emergency relocation mechanism for a further 120,000 refugees, 17 September 2015. Retrieved on 13 November 2017 http://europa.eu/rapid/press-release_STATEMENT-15-5664_en.htm.

Eurostat data, Asylum Quarterly Report, 2017. Retrieved on 13 November 2017 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_en.pdf.

Financial Times, Orban: EU's 'Christian identity' under threat from Muslim migrants. Retrieved on 28 October 2017 <https://www.ft.com/content/7ecde2c2-af12-329a-9133-29a7bee08e31>.

Groenendijk, K., & Nagy, B. The Hungarian parliament adopts an Act calling for a review of the legality of Council Decision (EU) 2015 1601. Retrieved on 14 November 2017 <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>.

Heijer den, M. et al., "Coercion, prohibition and great expectations: The continuing failure of the common European Asylum System", *Common Market Law Review* 53, 2016, pp. 607-642.

Human Rights Watch Report 2016. Retrieved on 14 November 2017 <https://www.hrw.org/world-report/2017/country-chapters/european-union>.

Human Rights Watch, Questions and answers: The EU-Turkey deal on migration and refugees. 2016. Retrieved on 13 November 2017 <https://www.hrw.org/news/2016/03/03/qa-eu-turkey-deal-migration-and-refugees>.

Juncker, J. C., "State of the Union Speech", 14 September 2016. Retrieved on 17 December 2017 http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm.

Labayle H., Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice, 11 September 2017. Retrieved on 14 November 2017 <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>.

Mouzourakis, M., "We need to talk about Dublin' responsibility under the Dublin system as a blockage to asylum burden-sharing in the European Union", *Refugee Studies Centre Working Paper Series*, Vol. 105, 2014, pp. 1-36.

Peers, S., The final EU/Turkey refugee deal: A legal assessment. Retrieved on 15 November 2017 <http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>.

Politico, Commission tells Poland to comply with refugee rules. Retrieved on 27 October 2017 <https://www.politico.eu/article/commission-tells-poland-to-comply-with-refugee-rules/>.

Postelnicescu, C., "Europe's new identity: The refugee crisis and the rise of nationalism", *Europe's Journal of Psychology*, Vol. 12, No. 2, 2016, pp. 203-209.

Scott, R. W., *Institutions and organizations: Ideas, interests and capabilities*, Los Angeles, Sage Publishing, 2014.

Sunderland J., For Europe, integrating refugees is the next big challenge. Retrieved on 1 September 2017 <https://www.hrw.org/news/2016/01/13/europe-integrating-refugees-next-big-challenge>.

The Economist, Most EU Countries are happy to welcome other Europeans. Retrieved on 20 November 2017 <https://www.economist.com/news/special-report/21719191-they-are-less-keen-refugees-outside-most-eu-countries-are-happy-welcome-other>.

HANNEKE VAN EIJKEN, BARBARA SAFRADIN AND LINDA A.J. SENDEN

Thym, D., The 'refugee crisis' as a challenge of legal design and institutional legitimacy, *Common Market Law Review*, Vol. 53, No. 1545-1574, 2016, pp. 1545-1573.

CJEU and General Court case law

Case 260/89 *ERT* [1991] ECLI:EU:C:1991:254.

Case C-493/10 *M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011] ECLI:EU:C:2011:865.

Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

Case T-193/16, General Court of Justice, *NG v. European Council* [2016] ECLI:EU:T:2017:129.

CJEU Judgment in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631.

AG opinions

Advocate General's Opinion Yves Bot in Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council* [2017] ECLI:EU:C:2017:631.

ECtHR case law

ECtHR Case *Čonka v. Belgium*, Application no. 51564/99, 5 February 2002.

ECtHR Case *M.S.S. v. Belgium and Greece*, Application no. 30696/09 and *N. S. (C-411/10) v. Secretary of State for the Home Department*.

ECtHR Case *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 14 March 2017.

EU legislation

Charter of Fundamental Rights of the European Union. Retrieved on 20 November 2017 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

Consolidated version of the Treaty on European Union. Retrieved on 20 November 2017 <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT>.

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 September 2015.

Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1 October 2016.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Council 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.

Council 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.

Council 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.

Council Regulation (EU) No 439/2010 Of The European Parliament and Of the Council of 19 May 2010 establishing a European Asylum Support Office.

Council 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 opera-

tional management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29 June 2013.

Council Regulation 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 (recast), OJ L 180, 29 June 2013.

Council Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

International legislation

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137. Retrieved on 20 November 2017 www.ref-world.org/docid/3be01b964.html.

No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, as amended by Protocol no. 11.

Protocol relating to the status of refugees, 31 January 1967, New York. Retrieved on 14 November 2017 www.unhcr.org/protection/convention/4dac37d79/reservations-declarations-1967-protocol-relating-status-refugees.html.

Proposals

Proposal for a regulation of the European Parliament and the Council establishing a common procedure for international protection and repealing Directive 2013/32/EU, COM (2016) 467.

Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM(2015) 451; ‘the Commission’s initial proposal’.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

Narin Idriz

3.1 INTRODUCTION

A brief glance at the most recent history of the EU makes it clear that it is framed as a history of crises rather than the history of one of the most stable and prosperous block of states in the world. The beginning of the millennium was marked by the ‘big-bang’ enlargement to the East, and due to the challenges it generated, it was sometimes referred to as the ‘enlargement crisis’.¹ It was immediately followed by the ‘constitutional crisis’ in the aftermath of the ‘No’ vote of the Dutch and the French to the Constitutional Treaty in 2005. The next chain of crises, which were also linked to and triggered by the ‘global financial crisis’, took place in various branches of the financial sector. These were referred to as the ‘Eurozone crisis’, ‘the sovereign debt crisis’ and the ‘banking crisis’.² Last but not least, the topic of this book, the ‘refugee crisis’, took its place at the top of the agenda in 2015 and has dominated both the EU and national agendas ever since.

This tumultuous state of affairs did not go unnoticed by academics, who question the ‘exceptional’ nature of those events and claim that it is not crises but ‘the discourse of crisis that is common place in the EU’.³ In that context Lawrence defines crisis as ‘a discursive construction – a narrative that describes set of facts, ordering them to reproduce a representation of crisis’.⁴ In that reading, crisis discourse becomes a technique of government, which conveniently creates political opportunities. The declaration of a ‘crisis’ not only evokes an atmosphere of threat and uncertainty, but also creates an environment conducive

1 G. Vobruba, “The enlargement crisis of the European Union: limits of the dialectics of integration and expansion”, *Journal of European Social Policy*, Vol. 13, 2003, pp. 35-62; M. Bach, “The enlargement crisis of the European Union: From political integration to social disintegration?” in M. Bach, C. Lahusen, & G. Vobruba (eds.), *Europe in motion: Social dynamics and political institutions in an enlarging Europe*, Berlin, Nomos, 2006, pp. 11-28.

2 See, e.g., J. C. Lawrence, “The EU in crisis: Crisis discourse as a technique of government”, in M. K. Bulterman, & W. J. M. Genugten (eds.), *Netherlands Yearbook of International Law*, The Hague, T.M.C. Asser Press, 2013, p. 194.

3 Id., p. 187.

4 Id., p. 190.

to taking measures that were previously seen far beyond what is politically (and legally) possible.⁵ In short, the crisis discourse sets the scene for the maxim ‘extraordinary times require extraordinary measures’. This chapter focuses on the so-called EU–Turkey deal of 18 March 2016 as a case study of the ‘extraordinary’ response to the ‘extraordinary’ nature of the influx of asylum seekers in 2015.

As the EU’s most important and most visible response to the influx, the EU–Turkey ‘refugee deal’ attracted a lot of attention and criticism. It will not be an exaggeration to say that it has been one of the most controversial policy steps taken by the EU and its member states in recent years. The reasons for the underlying controversy and criticism concerning the deal are manifold: Breaching international and European standards for protection of refugees, collaborating with an increasingly authoritarian regime and trampling on EU’s foundational values such as protection of human rights and human dignity are only a few examples. This chapter focuses on the legal aspects of the deal⁶: its legal form (i.e. a statement) and the process that led to its conclusion in total disregard of the applicable treaty procedure.

In February 2017, the General Court dismissed three cases brought by asylum seekers affected by the deal, on the ground that the deal was not an act of an EU institution, but that of member states (Section 3.4).⁷ This contribution challenges that finding by arguing with reference to the EU treaties and the case law of the Court of Justice of the EU (CJEU) on EU external relations that member states had no competence to act on their own on the subject matter of readmission of third country nationals (TCNs) to Turkey (Section 3.5). It was the Union that had exclusive competence in this area, as it had already acted by signing a Readmission Agreement with Turkey (Art. 79(3) TFEU). The Union had exclusive competence also by virtue of the fact that the commitments agreed upon in the deal affected existing internal rules and changed their scope. In the process leading to the deal, both member states and EU institutions acted outside the appropriate procedure laid down in the treaties (Art. 218(6)(a)(v) TFEU), thereby breaching both the principle of sincere cooperation under Arts. 4(3) and 13(2) of Treaty of the European Union (TEU) and, more generally, the rule of law (Section 3.6). However, before examining the background of the deal and the process that led to its conclusion (Section 3.3), as a preliminary

5 Id., p. 189. Lawrence provides few examples, such as the revision of Art. 136 of Treaty on the Functioning of the European Union (hereafter TFEU) with regard to the stability mechanism for member states whose currency is the euro, and the reinterpretation of the ‘no-bailout’ principle of Art. 125 of TFEU by the CJEU in *Pringle* (Case C-370/12, ECLI:EU:C:2012:756). For more past examples, see Id., *supra* note 4.

6 See E. Cannizzaro, “Denialism as the supreme expression of realism: A quick comment on *NF v. European Council*”, *European Papers*, Vol. 2, No. 1, 2017, pp. 251-257; S. Carrera, L. den Hertog, & M. Stefan, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, *CEPS Policy Insights*, No 2017-15/April 2017.

7 Case T-192/16, *NF v. European Council*, Order of the General Court of 28 February 2017, ECLI:EU:T:2017, at p. 128; Case T-193/16, *NG v. European Council*, ECLI:EU:T:2017, at p. 129; and T-257/16, *NM v. European Council*, ECLI:EU:T:2017, at p. 130.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

point, this contribution will briefly assess whether the events of 2015 could be defined as a ‘crisis’ within the ordinary meaning of the term (Section 3.2). Some of the questions to be answered for that purpose are: What is a crisis and what are some of its constitutive elements? Are they present in the so-called refugee crisis of 2015? Would it be too far-fetched to call it ‘constructed’?⁸

3.2 WAS THERE A ‘REFUGEE CRISIS’ IN 2015?

There are many definitions of the word *crisis* in different dictionaries.⁹ For our purposes, it suffices to focus on the first two entries of the definition that appear most often, so as to see what is common to those definitions. The first entry defines crisis as ‘a time of intense difficulty or danger’.¹⁰ The synonyms provided to the definition under this entry are catastrophe, calamity, cataclysm, emergency and disaster. What can be inferred from this definition and the synonyms is that we are talking about a sudden, unexpected and perhaps unprecedented catastrophic event for which the entity affected (a person, a community or a state) was not prepared. Are these words helpful in describing the overall situation in 2015?

Was the influx sudden and unexpected? Was it unprecedented? Were the EU and its member states unprepared? Concerning the unexpected nature of the events, Sassen points out to the fact that the ongoing conflicts in Syria, Iraq, Afghanistan, Somalia and Eritrea were in no way new. ‘If anything, the surprise should have been that the surge in refugees did not happen sooner’.¹¹ As to whether the flow of people was unprecedented, even though the numbers are significantly higher than before, it is difficult to sustain that claim as well. As a result of the conflict in former Yugoslavia, the UN High Commissioner for Refugees (UNHCR) estimated that in 1992 there were 541,000 refugees from the former Yugoslavia in European countries.¹² The conflict in Bosnia was followed by another conflict and yet another ‘crisis’ in Kosovo in 1999. By looking back at these ‘crises’, one sees clearly that the current fights and discussions surrounding hosting refugees and responsibility-sharing

8 Lawrence explains that by using the word *constructed*, she does not imply that crises are fake or made-up. She suggests that “events – even catastrophic ones – only become *crises* through the operation of discourse”. Lawrence, *supra* note 2, p. 190, footnote 9.

9 See the definition provided by the *Collins Cobuild English Language Dictionary* (HarperCollins Publishers, 1994), p. 335. See also the definition provided by *Merriam-Webster*. Retrieved from <https://www.merriam-webster.com/dictionary/crisis>.

10 See *English Oxford Living Dictionaries*. Retrieved from <https://en.oxforddictionaries.com/definition/crisis>.

11 S. Sassen, “A massive loss of habitat: New drivers of migration”, *Sociology of Development*, Vol. 2, No. 2, 2016, p. 221.

12 S. Meznaric, & J. Z. Winter, “Forced migration and refugee flows in Croatia, Slovenia and Bosnia-Herzegovina: Early warning, beginning and current state of flows”, *Refuge*, Vol. 12, No. 7, 1993, p. 3.

are nothing new. Germany also bore the brunt back in 1999.¹³ It was against this background that the Temporary Protection Directive was adopted.¹⁴ As can be deduced from its full title, the directive was an instrument to be employed in the event of mass influx of displaced people with a view of fair-sharing of responsibility between the member states of the EU. The instrument is still there, but has not been used. This refutes the assumption that Europe was not prepared for the mass influx of people in 2015. The legal framework under which it was possible to take swift measures in a response to a ‘crisis’ of that scale was there, but it was not used. This clearly indicates that the problems experienced were not due to unpreparedness and the lack of means, but rather a lack of political will, which supports the argument that the ‘crisis’ was constructed.

As to the second entry in the dictionaries concerning the meaning of the word, it refers to ‘a time when a difficult or important decision must be made’: a critical point, decisive point, turning point, crossroads, etc. Was the ‘refugee crisis’ of 2015 a turning point or crossroads for the Common European Asylum System (CEAS) or EU migration policy in general? One could say without much hesitation that this was not the case, or at least that it does not seem to be the case at this point in time (September 2017). One would expect to see initiation of fundamental changes, a major overhaul or reforms in the aftermath of an event that alleges to be a turning point for a system. So far there are no major changes or proposals for such a change. Without providing an exhaustive overview of the steps taken in the aftermath of the ‘crisis’, one can mention a few examples. The cornerstone of the CEAS, the Dublin Regulation III,¹⁵ is in place despite all critique and calls for a new system to replace it.¹⁶ The Commission’s proposal for reform does not go beyond tweaking the existing system.¹⁷ The transformation of Frontex into the European Border and Coast Guard Agency (EBCG) is also ‘more of the same’, as it constitutes another step contributing to the aim of establishing an integrated border management system at the EU level¹⁸; in other words, it is an attempt at strengthening the walls of ‘fortress Europe’. In short, in light of the definitions of ‘crisis’ provided in dictionaries, it is difficult to claim that the

13 I. Traynor, A. Travis, & L. Ward, German fury at “mean” Britain, *The Guardian*, 30 April 1999. Retrieved from <https://www.theguardian.com/world/1999/apr/30/alantravis.iantraynor>.

14 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 212/12, 7 August 2001.

15 Regulation (EU) No 604/2013 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 (Dublin Regulation III), OJ L 180/31, 29 June 2013.

16 M. Den Heijer, J. Rijpma, & T. Spijkerboer, “Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System”, *Common Market Law Review*, Vol. 53, No. 3, 2016, pp. 607-642.

17 See the European Commission Proposal of 4 May 2016 for a recast Dublin Regulation, COM (2016) 270 final.

18 See Regulation (EU) 2016/1624 of 14 September 2016 on the EBCG, OJ L 251/1, 16 September 2016.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

influx of people in 2015 constituted an event that lives up to the definitions of the word cited above.

3.3 DEVELOPMENTS PREPARING THE GROUND FOR THE EU–TURKEY STATEMENT

It took the EU roughly 10 years to negotiate a Readmission Agreement (RA) with Turkey.¹⁹ The agreement was signed on 16 December 2013, on the day the ‘EU–Turkey Visa Liberalization Dialogue’ was launched.²⁰ The two processes were interlinked: while Turkey undertook the obligation to readmit its own nationals (Art. 3 RA), TCNs and stateless persons (Art. 4 RA), who stayed on or transited through the territory of Turkey to reach EU territories, under the dialogue, the Commission was to screen Turkish legislation and administrative practices identified in the so-called visa roadmap²¹ with a view to removing the visa requirement applicable to Turkish nationals for short-term visits into the Schengen area.²² The deadline set for the implementation of the RA in its entirety was 1 October 2017. By that time Turkey also had to fulfil the 72 criteria set in the roadmap for visa-free travel for Turkish nationals to become a reality.²³

The plans and timetables agreed on had to be revised and renegotiated in 2015, as Europe was faced with mass influx of people. They started crossing the Aegean on fragile boats and marching towards Western Europe through the Balkan route. On 15 October 2015, the EU and Turkey agreed *ad referendum* on a ‘Joint Action Plan’,²⁴ which was welcomed by the European Council.²⁵ They activated the plan aiming at stepping up cooperation in the area of migration on 29 November 2015 in a meeting of heads of state or government with Turkey (‘November Statement’), and agreed further to make the RA fully applicable from June 2016,²⁶ so as to enable the Commission to deliver its progress report by autumn

19 Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorization, OJ L 134/3, 7 May 2014.

20 See Press Release of 1 October 2014. Retrieved from http://europa.eu/rapid/press-release_STATEMENT-14-285_en.htm.

21 See Roadmap towards a visa-free regime with Turkey. Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf.

22 The Commission’s first three reports dealt exclusively with Turkey’s progress in fulfilling the requirements of its visa liberalization roadmap. After the conclusion of the deal, the Commission’s reports were devoted to the implementation of the commitments undertaken under the deal, of which visa liberalization seems to be one part of decreasing importance. The latest evaluation of the state of affairs in this field can be found in the ‘Seventh Report on the Progress made in the implementation of the EU-Turkey Statement’, COM(2017) 470 final, 6 September 2017, pp. 10–11.

23 For details see the Roadmap, *supra* note 21.

24 See Commission Press Release (MEMO 15/5860) on the Joint Action Plan.

25 See Council Conclusions of 15 October 2015.

26 This change was to take place by a Decision of the Joint Readmission Committee, which has the power to take implementing arrangements necessary for the uniform application of the agreement under its Art.

with a view to complete the visa liberalization process by October 2016.²⁷ The EU agreed to expand its financial support by providing 3 billion euros channelled through a Refugee Facility for Turkey, which was to be established by the Commission with a view to coordinating the financing and support provided to Syrians in Turkey.²⁸

The gravity of the situation brought together once again the EU heads of state or government with the then Turkish prime minister Ahmet Davutoglu on 7 March 2016. They agreed on additional and more drastic measures to stop people trying to cross the Aegean. Turkey confirmed its commitment to implement the existing bilateral RA with Greece, prior to the entry into force of the EU–Turkey RA on 1 June 2016.²⁹ Some of the important principles on which they agreed to work were as follows:

- To return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU;
- To resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the EU member states, within the framework of the existing commitments;
- To accelerate the implementation of the visa liberalization roadmap with all member states with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016;
- To speed up the disbursement of the initially allocated 3 billion euros to ensure funding of a first set of projects before the end of March and decide on additional funding for the Refugee Facility for Syrians.

*‘The President of the European Council will take forward these proposals and work out the details with the Turkish side before the March European Council. This work will respect European and international law.’*³⁰

The details of the deal were worked out and it was made public via a press release on 18 March 2016 on the website of the Council of EU and European Council (‘the Statement’).³¹ The most important point for our purposes was the agreement to return all new immigrants from Greece to Turkey by 20 March 2016, and the implementation of the ‘one for one’ scheme under which for every Syrian readmitted to Turkey, one Syrian from

19(1)(b). The Joint Readmission Committee adopted Decision No 2/2016 to that effect. Turkey transposed that decision in its national law with Law No: 6714 of 3 May 2016, which was published in the Official Gazette No: 29717 on 20 May 2016.

27 See Meeting of Heads of State or Government with Turkey–EU–Turkey Statement, 29 November 2015, Press Release 870/15, point 5.

28 Id., point 6.

29 Statement of the EU heads of state or government of 7 March 2016.

30 Emphasis added. Id.

31 EU-Turkey statement of 18 March 2016, Press Release 144/16. <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

Turkey would be relocated to the EU. The EU agreed to mobilize an additional 3 billion euros for the Refugee Facility for Turkey by the end of 2018. The implementation of the visa roadmap was also to be accelerated in addition to Turkey’s accession process.³²

Juncker appointed Maarten Verwey as the EU coordinator to implement the statement in line with the agreement reached in the European Council under which ‘the Commission will coordinate and organise together with Member States and Agencies the necessary support structures to implement it effectively’.³³ In short, the Commission became the institution to monitor and coordinate the process. It has issued seven reports to inform the European Parliament, the Council and the European Council of the state of affairs following the deal.³⁴ It is also the institution that established the Refugee Facility and supervises and monitors its functioning.³⁵

The discussions and controversy surrounding the deal were far from over, even in 2017, more than a year after its conclusion. Both intergovernmental organizations (the Council of Europe) and human rights NGOs have criticized the deal and issued reports explaining why the deal is not a blueprint to be emulated with other countries.³⁶ In the meantime, the first cases in which asylum seekers tried to challenge the deal reached the General Court (GC),³⁷ the court of first instance for cases brought by individuals seeking to challenge EU measures. The GC dismissed the cases on the ground that it lacked jurisdiction to hear them. According to the GC, the EU–Turkey statement was not an act of an EU institution, that is the European Council, but that of the 28 heads of state and government of the member states of the EU. While it is extremely difficult for individuals to fulfil the individual standing requirements to be able to bring a case before EU courts,³⁸

32 Id., points 1, 2 and 6, 8.

33 Commission Press Release (IP/16/942) of 18 March 2016.

34 See COM(2016) 231 final of 20 April 2016; COM(2016) 349 final of 15 June 2016; COM(2016) 634 final of 28 September 2016; COM(2016) 792 final of 8 December 2016; COM(2017) 204 final of 2 March 2017; COM(2017) 323 final of 13 June 2017; and lastly, COM(2017) 470 final of 6 September 2017.

35 Commission Decision C(2015) 9500 of 24.11.2015 on the coordination of the actions of the Union and of the member states through a coordination mechanism – the Refugee Facility for Turkey, as amended by Commission Decision C(2016)855 of 10 February 2016. See also First Annual Report on the Facility for Refugees in Turkey, COM(2017)130 final of 2 March 2017.

36 See the Report of the Committee on Migration Refugees and Displaced Persons of the Council of Europe by rapporteur Ms. Tineke Strik, The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016, Doc. 14028 of 19 April 2016; see also Amnesty International Report, A blueprint for despair: Human rights impact of the EU-Turkey Deal, 14 February 2017. Retrieved from <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>; and the evaluation of Human Rights Watch, Q&A: Why the EU-Turkey migration deal is no blueprint. Retrieved from <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.

37 For full citation, see Case T-192/16, *supra* note 7.

38 To fulfil the standing requirements in front of the European Courts, individuals need to prove “direct and individual concern” for measures that are not addressed at them. For the restrictive interpretation of the requirement of “individual concern”, see Case 25/62, *Plaumann*, ECLI:EU:C:1963:17.

the form of the instrument challenged (a statement) and the approach of the GC focusing on form rather than substance turned the case into mission impossible for the applicants.

3.4 THE ORDER OF THE GENERAL COURT

The cases were brought by Afghan and Pakistani nationals who entered Greece by boat from Turkey after the conclusion of the deal. They were forced to submit their asylum applications in Greece. In their actions brought before the GC, they argued that EU–Turkey statement was an act attributable to the European Council establishing an international agreement and sought the annulment of that Act.³⁹ The Commission applied for leave to intervene, while the Council and the European Council asked the GC to dismiss the cases as inadmissible.⁴⁰ Since the Court’s approach and reasoning in these cases is identical, this contribution will refer only to the first one of these cases (NF).

The Court asked the institutions, *inter alia*, whether the meeting on 18 March 2016 led to a written agreement and requested documents to identify the parties that agreed to the ‘additional action points’ mentioned in the EU–Turkey statement. The European Council replied that no agreement, in the sense of Article 218 TFEU or Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT), was concluded between the EU and Turkey. It argued that the EU–Turkey statement, which was published by means of Press Release 144/16, was ‘not intended to produce legally binding effects nor constitute an agreement or a treaty’.⁴¹ On its part the Council claimed, ‘It had not been in any way involved in the structure dialogue’ between the member states and Turkey or ‘in the activities of the President of the European Council leading to that statement’.⁴² The Commission similarly held that this was merely ‘a political arrangement’.⁴³

The applicant (NF) contested the position of the Union institutions. He also pointed to the language used in what he calls the ‘challenged agreement’ and argued that the use of the word *agree* is an indication of the fact that the statement is ‘an agreement intended to produce legal effects vis-à-vis third parties’.⁴⁴ He added that the absence of the term *member states* from the statement implied that the ‘challenged agreement’ could not have been concluded by them.

As a preliminary point in its ruling, the GC reminded that the action for annulment ‘must be available in the case of *all measures* adopted by the institutions, bodies, offices and agencies of the Union, *whatever their nature of form, provided that they are intended*

39 Order of the GC in *NF*, para. 14.

40 *Id.*, paras. 19 and 23-24.

41 *Id.*, para. 27.

42 *Id.*, para. 30.

43 *Id.*, para. 29.

44 *Id.*, para. 32.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

to produce legal effects’.⁴⁵ Therefore, the fact that the measure was revealed in the form of a press release or a statement does not preclude its existence or the jurisdiction of the EU courts to review its legality, ‘provided that it emanates from an institution, body, office or an agency of the European Union’.⁴⁶

The GC repeated an earlier case law in which it found that measures adopted by member states physically using the premises of Union institutions and acting ‘not in their capacity as members of the Council or European Council, but in their capacity as Heads of State or Government of the European Union, are not subject to judicial review by the European Union Courts’.⁴⁷ The rest of the order reads as an exercise with a predetermined goal, in which the GC selectively chooses evidence that supports its finding that the statement was not an act attributable to an EU institution, and hence not subject to review.

In a quest to find the author of the contested measure, the Court started its examination with statement of 29 November 2015, which in the press release was announced as ‘Meeting of Heads of State or Government with Turkey – EU–Turkey Statement, 29/11/2015’. Similarly, the results of the second meeting were announced as ‘Statement of the EU Heads of State or Government, 07/03/2016’. According to the Court, the ‘EU–Turkey statement, 18 March 2016’ differed in presentation from the previous statements not only in title but also in content. It talked about a meeting between ‘Members of the European Council’ and their Turkish counterparts. It was ‘the EU and Turkey’ that agreed on the additional points in the statement. Hence, the Court had to determine in what capacity member states participated in the meeting on 18 March 2016: as members of the ‘European Council’ or as heads of state or government of the member states of the EU.⁴⁸

The Court first looked at the website where the press release was published, but the findings there were not conclusive. While the PDF version of the statement had the heading ‘International Summit’, which indicated meeting of heads of state or government, the online version was marked as ‘foreign affairs and international relations’, which indicated the work of the Council.⁴⁹

Concerning the expression ‘Members of the European Council’ and the indication that it was the EU that agreed on additional points with Turkey, the European Council claimed the confusing wording was to be explained by the simplification of the words to make the content of the press release accessible to the general public. ‘The term EU must be under-

45 Id., para. 42. Emphasis added. The GC refers to Case 22/70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32, para. 42; C-114/12, *Commission v. Council*, ECLI:EU:C:2014:2151, paras. 38-39; and C-28/12, *Commission v. Council*, ECLI:EU:C:2015:282, paras. 14-15.

46 Id. The GC refers to Case C-181/91 and C-248/91, *Parliament v. Council and Commission*, ECLI:EU:C:1993:271, para. 14.

47 Id., para. 44.

48 Id., paras. 53-54.

49 Id., para. 55.

stood in its journalistic context as referring to the Heads of State or Government of the Member States of the EU'.⁵⁰

Next, the Court looked at the official documents leading to the meeting, the invitations sent to various parties as well as the 'Working Programme of the Protocol service', which enabled it to conclude,⁵¹ 'notwithstanding the regrettably ambiguous terms of the EU-Turkey statement',⁵² that member states acted in their capacity as heads of state and government on 18 March 2016. The fact that the president of the European Council and the president of the Commission were also present in the meeting did not change that conclusion, as they were not officially invited.⁵³ Hence, the Court dismissed the case on the ground that it lacked jurisdiction.

The Court added, for the sake of completeness, that even if an agreement had been concluded on 18 March, the Court would not have had the jurisdiction to rule on its lawfulness as that agreement would have been concluded between the heads of state or government of the member states of the Union and the Turkish prime minister.⁵⁴

3.5 PLACING *NF* IN CONTEXT: THE *ERTA* DOCTRINE

Even though the Court paid lip service to the principle that substance comes over form,⁵⁵ in its analysis by sticking to form and ignoring the substance of the statement, it managed to evade many thorny issues. The Court considered it enough to establish that in the meeting on 18 March, members of the European Council acted in their capacity as heads of state and government, that is, as member states, to declare the case inadmissible. This is not in line with the approach of the Court of Justice, which established clearly that

it is not enough that an act should be described as a "decision of the Member States" for it to be excluded from review under [Art. 263 TFEU]. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.⁵⁶

50 Id., para. 58.

51 Id., paras. 62-65.

52 Id., para. 66.

53 Id., para. 67.

54 Id., paras. 72-73.

55 Id., para. 42.

56 Joined cases C-181/91 and C-248/91, *Parliament v. Council and Commission*, ECLI:EU:C:1993:271, para. 14.

It is quite instructive to compare the GC’s approach in *NF* with that of the Court of Justice (CJEU or the Court) in the seminal *ERTA* case. The CJEU followed a different approach in *ERTA*, in which the member states argued they had met in the Council *qua* member state to coordinate their policies concerning the conclusion of the European Road Transport Agreement (ERTA) with regard to the work of crews of vehicles engaged in international road transport.⁵⁷ The Commission requested the annulment of the Council’s proceedings regarding the negotiation and conclusion of the agreement by the member states of the The European Economic Community, arguing that the agreement ‘should have been concluded by the Community in accordance with the Community procedure defined by Article 228(1) [now Art. 218 TFEU]’.⁵⁸ The Council asked the Court to declare the application inadmissible on the ground that the proceedings were not an act whose legality could be challenged under the annulment procedure.⁵⁹ According to the CJEU, to be able to decide on admissibility, it had to first establish which authority was at the relevant time empowered to negotiate and conclude the agreement. The legal effect of the proceedings would differ ‘according to whether they are regarded as constituting the exercise of powers conferred on the Community, or as acknowledging a coordination by the Member States of the exercise of powers which remained vested in them’.⁶⁰

The rest of the judgement is well known for laying down the Court’s doctrine on implied exclusive external powers of the Community.⁶¹ The importance and relevance of the case justify repeating its findings once again. The Court established that ‘each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, *whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*’.⁶² The Court ruled that since the entry into force of Regulation 543/69 on the harmonization of certain social legislation relating to road transport, it was the Community that was empowered to negotiate and conclude agreements in this area.⁶³ Since the ‘Council’s proceedings dealt with a matter falling within the power of the Community, ... the Member States could not therefore act outside the framework of the common institutions’. The challenged proceedings had ‘definite legal effects both on relations between the Community and the Member States and on the

57 Case 22/70 *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32, para. 36.

58 *Id.*, para. 69.

59 *Id.*, para. 2.

60 *Id.*, para. 4.

61 The existence of this type of exclusivity in external relations, which arises through the exercise of an internal competence, is often referred to by the name of the *ERTA* judgement in which it was established; hence, it is called ‘ERTA pre-emption’ or ‘the ERTA effect’. See B. Van Vooren, & R. Wessel, *EU external relations law: Text, cases and materials*, Cambridge, Cambridge University Press, 2014, p. 104. See also P. Eeckhout, *EU external relations law*, 2nd edn., New York, Oxford University Press, 2011, pp. 71-76.

62 *ERTA*, para. 17.

63 *Id.*, para. 52.

relationship between the institutions'.⁶⁴ It will be demonstrated below that the same holds true for the EU–Turkey statement.

3.6 EVALUATION: THE LEGALITY OF THE EU–TURKEY STATEMENT

3.6.1 *Is the statement an 'agreement' or an 'act having legal effect'?*

To begin with the issue whether the statement is in fact an 'agreement', according to the CJEU, the term *agreement* is 'being understood in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, *whatever its formal designation*'.⁶⁵ In a relatively recent case, the Court established that a declaration made by the EU granting fishing rights to Venezuela in the exclusive economic zone of the French Guiana, and its acceptance by Venezuela (which was inferred from Venezuela's conduct and the fact that it did not express any reservations), taken together, had to be regarded as an agreement concluded between them.⁶⁶

The designation of an instrument is similarly not decisive under international law. What is decisive is the content of the instrument and the intent of the parties. As far as the content of the statement is concerned, it enumerates specific commitments or 'action points' on which the parties 'agreed'.⁶⁷ The intention of the parties to take concrete steps and bind themselves can be inferred also from the previous statement of 7 March 2016, which laid down the proposals forming the basis of some of the commitments in the statement of 18 March 2016. The president of the European Council was instructed to 'take forward these proposals and work out the details with the Turkish side before the March European Council'. The culmination of this process was revealed in the form of a statement via the contested press release. The ruling of the International Court of Justice (ICJ) in *Qatar v. Bahrain* on the issue whether the minutes of a meeting between the foreign ministers of the respective two countries constitute an 'agreement' is also quite instructive for determining the legal nature of the contested statement:

The Minutes are not a simple record of a meeting ... they do not merely give account of discussions and summarize points of agreement and disagreement. *They enumerate the commitments to which the Parties have consented.* They

⁶⁴ Id., para. 55.

⁶⁵ Emphasis added. Joined cases C-103/12 and C-165/12, *EP, Commission v. Council*, ECLI:EU:C:2014:2400, para. 83.

⁶⁶ Id., paras. 71-73.

⁶⁷ On the question whether the Statement can be considered an international agreement, see the blog by M. den Heijer, & T. Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?* Retrieved from <http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

thus create rights and obligations in international law for the Parties. They constitute an international agreement.⁶⁸

For the purposes of Article 263 TFEU, the statement does not even have to be an agreement; it is sufficient if it constitutes an act intended to produce legal effects *vis-à-vis* third parties. To determine whether that is the case, the CJEU looks at the substance of the contested measure. If that measure is ‘capable of affecting the interests of the applicant by bringing about a distinct change in his legal position’,⁶⁹ the measure in question can be subject to an action under Article 263 TFEU. The form in which such a measure is cast is irrelevant.⁷⁰ The legal position of NF and the other asylum seekers changed as a result of the EU–Turkey deal. The fact that Greece had to change its laws for the effective implementation of the deal does not change that conclusion.⁷¹ All the implementing measures necessary to put the deal into effect were adopted so swiftly is a further proof of the intent of the parties to be bound by the deal.

3.6.2 *What is the correct procedure and who is competent to act?*

To identify the appropriate procedure that had to be followed in concluding the so-called deal, one has to look at the content and aim of the statement.⁷² One can deduce from reading the statement that its primary aim was to materialize the return of ‘all irregular migrants’ to Turkey by 20 March 2016. In other words, the crux of the deal concerns the area of freedom, security and justice (Art. 4(2)(j) TFEU), which is an area of shared competence between the EU and its member states. The applicable provision is Arts. 79 TFEU, to which the ordinary legislative procedure applies (Art. 79(2) TFEU). According to Article 218(6)(a)(v) TFEU, agreements covering fields to which the ordinary legislative procedure applies are to be concluded by the Council after obtaining the consent of the European Parliament. As far as the conclusion of RAs is concerned, the Union has expressly conferred powers to conclude such agreements under Article 79(3) TFEU.

In the areas of shared competence, member states are allowed to exercise their competence to the extent that the Union has not exercised its competence or to the extent it has

68 Emphasis added. ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgement of 1 July 1994, ICJ Reports 1994, p. 112, para. 25.

69 Case 60/81, *IBM v. Commission*, ECLI:EU:C:1981:264, para. 9. See also T-353/10, *Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro AE v. European Commission*, ECLI:EU:T:2011:589, para. 22.

70 Id.

71 Greece: Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 3 April 2016. Retrieved from www.refworld.org/docid/573ad4cb4.html.

72 Joined cases C-103/12 and C-165/12, *EP, Commission v. Council*, ECLI:EU:C:2014:2400, para. 74.

ceased to exercise it (Art. 2(2) TFEU). As far as readmission of TCNs by Turkey is concerned, this is clearly and precisely what the EU–Turkey RA covers. In other words, the Union has exercised its competence in this specific area, pre-empting member states’ competence to conclude an agreement with Turkey on that topic.

It is not difficult to see how the findings of the Court in *ERTA* back in 1970 are still relevant and could be applied to the *NF* case. The statement definitely affected the relationship between the institutions. The EP was entirely sidestepped. Perhaps the case would have been handled differently had it been brought by the EP or the Commission before the CJEU instead of being brought by an individual before the GC. The urgency of the situation could not have been the excuse for not following the appropriate procedure and obtaining the consent of the EP, since the same provision allows the Council and the EP to agree on a time limit in such urgent situations. While questions were addressed to the Council by Members of the European Parliament concerning the nature of the EU–Turkey deal,⁷³ it is regrettable that the Parliament did not bring the issue before the CJEU. However, not only the EP that was denied its constitutional role, by not following the appropriate procedure, but the possible role of the CJEU under Article 218(11) TFEU also became illusory.⁷⁴

The deal also has implications on the relationship between the member states and the Union. It is worth noting that even if Article 79(3) TFEU did not exist and the Union had no express external competence thereunder, it would still have an implied exclusive competence under the *ERTA* doctrine, which is now codified under Article 3(2) TFEU by the Lisbon Treaty.⁷⁵ It is the Union that has exclusive competence to act in one of the main issue areas covered by the statement, since the commitments undertaken on the return of irregular migrants ‘may affect common rules or alter their scope’ (Art. 3(2) TFEU). To briefly mention what those common rules are, they are to be found under the overarching umbrella of the CEAS, which, among others, includes instruments defining the types of protection offered to those seeking asylum,⁷⁶ laying down the rules concerning their reception conditions,⁷⁷ as well as the rules and principles that apply concerning their return.⁷⁸ Moreover, as mentioned above, a RA, which regulates the return of illegal TCNs

73 See the questions raised by MEP Birgit Sippel on behalf of the S&D Group. Retrieved from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN.

74 The provision allows a member state, the EP, the Council or the Commission to obtain the opinion of the CJEU “as to whether an agreement envisaged is compatible with the Treaties”. Such an opinion would have been extremely valuable in this particular case.

75 The provision provides as follows: “The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”

76 Directive 2013/32/EU, Asylum Procedures Directive, OJ L 180, 29 June 2013, pp. 60-95.

77 Directive 2013/33/EU, Reception Conditions Directive, OJ L 180, 29 June 2013, pp. 96-116.

78 See Directive 2008/115/EC, Return Directive, OJ L 348/98, 24 December 2008, pp. 98-107.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

to Turkey, was also signed and ratified between the EU and Turkey before the conclusion of the deal.⁷⁹

One of the most obvious concrete examples as to how the deal affected or changed the scope of some of these rules is the concept of a ‘safe third country’ defined in Article 38(1)(e) of the Asylum Procedures Directive. Member states are allowed to apply this concept only to countries in which ‘the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention’. No matter how broadly this concept is interpreted, the fact that Turkey maintains a geographical limitation to the Geneva Convention and does not grant refugee status to asylum seekers coming from outside Europe places a big question mark on whether it fulfils the requirements of this definition.⁸⁰ To the extent that it does not, it arguably changes the scope of the ‘safe third country’ concept.

Another example of how the deal affected the application of internal rules would be the transformation of the hotspots on the Greek islands, which served as sites of reception for further relocation, into ‘closed pre-removal detention centers, where post-EU-Turkey-Statement arrivals are mandatorily confined’.⁸¹ Under EU law, detention must be a measure of last resort and should last for as short a period as possible.⁸² Article 8(1) of the Reception Conditions Directive also stipulates clearly that applying for asylum in accordance with the Asylum Procedures Directive shall not be a sole reason for detaining someone. However, the practice during the first few months of the deal was to automatically detain all new irregular arrivals to the Greek islands. This strict regime of detention had to be partially relaxed due to overcrowding; however, according to an Amnesty International Report, the detention continues for those with nationalities that are presumed to be ‘economic migrants’.⁸³

Another example to a change in internal rules as a result of the deal is the adoption of Council Decision 2016/1754,⁸⁴ which amended the second Relocation Decision adopted by the Council for the benefit of Italy and Greece. Under the new decision, member states

79 See *supra* note 19.

80 See the analysis of Statewatch by E. Roman, T. Baird, & T. Radcliffe, Why Turkey is not a “safe country”? February 2016. Retrieved from www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf; See also the Report of Amnesty International, No safe refuge: Asylum seekers and refugees denied effective protection in Turkey, 2016. Retrieved from <https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf>.

81 See Study for the LIBE Committee of the European Parliament by E. Guild, C. Constello & V. Moreno-Lax, “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, March 2017, p. 48.

82 See Art. 15(1) of the Return Directive; Art. 8(2) of the Reception Conditions Directive; and Art. 28(2) of Dublin Regulation III.

83 Amnesty International Report, *supra* note 36, pp. 8-10.

84 Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268/82, 1 October 2016.

are allowed to fulfil their obligations under the second Relocation Decision by also admitting Syrian nationals present in Turkey. This is the implementation of the ‘one for one’ aspect of the deal.

Regarding the exercise of exclusive competences by the Union under Article 3(2) TFEU, the Court recently ruled that rules which will be affected or the scope of which will be altered can be contained in different legal instruments.⁸⁵ Moreover, the commitments contained in the international agreement and the relevant EU legislation do not need to coincide fully.⁸⁶ Internal rules ‘may be affected or altered by such commitments also where those commitments fall within an area which is already largely covered by such rules’.⁸⁷ The Court concluded that ‘*Member States may not enter into such commitments outside the framework of the EU institutions, even if there is no possible contradiction between those commitments and the common EU rules*’.⁸⁸

It needs to be emphasized that in the areas in which the Union has already exercised its competence, member states are pre-empted not only from concluding international agreements as the wording of Article 3(2) TFEU lays down, but also from taking any actions that might lead to the adoption of acts with legal effects. For instance, in the International Maritime Organization (IMO) case,⁸⁹ the Court established that Greece failed to fulfil its obligations under the treaties by submitting a mere proposal to the Maritime Safety Committee of IMO, as that proposal could lead to legally binding rules over time. Since the area was occupied by EU rules, Greece was pre-empted from acting in this area. This case provides a good analogy for the EU–Turkey deal. For those who think the statement is not so problematic, because it is not legally binding, it is easy to point to the laws passed by Greece and Turkey within a few weeks to provide for its effective implementation. To sum up, irrespective of the legal nature and immediate effects of the statement, member states had no competence to act in any way in this area.

Lastly, if one looks at the other issues on which there was an ‘agreement’ in the EU–Turkey statement, such as visa liberalization, the upgrading of the Customs Union or the promise to accelerate the accession process by opening Chapter 33, these are all issues in which member states have no say as member states or as heads of state or government. They are all areas regulated by the EU. Even the extra 3 billion that is to be delivered to Turkey via the Refugee Facility for Turkey does not come entirely from the member state budgets; part of it comes from the EU budget.⁹⁰ Moreover, it is the Commission that

85 C-114/12, *Commission v. Council*, EU:C:2014:2151, paras. 82-85.

86 *Id.*, para. 69.

87 *Id.*, para. 70. The Court also refers to Opinion 2/91, ECLI:EU:C:1993:106, para. 25; and Opinion 1/03, ECLI:EU:C:2006:81, paras. 120 and 126.

88 Emphasis added. *Id.*, para. 71.

89 Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81.

90 For details, see the Factsheet on EU Facility for Refugees in Turkey. Retrieved from https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

established the facility and coordinates the efforts between the EU and its member states.⁹¹ All these examples clearly demonstrate that legally speaking, member states were in no position to make any commitments on their own, as they do not retain competence on the issues covered by the deal. In short, on the issue of ‘returns’, the existence of a RA between the EU and Turkey alone suffices to bring the statement within EU competence.⁹²

3.7 CONCLUSION

The General Court considered 15 October 2015 as the starting point of the EU–Turkey cooperation on issues of migration, whereas cooperation and dialogue in this area became official with the signing of the EU–Turkey RA and the launching of the Visa Liberalization Dialogue on 16 December 2013. That is also apparent in the Commission’s first three reports, which were devoted exclusively to the visa liberalization process. After the EU–Turkey deal, visa liberalization became only one of the issues covered in the Commission’s reports, which from that time on aimed at assessing the implementation of the deal. It is not difficult to guess why the GC did not take the RA as the starting point of its analysis, which can also be seen as ‘reordering’ of events under Lawrence’s account of constructing a crisis. Given the contentious nature of the deal, it sought to dispose of these cases in as ‘clean’ a manner as possible. Taking the deal out of its broader context of the EU–Turkey cooperation in the area of migration and juxtaposing it with elements of the former two statements that appear to support its conclusion, while ignoring elements that contradict it, the GC aimed merely at getting rid of these contentious cases without causing too much commotion.

While convenient at first sight, this is a dangerous road to take. The submissions of the other institutions also prove this point. They denied any involvement in the conclusion of the deal, while the role of the Commission as well as of the Council Presidency held by the Netherlands was pivotal in the process leading to the deal. The deal was a product of a process, and the fact that the agreement on the issue was reached between Davutoglu, Rutte and Merkel in the meeting on 6 March 2016 in Turkey’s permanent representation in Brussels does not change that conclusion.⁹³

91 For details *see supra* note 35.

92 Van Vooren and Wessel also confirm that the conclusion of a RA at the EU level on illegal immigrants (based on Art. 4(2) TFEU in combination with Art. 79(3) TFEU) with a third country will exclude member states’ competence to conclude an agreement with that country on that topic. *See* Van Vooren & Wessel, *supra* note 61, p. 104.

93 For instance, Mark Rutte was involved in the negotiations with Turkey since the Netherlands was holding the rotating Council presidency at the time. *See* “Rutte en Merkel in gesprek met Turkse Premier over Vluchtelingen [Rutte and Merkel in dialogue with Turkish Prime Minister over Refugees]”, *AD*, 6 March 2017. Retrieved from <https://www.ad.nl/buitenland/rutte-en-merkel-in-gesprek-met-turkse-premier-over-vluchtelingen~a7ff7f99/>.

By acquiescing to member states' action outside the framework of the EU treaties and institutions, the institutions (including the Court) are shooting themselves in the foot. They give member states a *carte blanche* for areas in which they themselves are competent to act, thereby not only rendering themselves irrelevant, but also enabling member state action, which is *ultra vires* and devoid of democratic legitimacy. Even if it were true that we live in extraordinary times, there is no indication that this will change in the near future. Moreover, the past years of the 'euro and sovereign debt crisis', in which the European Monetary Union was restructured, were quite exceptional too. Those years set a dangerous precedent in which the member states acted more and more frequently outside the treaty framework due to various reasons, such as the complexity of the issue area, the fact that not all member states were part of the Eurozone⁹⁴ and the pressure created by the ominous 'crisis' discourse. In that regard, the EU-Turkey deal seems to merely confirm a trend that has already been in the making for some time. The only institution that is capable of ringing the alarm bells seems to be the CJEU.

The three orders of the GC discussed above have been appealed and the ball is now in the court of the CJEU.⁹⁵ As in the past, it is still the duty of the Court to ensure respect for the principle of conferral (Art. 5(1) TEU); to restore the institutional balance and respect for the rule of law⁹⁶; to ensure that each institution acts 'within the limits of the powers conferred on it in the Treaties and in conformity of the procedures, conditions and objectives set out in them' (Art. 13(2) TEU); and last but not least, to 'ensure that in the interpretation and application of the Treaties the law is observed' (Art. 19(1) TEU). The founding values of the Union are at the top of the constitutional hierarchy of norms.⁹⁷ They are there to be upheld and applied at all times. When member states and other institutions are merely paying lip service to them and completely disregarding them in practice, the only institution capable of crying foul is the Court. Whether it will use the appeal of the three cases as an opportunity to actually do so remains to be seen.

94 For a detailed analysis of the financial crisis and its implications for the EU legal order, see E. Chiti, & P. G. Teixeira, "The constitutional implications of the European responses to the financial and public debt crisis", *Common Market Law Review*, Vol. 50, 2013, pp. 683-708.

95 The cases were appealed on 21 April 2017 by *NF*, *NG* and *NM* (Cases C-208/17 P, C-209/17 P and C-210/17 P), OJ C 231/12, 17 July 2017.

96 Case 294/83, *Les Verts*, ECLI:EU:C:1986:166.

97 See Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461, paras. 303-304.

3 *THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?*

REFERENCES

Primary Law

Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation, *OJ L* 134/3, 7 May 2014.

Consolidated versions of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), *OJ C* 202/1, 7 June 2016.

Secondary Law

Commission Decision C(2015) 9500 of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism—the Refugee Facility for Turkey, as amended by Commission Decision C(2016)855 of 10 February 2016. See also First Annual Report on the Facility for Refugees in Turkey, COM (2017)130 final of 2 March 2017.

Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, *OJ L* 268/82, 1 October 2016.

Directive 2001/55/EC, Temporary Protection Directive, *OJ L* 212/12, 7 August 2001.

Directive 2008/115/EC, Return Directive, *OJ L* 348/98, 24 December 2008.

Directive 2013/32/EU, Asylum Procedures Directive, *OJ L* 180/60, 29 June 2013.

Directive 2013/33/EU, Reception Conditions Directive, *OJ L* 180/96, 29 June 2013.

Greece: Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 3 April 2016. Reviewed from www.ref-world.org/docid/573ad4cb4.html.

Regulation (EU) No 604/2013 (*Dublin Regulation III*), *OJ L* 180/31, 29 June 2013.

NARIN IDRIZ

Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard, OJ L 251/1, 16 September 2016.

Turkey: Law No: 6714 of 3 May 2016, Official Gazette No: 29717, 20 May 2016.

Case Law

European Court of Justice

Case 25/62, *Plaumann*, ECLI:EU:C:1963:17.

Case 22/70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32.

Case 60/81, *IBM v. Commission*, ECLI:EU:C:1981:264.

Case 294/83, *Les Verts*, ECLI:EU:C:1986:166.

Case C-181/91 and C-248/91, *Parliament v. Council and Commission*, ECLI:EU:C:1993:271.

Joined Cases C-402/05P and C-415/05P, *Kadi I*, ECLI:EU:C:2008:461.

Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81.

Case C-28/12, *Commission v. Council*, ECLI:EU:C:2015:282.

Joined cases C-103/12 and C-165/12, *EP, Commission v. Council*, ECLI:EU:C:2014:2400.

Case C-114/12, *Commission v. Council*, ECLI:EU:C:2014:2151.

Case C-370/12, *Pringle*, ECLI:EU:C:2012:756.

Cases C-208/17P, C-209/17P and C-210/17P, *NF, NG and NM*, OJ C 231/12, 17 July 2017.

Case T-353/10, *Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro AE v. European Commission*, ECLI:EU:T:2011:589.

Case T-192/16, *NF v. European Council*, ECLI: EU:T:2017.

Case T-193/16, *NG v. European Council*, ECLI:EU:T:2017.

3 *THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?*

Case T-257/16, *NM v. European Council*, ECLI:EU:T:2017.

Opinion 2/91, ECLI:EU:C:1993:106.

Opinion 1/03, ECLI:EU:C:2006:81.

International Court of Justice

Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports* 1994, p. 112.

Official Documents

COM(2016) 231 final of 20 April 2016, First Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2016) 349 final of 15 June 2016, Second Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2016) 634 final of 28 September 2016, Third Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2016) 792 final of 8 December 2016, Fourth Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2017) 204 final of 2 March 2017, Fifth Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2017) 323 final of 13 June 2017, Sixth Report on the Progress made in the implementation of the EU-Turkey Statement.

COM(2017) 470 final of 6 September 2017, Seventh Report on the Progress made in the implementation of the EU-Turkey Statement.

Commission Press Release (STATEMENT/14/285) of 1 October 2014.

Commission Press Release (IP/16/942) of 18 March 2016.

Council Conclusions of 15 October 2015.

NARIN IDRIZ

EU-Turkey statement of 29 November 2015, Press Release 870/15.

EU-Turkey statement of 18 March 2016, Press Release 144/16. Retrieved from www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

European Commission Fact Sheet (MEMO 15/5860) on the Joint Action Plan of 15 October 2015.

European Commission Proposal of 4 May 2016 for a recast Dublin Regulation, COM (2016) 270 final.

Report of the Committee on Migration Refugees and Displaced Persons of the Council of Europe by rapporteur Ms. Tineke Strik, "The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016", Doc. 14028 of 19 April 2016.

Roadmap towards a visa-free regime with Turkey. Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf.

Statement of the EU Heads of State or Government of 7 March 2016.

Academic Literature

Bach, M., "The enlargement crisis of the European Union: From political integration to social disintegration?" in M. Bach, C. Lahusen, & G. Vobruba (eds.), *Europe in Motion: Social Dynamics and Political Institutions in an Enlarging Europe*, Baden-Baden, Nomos, 2006, pp. 11-28.

Bulterman, M. K., Genugten, W.J.M. (eds.), *Netherlands Yearbook of International Law*, Vol. 44, 2013.

Cannizzaro, E., "Denialism as the Supreme Expression of Realism: A Quick Comment on *NF v. European Council*", *European Papers*, Vol. 2, No. 1, 2017, pp. 251-257.

Carrera, S., den Hertog, L., & Stefan, M., "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", *CEPS Policy Insights*, No. 2017-15, April 2017.

3 THE EU–TURKEY STATEMENT OR THE ‘REFUGEE DEAL’: THE EXTRA-LEGAL DEAL OF EXTRAORDINARY TIMES?

Chiti, E., & Teixeira, P. G., “The constitutional implications of the European responses to the financial and public debt crisis”, *Common Market Law Review*, Vol. 50, 2013, pp. 683-708.

Collins Cobuild English Language Dictionary, HarperCollins Publishers, 1994.

Den Heijer, M., Rijpma, J., Spijkerboer, T., “Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System”, *Common Market Law Review*, Vol. 53, No. 3, 2016, pp. 607-642.

Eeckhout, P., *EU External Relations Law*, 2nd ed., Oxford, Oxford University Press, 2011.

Guild, E., Constello, C., Moreno-Lax, V., “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, March 2017. Retrieved from [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf).

Lawrence, J. C., ‘The EU in Crisis: Crisis Discourse as a Technique of Government’, in M.K. Bulterman and W.J.M. Genugten (eds.), *Netherlands Yearbook of International Law*, 2013.

Meznaric S., Winter, J. Z., Forced migration and refugee flows in “Croatia, Slovenia and Bosnia-Herzegovina: Early warning, beginning and current state of flows”, *Refuge*, Vol. 12, No. 7, 1993, p. 3.

Sassen, S., “A Massive loss of habitat: New drivers of migration”, *Sociology of Development*, Vol. 2, No. 2, 2016, pp. 204-233.

Van Vooren, B., & Wessel, R., *EU external relations law: Text, cases and materials*, Cambridge, Cambridge University Press, 2014.

Vobruba, G., “The enlargement crisis of the European Union: Limits of the dialectics of integration and expansion”, *Journal of European Social Policy*, Vol. 13, 2003, pp. 35-62.

NARIN IDRIZ

Online Sources

Amnesty International Report, A blueprint for despair: Human rights impact of the EU-Turkey deal, 2017. Retrieved from <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

Amnesty International, No Safe Refuge: Asylum Seekers and Refugees Denied Effective Protection in Turkey, 2016. Retrieved from <https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf>.

Den Heijer, M., & Spijkerboer, T., Is the EU-Turkey refugee and migration deal a treaty? Retrieved from <http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>.

English Oxford Living Dictionaries. Retrieved from <https://en.oxforddictionaries.com/definition/crisis>.

Factsheet on EU Facility for Refugees in Turkey. Retrieved from https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf.

Human Rights Watch, Q&A: Why the EU-Turkey migration deal is no blueprint. Retrieved from <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.

Merriam-Webster. Retrieved from <https://www.merriam-webster.com/dictionary/crisis>.

Roman, E., Baird, T., & Radcliffe, T., 'Why Turkey is Not a "Safe Country"?' February 2016. Retrieved from www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf.

"Rutte en Merkel in gesprek met Turkse Premier over Vluchtelingen [Rutte and Merkel in dialogue with Turkish Prime Minister over Refugees]", *AD*, 6 March 2017. Retrieved from <https://www.ad.nl/buitenland/rutte-en-merkel-in-gesprek-met-turkse-premier-over-vluchtelingen~a7ff7f99/>.

The Guardian, "German fury at 'mean' Britain", *The Guardian*, 30 April 1999. Retrieved from <https://www.theguardian.com/world/1999/apr/30/alantravis.iantraynor>.

4 THE EU, TURKEY AND THE REFUGEE CRISIS: THE EXTERNALIZATION OF MIGRATION MANAGEMENT AND HUMAN SMUGGLING

Ayşem Biriz Karaçay

Since the 1990s, the European Union (EU) has progressively attempted to form policies and measures that manage and efficiently govern mobility towards and within the EU. Stemming from the notion that human mobility can be ‘controlled’, the EU has extended the governance of irregular migration and asylum across third countries, via the policy of externalization of border controls. The externalization policies were implemented for ‘harmonizing’ and ‘securitizing’ member states’ migration and border policies through geographical extension of policing away from European borders to third countries.¹ The EU has relied on border externalization as the main tool of its migration management policy, in an effort to address the issue of migration before migrants reach to the EU’s external border.²

This chapter investigates recent developments in EU policy on controlling irregular migration at the European periphery by focusing on the shifting human smuggling routes in the Eastern Mediterranean. More precisely, with the arrival of mostly Syrian refugees to the shores of Greek islands from Turkey, the role of Turkey, as bridging irregular migrants to Europe through human smuggling, gained utmost importance, which has already been reflected on the frequent high-level meetings and agreements signed between the EU and Turkey. The number of refugees in Turkey has reached over 3.4 million (including Syrians, Iraqis, Afghans, Iranians, Somalians and other nations), making Turkey the largest refugee host country in the world. Out of the more than 3 million registered

-
- 1 C. Boswell, “The ‘external dimensions’ of EU immigration and asylum policy”, *International Affairs*, Vol. 79, No. 3, 2003, pp. 619-638; C. Boswell, “Migration control in Europe after 9/11: Explaining the absence of securitization”, *Journal of Common Market Studies*, Vol 45, No. 3, 2007, pp. 589-610; S. Lavenex, “Shifting up and out: The foreign policy of European Immigration Control”, *West European Politics*, Vol. 29, No. 2, 2006, pp. 329-350; S. Lavenex, “The power of functionalist extension: How EU rules travel”, *Journal of European Public Policy*, Vol. 21, No. 6, 2014, pp. 885-903; S. Lavenex, & E. M. Uçarer, *Migration and the externalities of European integration*, Lanham, Lexington, 2002.
 - 2 F. Duvell, & B. Vollmer, Irregular migration in and from the neighbourhood of the EU. A comparison of Morocco, Turkey and Ukraine, – Counting the uncountable, Data and trends across Europe, Oxford, Centre on Migration Policy and Society, 2009. Retrieved from clandestino.eliamep.gr/wp-content/uploads/2009/11/transit_report_compas_sept091.pdf; B. Benvenuti, The migration paradox and EU-Turkey relations, *IAI Working Papers*, 17/05, 2017. Retrieved from www.iai.it/sites/default/files/iaiw1705.pdf.

Syrian refugees in the country, 246,720 people are hosted in 23 camps run by the Disaster and Emergency Management Authority of Turkey (AFAD), where refugees have access to shelter, health, education, food and social activities. More than 90% of refugees in Turkey live outside of camps in urban and peri-urban areas.

This chapter sheds light on the changing political discourse between Turkey and the EU, by critically discussing current European border control practices. In that line, it highlights that the implementation of the EU–Turkey refugee deal does not end up the smuggling in the region but led to the emergence of different directions and strategies for the human smugglers. The chapter is structured in the following way: First, it examines the formation of the externalization policies and figures out how human smuggling routes have shifted along the borders of the EU. Second, it provides a brief overview of Turkey–EU relations in order to assess the impact of externalization policies on both Turkey’s migration policy development and human smuggling activities after the onset of the civil war in Syria in late 2011. Third, it examines the shifting smuggling routes in the Eastern Mediterranean, following the implication of the EU–Turkey deal.

4.1 THE EU AND THE EXTERNALIZATION POLICIES

Appearing first in the Tampere Council conclusions (1999), externalization as a policy has also been on the agenda of the Seville Council (2002), which concluded that “future cooperation agreements with third countries should include a clause on ‘joint management of migration flows’ as well as ‘readmission’ in the event of ‘illegal immigration’”.³ Various forms of cooperation agreements like bilateral or regional policy dialogues, agreements on visa facilitation, funding or operational support from EU agencies such as ‘Frontex’ have facilitated the formulation of these policies, while their implementation turned non-EU and EU countries along the EU border into buffer zones at the fringes of Europe.⁴ Along that line, through its European Neighborhood Policy (ENP), for instance, the EU began to work with its southern and eastern neighbours either bilaterally or regionally to achieve possible political association, economic integration as well management of migration to be extended geographically.⁵

3 Duvell & Vollmer 2009, *supra* note 2.

4 As regards the regional dialogue processes, priority is given to the Africa–EU Partnership on Migration, Mobility and Employment and the Rabat Process, the Prague Process, the Eastern Partnership Panel on Migration and Asylum, the migration dialogue with Latin America, and dialogue with countries along the Silk route, including in the framework of the Budapest Process.

5 The fully participating partners in the ENP have agreed on ENP action plans which set out the partner country’s agenda for political and economic reforms, while reflecting the country’s needs and capacities, as well as its and the EU’s interests. The ENP is also complemented by regional and multilateral cooperation initiatives such as Eastern Partnership, the Euro-Mediterranean Partnership (EUROMED) and Black Sea

4 THE EU, TURKEY AND THE REFUGEE CRISIS: THE EXTERNALIZATION OF MIGRATION
MANAGEMENT AND HUMAN SMUGGLING

Furthermore, 'readmission agreements' or the principle of 'safe third country' were activated, and even the construction or refurbishment of 'detention facilities' (like in Turkey and Ukraine) were funded for helping third countries contain irregular migrants and prevent them from moving onward. As a result, for containing unwanted migration and readmitting irregular migrants, the responsibility of early monitoring, deterrence and prevention of illegal entry was delegated to peripheral member countries like Greece and Italy and third countries neighbouring the EU such as Turkey and Morocco.

In consistency with the externalization policies, migrant smugglers are undoubtedly turned into 'criminals' who bring in migrants whom states have defined as 'unwanted'.⁶ Since the events of September 11 and bombings in London and Madrid, human smuggling has been associated with crime and terrorism; hence the security and humanitarian crisis discourse is reinforced in political dialogue, newspapers and policy reports. Indeed, this discourse provided the context for the justification of both the EU's externalized policies and member states' internal policies for 'fighting against illegal migration'.⁷ As a consequence, with the dominant security and humanitarian crisis discourse, prior to the Arab Spring, fighting against illegal migration, controlling external borders, stopping migrant smuggling and dismantling criminal networks have already arisen as the agreed lines of the EU migration and border policies.

4.1.1 *After the Arab Spring: Refugee crisis and human smuggling*

The Arab Spring and events in the Southern Mediterranean since the end of 2010 have directly intensified migrants' and refugees' travel on smugglers' boats via the extremely dangerous Central Mediterranean route, which starts in Egypt or more commonly Libya and ends in Malta or more often Italy. The significant population movements (of Africans, mostly sub-Saharan, and Arabs) along this route caused the revision of the Global Approach on Migration (GAM), the overarching framework of the EU external migration and asylum policy since 2005. The updated version of Global Approach to Migration and Mobility (GAMM) in 2011 covers mobility as well as migration and considers development and

Synergy. To facilitate policy dialogue and operational cooperation with partner countries, the Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility (CAMMs) were also set up.

6 V. Billger, M. Hofmann M. & M. Jandl, "Human smuggling as a transnational service industry: Evidence from Austria", *International Migration*, Vol. 44, No. 4, 2006, pp. 59-93; I. van Liempt, A critical insight into Europe's criminalisation of human smuggling, *European Policy Analysis Issues*, Siepa, Swedish Institute for European Policy Studies, 2016. Retrieved from <http://www.sieps.se/en/publications/2016/a-critical-insight-into-europes-criminalisation-of-human-smuggling-20163epa>; T. Baird, & I. van Liempt, "Scrutinising the double disadvantage: Knowledge production in the messy field of migrant smuggling", *Journal of Ethnic and Migration Studies*, Vol. 42, No. 3, 2016, pp. 400-417.

7 C. Mainwaring & N. Brigden, "Beyond the Border: Clandestine Migration Journeys, Special Issue Introduction", *Geopolitics*, Vol. 21, No. 2, 2016, pp. 243-262.

asylum matters for the first time, while adopting a more migrant-centred approach. Nevertheless, it still reiterated the existing policies of externalization by offering merely mutually beneficial cooperation and partnership possibilities especially with the third countries in North Africa.

Yet, neither GAMM nor mechanisms of border controls already in place have hindered irregular migration to Europe; instead all were challenged by the tragic event of the sinking boat near Lampedusa (leaving more than 360 people dead) on 3 October 2013. Following this tragic event and a second sinking that left 268 people dead just one week later, a sea rescue operation called ‘Mare Nostrum’⁸ was launched by the Italian government, which was undertaken one year later by Frontex-led operation, called ‘Triton’, for ensuring effective surveillance of the maritime borders and assisting vessels in distress. The dramatic events and increasing migration pressure along the EU borders also pushed forth the activation of the European Border Surveillance System Initiative (Eurosur) towards the end of 2013, with the premise of increasing reaction capability at the external borders of the EU.⁹

The policies of border surveillance and control, escalating conflicts in North Africa and Middle East, and tragic events that resulted in the loss of people’s lives shifted migrant journeys from a long and extremely perilous Central Mediterranean route to a shorter and relatively safer crossing from Turkey to Greece (Eastern Mediterranean route). Especially with the civil war in Syria amidst the Arab Spring, the scale of the migratory flows via the Eastern Mediterranean route reached previously unseen heights. As a consequence, throughout 2015 the Eastern Mediterranean route and the Western Balkan route (from Greece, FYROM and Serbia to Hungary) to reach to the country of destination mostly in Northern Europe have gained importance with relatively large numbers of people starting to leave or transit via Turkey.

As a response, during 2015, the EU urgently adopted a number of measures to tackle the irregular crossings. In April 2015, the EU Joint Foreign and Home Affairs Council approved a 10-point action plan with direct and substantial measures on the Mediterranean Sea. Further to this, the Common Action Plan against Migrant Smuggling (May 2015) laid down a wide-ranging strategy for fighting against illegal migration and migrant smuggling. Simultaneously, an EU military operation (EUNAVFOR Med), which was lately renamed Sophia (name of a baby born on one of the ships’ board operating in this task force), was established to disrupt migrant smugglers in the central part of southern Mediterranean Sea. In the wake of a series of tragedies at sea, culminating in the sinking of a vessel on 19 April 2015 with an estimated 600-700 victims, implementation packages were proposed

8 It aimed at identifying boats in distress, rescuing migrants, and apprehending human traffickers, and in one year, more than 17,500 people were rescued.

9 Its central aims are to reduce the number of undetected entries into the EU, increase Europe’s internal security by preventing cross-border crime and reduce the death toll of migrants at sea.

in order to realize the Common Action Plan against Migrant Smuggling. Accordingly, member states have agreed for the first time to relocate 160,000 asylum seekers from Greece and Italy to other EU countries, to resettle 20,000 people from outside of the EU to the EU countries, to create ‘hotspots’ in Greece and Italy to ensure the registration of migrants, to establish an EU common list of ‘safe countries’ and to formulate a more effective return policy.

However, although efforts were made at the European level in the course of 2015 to manage borders through registration, screening, relocation and return, this has been only partially implemented and often at a very slow pace. Yet these failed efforts revealed failures of the urgent policy responses of the EU and in turn paved the way for alternative solutions: cooperation with third countries. Not surprisingly, the unprecedented numbers in irregular crossings via Turkey made this candidate country with a Syrian refugee population at the time of around 2 million an ideal partner and the best gatekeeper along the European borders.¹⁰ Despite the fact that 2015 marked a new era in the EU–Turkey relations,¹¹ for a long time, Turkey, as a transit country, has been one of the ‘focal points of the EU’s externalization strategy’. Therefore, the following part briefly recounts the externalization of the EU’s migration and asylum practices towards Turkey in order to understand the historical background behind the intensified EU–Turkey cooperation in the course of 2015.

4.2 TURKEY AND EXTERNALIZATION POLICIES

Turkey has stepped in a new area in the migration management after the EU’s Helsinki decisions of December 1999, which declared her candidacy to the EU membership. Throughout early 2000s, harmonization of asylum and migration policies in line with the European *acquis* has dominated discussions on Turkey’s accession process. The EU has criticized Turkey for not having relevant asylum and migration policies and for not doing enough to prevent irregular migration. Hence, the question of how Turkey’s state institutions and legal frameworks would handle the phenomena of migration and asylum paved the way for the ‘EU-ization’ of the migration and asylum policies of Turkey: aligning the domestic law with EU legislation as part of the EU pre-accession requirements.¹²

10 I. Toygür, & B. Benvenuti, “The European response to the refugee crisis: Angela Merkel on the move”, *IPC-Mercator Policy Briefs*, June 2016. Retrieved from http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/Ilke-Toygur_BiancaBenvenuti_FINAL.pdf.

11 Id.

12 A. Icduygu, “EU-ization matters: Changes in immigration and asylum practices in Turkey” in T. Faist, & A. Ette (eds.), *The Europeanization of national policies and politics of immigration: Migration, minorities and citizenship*, London, Palgrave Macmillan, 2007; J. Tolay, “Turkey’s ‘Critical Europeanization’: Evidence from Turkey’s immigration policies”, in P. Elitok, & T. Straubhaar (eds.), *Turkey, migration and the EU: Potentials, challenges and opportunities*. Hamburg, Hamburg University Press, 2012, pp. 39-61.

As a response, Turkish government and bureaucracy have engaged in a fast-reforming process which touched upon a wide range of policy areas on migration and borders such as introducing national asylum legislation, harmonizing visa stickers and regulations with the EU, and establishing a civilian border security agency. To this end, in accordance with the EU Accession Partnership Document (2001), National Program and Action Plans were prepared¹³. Notably, the National Action Plan on Migration and Asylum (2005) and the National Action Plan for Implementing Integrated Border Management Strategy (2006) identified tasks and timetable for the alignment of Turkey's asylum and migration strategy and border management with the acquis.¹⁴ As proposed in these plans, two new bureaus under the Ministry of Interior (Asylum and Migration Bureau [AMB] and Integrated Border Management Bureau [IBMB]) were created to follow up the roadmap and to give new direction to Turkey's legislative reform and capacity-building efforts. AMB was commissioned to work on drafting laws and projects on asylum and migration, while IBMB, which became the Border Management Bureau (BMB) in 2008, began working on studies for legislative and administrative structure of integrated border management and carrying out projects about the establishment of a new civilian border security unit.¹⁵

Research concerning migration and border controls has demonstrated that socialization into the EU field has occurred through harmonization of legal systems, budgetary and technical assistance, exchange of information, and cooperation and training involving a range of domains.¹⁶ For instance, in 2013, under the leadership of the AMB, the Law on Foreigners and International Protection (LFIP, Law No. 6458) came into force, after widespread consultation with a range of stakeholders, including civil society and international organizations. The new law created a brand new, civilian Directorate General of Migration Management (DGMM). Replacing AMB, DGMM mandated to take charge of migration and asylum and is currently in the process of establishing full operational command on the asylum case load. The draft 'Law on Border Security' to form a new civilian national border guard agency prepared by the BMB is still in the process of being

13 Regarding migration, the main conditions stipulated in the Accession Partnership Document, which was revised in 2003, 2006 and 2008, are: (1) Align visa policies with that of the EU; (2) adopt and implement EU practices on migration, including admission, readmission and expulsion in order to prevent illegal migration; (3) strengthen border management and prepare for the implementation of the Schengen system and (4) lift the geographical limitation of the 1951 Convention, strengthen the system for hearing and determining applications for asylum and develop accommodation facilities and a social support system for asylum seekers and refugees. In accordance with Accession Partnership, Turkey prepared its initial National Program for the Adoption of the Acquis in March 2001 and revised it in 2003 and 2008.

14 A. Icduygu, & K. Kirişçi (eds.), *Land of diverse migrations: Challenges of emigration and immigration in Turkey*, Istanbul, Istanbul Bilgi University Press, 2009.

15 A. B. Karaçay, "Introduction: Critical reflections in Turkish immigration and asylum policies" in A. B. Karaçay, D. Ş. Sert, & Z. G. Göker (eds.), *Waves of diversity: Socio-political implications of international migration in Turkey*, Istanbul, ISIS Press, 2015, pp. 11-25.

16 T. Baird, "Functional actorness? Border security in the EU and Turkey", *International Journal of Public Administration*, Vol. 38, No. 12, 2017, pp. 849-859.

developed. During this EU-ization process, various twinning projects, exchange conferences, procurement of technology and enhanced cooperation with European law enforcement organizations also channelled European expertise and experience to Turkey's preparations in asylum, migration and border management.¹⁷ As a consequence, despite the uncompleted law-making process of the IBM, the adoption of the notion of BM BMB and AMB as a natural and self-evident way of framing asylum, migration and border governance is also indicative of the successful lobbying practices of EU agencies in normalizing and diffusing 'migration management' terminology and 'good governance' practices.¹⁸

Nonetheless, although far-reaching legislative reforms have taken place in Turkish governmental entities, one important aspect stands out when looking at the whole EU-ization process on Turkey's path to accession. The policies on which the EU commonly agreed to were mainly security-driven measures, focusing on border control, return and readmission of irregular migrants and a fight against human smuggling. Regarding the Turkish-Greek border, for instance, Turkey has increased the number of military personnel on its border with Greece and supported an enhanced cooperation between Turkish and Greek coast guards. These initiatives were reinforced by the first deployment of Frontex Rapid Border Intervention Team (RABIT) at the request of the Greek authorities in the Evros River in 2010 and by the initiation of two actively cooperated Frontex operations, Poseidon Land and Poseidon Sea in 2010-2011.¹⁹ Additionally, Greece initiated two national operations, Aspida (Shield) and Xenios Zeus, which included the deployment of approximately 1,800 border police officers and the construction of a 10.5-kilometre-long fence on the border with Turkey in 2012.²⁰ While efforts were made by the Turkish side in conjunction with this ongoing reform process that aligns with externalized European policies, numerous problems along this border still persist. Many reports by non-governmental organizations (NGOs) highlighted increasing informal push-backs and the inhumane conditions in detention facilities, while the Council of Europe, the European Union Agency for Fundamental Rights and the United Nations Special Rapporteur on the human rights of migrants have also expressed serious concerns about human rights violations committed at this border.

Further to the external border policies, under the frame of assisting third countries with migration control and management, the EU offered bilateral as well as EU-wide readmission agreements to third countries. The readmission agreements were considered as potential impediments against the movement of 'unwanted' immigrants within the

17 Id.

18 S. Fine, "Liaisons, labelling and laws: International Organization for Migration bordercratic interventions in Turkey", Special Issue: Researching the International Organization for Migration, *Journal of Ethnic and Migration Studies*, 2017, pp. 1-13.

19 A. B. Karaçay, "Shifting human smuggling routes along Turkey's borders", *Turkish Policy Quarterly*, Vol. 15, No. 4, 2017, pp. 97-108.

20 Id.

borders of the EU. They establish the obligations, conditions and procedures regarding the return of irregular persons from a requesting state (in this case the EU member states) to a requested state. Turkey signed its first bilateral readmission protocol with Greece in 2002. However, during the period of 2002-2010, it has not been very effective, since the expected and pre-established quota of third-country nationals was not met.²¹

Besides bilateral readmission agreements concluded with countries in and outside Europe,²² the negotiations for the EU–Turkey readmission agreement that commenced in late 2009 were actually completed on 16 December 2013. The agreement requires the Turkish authorities to take back not only their own nationals but also illegal aliens who have transited through their territory; the latter will then be sent back to their country of origin.²³ As for the visa liberalization dialogue, on the same date as the signature of the agreement, the EU presented Turkey with a visa liberalization roadmap containing 72 criteria to be fulfilled in the areas of documents security, migration and border management, public order and security and fundamental rights.²⁴ After the full implementation of the Readmission Agreement (three years after ratification of the agreement by both parties), the visa liberalization would be implemented. After initiating the agreement, it was negotiated that ‘in parallel to the signature of the readmission agreement between Turkey and the EU, [the EU will] ... take steps towards visa liberalization as a gradual and long-term perspective’.²⁵

Consequently, the whole EU-ization process in conformity with the EU’s external policies has already strengthened Turkish role as gatekeeper of Europe and guardian of ‘Fortress Europe’.²⁶ Therefore, for the EU, Turkey has clearly been the inevitable partner to deal with the ‘refugee crisis’ subsequent to the flows of refugees and migrants from Syria, Libya and other countries, which undoubtedly highlighted the EU’s limited capacity to respond in a coordinated and effective manner.

-
- 21 A. Icduygu, & D. B. Aksel. “Two-to-Tango in migration diplomacy: Negotiating readmission agreement between the EU and Turkey”, *European Journal of Migration and Law*, Vol. 16, No. 3, 2014, pp. 337-363. The data obtained from the Department of Aliens, Borders and Asylum of the General Directorate of Security within the Turkish Ministry of Interior illustrate that contrary to 65,300 migrants who were requested by the Greek authorities in 2002–2010, 10,124 persons were accepted for readmission by Turkish authorities and only 2425 readmissions were actually completed.
- 22 Among the countries in Europe, Turkey has bilateral readmission agreements with Greece (2002), Romania (2004), Ukraine (2005), Bosnia Herzegovina (2012), Moldova (2012), Belarus (2013) and Montenegro (2013). Outside of Europe, Turkey has readmission agreements with Syria (2001), Kyrgyzstan (2003), Pakistan (2010), Russia (2011), Nigeria (2011) and Yemen (2011).
- 23 M. Rais, “European Union readmission agreements”, *Forced Migration Review*, (51 January), 2016. Retrieved from www.fmreview.org/sites/fmr/files/FMRdownloads/en/destination-europe/rais.pdf.
- 24 Benvenuti, *supra* note 2.
- 25 S. E. Paçacı, A step backward for Turkey?: The Readmission Agreement and the hope of visa-free Europe, Istanbul Policy Center-Sabancı University-Stiftung Mercator Initiative, 2015. Retrieved from http://ipc.sabanciuniv.edu/wp-content/uploads/2015/12/A-Step-Backward-for-Turkey_The-Readmission-Agreement-and-the-Hope-of-Visa-Free-Europe.pdf.
- 26 Benvenuti, *supra* note 2.

4.2.1 After the Syrian civil war: Refugee crisis and human smuggling

After the onset of the civil war in Syria in late 2011, Syrian refugees – among other nationals, such as Iraqis and Afghans – started making the irregular journey across the Aegean Sea from Turkey to Greece. Notably, in 2015, more than 850,000 refugees and migrants reached Greek islands.²⁷ Thus, the Aegean Sea turned into a corridor rather than a route for an ever-increasing number of migrants and refugees arriving to Greek islands from the nearby Turkish coasts. In 2015, the number of migrants moving along the Eastern Mediterranean route has largely surpassed the number of those using the Central Mediterranean route. This has made the Eastern Mediterranean route the main maritime pathway of migration across the Mediterranean to the EU.

The clandestine arrivals from Turkey to Greece also marked the rise in the smuggling activities, albeit its organization has not altered much since the late 1990s. That is, the smuggling services along this route are organized in small loose and flexible networks.²⁸ These smuggling networks can adapt themselves to changes in national and international initiatives designed to mitigate their activities. In particular, changes in the current smuggling dynamics came with Syrians' increased access to information via informal social networks and to family members and friends who had embarked on the journey to Europe.²⁹ For them, social media developed into the main means of communication, with individuals frequently communicating on Facebook, Skype, WhatsApp and Viber.³⁰ In addition to this, smugglers themselves have also made an interesting shift in their communication strategy by advertising their services via social media outlets. New smugglers and ad hoc smuggling networks without any experience have emerged just to gain more from this highly profitable smuggling business. As a result, this clandestine business had become an easily accessible sector, especially in 2015.

The steady escalation in the number of irregular crossings and smuggling services across the Aegean Sea has become an increasingly pressing issue in Europe. However, the European policies implemented for the arrivals in the Aegean Sea were not much different than their immediate responses subsequent to the Arab Spring and events in the Southern Mediterranean. That is to say, the EU kept on formulating externalization policies to impede 'unwanted migration' along its borders, even though ineffective relocation and

27 UNHCR, February 2017, Desperate journeys. Retrieved from www.unhcr.org/58b449f54.pdf.

28 Karaçay, *supra* note 19.

29 Karaçay, *supra* note 19; O. O. Demir, M. Sever & Y. Kahya, "The Social Organisation of Migrant Smugglers in Turkey: Roles and Functions," *European Journal on Criminal Policy and Research*, Vol. 23, No. 3, 2017, pp. 371-391; Europol, Migrant smuggling in the EU, February 2016. Retrieved from <https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu>.

30 Karaçay, *supra* note 19; W. Huddelston, A. B. Karaçay, & M. Nikolova, "Study on smuggling of migrants, characteristics, responses and cooperation with third countries: Case Study 4: Nigeria – Turkey – Bulgaria", Unpublished Report for EC, 2015; Europol, *supra* note 29.

resettlement scheme with transfers less than expected and overcrowded and understaffed hotspots in Greece and Italy functioning like detention centres revealed much about the structural limitations of the EU policies. Yet, despite these failures, following the increasing clandestine arrival trends in the Aegean Sea throughout 2015, early warning and surveillance activities of the ongoing operations of Frontex were enhanced in cooperation with the Greek and Turkish Coast Guards. Further to them, in addition to the initiation of the operations of the Turkish Coast Guard, ‘Operation Safe Med’ in the Mediterranean Sea and ‘Operation Aegean Hope’ in the Aegean Sea, three NATO vessels were ordered to move immediately to the Aegean Sea to conduct reconnaissance and surveillance.³¹

In addition, the lack of a coordinated and proportional EU response to ‘refugee crisis’ made many far-right parties with anti-immigration agendas to renew weight with populist, nationalist and anti-immigrant policies that run counter to fundamental European values. In several European countries, including Finland, Hungary, Latvia, Lithuania, Norway and Switzerland, right-wing parties have taken the reins of government. And even where right-wing populists haven’t gained power, groups such as Britain’s UKIP, the French Front National and Germany’s Alternative für Deutschland are enjoying record popularity.

Not surprisingly, as a response, closed borders, barbed-wire fences and maritime pushbacks turned into policy norms rather than the exceptions. Promoting national and populist rhetoric and anti-immigrant sentiments, Hungary, for instance, closed its borders with Serbia, Romania and Croatia, allowing its army to use rubber bullets, tear gas and barbed wire against migrants, while Slovenia started building its own fence along the Croatian border; its parliament approved the deployment of the country’s army to manage the migrants’ flow at its borders. Towards the end of the same year, due to unexpected migratory flows and big influx of persons seeking international protection, Germany, Austria and Norway have also reintroduced temporary internal border controls (Germany on all borders, with focus on Austrian land borders; Austria on all borders, with focus on land borders with Italy, Hungary, Slovenia and Slovakia; and Norway on all borders, with focus on ports with ferry connections to Norway via internal borders). However, neither these interventions nor the closed borders or anti-immigrant policies were enough to ‘stop’ the unprecedented volume of clandestine arrivals from Turkey to Greek islands as seen at the start of 2016. As a result, the trend of increasing clandestine arrivals in the Aegean Sea throughout 2016 and the EU’s failed urgent responses in managing the ‘refugee crisis’ have led EU policy makers to approach Turkey as the best gate keeper of the ‘Fortress Europe’ for a long time.

31 Karaçay, *supra* note 19.

4.3 THE EU–TURKEY DEAL

On 29 November 2015, at the EU–Turkey summit, Turkey and the EU activated the Joint Action Plan (JAP), which had been agreed *ad referendum* on 15 October 2015. Accordingly, both sides decided to step up their cooperation for support of Syrians under temporary protection and migration management to address the crisis created by the situation in Syria and to stem the migration flow coming to the EU via Turkey. In other words, built on a spirit of burden sharing, the main objectives of JAP were to bring order into migratory flows and to curtail irregular migration. To this end, the EU is committed to provide an initial €3 billion to help Turkey improve the situation of Syrian refugees currently in the country, to open Chapter 17 (Economic & Monetary Policy) of negotiations and to ensure the full implementation of the Readmission Agreement and the visa liberalization dialogue at an earlier date.³²

Following the activated JAP, on 7 March 2016, the EU heads of state or government held a meeting with Turkey to strengthen their cooperation on the migration and refugee crisis and came up with the EU–Turkey statement. The statement clearly underlined the full and speedy implementation of the JAP, and the reduction of the number of ‘illegal’ entries from Turkey to Greece. On 18 March 2016, the leaders of the EU met again in Brussels with their Turkish counterparts and revised the EU–Turkey statement. With this revised version of the EU–Turkey statement (mostly referred to as the EU–Turkey deal), both sides reached an agreement on stopping the flow of irregular migration via Turkey to Europe, breaking the business model of smugglers and offering migrants an alternative to putting their lives at risk.

To achieve their goals, EU and Turkish leaders agreed on returning to Turkey all irregular migrants crossing from Turkey to the Greek islands after 20 March 2016. For every Syrian returned to Turkey, another Syrian will be resettled from Turkey to the EU (one-to-one scheme). In essence, Turkey will take any necessary measures to prevent new sea or land routes for illegal migration. Once irregular crossings end, a voluntary humanitarian admission scheme will be activated; the EU will mobilize an additional 3 billion euros and the EU and Turkey will work to improve humanitarian conditions inside Syria. They reconfirmed their commitment to re-energize the accession process as set out in the joint statement of 29 November 2015 and agreed, as a next step, to open Chapter 33.

The statement took effect on 20 March 2016, and 4 April 2016 was set as the target date for the start of returns of people arriving in Greece after 20 March and for the first resettlements. 4 April 2016 thus saw the start of two processes: returns from the Greek islands to Turkey to make clear that this is a dangerous route and the wrong route and the first resettlements of Syrian refugees from Turkey to Europe. The implementation of the

³² Benvenuti, *supra* note 2.

EU–Turkey deal clearly reveals the pragmatic approach of both sides in the field of migration and border policies and practices.

4.3.1 *The deal and human smuggling*

In 2016, numbers migrating along the Eastern Mediterranean route substantially decreased. Only 173,450 people – compared to 856,723 arrivals one year before – crossed over by sea from Turkey to Greece.³³ In fact, 87% of those arrivals occurred during the first three months of 2015, before the signing of the EU–Turkey statement. Another decline was reported by the Turkish Coast Guards in the number of apprehensions (down by 60%) and interceptions (833 in 2016 compared to 2,430 in 2015). The substantial decrease in the numbers leaving Turkey for Greece was also underlined in the first EC report on the progress made in the implementation of the EU–Turkey statement. Also, in 2016 alone, in total 3,314 smugglers were apprehended in Turkey. Although this is a reduction from 2015 when 4,471 smugglers were detained, it is still a large number in relation to previous years (2010-2014), where the average apprehension rate of smugglers was approximately 1,500 each year.³⁴ Despite this declining trend, which is in compliance with the deal's objectives (preventing the irregular arrivals and smuggling services on the region), essentially, the EU–Turkey deal did not seem to be the only reason for the lessening of this route's usage.

Firstly, towards the end of 2015, the closure of the Western Balkans route and deteriorating weather conditions with the arrival of winter had already contributed to this decrease.³⁵ It was further intensified throughout 2016, as more and more Schengen countries re-imposed temporary border controls to hinder the crossings. Besides Germany, Austria and Norway, which had prolonged proportionate temporary border controls in 2015, Belgium, Denmark and Sweden began to issue passport checks on their frontiers. In addition to the border controls, walls were implemented as new barriers for halting irregular entries. After Austria, Bulgaria, Estonia and Hungary announced or began work on these walls in 2015, Bulgaria, Hungary and Austria expanded their fences, Norway built a fence on its Russian border while the United Kingdom funded a wall in Calais, France. Also borders between the Republic of Macedonia and Greece were tightened.

Secondly, the sharp decrease in crossings from Turkey to Greece along with the rise in the number of refugees and migrants stranded at the borders could not hinder the shift in crossings from the Eastern Mediterranean route to the Central Mediterranean route

33 UNHCR, *supra* note 27.

34 DRC Turkey, Overview of mixed migration trends, February 2017. Retrieved from <https://drc.ngo/media/3266314/synthesis-of-mixed-migration-trends-in-and-around-turkey-february-2017.pdf>.

35 Benvenuti, *supra* note 2.

(from North Africa to Italy, in particular).³⁶ Thus, the Central Mediterranean route became the primary as well as the deadliest entry point to Europe, with the death toll of migrants reaching 5,079 in 2016, compared to the record of 3,771 at sea in 2015.³⁷

Thirdly, in addition to this shift, throughout 2016, further diversifications along the Eastern Mediterranean route revealed how smugglers adapted their services to increased controls in order to find new ways into the EU. As stated by the report of the UNHCR,³⁸ refugees and migrants increasingly diversified their routes out of Turkey. Accordingly, in total, 3,282 migrants attempted to cross the *Turkey–Greece land border* in 2016, while 660 refugees and migrants crossed from Turkey between January and April 2017, a 54% decrease from during the same period in 2016.³⁹ Even though the numbers crossing to Greece via the land border have dropped compared to the same period in 2016, between January and June of 2017, the Turkish Land Forces reported intercepting 10,382 persons, amounting to an average of 57 per day. Also, Hellenic Police statistics indicate that 841 refugees and migrants had crossed from Turkey to Greece irregularly as of the end of May 2017. According to the UNHCR report,⁴⁰ in June, high numbers of arrivals in Greece's Evros region were reported with around 500 refugees and migrants, mostly from Syria, Pakistan, Iraq and Afghanistan, arriving in a span of four days. They contributed to an estimated total of 1,500 arrivals via the Turkey–Greece land border in the first six months of 2017.⁴¹

Since mid-2016, increased numbers of people started to cross the sea from Turkey to Cyprus. Indeed, 349 arrivals to *Cyprus* were recorded between August and December 2016,⁴² while 302 persons mostly from Syria had crossed to Cyprus from Turkey in the first four months of 2017. Many Syrians arriving in Cyprus report crossing irregularly from Turkey to join family members already granted protection there, including husbands and fathers.

During the reporting period (20 April to 18 June 2016) of the second EC Report on the progress made in the implementation of the EU–Turkey statement, a number of refugees had already arrived in *Crete* from Antalya in southern Turkey, after smugglers had promised to take them to Italy. In June 2016, a boat was intercepted off the coast of Crete, carrying 65 migrants from Syria, Afghanistan and Pakistan. One week later, more than 340 migrants were rescued in another incident off the coast of Crete, a new direction from Turkey. Overall, despite the new directions, as seen in the case of Cyprus and Crete, in fact, considerably less people have managed to cross over to the Greek islands since the deal. However,

36 Id.

37 UNHCR, *supra* note 27.

38 UNHCR, *supra* note 27; UNHCR, January–June 2017, *Desperate journeys*. Retrieved from <https://data2.unhcr.org/fr/documents/download/58838>.

39 UNHCR, *supra* note 27; UNHCR, January–June 2017, *supra* note 38.

40 UNHCR, January–June 2017, *supra* note 38.

41 Id.

42 UNHCR, *supra* note 27.

in August 2017, the arrivals increased significantly.⁴³ A total of 1,196 people arrived in the Greek islands of northern and eastern Aegean Sea between 18 and 23 August 2017.⁴⁴

In addition to the Greek land border and islands, several boats from Turkey continued to land each month in Italy, as some refugees and migrants sought to avoid returns under the EU–Turkey statement, as well as the arduous western Balkans crossing.⁴⁵ Such arrivals increased by 26%, from 2,471 in 2015 to 3,114 by the end of 2016.⁴⁶ For this sea route from Turkey to Italy, a novel smuggling pattern developed on the Mediterranean Sea region of Turkey.⁴⁷ Smugglers – in cooperation with cargo carriers – organized the departure of refugees and migrants from coastal towns on the Mediterranean region, such as Mersin, Adana and Hatay. Wooden boats would depart from these points along the south-eastern Turkish coast to reach cargo vessels waiting offshore.⁴⁸ The vessels used were steel cargo ships ranging between 50 and 100 metres in length, transporting between 250 and 800 refugees and migrants. In these operations, smugglers mainly focused on Italy rather than the Greek islands as the country of destination, especially in 2014 and 2015.⁴⁹ Even though the use of ‘ghost ships’ (decommissioned cargo vessels) considerably declined in the region, in May and June, more than 1,000 refugees and migrants arrived in Italy by boat from Turkey, a total of 1,941 for the period of January to June 2017.⁵⁰

The escape route from Turkey via the Black Sea was rarely used in 2013 and 2014 before the so-called refugee crisis in Europe reached its peak.⁵¹ In other words, this migratory route had last seen a similar activity in 2014 (433), which was then followed by a relatively quiet period in 2015 (68) and 2016 (1).⁵² In total, between 2014 and 2016 the national authorities of these countries detected some 500 migrants who reached their shores on medium-sized fishing boats from Turkey across the Black Sea.⁵³ However, recently, more and more people are again trying to travel from Turkey via the Black Sea to reach Bulgaria or Romania. Since the beginning of 2017, already 649 migrants were caught, while they

43 Harekact, 13 November 2017, EU-Turkey Deal, <http://harekact.bordermonitoring.eu/2017/11/13/second-harekact-newsletter-out>.

44 Keep Talking Greece, 23 August 2017, *1,190 new refugees arrive in 5 days. Does Erdogan let EU-Turkey deal go burst?* <http://www.keeptalkinggreece.com/2017/08/23/refugees-increase-greece-erdogan/>.

45 UNHCR, *supra* note 27.

46 *Id.*

47 Karaçay, *supra* note 19.

48 *Id.*

49 *Id.*

50 UNHCR Jan-June 2017, *supra* note 38.

51 Harek Act, Is new deadly route being (re)established in the Black Sea, 2017. Retrieved from <http://harekact.bordermonitoring.eu/2017/09/22/is-a-new-deadly-route-being-re-established-in-the-black-sea/#more-1481>.

52 Frontex, *Do the increased arrivals in Romania mean the opening of a new route via Black Sea?*, 2017. Retrieved from <http://frontex.europa.eu/pressroom/hot-topics/do-the-increased-arrivals-in-romania-mean-the-opening-of-a-new-route-via-black-sea--6tK2MC>.

53 *Id.*

tried to cross via the Black Sea.⁵⁴ The increase in the Black Sea route clearly indicates the alternative strategies that the smugglers are using, even though the sailing condition on this route is very difficult and dangerous. So, these isolated cases might be considered as unique instances that came out possibly by migrants' and smugglers' search for novel but unsafe strategy, as a response to the increased surveillance on the Eastern Mediterranean route.

Finally, the changing climatic conditions, border controls and walls have already altered migrants' decision on undertaking the dangerous journey via the Aegean Sea, which has caused thousands of migrants and refugees to be stranded on European borders. As the Danish Refugee Council reported, since March 2016, those stranded at the Greek and Bulgarian borders have increased by 47% and 443%, respectively.⁵⁵ In consistency with this report, International Organization of Migration revealed how this rising trend on the borders has continued in the following months of 2017. Also, the continued flow of people arriving in EU member states, such as Austria and Germany, indicates that the increased surveillance and strict border controls have led to a re-organization of the smuggling process, using different routes and strongly relying on smuggling networks.

4.4 CONCLUSION

The refugee crisis which affected all European societies has clearly uncovered the structural limitations of the EU migration policies. The fragility of the solidarity and commitment across and within the EU became particularly clear. The European legal and institutional systems in place for asylum seekers and migrants have not ensured a fair responsibility/burden-sharing between countries, and have not prevented people from reverting to using smuggling routes. Seeking asylum is a fundamental and unalienable right that must be respected by all. Asylum and migration policies should be human rights based and should include a systematic human rights impact assessment. It is necessary to find alternative tools for refugees to arrive safely in the EU without risking their lives in unseaworthy boats and paying their life savings to smugglers. This will require rethinking the visa requirements to ensure safe arrivals. In sum, despite strict border controls or action plans, the smuggling routes, as seen in recent practices, might re-shift, while their structure and organization may also alter. In other words, the EU, with its externalized migration and border policies, has been caught up in a vicious cycle in which increasing numbers of border deaths lead to calls to 'combat' smuggling and increased border patrolling, which forces refugees and

⁵⁴ Harek Act, *supra* note 51.

⁵⁵ DRC Turkey, *supra* note 34.

other migrants to use more dangerous routes using smugglers' services.⁵⁶ Longer and more dangerous routes means more people get injured or die while crossing borders, which then leads to public outrage and calls for even more stringent border controls. At Europe's frontiers, an industry of border controls has emerged, involving European defence contractors, member state security forces and third countries, as well as a range of non-security actors. Whenever another 'border crisis' occurs, this industry grows again, feeding on its own apparent 'failures'.

REFERENCES

- Andersson, R., "Europe's failed 'fight' against irregular migration: Ethnographic notes on a counterproductive industry", *JEMS*, Vol. 42, No. 7, 2016, pp. 1055-1075.
- Baird, T., "Functional Actorness? Border Security in the EU and Turkey", *International Journal of Public Administration*, Vol. 38, No. 12, 2017, pp. 849-859.
- Baird, T., & van Liempt, I., "Scrutinising the double disadvantage: Knowledge production in the messy field of migrant smuggling", *Journal of Ethnic and Migration Studies*, Vol. 42, No. 3, 2016, pp. 400-417.
- Baird, T., "Functional actorness? Border security in the EU and Turkey", *International Journal of Public Administration*, Vol. 38, No. 12, 2017, pp. 849-859.
- Benvenuti B., 'The migration paradox and EU-Turkey relations', *IAI Working Papers*, Issue: 17|05, 2017. Retrieved from www.iai.it/sites/default/files/iaiw1705.pdf.
- Billger, V., Hofmann, M., & Jandl, M., "Human smuggling as a transnational service industry: Evidence from Austria", *International Migration*, Vol. 44, No. 4, 2006, pp. 59-93.
- Boswell, C., "Migration control in Europe after 9/11: Explaining the absence of securitization", *Journal of Common Market Studies*, Vol. 45, No. 3, 2007, pp. 589-610.
- Boswell, C., "The 'External Dimensions' of EU Immigration and Asylum Policy", *International Affairs*, Vol. 79, No. 3, 2003, pp. 619-638.

56 R. Andersson, "Europe's failed 'fight' against irregular migration: ethnographic notes on a counterproductive industry", *JEMS*, Vol. 42, No. 7, 2016, pp. 1055-1075.

Çarmıklı, E., & Kader, U., "Migrant smuggling in Turkey: The other side of the refugee crisis," *USAK Report*, No. 45, Ankara, Karınca Yayıncılık, 2016.

Demir, O. O., Sever, M., & Kahya, Y., "The social organisation of migrant smugglers in Turkey: Roles and functions," *European Journal on Criminal Policy and Research*, Vol. 23, No. 3, 2017, pp. 371-391.

DRC Turkey, Overview of mixed migration trends, February 2017. Retrieved from DRC Turkey. Retrieved from <https://drc.ngo/media/3266314/synthesis-of-mixed-migration-trends-in-and-around-turkey-february-2017.pdf>.

Duvell F., Vollmer, B., Irregular migration in and from the neighbourhood of the EU. A comparison of Morocco, Turkey and Ukraine: Counting the uncountable, data and trends across Europe, Oxford, Centre on Migration Policy and Society, 2009. Retrieved from clandestino.eliamep.gr/wp-content/uploads/2009/11/transit_report_compas_sept091.pdf.

Elitok Paçacı, S., A step backward for Turkey? The readmission agreement and the hope of Visa-Free Europe (Istanbul Policy Center-Sabancı University-Stiftung Mercator Initiative), 2015. Retrieved from http://ipc.sabanciuniv.edu/wp-content/uploads/2015/12/A-Step-Backward-for-Turkey_The-Readmission-Agreement-and-the-Hope-of-Visa-Free-Europe.pdf.

European Commission, Second Report on the progress made in the implementation of the EU-Turkey Statement, *European Commission*, 15 July 2016. Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd_commission_report_on_progress_made_in_the_implementation_of_the_eu-turkey_agreement_en.pdf.

Europol, Migrant Smuggling in the EU, February 2016, <https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu>.

Fine, S., Liaisons, labelling and laws: International Organization for migration bordercratic interventions in Turkey, Special Issue: Researching the International Organization for Migration, *Journal of Ethnic and Migration Studies*, 2017, pp. 1-13.

Frontex, *Do the increased arrivals in Romania mean the opening of a new route via Black Sea?*, 2017. Retrieved from <http://frontex.europa.eu/pressroom/hot-topics/do-the-increased-arrivals-in-romania-mean-the-opening-of-a-new-route-via-black-sea--6tK2MC>.

Harek Act, Is new deadly route being (re)established in the Black Sea, 2017. Retrieved from <http://harekact.bordermonitoring.eu/2017/09/22/is-a-new-deadly-route-being-re-established-in-the-black-sea/#more-1481>.

Harek Act, EU-Turkey Deal, 2017. Retrieved from <http://harekact.bordermonitoring.eu/2017/11/13/second-harekact-newsletter-out/>.

Huddelston, W., Karaçay, A. B., & Nikolova, M., "Study on smuggling of migrants, characteristics, responses and cooperation with third countries: Case Study 4: Nigeria—Turkey—Bulgaria," Unpublished Report for EC, 2015.

Icduygu, A. & Koser Akcapar, S., "Turkey' in migrant smuggling data and research: A global review of the emerging evidence base", *International Organization of Migration*, 2 November 2016, pp. 137-160. Retrieved from http://reliefweb.int/sites/reliefweb.int/files/resources/smuggling_report.pdf.

Icduygu, A., & Aksel, D. B. "Two-to-Tango in migration diplomacy: Negotiating Readmission Agreement between the European and Turkey", *European Journal of Migration and Law*, Vol. 16, No. 3, 2014, pp. 337-363.

Icduygu, A., & Kirişçi, K. (eds.), 2009 *Land of Diverse Migrations: Challenges of Emigration and Immigration in Turkey*, Istanbul, Istanbul Bilgi University Press, 2009.

Icduygu, A., "EU-ization matters: Changes in immigration and asylum practices in Turkey" in T. Faist, A. Ette (eds.), *The Europeanization of National Policies and Politics of Immigration*. London, Palgrave Macmillan, 2007.

Karaçay, A. B., "Introduction: Critical reflections in Turkish immigration and asylum policies" in A. B. Karaçay, D. Ş. Sert, & Zeynep Gülru Göker (eds.), *Waves of Diversity: Socio-Political Implications of International Migration in Turkey*, Istanbul, ISIS Press, 2015, pp. 11-25.

Karaçay, A. B., "Shifting human smuggling routes along Turkey's borders", *Turkish Policy Quarterly*, Vol. 15, No. 4, 2017, pp. 97-108.

Keep Talking Greece, *1,190 new refugees arrive in 5 days. Does Erdogan let EU-Turkey deal go burst?*, 23 August 2017, <http://www.keeptalkinggreece.com/2017/08/23/refugees-increase-greece-erdogan/>.

4 THE EU, TURKEY AND THE REFUGEE CRISIS: THE EXTERNALIZATION OF MIGRATION
MANAGEMENT AND HUMAN SMUGGLING

Lavenex, S., & Uçarer, E. M., *Migration and the externalities of European integration*. Lanham, Lexington, 2002.

Lavenex, S., "Shifting up and out: The foreign policy of European immigration control", *West European Politics*, Vol. 29, No. 2, 2006, pp. 329-350.

Lavenex, S., "The power of functionalist extension: How EU rules travel", *Journal of European Public Policy*, Vol. 21, No. 6, 2014, pp. 885-903.

Mainwaring, C., & Brigden, N., "Beyond the border: Clandestine Migration Journeys", Special Issue Introduction, *Geopolitics*, Vol. 21, No. 2, 2016, pp. 243-262.

Rais, M., "European Union Readmission Agreements", *Forced Migration Review*, Vol. 51, January, 2016. Retrieved from www.fmreview.org/sites/fmr/files/FMRdownloads/en/destination-europe/rais.pdf.

Tolay, J., "Turkey's 'Critical Europeanization': Evidence from Turkey's immigration policies", in S. P. Elitok, & T. Straubhaar (eds.), *Turkey, Migration and the EU: Potentials, Challenges and Opportunities*, Hamburg, Hamburg University Press, 2012, pp. 39-61.

Toygür, I., & Benvenuti, B., "The European response to the refugee crisis: Angela Merkel on the move", *IPC-Mercator Policy Briefs*, June 2016. Retrieved from http://ipc.sabanciuniv.edu/wp-content/uploads/2016/06/IlkeToygur_BiancaBenvenuti_FINAL.pdf.

UNHCR, *Desperate Journeys*, February 2017. Retrieved from www.unhcr.org/58b449f54.pdf.

UNHCR, *Desperate Journeys*, January-June 2017. Retrieved from <https://data2.unhcr.org/fr/documents/download/58838>.

van Liempt, I., & Sersli, S., "State responses and migrant experiences with human smuggling: A reality check", *Antipode*, Vol. 45, No. 4, 2013, pp. 1029-1046.

van Liempt, I., "A critical insight into Europe's criminalisation of human smuggling," *European Policy Analysis Issues*, 2016, Siepa, Swedish Institute for European Policy Studies. Retrieved from <http://www.sieps.se/en/publications/2016/a-critical-insight-into-europes-criminalisation-of-human-smuggling-20163epa/>.



5 WILL TAILOR-MADE MIGRATION DEALS HELP TO SOLVE THE EUROPEAN MIGRATION ‘CRISIS’?

Annelies Zoomers, Femke van Noorloos and Ilse van Liempt

5.1 INTRODUCTION

Since the beginnings of 2015, the *European migrant crisis*, or the *European refugee crisis*, has been at the top of policy agendas in the European Union (EU) as well as in individual European countries. In this period, rising numbers of asylum seekers and migrants travelled across the Mediterranean Sea or overland through Southeast Europe to arrive in the EU for finding a safer and better life. The top three nationalities of the over 1 million Mediterranean Sea arrivals between January 2015 and March 2016 were Syrian (47%), Afghan (21%) and Iraqi (9%), in addition to considerable numbers coming from various African countries.¹ In addition to problems related to how to deal with the inflow of thousands of migrants (mostly concentrating in Italy and Greece), the number of deaths at sea rose to record levels in April 2015, when more than 1,200 people drowned in the Mediterranean Sea due to the sinking of their boats.²

One of the direct responses to tackle the refugee ‘crisis’ was the EU–Turkey deal, which formally came into effect on 20 March 2016. This ‘deal’ fits a wider trend in Europe of externalizing migration policies and shifting responsibilities for migration control onto countries of origin and transit. In the context of the current ‘crisis’ in Europe and a hardening political climate, we, however, observe that the EU–Turkey statement and the solution of offshoring and outsourcing responsibilities are explicitly presented as a way to *solve* the ‘crisis’.

According to the EU–Turkey statement, Turkey agreed to collaborate in a scheme enforcing that migrants arriving in Greece who did not apply for asylum or whose claim was rejected would be sent back to Turkey. With the deal, it was hoped people will be discouraged from making the dangerous journey by sea from Turkey to Greece. In return,

* This chapter is based on an earlier article published in *International Migration*, Vol. 48, 2010, pp. 42-75: Europe’s migration agreements with migrant-sending countries in the Global South: a critical review by Aderanti Adepaju, Femke van Noorloos and Annelies Zoomers. It is based on fieldwork and internet research carried out in 2007 (see footnote 2), in addition to new field research carried out in Greece and Turkey, in the context of the NWO research ‘Evidence-based assessment of migration deals: the case of Turkey.’ Retrieved from <https://www.nwo.nl/en/research-and-results/research-projects/i/18/28318.html>.

1 UNHCR, 2017. Retrieved on 14 November 2017 from <https://data2.unhcr.org>.

2 Migration Policy Institute, 2017. Retrieved on 14 November 2017 from www.migrationpolicy.org.

Turkey would receive aid and political concessions like visa deregulation. From the beginning there has been much discussion about the ‘success’ of this EU–Turkey migration deal. Since the start of the scheme, the inflow of migrants and refugees has considerably decreased, but it is not clear whether this ‘success’ can be attributed to the EU–Turkey deal: According to the opponents, reduced inflows of migrants/refugees into the EU was (also) the consequence of the closure of the Balkan route, as well as the result of ‘normal’ seasonality and the ending of the migration life cycle (most people having left in the earlier period). In addition, opponents criticize the EU–Turkey deal for being illegal and immoral: In spite of human rights violations, Turkey is presented as a safe country and there is much discussion about the EU being responsible for people being detained in Turkey without access to asylum.³

There are also implementation problems: Greece and Turkey do not have the required capacity to host and ‘process’ large numbers of people, who in majority will be forced to return to their countries of origin. Along with the introduction of the EU–Turkey deal, possibilities for people to get asylum are very much reduced and increasing numbers of people are forced to return. One week after the EU–Turkey statement was implemented, Turkey signed a Readmission Agreement (which was long in the making) with Pakistan.

Also, the accompanying system to redistribute accepted refugees throughout the EU has largely failed, as member states have not met their promises. At its start, the EU–Turkey statement had promised to resettle 72,000 refugees across EU member states. However, as of November 2017, less than 9,000 had been resettled. At the borders of Europe – within and outside of the EU – large and heterogeneous groups of refugees/migrants are kept in overcrowded camps, often without legal support or even in detention.⁴ In spite of these problems, however, at the political level, many see this approach – making migration deals with third countries – as a feasible way forward: the externalization of the EU border – finding ways to keep illegal migrants out while simultaneously taking care of creating ‘legal ways’ is presented as the ‘new’ EU approach. After the 2015 Valetta Summit, the 2015 EU–Turkey joint action plan and the 2016 EU–Turkey statement, the European Commission proposed a *new migration partnership* framework which was endorsed by the European Council in June 2016. In the context of this framework, the EU will seek to form *tailor-made partnerships* with key third countries of origin and transit. More concretely, by establishing ‘migration compacts’ with countries such as Jordan, Lebanon, Niger, Nigeria, Senegal, Mali, Ethiopia, Tunisia, Libya, Morocco, Algeria, Iran, Egypt, Afghanistan, Pakistan and Bangladesh, the EU aims to solve the ‘European migration crisis’. The partnerships are expected to contribute to saving lives at seas and in deserts; fighting trafficking and

3 M. J. Alpes, S., Tunaboylu, O. Ulusoy, & S. Hassan, Post-deportation risks in Turkey: The EU-Turkey-Statement as a test case for the externalization of protection responsibilities, EUI Policy Brief, 2017. Retrieved from <http://cadmus.eui.eu/handle/1814/49005>.

4 Id.

5 WILL TAILOR-MADE MIGRATION DEALS HELP TO SOLVE THE EUROPEAN MIGRATION
'CRISIS'?

breaking smuggling networks; increasing returns, while enabling migrants and refugees to stay closer to home; and helping countries to address the root causes of migration.⁵

The EU thus aims to establish 'compacts' with third countries: political packages which encompass clear targets and joint commitments, including but not limited to the conclusion of formal agreements on readmission.⁶ A 'win-win-win' situation is envisaged by combining different policy elements beyond migration, such as trade and development.⁷ These new EU policies are very much in line with the 'UN global compact on migration' (New York 2016)⁸ trying to arriving at a new and more integrated approach aiming at coordinated and structural cooperation with third countries – such a framework should contribute to safe regular migration, also in line with the sustainable development goals.

This chapter, based on research carried out in various countries in 2007 and 2017,⁹ aims to assess to what extent 'tailor made migration deals with third countries' will help to solve the European migration crisis. We will show that migration agreements are anything but new: Since the 1990s, many bilateral migration agreements have been instituted between EU member states and countries of emigration or transit, with goals ranging from control-

5 EC Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new partnership framework with third countries under the European Agenda on Migration. Communication 7/6/2016. Strasbourg, EC, 2016.

6 C. Bauloz, The EU migration partnership framework: An external solution to the crisis? *EU Migration Law Blog*, 31 January 2017. Retrieved from <http://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/>.

7 Id.

8 The UN is currently organizing a 'global consultation' on different subtopics (e.g., asylum to human rights, root causes of migration, integration and reintegration, diasporas, remittances, readmission and smuggling, development aid and co-development).

9 The chapter is based on fieldwork and internet research carried out in various places, first in 2007 and then in 2017. In 2007, we contacted relevant ministries, especially the Justice and Immigration Ministry of certain selected African countries with large emigrant populations, to solicit pertinent information (which was very difficult to obtain) on the bilateral agreements they had entered into with EU countries; held interviews with representatives of European embassies in Abuja, Nigeria as well as various African embassies in the Netherlands and Belgium; and collected additional information by approaching key informants working in advisory and research capacities on international migration. Finally, we conducted an extensive search of policy documents (including parliamentary documents, regulations and laws), as well as newspaper articles, research articles and internet materials. In 2017 we carried out field research in Greece and Turkey, assessing the consequences of the EU-Turkey deal. Observations were done at refugee camps on Lesbos and Chios (Moria, Vial, Souda, Pikpa), 18 interviews were held with asylum seekers on the islands and 22 telephonic interviews were conducted with 35 individuals who were repatriated from the Greek islands. The researchers also observed inter-agency and coordination meetings (4) and interviewed lawyers (3 Turkish, 5 Greek), practitioners working at international NGOs (4), representatives of UN and EU institutions (9) and civil servants working with the Greek police and local municipalities on both Chios and Lesbos (4). On top of that, 17 interviews were conducted with Pakistani immigrants who were deported under the deal and 11 Syrian families who were resettled to the Netherlands from Turkey under the deal. We would like to acknowledge the valuable contributions by Jill Alpes, Orçun Uloşoy, Sevda Tunaboğlu and S. Hassan to data collection in the context of Greece, Turkey and Pakistan; see I. van Liempt, M. J. Alpes, S. Hassan, S. Tunaboğlu, O. Ulusoy, & A. Zoomers. Evidence-based assessment of migration deals, the case of the EU-Turkey Statement. Final Report, NWO, 2017.

ling migration (focusing on fighting irregular migration, readmission and repatriation); encouraging legal migration (by using migration quota, circular migration) and/or stimulating co-development.¹⁰ More recently, the European Commission has become more active itself by signing EU mobility partnerships with various countries, with varying success. In order to be able to assess current policies, it is imperative to critically revisit earlier experiences and analyse the opportunities and limitations of different types of migration deals, partnerships and agreements. We show that in the course of time, migration agreements have increasingly become focused on migration restriction and control, and that the externalization of the EU's migration control has intensified. The multilateral character of current deals, set within the current EU political landscape, makes implementation even more complex. We argue that in spite of spending billions of euros mainly on discouraging and controlling migration, migration deals have not been successful in turning the tide and solving the migration 'crisis'. In order to find a sustainable solution, more attention needs to be given to providing legal pathways to migration (instead of stopping migration). Future deals should ensure that migrants move to the 'right places' and get a right 'to remain'.

5.2 EXPERIENCES WITH EU MIGRATION AGREEMENTS SINCE THE 1990S

The EU–Turkey deal and the *new migration partnership* framework of 2016 are in many respects not new: They have already been there since the 1990s – when migration flows towards Europe started to increase – when the EU, and the individual EU countries, became increasingly active establishing various bilateral and multilateral migration policies. The past two decades have seen the steady emergence of various bilateral and multilateral migration agreements between Europe and migrant-sending countries in the Global South, focusing on a variety of different goals: (a) Preventing and combating irregular labour migration (including admission procedures and arrangements for repatriation, social security, family reunification, integration and return); (b) expanding avenues for regular labour migration – while taking into consideration labour market needs and demographic trends, as well as principles of ethical recruitment; while also (c) enhancing the developmental impact (co-development) and tackling the 'root causes of migration'.

10 A. Adepou, F. van Noorloos, & A. Zoomers, "Europe's migration agreements with migrant-sending countries in the global south: A critical review", *International Migration*, Vol. 48, No. 3, 2009, pp. 42-75.

5.2.1 *Controlling migration: Agreements aimed at curtailing and controlling irregular migration and the readmission of repatriated migrants*

Reviewing the variety of EU migration agreements since the 1990s, the main aim was arguably controlling borders and repatriating irregular migrants. This is in line with general EU migration policies: Tightening controls at its external borders (Frontex), while establishing bilateral and multilateral agreements with a number of migrant-sending countries, was (and is still) seen as the top priority.

In 2004, as a response to the arrival of a rapidly growing number of migrants and refugees from Africa, the EU created Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), which became the implementing agency of the EU common external border policy. In this same period, the EU started to sign agreements with countries such as Albania, Russia, Sri Lanka, Macao and Hong Kong aiming at controlling irregular migration and ensuring cooperation on the readmission of irregular migrants. In the course of time, individual EU member states also became increasingly active in signing their own readmission agreements. The EU and its member states (in the beginning in particular France, Italy and Spain) provided African and Mediterranean countries with substantial financial and personnel support in controlling borders, fighting human trafficking and strengthening their police and intelligence apparatus. For example, in response to increasing levels of irregular migration from Mauritania, Senegal and Cape Verde, the EU decided to intensify patrols in West African waters and increased police cooperation – in return for generous development aid packages to these countries.

Attempting to turn the tide of irregular migration, the EU proposed to increase cooperation with and provide assistance to Morocco and Algeria and started to develop a comprehensive migration policy for the main countries of origin and transit in West Africa and in sub-Saharan Africa as a whole.¹¹ From 2006, the dominant EU approach was pushing for readmission agreements under which African countries would take back irregular migrants, in exchange for economic assistance. In the readmission agreement with Morocco, the EU demanded Morocco to take back its own nationals, but also those from other countries who have transited through Morocco's territory to Europe. Similar agreements were made with other African countries.

In addition to this EU strategy, individual EU member states also tried to secure cooperation of Maghreb countries by establishing bilateral agreements aimed at curtailing irregular migration and ensuring the return and readmission of irregular migrants. Examples are the agreement between Tunisia and Italy (1998) for facilitating the readmis-

11 European Commission, *Visit to Ceuta and Melilla: Report of Technical Mission to Morocco on Illegal Immigration*, 7-11 October 2005. Memo/05/380. Brussels, EU, 2005.

sion of irregular nationals and third-country citizens in transit; the agreement between Morocco and Spain (1999) for facilitating the readmission of Moroccan nationals as well as transit migrants; the agreements between Libya and Italy (2003, 2004, 2005) for combating smuggling and providing sea-rescue operations, training and equipment of control personnel, identification centres for migrants, and detention camps to prevent sub-Saharan African migrants from crossing to Europe; and Nigeria's agreements with Ireland, UK, Italy and Spain, mostly on combating trafficking, readmission of irregular migrants, exchange of information, etc.¹²

Hence, the variety of bilateral and multilateral agreements with countries of emigration and transit since the 1990s have been prime examples of the externalization of Europe's migration control¹³ and securitization of migration policy.¹⁴ These practices have given rise to four criticisms: (1) violation of migrants' human rights, (2) ineffectiveness in controlling migration, for example due to spatial substitution effects such as changes in migrants' routes, (3) high informality and lack of transparency in negotiations and (4) unequal power relations leading to unbalanced and ineffective partnerships.

With regard to the first point, examples of human rights violations taking place in the Maghreb countries at the time were numerous (Directorate-General, 2006). European police and immigration services were sometimes blamed for collaborating with organizations that were mentioned as being responsible for torture, disappearance and political liquidations – and sacrificing human rights for the sake of stopping migration.¹⁵ Hence, irregular migrants 'in transit' often found themselves in highly vulnerable situations. In addition, there were frequent violations of the '*non-refoulement*' principle: In the EU external border agency Frontex's 'HERA' operations¹⁶ in collaboration with Spain, Senegal, Mauritania and Cape Verde, one of the problems was the serious lack of adequate asylum screenings before returning would-be migrants to their origin countries.¹⁷ A fairly large number of transit migrants caught in the Mediterranean came from countries where their

12 A. Adepoju, *Regional migration processes, multilateral and bilateral migration agreements in sub-saharan Africa*. IOM, Berne Initiative Policy Research Papers, Berne, International Organisation for Migration, 2004.

13 C. Boswell, "The 'external dimension' of EU immigration and asylum policy", *International Affairs*, Vol. 79, No. 3, 2003, pp. 619-638; M. Samers, "An emerging geopolitics of 'illegal' immigration in the European Union", *European Journal of Migration and Law*, Vol. 6, 2004, pp. 27-45.

14 D. Bigo, "Security and immigration: Toward a critique of the governmentality of unease", *Alternatives*, Vol. 27, No. 1, 2002, pp. 63-92.

15 A Gambian television broadcaster once accused Spain of collaborating with the infamous Gambian National Intelligence Agency (NIA) in its fight against irregular migration. The NIA has been severely criticized due to accusations of systematic torture, disappearances and probable political liquidations (*Afrol News*, 22 November 2006).

16 See: Frontex, Archive of operations. Retrieved on 29 October 2017 from <http://frontex.europa.eu/operations/archive-of-operations/oKWeXJ>.

17 ECRAN Weekly Update, 3 November 2006.

lives were in danger,¹⁸ but they did not get asylum. Hence, as a consequence of such externalization policy, transit migrants and refugees have often become more vulnerable. This was witnessed in 2003 when Malta repatriated a large number of Eritrean refugees, which led to their imprisonment and torture.¹⁹ Today we see similar things happening in Turkey and even in Greece, where it is extremely difficult to get access to asylum.

With regard to the second point, spatial substitution effects and changing migration routes,²⁰ it is important to rethink of the effectiveness of restrictive and securitized migration policies. The introduction of tougher rules regarding regular migrants' entry to and residence in Europe has, from the mid-1990s, inadvertently pushed irregular West African migrants to use complex routes to reach the Maghreb as a transit region, in order to enter Europe clandestinely.²¹ Without doubt, Frontex operations (and outsourcing the responsibility of stopping migrants to the Maghreb) have resulted in a southward shift of migration networks and an intensification of migration industries.

Third, apart from the question of externalization of migration control, negotiations on bilateral and multilateral agreements often took place on the initiative of the EC and with significant power play and unilateralism from the European side²²: As Europe pushed for agreements with third countries in a non-participatory way (e.g. in the case of the EU mobility partnerships of 2008), the cost-benefit balance for these countries was often lost.²³ Problems with the readmission of third-country nationals were, and still are, often a sensitive issue in migration agreements, but the EU's push for these issues has only increased (e.g. in case of the EU-Turkey deal). As a result of these imbalanced cost-benefit distribu-

18 A. Betts, & J. Milner, *The externalisation of EU asylum policy: The position of African states*. Working Paper No. 36. Oxford University, Centre on Migration, Policy and Society, 2006. Retrieved from https://www.compas.ox.ac.uk/2006/wp-2006-036-betts-milner_eu_asylum_policy_africa/.

19 Directorate-General for External Policies of the Union, *Analysis of the external dimension of the EU's asylum and migration policies*. Brussels, European Parliament, DGEPU, Directorate B, Policy Department, 2006. Retrieved from www.statewatch.org/news/2006/jul/eu-res-study-ext-imm.pdf.

20 H. De Haas, "The determinants of international migration. Conceptualising policy, origin and destination effects", *University of Oxford International Migration Institute Working Paper*, Vol. 32, April 2011; J. Schapendonk, *Turbulent Trajectories. Sub-Saharan African Migrants Heading North*. PhD thesis, Radboud University Nijmegen, 2011. Retrieved from <http://repository.uibn.ru.nl/bitstream/handle/2066/91326/91326.pdf>.

21 A. Adepoju, *The challenge of labour migration flows between West Africa and the Maghreb*, ILO Migration Research Papers, Geneva, International Labour Organisation, 2006; A. Adepoju, T. van Naerssen, & A. Zoomers (eds.), *International migration and national development in sub-Saharan Africa. Viewpoints and policy initiatives in the countries of origin*, Afrika-Studiecentrum Series, Vol. 10. Leiden/Boston, Brill publishers, 2008.

22 R. Parkes, "EU mobility partnerships: A model of policy coordination?", *European Journal of Migration and Law*, Vol. 11, 2009, pp. 327-345.

23 N. Reslow, "The role of third countries in EU Migration Policy: The mobility partnerships", *European Journal of Migration and Law*, Vol. 14, 2012, pp. 393-415; M. Chou, & M. Gibert, "The EU-Senegal mobility partnership: From launch to suspension and negotiation failure", *Journal of Contemporary European Research*, Vol. 8, No. 4, 2012, pp. 408-427.

tions, the implementation of these agreements proves less effective due to non-cooperation by third-country governments in practice.

Finally, migration agreements have also been criticized for a lack of transparency and the high level of 'informality'. Negotiations between EU member states and African countries often took place behind closed doors, and there was often a preference for informal and flexible agreements, also for the sake of dealing with rapidly changing situations. Arrangements for repatriation and migration control (as well as incentives such as development aid and preferential entry quota) were often established outside formal agreements.²⁴ This meant not only that these arrangements were less transparent and controllable by parliaments, but that there were limited checks and balances with respect to human rights guarantees. Politically sensitive issues (such as financial clauses and collaborating institutions) were often arranged outside the formal agreement. Agreements often remained unpublished, allowing governments to collaborate with all kinds of institutions, such as local intelligence services and private security companies, without parliamentary control.

5.2.2 *Agreements to expand avenues for regular labour migration*

Although most EU and bilateral migration agreements focused predominantly on migration control and readmission, there were also attempts to opening more channels for regular migration to the EU, which had long been out of fashion. During the 1970s, bilateral labour migration agreements, especially those directed towards low-skilled migrants, were frequently used by European states to satisfy their labour market needs (with guest workers coming from Spain, Italy, Turkey and Morocco). Nevertheless, following the 1980s economic decline, increasing unemployment rates and the later EU expansion, this guest workers programme came to an end, and afterwards most EU countries reduced entry possibilities for low-skilled labour migrants from outside the EU.

To the extent that countries used bilateral migration agreements to attract labour migrants from other parts of the world, this was mainly reserved to a few countries (e.g. Spain, Italy and Portugal). Spain and Italy concluded agreements including labour migration with Eastern European, Maghreb, Asian and Latin American countries, but cooperation with sub-Saharan Africa was increasing in the 1990s and 2000s.

Spain has devised various labour quota systems to respond to shortages in the labour market, set up in the 1990s and 2000s.²⁵ Particularly around 2000, Spain's migration policy

24 J. Cassarino, "The 'new approach' to the readmission of illegal persons: operability versus transparency", *This Century Review*, 2007. Retrieved from http://history.thiscenturyreview.com/The_New_Approach_to_the_Readmission_of.thenewapproach.0.html.

25 N. O. Pérez, *Spain: Forging an immigration policy*. Washington, Migration Policy Institute, 2003. Retrieved from www.migrationinformation.org/Profiles/display.cfm?ID=97.

focused strongly on bilateral agreements with main sending countries, which combined legal labour migration quota with a renewed emphasis on controlling irregular migration (following the EU policy).²⁶ In addition to Ecuador, Colombia and the Dominican Republic, Spain signed bilateral agreements with Morocco, Nigeria, Poland and Romania. In a reform of the quota system in 2002, the Spanish government started to issue work permits only to nationals from countries with which bilateral agreements had been established, and only citizens living in these countries of origin could apply. Spain's general labour migration policy and the role of bilateral agreements therein fluctuated much in the 2000s in light of political fluctuations²⁷: While labour migration quotas and work permits were never completely dropped, their influence and conditionality varied, and they were often combined with restrictive measures such as readmission agreements.²⁸ For example, given higher numbers of irregular migration from and through Senegal and Morocco, Spain concluded bilateral agreements with these countries in 2006 and 2007. Spain's primary interest was arguably the readmission of irregular migrants, but the agreements also included balanced measures on legal labour migration and development/technical aid to compensate.²⁹

By the same time, the European Commission (EC) also showed a renewed interest in labour migration quotas.³⁰ From the mid-2000s there was much interest in migration and development and in global partnerships on the topic. The EC has devised a number of policy instruments, external cooperation agreements and pilots that included some elements of legal labour migration, although readmission and restriction of migration were always key priorities, and avenues for visa facilitation and circular migration were very much restricted, especially for African third countries. For example, in 2007 the EU unveiled a pilot project for a new 'guest worker' scheme for Africa – starting with Mali – which aimed to boost local economies, enhance the earnings of potential of migrants and stop irregular migration. This flexible scheme was designed to coordinate job offers in the EU with job seekers in Africa, through setting up job centres for migrants. After that, in 2008 the EU mobility partnerships were presented by the Commission as a new instrument for managing migration flows with third countries. They are legally non-binding declarations meant for

26 Id.; A. Balch, *Managing labour migration in Europe: Ideas, knowledge and policy change*, Manchester, Manchester University Press, 2013.

27 Id.

28 Id.

29 Id.; Reslow, *supra* note 23.

30 The EU's renewed interest from the 2000s in introducing bilateral and multilateral workers' schemes had to do with preventing irregular migration as well as meeting Europe's labour market needs, though the first objective has increased in importance. The process has been complex: In a climate where EU member states are generally reluctant to supranationalize migration policy to the EC, they have been particularly reluctant to relinquish competence over opportunities for legal migration. See N. Reslow, "Deciding on EU external migration policy: The member states and the mobility partnerships", *European Integration*, Vol. 34, No. 3, 2012, pp. 223-239.

long-term dialogue and cooperation, and can include many different measures; the basic idea is an exchange between the third country's readmission of its own citizens and third-country nationals, on the one hand, and opportunities for legal migration to the EU (through circular migration and/or visa facilitation), on the other.³¹ The EC signed EU mobility partnerships with Moldova, Georgia, Armenia and Cape Verde, while negotiations with Senegal failed.³²

European experiences with labour migration agreements leave no doubt that, although they may provide a certain number of migrants with an opportunity to migrate in a regular situation, it has not yet been sufficient to provide a solution for the problem of irregular migration.³³ Despite various Spanish labour migration projects with Eastern European and Latin American sending countries, regular labour migration still formed a relatively small part of the total flow of labour migrants to that country.³⁴ It has proven difficult to ban irregular migration – because irregular workers were and are such a vital part of the Spanish labour market and many employers have an interest in maintaining low salary levels.

For third countries, however, legal migration opportunities are a key objective in negotiations about migration deals, and the absence of genuine and significant opportunities for legal migration can be a reason for non-cooperation. Senegal refused to sign the EU mobility partnership due to the excessive focus on restricting migration (e.g. taking back both their own nationals and third-country nationals would mean enormous costs for Senegal) while they had little trust in the EU's vague promises of visa facilitation and legal migration opportunities for Senegalese migrants to the EU.³⁵ Interestingly, the availability of more balanced bilateral deals with France and Spain, which offered better labour market access opportunities, was also one of the reasons for Senegal to halt negotiations with the EC.³⁶ Hence competition between the EC and individual member states can be used as a negotiation tool for third countries, and the complexity of multilateral negotiations with the EC only complicates balanced and successful agreements.³⁷

Conditionality of legal migration opportunities on cooperation in restricting migration is often criticized: Preferential quota systems were often restricted to countries willing to cooperate on readmission and migration control. In the case of lack of cooperation (such

31 Reslow, *supra* note 23.

32 Chou & Gibert, *supra* note 23; Reslow, *supra* note 23.

33 European Commission, *Study on the links between legal and illegal migration*, Brussels, EU, 2004. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133191c>.

34 A. Serra, "Current immigration debates in Europe: A publication of the European migration dialogue: Spain", in J. Niessen, Y. Schibel, & C. Thompson (eds.), *Current immigration debates in Europe*, Brussels, Migration Policy Group, 2005. Retrieved from http://www.migpolgroup.com/wp-content/uploads/2005/09/141.EMD_Spain_2005.pdf.

35 Reslow, *supra* note 23.

36 Reslow, *supra* note 23.

37 Chou & Gibert, *supra* note 23; Parkes, *supra* note 22.

as Morocco in 2001), countries were 'punished' by lowering the preferential quota.³⁸ However, such conditionality has become only stronger in recent deals.³⁹

In addition, circularity and return of labour migrants were frequently highlighted as problems: Whereas the EU and its member states attempted to base labour migration policies on the condition of circular migration (allegedly to prevent brain drain and to allow for a higher development impact in the countries of origin, but also to reduce migration and the state's responsibilities for reproduction), migrants frequently did not return, for example because structural development in their countries of origin did not take place. While innovative measures were taken to secure or incentivize such return in circular migration deals, problems were not completely solved.

Interestingly, in terms of dealing with highly skilled migrants specifically, the bilateral or multilateral agreements were hardly used: In their policies of selecting and attracting such 'desired' highly skilled migrants, the EU and its member states often acted unilaterally, without consulting much with the countries of origin. This confirms the argument that migration policies have in general not become more restrictive, but rather more selective, with a clear line between 'undesired' and 'desired'.⁴⁰

5.2.3 *Co-development agreements: The incorporation of development aid in migration agreements*

In the context of new migration partnerships, in addition to fighting irregular immigration (both on land and on sea) and offering more avenues for regular migration, attention is also given to development aid and/or programmes aimed at 'dealing with the root causes of migration'. This was no different in the 1990s and 2000s: Development aid was incorporated as a 'carrot' for cooperating governments to also accept the 'stick' approach of restricting migration.

The linking of migration control and development started in 2003 with the inclusion of a migration paragraph (including an obligation of readmission) in the Cotonou agreement between the EU and ACP countries (Africa, the Caribbean and the Pacific). At the end of September 2006, the EU and Mali signed a migration control agreement in exchange for development aid. Under this agreement, the EU promised to grant Mali €426 million over the period 2008-2013, with the funding going mainly into poverty reduction projects,

38 J. Chaloff, & F. Piperno, "International migration and relations with third countries: Italy", in J. Niessen, & Y. Schibel (eds.), *International migration and relations with third countries*, Brussels, Migration Policy Group, 2004. Retrieved from http://www.migpolgroup.com/wp-content/uploads/2016/10/144.Italy__InternationalMigrationandRelationswiththirdcountries_2004.pdf.

39 Bauloz, *supra* note 6.

40 M. Czaika, & H. de Haas, "The effects of immigration policies", *Population and Development Review*, Vol. 39, No. 3, 2013, pp. 487-508.

which should help to better control migratory flows (see also the 2007 pilot project mentioned before). The EU's expectation was that economic growth, productive investment, support of the private development sector and regional integration could substantially boost job creation in Mali and halt the flow of irregular migrants – and also strengthen efforts to fight the networks organizing irregular migrations. Besides Mali and Senegal, Morocco and Mauritania also signed potentially lucrative agreements with the EU.

In addition, individual countries such as France and Spain⁴¹ have offered development aid in exchange for the cooperation of (mainly African) countries of origin in the fight against irregular migration. France, in particular, has a long tradition of linking migration to development policy, known as 'co-development'. This officially means that *they call for an alternative approach: investing in job creation infrastructure in 'hospitable places' via local authorities*.

This aid is mainly allocated to the countries of origin of the main migration flows (often Francophone countries), and is also being instrumentally used to reduce irregular migration pressure.⁴² This French model is strongly connected to specific migration systems and transnational networks of African migrants in France. Co-development policy is thus based on these social networks and existing development initiatives, and aims to use them instrumentally to counter irregular migration.⁴³ The policy is carried out mainly at local and regional government levels, in collaboration with migrant organizations, although the new French migration law of 2006 aims to formalize it on a federal level.

As part of co-development policy, Mali and France established a 'Consultation on Migration', signed in December 2000, which involves an annual bilateral discussion at the ministerial level. It deals with issues such as the integration of Malians in France, the co-management of migration flows to allow migrants to circulate and cooperative development in core emigration localities in Mali to build infrastructure, stimulate job creation and support education, health care and income generation.⁴⁴ Malians abroad are mobilized for their country's economic development; their skills are registered and the information is co-managed by a Franco-Malian committee. A contract with a local Malian bank guarantees loans to small businesses that require additional funding for expansion. The agreement aims at stimulating migrants to return voluntarily and become self-supporting. The funds

41 In 2006, Spain offered the Gambia and Guinea each €5 million in direct development aid, in exchange for signing global migration agreements (involving readmission, migration control, labour migration, etc.).

42 R. Magoni, "International migration and relations with third countries: France", in J. Niessen, & Y. Schibel (eds.), *International migration and relations with third countries: European and US approaches*, Brussels, Migration Policy Group, 2004. Retrieved from http://www.migpolgroup.com/wp-content/uploads/2016/10/144.France_InternationalMigrationandRelationswiththirdcountries_2004.pdf.

43 J. Aumüller, "Migration control through *Codéveloppement*?" in J. Blaschke (ed.), *Migration and political intervention, theories and debates*, Berlin, Europäisches Migrationszentrum, 2004. Retrieved from www.emz-berlin.de/projekte_e/pj41_pdf/Aumueller_Code.pdf.

44 Adepaju, *supra* note 12 and 21.

previously used for forced repatriation from France to Mali were now used to encourage voluntary return in more humane circumstances, while also providing livelihood for the returnees, who were mostly unskilled migrants.

While the shift from restrictive measures to a more facilitating approach (offering development aid and tackling root causes of migration) may seem positive, caution is needed in evaluating these policies, as the increased link between development and migration policy may have harmful long-term effects. For example, conditionality comes back: Making cooperation on migration a condition for gaining development funds could lead to an undesirable situation where the main countries of departure and transit of irregular migrants to Europe secure extra funds, while other – possibly poorer – countries without direct migration towards Europe are cut on development aid. In the new EU Migration Partnership Framework, conditionality is extremely clear.⁴⁵ This reflects recurrent issues with the intertwining of migration and development aid. France's co-development policy seems to have contributed to an allocation of development funds with a bias in favour of the main emigration countries instead of to the poorest countries, and the total budget spent on development is relatively low.⁴⁶ In 2003 the UK and Spain proposed to the EC to take punitive measures (mainly cutting donor money) against those countries that do not actively collaborate in the fight against irregular migration. However, other member states objected and a much watered-down version of the initial proposal was accepted instead.⁴⁷ In addition, Betts and Milner⁴⁸ show how general refugee funds – such as that of the UN High Commissioner for Refugees – were receiving less, because European countries were increasingly financing the refugee protection programmes of individual African countries. This not only hampers the effectiveness of refugee protection, but also leads to competition between African countries for donor money. On the other hand, the link between migration and development aid can also have positive effects. In Spain, migration pressure in the 2000s put the whole African continent on the map, causing it to triple its development budget for Africa in two years, reaching €600 million in 2006.⁴⁹ Spain not only increased its budget for migrant-sending (transit) countries, but it was also supporting various regional and global funds.

45 Bauloz, *supra* note 6.

46 Magoni, *supra* note 42.

47 D. Flynn, 'International migration and relations with third countries: the United Kingdom', in J. Niessen, & Y. Schibel (eds.), *International migration and relations with third countries*, Brussels, Migration Policy Group, 2004, p. 8. Retrieved from www.migpolgroup.com/multiattachments/2575/DocumentName/UKforeignrelationsfullreport.pdf.

48 Betts & Milner, *supra* note 18.

49 M. Moratinos, *Discurso del Ministro Español de Asuntos Exteriores y de Cooperación en la Conferencia Europa-África sobre Migración y Desarrollo*, Tripoli, 22 November 2006, Madrid, Ministerio de Asuntos Exteriores, 2006. Retrieved from www.maec.es/es/MenuPpal/Actualidad/Declaraciones+y+discursos/Discurso+Ministro20061122.htm.

Besides the possible conditionality problems, it is alarming that – under the cover of ‘co-development’ – an increasing part of Europe’s official development aid is spent on migration control. For example, the Netherlands spent official development funds on capacity building of the Ghanaian government, directly related to migration control.⁵⁰ The 2006 French-Senegalese bilateral agreement also provides an example of development money being spent on goals such as modernization of the Senegalese police apparatus (aimed at controlling irregular migration) and information campaigns against irregular migration. The same goes for Spain’s agreements with Gambia and Guinea, in which the development paragraph included measures such as capacity building of migration-related institutions, development of a national migration policy, information campaigns on migration and recruitment schemes. Additionally, various countries paid for humanitarian aid to repatriated migrants with development funds for programmes. The humanitarian consequences of the EU’s migration policy are thus dealt with using official development aid.⁵¹

Finally, attacking ‘root causes’ in terms of economic development in the countries of origin has long been argued to be a flawed approach to reducing migration: As researchers have argued, economic development will only increase aspirations and emigration flows in emigration regions, at least for a certain period of time.⁵²

5.3 DISCUSSION: FROM DISCOURAGEMENT POLICIES TO OPPORTUNITIES FOR REGULAR MIGRATION, SETTLEMENT AND JOB CREATION

In conclusion, bilateral and multilateral agreements signed by the EU, or its individual member states, with migrant-sending and transit countries are not new: We can learn from experiences with such agreements since the 1990s. They have passed through various stages, and have covered various goals: controlling migration (focusing on fighting irregular migration, readmission and repatriation), encouraging legal migration (by using migration quota, circular migration) and/or stimulating co-development.⁵³ Often these goals are combined in one agreement: With the main goal being restricting and controlling (irregular) migration (the ‘stick’), Europe provides some legal opportunities for labour migration

50 Dutch Ministry of Foreign Affairs, *Kamerbrief inzake derde rapportage migratie en ontwikkeling*, 2006. Retrieved from <https://www.rijksoverheid.nl/documenten/kamerstukken/2010/05/21/kamerbrief-inzake-derde-rapportage-migratie-en-ontwikkeling>.

51 A. Zoomers, & G. Nijenhuis, “Does migration lead to development? Or is it contributing to a global divide?” *Societies*, Vol. 2, 2012, pp. 122-138. Retrieved from www.mdpi.com/journal/societies.

52 See for example H. De Haas, “Turning the tide? Why development will not stop migration”, *Development and Change*, Vol. 38, No. 5, 2007, pp. 819-841.

53 A. Adepoju, T. van Naerssen, & A. Zoomers (eds.), *International migration and national development in sub-Saharan Africa. Viewpoints and policy initiatives in the countries of origin*, Afrika-Studiecentrum Series Vol. 10. Leiden/Boston, Brill publishers, 2008.

and/or development aid as a 'carrot' to ensure cooperation. Since these earlier migration deals and given the current idea of a 'migration crisis', the externalization of the EU's migration control has only intensified: Europe's migration policy is largely carried out in transit and emigration countries.⁵⁴ While current agreements (and plans for new agreements) still maintain 'carrots' for transit and emigration countries, the restrictive aspect and the goal of limiting migration have become even more dominant. In the older agreements, the rights of refugees were not debatable, at least in theory; nowadays in the EU-Turkey deal even the regular entry opportunities for refugees to the EU are under discussion, and only limited numbers of accepted refugees are taken (and even in that process member states are not fulfilling their duties in terms of quotas). In this process, creating legal avenues for labour migrants is even further away – except for the highly skilled and other 'desired' migrants.

Part of the problem with the current EU-Turkey deal is in its implementation and the continuing unwillingness of EU member states to fulfil their promises of hosting refugees. A sustainable EU approach to migration management would need to move from shifting responsibilities through returns to third countries, towards fairly sharing protection responsibilities both within the EU and globally.⁵⁵

The multilateral character of current deals, set within the current EU political landscape, makes implementation even more complex as compared to the previous deals that were more often bilateral and drafted during less-complex political and economic times for the EU. As Parkes⁵⁶ argues on the EU mobility partnerships of 2008: 'The bulk of the Partnerships relies upon commitments put forward by a coalition of willing EU Member States prepared to commit only limited resources and to migration questions of their choosing'.⁵⁷ Very similar issues are now seen in a more pressing way with the EU-Turkey deal.

The present EU migration policy – in which the emphasis lies on guarding the external borders and concluding 'deals' with third countries (such as Turkey) to limit the influx – is claimed by some people as a success. This success is measured against the falling number of migrants coming in. In exchange for large sums, countries such as Libya, Niger and Chad are to help in holding back and accommodating migrants. To the extent that refugees and migrants nevertheless succeed in entering the EU, they are held in camps for 'screening', after which they are sent back or 'admitted and placed' via a 'top-down' procedure in one of the locations selected for the purpose. Looking at the outcomes, however, the present action plan for controlling migration is contributing to a worsening situation in many respects. The European migration deals are illegal and immoral in several respects. The plan does not offer a solution, but makes problems less visible and is itself the cause of

54 Boswell, *supra* note 13; Samers, *supra* note 13.

55 Alpes *et al.*, *supra* note 3.

56 Parkes, *supra* note 22.

57 Parkes, *supra* note 22, p. 328.

problems. Thousands of migrants die annually during the hazardous crossing: The number of drowned persons still amounts to many thousands. Many become the victims of people traffickers who dump migrants in the sea or shut them up in trucks. With the sharpening of the policy and the raising of external borders, migrants take ever more risks and are increasingly thrown back on people smugglers who help them to land in Europe for a large sum. While, on the one hand, investments are made in raising barriers to entry, on the other hand, NGOs are investing in a whole infrastructure to rescue migrants and refugees. At the spots where refugees and migrants want to enter, 'camps' spring up on the borders of Europe, where they bivouac for a long time in degrading conditions until they see a possibility to 'escape'. It is sometimes not during the preceding period (through wars etc.) but precisely during this period of reception that people are traumatized. Irrespective of who they are or what is their background, people live in appalling conditions in a confined space with no prospects, often also in a hostile environment. People are 'sent back' after years of processing or settled without their consent in places where it is difficult to build up a normal existence. Not only migrants but also 'locals' want to have a say in their own lives. In the present system, however, no account at all is taken of the migrants' aspirations and preferences, or of the question of what contribution they can make. The same applies to the receiving side, where the local population is given insufficient say and granted insufficient time to become accustomed to newcomers.

Up to now, these migration deals have not been able to turn the tide – and solve the European migration crisis. European migration policies are wrongly focusing on irregular migration, readmission and repatriation. Gigantic sums are spent on border controls and Frontex ships, reception camps and detention centres, asylum procedures, deportations and reception centres – not to mention rescuing people from the sea, despite the fact that the migrants continue 'to stream in'. According to Bauloz,⁵⁸ 'the EU Migration Partnership Framework is inherently at odds with the sustainable development goals which have been adopted by all EU Member States. Rather than pursuing sustainable development through, *inter alia*, the facilitation of orderly, safe, regular and responsible migration and mobility of people (target 10.7), the Mobility Partnership Framework (MPF) uses sustainable development as a leverage for stemming migration'.

In order to find a solution for the European migration crisis and achieving the sustainable development goals, we argue that, in the framework of the new migration policy, European funds should be used – not for the closure of borders or readmission procedures, but instead for the creation of a jobs plan from which both migrants and 'native groups' could benefit. Some of the funds could be invested in the development of employment and infrastructure *in Africa and Asia* (regions that have to contend with forced migration and/or have to fulfil a function in the reception of refugees from neighbouring countries),

58 Bauloz, *supra* note 6.

while ensuring at the same time that European investments will not lead to 'land grabbing'. The local population must be kept well informed and in good time and also have a say in the type of investments that are made (and the employment that is created). Instead of concluding big 'deals' with national governments that attach little value to human rights (such as Turkey and Chad) in order to stop migration, it would be more useful to take a chance with local authorities (municipalities and provinces) who are interested in playing a role in the reception of migrants in dialogue with the population, in exchange for additional investments in employment and infrastructure.

The programme can also be directed at rural areas *within Europe* that suffer from population loss and ageing and are prepared to take in refugees and migrants. In countries such as Spain, Portugal, France and Greece (and also the Netherlands) many provinces and municipalities have to contend with depopulation and ageing. The attraction of migrants can help to turn the tide, but investments will need to be made. Certainly, if the 'hosting' of migrants is accompanied by the receipt of a bonus in the form of investments in jobs, training facilities, a better infrastructure or a wider range of facilities, the willingness to host migrants and/or refugees will increase, and there will be better opportunities for integration. If the local population has a say and the arrival of migrants also offers clear advantages for them, the prospects for integration will be much greater than in the present system where there is often a wide 'gap' between the decision makers (policy makers – politicians) and the civil population. Instead of punishing local authorities 'top down' when they fail to adhere to quotas imposed from above, a 'bottom up' policy, in which citizens and local authorities are rewarded for initiatives in which the expansion of employment and integration are combined, will probably be many times more successful. Local authorities – and local communities who want to welcome newcomers – should be rewarded with investments in jobs, facilities or infrastructure. All this will help EU migration policies to become more effective and humane, and also become better in line with the sustainable development goal of 'leaving no one behind'.

5.4 FINAL REFLECTIONS

Discussions about tailor-made migration deals could help to solve the European migration crisis are very much dominated by two questions: First, how can we control migration and prevent an inexhaustible stream of migrants and refugees finding their way from Africa and Asia to Europe? Secondly, how can we profit from migration or, in any event, avoid the influx of migrants at the expense of our prosperity? Those in particular who see a direct relationship between migration, islamization and terrorism believe that migration constitutes a threat to our society; others, who are more open to the admission of migrants, try

to show their economic value or appeal to moral obligations and migrants' rights. The large majority is probably somewhere in between these extremes.

Until now, migration partnerships aimed at controlling or stopping migration have not been able to solve the migration crisis. The manner in which migrants and refugees are dealt with is at odds with global sustainability objectives ('leaving no one behind') and criteria for 'good governance'. People are shut up for years at the gates of Europe with no prospect of a decent existence. The procedure is not transparent: A large corps of officials – assisted by interpreters – is engaged in screening people on the basis of hard criteria, but much of the work is done behind closed doors. The rights of migrants are determined by where they come from (what country) and little is asked about their qualifications, their preferences or where they could best thrive. Migrants – and deportees – are treated as playthings, and when they finally arrive at the place of destination after years (in the most favourable cases), it is usually not the place of their first choice. Migrants and the host population must have a greater say. If they can have an influence on where they may live and work – and also if the local population can benefit from additional jobs and facilities – that can only further a successful integration. In brief, not only screen migrants and refugees for origin and status, but also take motivation and qualities into account and give people a say in determining their future. Stop shutting migrants up in camps for years, use the money for additional infrastructure and extra jobs, investments from which the host population will also profit. Ensure that migrants find their way to places and jobs where they can fully realize themselves.

It is striking that no one has so far complained about the waste of money, while only limited results are being achieved. Gigantic sums are spent on border controls and Frontex ships, reception camps and detention centres, asylum procedures, deportations and reception centres – not to mention rescuing people from the sea, despite the fact that the migrants continue 'to stream in'. It is time for a fresh approach, giving priority to steering migration flows in the 'right direction' (instead of stopping migration) and providing legal ways for migration by investing the money in a jobs plan and new infrastructure: 97% of the world population does not wish to emigrate and prefers to stay where it is. Investment in additional employment and infrastructure in 'hospitable places' (via local authorities) appears to be a better way than concluding deals with governments of unsafe countries. We propose to use migration deals to ensure that people within and outside the EU 'have the right to remain' and that migrants are guided in the direction where they are welcome and are able to work towards the future.

REFERENCES

Adepoju, A., *Regional Migration Processes, Multilateral and Bilateral Migration Agreements in Sub-Saharan Africa*. IOM, Berne Initiative Policy Research Papers. Berne, International Organisation for Migration, 2004.

Adepoju, A., "Review of research data on trafficking in Sub-Saharan Africa", *International Migration*, Vol. 43, No. 1-2, 2005, pp. 75-98.

Adepoju, A., *The challenge of labour migration flows between West Africa and the Maghreb*, ILO Migration Research Papers, Geneva, International Labour Organisation, 2006.

Adepoju, A., *Highly skilled migration: Balancing interests and responsibilities and tackling brain drain*, Brussels, Civil Society Day, Global Forum on Migration and Development, 2007.

Adepoju, A., van Naerssen, T., & Zoomers, A. (eds.), *International migration and national development in sub-Saharan Africa. Viewpoints and policy initiatives in the countries of origin*, Afrika-Studiecentrum Series, Vol. 10, Leiden/Boston, Brill publishers, 2008.

Adepoju, A., van Noorloos, F., & Zoomers, A., "Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review", *International Migration*, Vol. 48, No. 3, 2009, pp. 42-75.

Agunias, D., *Linking temporary worker schemes with development*, Washington, Migration Policy Institute, 2007. Retrieved from <http://migrationinformation.org/Feature/display.cfm?id=576>.

Alpes, M. J., Tunaboylu, S., & van Liempt, I., Human rights violations by design: EU Turkey statement prioritises returns from Greece over access to asylum, policy brief 2017/29, Migration Policy Centre, 2017a. Retrieved from <http://cadmus.eui.eu/handle/1814/48904>.

Alpes, M. J., Tunaboylu, S., Ulusoy, O., & Hassan, S., *Post-deportation risks in Turkey: The EU-Turkey-Statement as a test case for the externalization of protection responsibilities*, EUI Policy Brief 2017/30, 2017b. Retrieved from <http://cadmus.eui.eu/handle/1814/49005>.

Amnesty International, *Spain/Morocco: The authorities must be held accountable for the violation of migrants' rights*, Press Release, 26 October 2005.

Aumüller, J., "Migration control through *Codéveloppement?*" in *Migration and Political Intervention, Theories and Debates*, Berlin, Europäisches Migrationszentrum, 2004. Retrieved from www.emz-berlin.de/projekte_e/pj41_pdf/Aumueller_Code.pdf.

Awad, I., *Comentarios sobre el tema "Acuerdos y programas de migración temporal"*. Presented at the Encuentro Iberoamericano sobre Migración y Desarrollo (4th part), Madrid, 18-19 July 2006. Retrieved from <http://www.rcmvs.org/documentos/SEGIB/8%20cuarta-Parte.pdf>.

Balch, A., *Managing labour migration in Europe: Ideas, knowledge and policy change*, Manchester, Manchester University Press, 2013.

Bauloz, C., The EU Migration Partnership Framework: An External Solution to the Crisis? *EU Migration Law Blog*, 31 January 2017. Retrieved from <http://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/>.

Belguendouz, A., *Enjeux Migratoires Maghreb-Europe-Afrique Subsaharienne: Un regard du Sud*. Sale, Imprimerie Beni Snassen, 2006.

Betts, A., & Milner, J., *The externalisation of EU asylum policy : The position of African states*. Working Paper No. 36. Oxford, Oxford University, Centre on Migration, Policy and Society, 2006. Retrieved from https://www.compas.ox.ac.uk/media/WP-2006-036-Betts-Milner_EU_Asylum_Policy_Africa.pdf.

Bigo, D., "Security and immigration: Toward a critique of the governmentality of unease", *Alternatives*, Vol. 27, No. 1, 2002, pp. 63-92.

Boswell, C., "The 'external dimension' of EU immigration and asylum policy", *International Affairs*, Vol. 79, No. 3, 2003, pp. 619-638.

Cassarino, J., "The 'new approach' to the readmission of illegal persons: Operability versus transparency", *This Century Review*, Vol. 01, 2007.

Chaloff, J., & Piperno, F., "International migration and relations with third countries: Italy", in J. Niessen & Y. Schibel (eds.), *International migration and relations with third countries*. Brussels, Migration Policy Group, 2004. Retrieved from www.migpol-group.com/multiattachments/2571/DocumentName/Italyforeignrelationsfullreport.pdf.

Chou, M., & Gibert, M., "The EU-Senegal mobility partnership: From launch to suspension and negotiation failure", *Journal of Contemporary European Research*, Vol. 8, No. 4, 2012, pp. 408-427.

Czaika, M., & de Haas, H., "The effects of immigration policies", *Population and Development Review*, Vol. 39, No. 3, 2013, pp. 487-508.

Czaika, M., & Hobolth, M., "Do restrictive asylum and visa policies increase irregular migration into Europe?" *European Union Politics*, Vol. 17, No. 3, 2016, pp. 345-365.

De Haas, H., *Trans-Saharan migration to North Africa and the EU: Historical roots and current trends*. Washington, Migration Policy Institute, 2006. Retrieved from <http://migrationinformation.org/Feature/display.cfm?id=484>.

De Haas, H., "Turning the tide? Why development will not stop migration", *Development and Change*, Vol. 38, No. 5, 2007, pp. 819-841.

De Haas, H., "The determinants of international migration. Conceptualising policy, origin and destination effects", University of Oxford International Migration Institute Working Paper 32, April 2011.

Delicato, V., *National legislation and good practices in the fight against illegal migration – the Italian model*, Rome, CARDS Programme, 2004.

Directorate-General for External Policies of the Union, *Analysis of the external dimension of the EU's asylum and migration policies*, Brussels, European Parliament, DGEPU, Directorate B, Policy Department, 2006. Retrieved from www.state-watch.org/news/2006/jul/eu-res-study-ext-imm.pdf.

Dutch Ministry of Foreign Affairs, *Kamerbrief inzake derde rapportage migratie en ontwikkeling*, 2006. Retrieved from www.minbuza.nl/nl/actueel/brievenparlement,2006/08/Kamerbrief-inzake-derde-rapportage-migratie-en-ont.html.

Dutch Parliament, *Verslag algemeen overleg vaste commissie voor Justitie*, 20 March 2006. www.parlando.sdu.nl.

EC (European Commission), *Study on the links between legal and illegal migration*. Brussels, EU, 2004a. Retrieved from http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0412en01.pdf.

ANNELIES ZOOMERS, FEMKE VAN NOORLOOS AND ILSE VAN LIEMPT

EC, *Report of Technical Mission to Libya on illegal immigration*, 22 November to 6 December 2004, Memo 7753/05, Brussels, EU, 2004b.

EC, *Visit to Ceuta and Melilla: Report of technical mission to morocco on illegal immigration*, 7-11 October 2005, Memo/05/380, Brussels, EU, 2005.

EC, *Circular migration and mobility partnerships between the European Union and third countries*, Memo/07/197, Brussels, EU, 2007.

EC Communication from the Commission to The European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, Communication 7/6/2016, Strasbourg, EC, 2016.

EMN (European Migration Network), *Irregular migration in Italy. Illegally resident Third Country Nationals in Italy*, Rome, European Migration Network, 2005. Retrieved from www.emnitaly.it/down/pilotstudy2-english.pdf.

EUbusiness, 2006. Retrieved on March 2008 www.Eubusiness.com.

Flynn, D., "International migration and relations with third countries: The United Kingdom", in J. Niessen & Y. Schibel (eds.), *International migration and relations with third countries*, Brussels, Migration Policy Group, 2004. Retrieved from www.migpolgroup.com/multiattachments/2575/DocumentName/UKforeignrelationsfullreport.pdf.

Hamilton, K., & Yau, J., *The global tug-of-war for health care workers*, Washington, Migration Policy Institute, 2004. Retrieved on June 2007 <http://migrationinformation.com/Feature/print.cfm?ID=271>.

IOM (International Organisation for Migration), *2003 World Migration Report*. Geneva, IOM, 2003.

IOM, *Towards development-friendly migration policies and programmes: Some concrete examples from European member states*. Geneva, IOM, 2006. Retrieved from https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/research/CMD15160306.pdf.

Leung, M. W. H., "Migration, diaspora and development: The case of the People's Republic of China", in A. Adepoju, T. van Naerssen & A. Zoomers (eds.), *International migration and national development in sub-Saharan Africa*, Leiden, Brill Publishers, 2007.

Liempt, I. van, Alpes, J., Hassan, S., Tunaboylu, S., Ulusoy, O., & Zoomers, A., *Evidence-based assessment of migration deals: The case of Turkey*, Final report NOW, Utrecht University, 2017.

Magoni, R., "International migration and relations with third countries: France", in J. Niessen & Y. Schibel (eds.), *International migration and relations with third countries: European and US approaches*, Brussels, Migration Policy Group, 2004. Retrieved from www.migpolgroup.com/multiattachments/2567/DocumentName/Franceforeignrelations-fullreport.pdf.

Martin, P., Martin, S. & Best, P. "Best practices options: Mali", *International Migration*, Vol. 40, No. 3, 2002, pp. 87-102.

Messner, D., "The European Union: Protagonist in a multilateral world order or peripheral power in the Asia-Pacific Century?", *Internationale Politik und Gesellschaft*, Vol. 1, 2007, pp. 11-27.

Migration Policy Institute, 2017. Retrieved on 14 November 2017 www.migrationpolicy.org.

Ministerio de Relaciones Exteriores Ecuador, Boletín de Prensa No. 246, 2005.

Moratinos, M., *Discurso del Ministro Español de Asuntos Exteriores y de Cooperación en la Conferencia Europa-África sobre Migración y Desarrollo*, Tripoli, Madrid, Ministerio de Asuntos Exteriores, 2006a. Retrieved on 22 November 2006 www.maec.es/es/MenuPpal/Actualidad/Declaraciones+y+discursos/Discurso+Ministro20061122.htm.

Moratinos, M., "España: una nueva política exterior hacia África", *Revista Política Exterior*, Madrid, Ministerio de Asuntos Exteriores, 2006b. Retrieved on 01 May 2006 www.maec.es/es/MenuPpal/Actualidad/Declaraciones+y+discursos/ESPAÑA+UNA+NUEVA+POLITICA+EXTERIOR+HACIA+AFRICA+Revista+Politica+Exterior.htm.

Müssig, G., *Acuerdos y programas de migración temporal*. Presented at the Encuentro Iberoamericano sobre Migración y Desarrollo (4th part), Madrid, 18-19 July 2006. www.crmsv.org/pagina_novedades.htm.

Noll, G., "The Euro-African migration conference: Africa sells out to Europe", 2006. Retrieved on 27 April 2007. Retrieved from www.opendemocracy.net/people/migrationeurope/migration_conference_3738.jsp.

Nwogu, V., *Trafficking of persons to Europe: The perspective of Nigeria as a sending country*. Presented at the ASI & OIKOS Conference on Trafficking and migration: A human rights approach, NPC (Nigeria), LO/PATWA, 2005. https://books.google.nl/books?id=8u0YBwAAQBAJ&pg=PA179&lpg=PA179&dq=Nwogu,+V.,+Trafficking+of+persons+to+Europe:+The+perspective+of+Nigeria+as+a+sending+country.+Presented+at+&source=bl&ots=MCOPz_zd-L&sig=VGpbasKPKSkHr_2iFuvAV6sMag8&hl=nl&sa=X&ved=0ahUKEwi94pytwKXZAhVPaFAKHT8IAjYQ6AEILTAB#v=onepage&q=Nwogu%2C%20V.%2C%20Trafficking%20of%20persons%20to%20Europe%3A%20The%20perspective%20of%20Nigeria%20as%20a%20sending%20country.%20Presented%20at&f=false.

Nwogu, V. I. "Nigeria: Human trafficking and migration", *Forced Migration Review*, 25, 2006, pp. 32-33. Retrieved on May 2007 www.fmreview.org/text/FMR/25/20.doc.

OECD (Organisation for Economic Co-operation and Development), *Migration for Employment: Bilateral agreements at a crossroads*, Paris, OECD, 2004.

O'Neil, K., *Brain drain and gain: The case of Taiwan*, Washington, Migration Policy Institute, 2003. Retrieved from www.migrationinformation.org/Feature/display.cfm?ID=155.

Oropenza, J. A., *Gobernabilidad migratoria: Integración, regularización y programas de migración laboral temporal*. Presented at the Encuentro Iberoamericano sobre Migración y Desarrollo (4th part), Madrid, 18-19 July 2006. Retrieved from www.crmsv.org/pagina_novedades.htm.

Ortega Pérez, N., *Spain: Forging an immigration policy*, Washington, Migration Policy Institute, 2003. Retrieved from www.migrationinformation.org/Profiles/display.cfm?ID=97.

OSCE (Organisation for Security and Cooperation in Europe), *Handbook 2006*. Chapter IX. Interstate Cooperation, Vienna, OSCE, 2006. <https://www.osce.org/eea/19242?download=true>.

Padilla, B., *Latin American immigration to Southern Europe*. Washington, Migration Policy Institute, 2007. Retrieved from www.migrationinformation.org/Feature/display.cfm?id=609.

Parkes, R., "EU mobility partnerships: A model of policy coordination?" *European Journal of Migration and Law*, Vol. 11, 2009, pp. 327-345.

PICUM (Platform for International Cooperation on Undocumented Migrants), Newsletter, February 2007a. Retrieved on March 2008 www.picum.org.

PICUM, Newsletter, May 2007b. Retrieved on March 2008 www.picum.org.

Quinn, E., *Research study 3: Return migration from Ireland*, Dublin, European Migration Network, 2007. Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/return-migration/ie-report14-2_en.pdf.

Ratha, D., & Shaw, W., *Causes of South-South migration and its socioeconomic effects*, Washington, Migration Policy Institute, 2007. Retrieved from www.migrationinformation.org/Feature/display.cfm?id=647.

Reslow, N., "Deciding on EU external migration policy: The member states and the mobility partnerships", *European Integration*, Vol. 34, No. 3, 2012a, pp. 223-239.

Reslow, N., "The role of third countries in EU Migration Policy: The mobility partnerships", *European Journal of Migration and Law*, Vol. 14, 2012b, pp. 393-415.

Samers, M., "An emerging geopolitics of 'illegal' immigration in the European Union", *European Journal of Migration and Law*, Vol. 6, 2004, pp. 27-45.

Schapendonk, J., *Turbulent trajectories: Sub-Saharan African migrants heading North*. PhD thesis Radboud University Nijmegen, 2011. Retrieved from <http://repository.uibn.ru.nl/bitstream/handle/2066/91326/91326.pdf>.

Serra, A., "Current immigration debates in Europe: A publication of the European migration dialogue: Spain", in J. Niessen, Y. Schibel & C. Thompson (eds.), *Current immigration debates in Europe*, Brussels, Migration Policy Group, 2005. Retrieved from <http://www.isp.org.pl/files/10818642280206864001128350820.pdf>.

UNHCR, 2017. Retrieved on 14 November 2017 <https://data2.unhcr.org>.

ANNELIES ZOOMERS, FEMKE VAN NOORLOOS AND ILSE VAN LIEMPT

Wabgou, M., "Governance of migration in Senegal: The role of government in formulating migration policies", in A. Adepou, T. van Naerssen & A. Zoomers (eds.) *International Migration and National Development in sub-Saharan Africa*, Leiden, Brill Publishers, 2007.

Woud, F., *Terugkeer in het kader van internationale handelsverdragen: het geval: Cotonou*. In Adviescommissie voor Vreemdelingenzaken, Advies terugkeerbeleid, 2004.

Zoomers, A., & Nijenhuis, G., "Does migration lead to development? Or is it contributing to a global divide?" *Societies*, Vol. 2, 2012, pp. 122-138. Retrieved from www.mdpi.com/journal/societies.

6 ALBANIAN MASS MIGRATION: IDENTIFYING POLICY AND LEGAL GAPS

Irina Kotenko and Ildir Peçi

6.1 INTRODUCTION

From 2014, migration authorities of several EU countries have observed a severe increase in the amount of asylum seekers arriving from the Western Balkans, mostly from Albania.¹ The rise in the number of Albanian refugees was mostly reported in European countries, such as the Netherlands and Germany. Despite a recent decrease in asylum applications from Albanians, in 2017 they still hit the lists of nationalities which most often apply for asylum.² In 2016 Albanians were included in the lists of five main citizenships of asylum applicants.³ In 2017 Eurostat reported that in the first quarter of 2017 Albanians were still on the third place among first-time asylum applicants in Germany and France.⁴

The number of Albanians seeking asylum increased on the background of events of 2015-2016 when an unprecedented number of Syrian refugees flooded Europe. An unexpected exodus of Albanians complicated an already severe situation within the host countries. This attracted attention within the European refugee crisis because in the period 2014-2016 Albanians did not suffer from war and political or other forms of persecutions as Syrian refugees did.

However, Albania, which traditionally had a long history of migration, in the recent decades has especially suffered from departure of young people towards Europe, the United States or Canada. Reasons for massive migration of young population are mostly of economic nature: poor economic situation, high unemployment and lack of qualitative educational institutions. An additional factor is better quality of training and educational

1 “Albanezen grootste groep die nu asiel aanvraagt” NOS. 28.03.2016. Retrieved from https://nos.nl/artikel/2095645-albanezen-grootste-groep-die-nu-asiel-aanvraagt.html?_sp=d4b9bf37-3a17-4fa2-bc9d-3f38d95fc71e.1502449463492.

2 See more at Fatjona Mejдини, Vincent Triest. “Albanian Asylum-Seeker Numbers in Germany Rise Again” *BalkanInsight*, 20 October 2016. www.balkaninsight.com/en/article/large-number-of-albanians-still-asking-for-asylum-in-germany-10-19-2016#sthash.CYXhrNct.dpufIn.

3 Eurostat Online Database. Retrieved from [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Five_main_citizenships_of_\(non-EU\)_asylum_applicants,_2016_\(number_of_first_time_applicants,_rounded_figures\)_YB17.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Five_main_citizenships_of_(non-EU)_asylum_applicants,_2016_(number_of_first_time_applicants,_rounded_figures)_YB17.png).

4 Eurostat Online Database. Retrieved from http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Thirty_main_citizenships_of_first_time_asylum_applicants_by_destination_country_in_the_EU_28,_1st_quarter_2017_update.png.

opportunities that Albanian families think or hope they would find abroad. Therefore, people have been leaving Albania to economically more prosperous countries in order to find job or, in the case of young people, to receive their professional education or vocational training. Despite recent patterns of return migration to Albania (mainly due to the world economic crisis in 2008 and later on the Greek economic falldown), many Albanians who pursued their education abroad still choose to settle down in the host countries and do not intend to return to their country.⁵

Most Albanian asylum seekers are motivated to seek asylum protection by the very same reasons which wheeled forward their economic migration from Albania. Attempts to categorize current forms of emigration (including asylum seeking) are among others reflected in strategic documents of the government of Albania in parts where it refers to migration and human mobility.⁶ Emigration is connected to various targets, such as health, labour rights, trafficking and remittances.⁷

This chapter seeks to tackle the bottlenecks of the phenomenon of international asylum emigration of Albanians. Since the authors believe that a more in-depth understanding of push factors undoubtedly contributes to shaping a better legal and policy framework in reacting to and preventing the phenomenon, the first part of the chapter will be devoted to the analysis of general factors, which contributed to mass exodus of asylum seekers.

To this end, the chapter will firstly give an overview of the push factors relevant to the increase in asylum seekers from Albania to Europe and further will provide categorization of reasons for a choice of asylum as a means of emigration. In doing so, the authors will base themselves in already existing research and reports conducted by scholars and civil society organizations. Some national and international institutions have also published several studies and documents containing data, analysis and trends on migrations. Some of them worth mentioning from the very outset are the Ministry of Internal Affairs (MIA) report *Albania: Extended Migration Profile 2012-2014* (published in 2015); migration profile of the Republic of Albania for the year 2015 (published in December 2016); the International Organization of Migration (IOM) report *Mapping Major Migration Flows over the Territory of Western Balkan Countries, 2009-2013* (published in 2014).

5 “Return migration and reintegration in Albania”, *Albanian Institute of Statistics (INSTAT) International Organization of Migration National Survey*, 2013, p 9. Retrieved from www.albania.iom.int/publications/reports/Return%20Migration%20and%20Reintegration%20in%20Albania%202013.pdf. The national survey provides figures on the return migration to Albania. It observes that a total of 133,544 Albanians returned home in the course of 2009–2013 (observation period).

6 Government of Albania, *National Strategy for Development and Integration, 2015-2020*. Retrieved from www.qbz.gov.al.

7 IOM, “Following up on the 2030 agenda for sustainable development’s commitments towards migration: Challenges and opportunities”, *Background paper*, 2016, p. 1.

Secondly, this chapter will give an overview of and analyse the gaps in the legal and policy framework existing in Albania with respect to international migration. Some general conclusions will be formulated in the last part of the chapter.

6.2 GENERAL PUSH FACTORS OF ASYLUM SEEKING FROM ALBANIA

Since the fall of communism in the early 1990s, Albania has become a country with one of the highest emigration rates in Europe. In the period between 1990 and 2000 about one-third of Albanian population was living abroad, mostly in the neighbouring European countries of Greece and Italy. In the period before 2010, emigration had become a main reason of population decline and its average rate was estimated as five times higher than the emigration rate from European countries.⁸ Even today Albania's emigration rate remains one of the highest in the world accounting for nearly 39% of the total population of the country in 2015.⁹ The core reasons for Albanian emigration were analysed in a number of migration studies and all lay in the areas of economy, social instability and hectic political situation: poor employment prospects, lack of educational opportunities, poor living conditions, no better opportunities for future and lack of social security and stability.¹⁰

From 2014, a high number of Albanians seeking refuge in Western European countries, including Germany and the Netherlands, has become a matter of special importance and concern.¹¹ A special feature of this phenomenon is that this group of asylum seekers are not running from war or political prosecution or even extreme poverty. The reasons for such a drastic increase were suggested in a number of studies, including the report of European Asylum Support Office¹² and the study conducted by the Hanns-Seidel Foundation.¹³ Both working papers lay out basic push factors which have driven a mass departure of Albanians seeking asylum.

8 K. Barjaba, "Migration and ethnicity in Albania: Synergies and interdependencies", *Brown Journal of World Affairs*, Vol. XI, No. I, Summer/Fall 2004, p. 4.

9 UNDESA, *Trends in International Migrant Stock: The 2015 revision* (United Nations database, POP/DB/MIG/Stock/Rev.2015), 2015.

10 R. King, & J. Vullnetari, 'Migration and Development in Albania', *Sussex Centre for Migration Research*, Dec Working Paper C5, 2003; see also K. Barjaba, "Migration and ethnicity in Albania: Synergies and interdependencies", *Brown Journal of World Affairs*, Vol. XI, No. I, Summer/Fall 2004.

11 *Supra* note 1.

12 European Asylum Support Office, *Asylum applicants from the Western Balkans: Comparative analysis of trends, push-pull factors and responses* (Update), May 2015, p. 13.

13 Hanns-Seidel Foundation, *Comprehending Albanian Migration to Germany in the period 2014-2016*, *Berlin process series Working paper*, Migration, February 2016, p. 8.

In attempting to analyse an unusual increase in the asylum-seeking trips from Albania, the above-mentioned studies accentuate the following main push factors which drive the population to seek shelter in European countries:

(i) Labour market situation in Albania was severely affected by transition from centralized planned economy to free market.¹⁴ In the first years after collapse of the communist regime in Albania (early 1990s), most of the state-owned enterprises underwent bankruptcy and failed to provide working places. Public industrial sectors such as textile, mining and chemical industry were hit the most.¹⁵ During the past two decades, Albania has experienced a constant growth in unofficial employments in the private sector (up to 42% of unofficial 'self-employment', especially in the agricultural sector, where it reaches 95%).¹⁶

One of the specifics of Albanian labour market is that approximately 90% of registered companies are family owned and employ only one to four family members with no official labour contract (hence social security benefits); thus, only the rest of the companies constitute an 'open' labour market where employment outside of family connections can be sought.¹⁷ Political affiliations also play a role in employment in the public sector, where ruling party members or people loyal to a current ruling party receive a significant advantage in seeking and obtaining employment. Promising of jobs has become a powerful 'currency' for local politicians in their election campaigns.

Currently, the labour market is characterized by severe unemployment rate with job opportunities mainly created within and around central municipal areas of Tirana, Durres and Elbasan.¹⁸ Young people are the most vulnerable group in the labour market. Not only employment rates are high among the young age group,¹⁹ but a delay in entry into the workforce constitute a serious disadvantage and has a negative impact on processes aiming to combat poverty and reach social stability.²⁰ Considering that the workforce in Albania is in principle 'young', with over 1 million of inhabitants between 15 and 64 years old, the employment of young people remains a matter of primary concern.²¹

Furthermore, such factors as high level of corruption, importance of unofficial 'connections' for finding a job, nepotism (the Albanian Institute of Statistics [INSTAT] indicates

14 INSTAT, Labour market dynamics 2001-2011, 2014, p. 9. Retrieved from www.instat.gov.al/media/1574/labour_market_in_albania_marco_pranvera.pdf.

15 INSTAT, Labour market situation in Albania, Working paper, 2005, p. 2.

16 Id., p. 45.

17 A. Hackaj, *Youth employment trends in Albania: What the market is looking for?*, Tirane, Friedrich-Ebert-Stiftung, April 2015, p. 4.

18 INSTAT, *supra* note 15, p. 51, 61 (table A.3).

19 INSTAT, *supra* note 14, p. 6, *see also*: INSTAT figures, registered jobseekers by sex and education level, table. Retrieved from www.instat.gov.al/en/themes/labour-market-and-education/administrative-data-on-labour-market/#tab2.

20 M. Braga, 'When the manna comes from abroad – remittances and youth labour market behavior in Albania', Paolo Baffi Centre Research Paper, No. 2009-41, May 2009, p. 4.

21 Hackaj, *supra* note 17.

that over 87.5% of individuals look for jobs mainly through family connections, the number matched by 62% enterprises admitting to search for candidates for vacancies among family and friends),²² generally low-income level complemented by the lack of social and working security and general absence of codes of conduct for employers make obtaining a decent job a very complicated affair.

(ii) Another factor which comes to the fore is the current state of social security and health care system in Albania.

Despite the presence in the Albanian legislative system of well-structured provisions regulating the social and health care security system, enforcement of these provisions remains ineffective. Studies analysing the current state of affairs in the area of social insurance in Albania report on the inefficiency of the current system of the payments related to unemployment or (even temporal) disability and senior pensions, and other social benefits related to sickness coverage, maternity leave, etc.²³

Factors contributing to the reported inefficiency of social security and health care system are closely interconnected with a labour market situation. Firstly, since a social insurance scheme in Albania is financed by contribution of employers and self-employed employees (administered by the state agency, the Social Insurance Institute), the high level of unemployment or 'informal' employments in private sector results in lack of contributors to state pension funds.

Very low social security payments, including social pensions, make many Albanians worry about their own fate and of their parents who lost the ability to work (whether it is due to age or a disease). A fear of failure in providing for the family pushes young Albanians to even more extravagant lengths than to seek asylum with a hope to obtain better living conditions and being able to disperse money for family left behind in Albania. In this light, remittances from Albanians settled abroad form a significant part of the country's GDP and have a positive impact on reducing, among other thing, the poverty level.²⁴ While at the macro-level remittances play an important role and carry a positive impact on Albania's economic growth and stability, on a micro-level they remain an important tool to fight poverty and provide for a substitute for state's social support.

Drawbacks of the health care system also cause concerns and contribute to a decision to emigrate from Albania. In comparison to neighbouring countries, a small part of

²² Id., p. 23.

²³ A. Braholli, & M. Spaho, "Social security system in Albania: An alternative implementation", *Interdisciplinary Journal of Research and Development*, Vol. IV, No. 2, 2017, pp. 246-253; see also L. Mano, & M. Selita "The Albanian social security system and the institutions of social protection in Albania", *European Journal of Social Sciences*, Vol. 3, No. 2, January-April 2015, pp. 18-25.

²⁴ IOM, Study: Competing for remittances, 2005, p. 39. Retrieved from www.albania.iom.int/publications/brochures/05%20-%20Competing%20for%20Remittances.pdf.

Albanian budget (currently under 4% of GDP²⁵) goes to investment to the health care.²⁶ Relevant studies assess that not more than 50% of existing health care centres (including hospitals or emergency rooms) are adequately equipped and supplied with necessary medications and accessible for disabled people.²⁷ Due to the rather poor infrastructure of state-funded health centres, private health services are widely represented in Albania. However, although it is common in Albania to seek treatment in private medical institutions or to make trips abroad to obtain medical treatment – neither of the options are evidently available for a majority of less-than-wealthy Albanians.

(iii) The next important factor motivating Albanians to seek possible means of emigration is poor and outdated educational infrastructure, including primary education of children.

As of today, the Albanian educational system remains subject to concerns related to income and social class inequality, urban–rural divide, gender disparities and discrimination against minorities (such as Roma and Balkan Egyptians) and children with disabilities.²⁸ Exclusion of minority’s children (Roma) is an especially relevant factor. The Albanian Coalition for Child Education observed in 2013 that more than 50% of Roma children in the age group 6-16 haven’t ever been enrolled in school and more than 40% of Roma youth can be considered as illiterate.²⁹

Education of children with special needs (disabilities) is hindered in Albania by a several barriers, including structural, pedagogical, professional, infrastructural and behavioural.³⁰ Very few kindergartens and schools provide infrastructure required for children with disabilities.³¹ In the rural areas of Albania there are also transportation problems for children with disabilities, resulting in a number of such children who live in the remote areas not attending any form of education.³²

Secondary professional and vocational education in Albania is also characterized by lack of adequate infrastructure, insufficient financial mechanisms, lack of professional teachers and outdated curricula, which according to the observations do not meet labour market demands.³³

25 INSTAT, *Albania in figures*, 2014, p. 18.

26 E. Uruçi, & F. Scaleria, *Health market in Albania, problems and challenges*, *Interdisciplinary Journal of Research and Development*, Vol I, No. 2, 2014, p. 90.

27 *Monitoring of the primary health care system in Albania*, USAID Study, 2014, p. 10.

28 Albania. *Education policy review: Issues and recommendation*, UNESCO, Review, April 2017, p. 12.

29 Albanian Coalition for Children Education, *Report, Albania: The situation of Pre-University Education*, 2013, p. 24.

30 *Save the Children, Inclusive education in Albania: Analytical study*, November 2012, p. 63.

31 *Id.*, the study refers to the reports of the Regional Education Authority representatives, according to which no more than 35% of all kindergartens’ and nine-year schools’ buildings meet the conditions for the inclusion of children with disabilities.

32 *Save the Children, supra* note 30, p. 65.

33 Albanian Coalition for Children Education, *supra* note 29, p. 29.

(iv) The list of push factors of Albanian migration cannot be completed without mentioning specific societal problems of minority groups.

Among those groups, primarily the Roma minority and LGBT community top the list. Both groups suffer in Albania from severe discrimination, fear of violence and absence of state support. Gays and lesbians in Albania are rarely accepted openly in society, which still remains mainly patriarchal and traditional. Other studies indicate that the overall attitude towards LGBT people remained negative, with a large percentage of people considering homosexuality as a disease and many ready to abandon their own child or a relative upon their coming out as gay.³⁴ Although there is no official statistics on hate crime or hate speech, there are reported cases of an LGBT applying successfully for an asylum in other countries.³⁵

As to the problems of national minorities, people who belong to the Roma minority group have a hard life in Albania. At the moment, the Roma community is recognized as the poorest and the most excluded group in Albania.³⁶ While Eurostat does not report on ethnic origin classification of asylum seekers, statistical data from Germany estimates that 11% of asylum seekers from Albanian are of Roma and Egyptian ethnicity.³⁷ Regarding the high number of asylum seekers belonging to this group, the IOM research points out that the push factors, including unemployment and lack of proper housing facilities and generally poor living conditions, are especially strong.³⁸ Other reports observe similar problems, including no or limited access to water.³⁹ Roma children and elderly additionally suffer from lack of community and social services, such as schooling and health care services. This is due to informal internal migration processes when the Roma move from one place to another within one country with no official notification or residence registration notice in pursuing work or some income opportunities.⁴⁰

Additionally, various reporters observe discriminative and abusive treatment from state authorities, including police. Despite certain efforts (often sponsored by international donors) to teach police officers a different attitude to Roma community (mostly by means

34 The Danish Institute for Human Rights, Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, sociological report: Albania, p. 5. Retrieved from https://www.coe.int/t/Commissioner/Source/LGBT/AlbaniaSociological_E.pdf.

35 Id., p. 3, 9.

36 Save the Children, Special report on problems and situation of the Roma minority in Albania, 2013, p. 9. Retrieved from <https://albania.savethechildren.net>.

37 IOM, I. Gëdeshi, & E. Xhaferaj, Social and economic profile of the return migrants in Albania, 2016. https://www.albania.iom.int/publications/reports/06.2017/Profil%20returnees_social_ekonomik_ENG.PDF.

38 IOM, Migration governance in Albania Report, December 2016, p. 14.

39 Immigration and Refugee Board of Canada, Albania: Situation of Roma, including access to education, employment, housing and social services; treatment of Roma by society and authorities, 2014. Retrieved from www.refworld.org/docid/53b13bfb4.html.

40 Save the Children, *supra* note 36, p. 10.

of trainings and other educational tools),⁴¹ discriminative and abusive actions from police officers against Roma is still a usual practice in Albania.⁴²

(v) Presence of a social system parallel to state authority constitutes yet another push factor, which forces Albanians to seek ways to emigrate.⁴³ This parallel social system, which still exists in rural areas of north and central Albania, stems from traditional customary laws codified in the 15th century as oral and published only in the beginning of the 20th century. These laws, which draw on the centuries-old tribal tradition, are called *Kanun* and embrace the regulation of many aspects of life: economic and household, hospitality, brotherhood, marriage, family connections, land and boundaries and are spread in north and central Albania and the surrounding areas, where ethnic Albanians live (Kosovo, Macedonia and Montenegro). During the communism period in Albania, the application of *Kanun* and, especially, blood feuds was severely oppressed. However, in the 1990s, during the 'stateless and lawless' period in Albania, the use of *Kanun* was restored (especially) in rural areas.⁴⁴

The most controversial practice based on this customary law is blood feud (called *Gjakmarrja* in Albanian). *Gjakmarrja* regulates consequences of violation of honour and can last until all the men of two involved families are killed. Modern blood feuds can be caused by various seemingly minor causes, such as land disputes or even oral arguments.

Mostly, the weakness of state enforcement coupled with lack of a trustworthy justice system has resulted in increased number of families involved in blood feuds. Thus, according to the Albanian Committee of Nationwide Reconciliation (an NGO working with the families – victims of blood feuds), it is estimated that since the end of communism, around 3,000 families were involved in blood feuds, which resulted in 10,000 people losing their lives due to honour killing.⁴⁵

In 2006, for example, approximately 860 families in Albania remained effectively self-imprisoned due to blood feuds.⁴⁶ In 2010 the committee reported on numerous cases of honour killings in central Albania and indicated that police at the time was aware of the situation and failed either to prevent the killings or to conduct a proper and thorough investigation.⁴⁷ As of this writing, blood feuds have resulted in lethal danger for many

41 Immigration and Refugee Board of Canada, *supra* note 39, para. 6.

42 Amnesty International, Submission to the European Commission against racism and intolerance, 2014, p. 6.

43 K. Kuntz, We'll get you an Albanian boy's life ruined by blood feuds, Spiegel Online, 6 June 2014. Retrieved from www.spiegel.de/international/world/blood-feuds-still-prevalent-in-albania-a-973498.html.

44 Immigration and Refugee Board of Canada, Albania, blood feuds, Issue Papers, May 2008, p. 1, 8.

45 *Id.*

46 *Id.*, p. 10.

47 Committee of Nationwide Reconciliation, Report, About the culture of law and rule of justice in facing crimes against human life, 22 January 2010.

young Albanians and, following from generation to generation, has forced many Albanian families to desperately seek ways to move their children from Albania.⁴⁸

All factors mentioned above are commonly listed as an explanation of the urge for Albanians to seek better living opportunities outside of Albania. However, although these factors serve as a reason for economic emigration, they do not explain by themselves the choice of asylum as a means of emigration. Specifically, most of these push factors do not provide a relevant and justified criterion for requesting and obtaining an asylum under the present eligibility criteria formulated in Article 1A of the Convention Relating to the Status of Refugees⁴⁹ and the EU Qualification Directive.⁵⁰

In the following paragraphs the authors will attempt to look deeper and categorize the circumstances which influence Albanians to choose asylum as a means of emigration.

6.3 DEMOGRAPHIC AND SOCIAL FACTORS FACILITATING ASYLUM TRIPS

A study conducted by the Hanns-Seidel Foundation indicated that the number of young adults who sought asylum in Germany in the period of 2014-2015 was particularly high.⁵¹ Thus, with reference to Eurostat data, the authors report that in 2015, 53,805 asylum applications were submitted by Albanians, of which 24,390 or about 45% belonged to the age group 18-34 years. About 5.8% of these (3,130 persons) were 14-17 years old and over 60% (32,410) were male. The young families or couples constitute next large group of Albanian asylum seekers.

6.3.1 *Educational level*

If we try to draw a demographic and educational portrait of a 'typical Albanian asylum seeker' based on these statistics, it appears that most of those who choose to seek asylum in Germany are young men with a rather low educational level. The study was not able to discern a single educational pattern among those who were interviewed by the researchers. Among those Albanians whom Hanns-Seidel Foundation has interviewed in Germany or upon return to Albania after an unsuccessful trip, only few people have done schooling

48 Committee of Nationwide Reconciliation, the official address to the Secretary General of the UN. Retrieved from www.pajtimi.com/revistat/Letter_to_BANKI-MOON.pdf.

49 UN General Assembly, Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137.

50 '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', Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 Art. 9.

51 Hanns-Seidel Foundation, *supra* note 13, p. 12.

beyond high school. Only in few cases, an interviewee had graduated from university prior to their immigration.

The Albanian patriarchal society protrudes the role of men in the family as leading, imposing on even young people a responsibility to make their life choices. This pressure in combination with young age, lack of experience and low education results in unmediated decision often made in a rush.⁵²

6.3.2 *Ethnic origin*

As noted above, among Albanian asylum seekers there is a high percentage of people belonging to the Roma community. Factors listed above (including generally high poverty level, lack of adequate housing or opportunities, no or limited access to social services and usual abusive treatment by the state authorities and police) influence decisions of Roma to immigrate. Lack of education (a large number of Roma inhabitants in Albania drop out of school after or even prior to completing primary school and remain illiterate) might explain the lack of proper consideration in making decisions regarding their immigration, including the method and means of immigration.

6.3.3 *Information sources*

In their report, the Hanns-Seidel Foundation placed friends and family members on the top of the list of major sources of information on asylum migration.⁵³ The interviewees commonly explained that they had made a decision to emigrate (through asylum application) since they 'have heard from their friends that there was a need in labour force'.⁵⁴ This approach where the information received from a family member of a friend was trusted more than any more or less 'official' information source, let alone consultation with a specialist, fits well into the demographic portrait of an average asylum seeker. Lack of education, lack of experience and the habit of making decisions in a rush resulted in many young people emigrating as asylum seekers with neither preliminary preparation nor a clear plan of what to do once at a destination country.⁵⁵

Considering that the peak of asylum-seeking trips occurred in the midst of the 2015-2016 refugee crisis, many emigrants were motivated by the Albanian media presenting related events. Possibly, a wrong interpretation of those events led eventually many Albanians to a decision to follow the path of Syrian refugees and attempt to settle in Europe.

52 Id., p. 15.

53 Id., p. 14.

54 Id.

55 Id., p. 15.

Against this background there were no or very little attempts by Albanian authorities to educate citizens and explain the actual nature and purpose of asylum application, together with necessary eligibility requirements. Moreover, during an interview with the border and immigration control authorities, some interviewees admitted helplessness of the authorities in preventing asylum migration and observed lack of official policies which would regulate immigration and provide for necessary educational and informational sources.

Neither was information on the means of migration and specific requirements for asylum provided by representatives of the countries mostly targeted by asylum seekers.

Only after massive rejections of asylum application became evident, the number of asylum requests started to decrease.

6.3.4 *Visa liberalization policy*

Evidently, the visa liberalization policy (from 2012, Albanians do not need any more visa to enter the Schengen area) enormously facilitated asylum trips. While before the introduction of the no-visa entry, asylum trips requested serious preparation, which involved ‘services’ of human traffickers, after visa liberalization, such trips involved no illegal border crossing. Visa liberalization also made preparation time for such trips very short. In the studies, it was observed that two to three days were required in reported cases to gather some necessary documents, such as school certificates.⁵⁶

6.3.5 *Return migration*

During the past decade, it appears that there was also an increase in return migration to Albania. INSTAT reported an increasing trend of returns in the year 2009 onwards.⁵⁷ The core factors motivating Albanians to return were the economic crisis of 2008 and subsequent decrease in employment opportunities in the main emigration destinations Greece and Italy. Economic and political crisis in Greece served as an extra incentive for Albanians living there to seek their luck in their home country.

According to INSTAT report of 2013, 139,827 Albanians returned to their country during the period 2009-2013. It is observed in the report that while some of the Albanians returned to their settlement of origin, the majority settled in the economic centres of Albania, such as the capital, Tirana, or port cities of Durrës and Vlorë. In view of the

⁵⁶ Id.

⁵⁷ INSTAT and IOM, Report, Return migration and reintegration in Albania, 2013, p. 19.

absence of a well-implemented registration mechanism of return migrants, the actual number of returnees still remains the subject of debate.

In this light, the internal migration policy is expected not only to provide mechanisms working to prevent asylum-seeking migration, but to aim to establish tools for reintegrating returnees into the Albanian job market. In the following paragraphs the authors will look into the policy and legal and institutional framework of Albania regarding the international migration of Albanians in general and the increased asylum seekers in particular.

6.4 GENERAL OVERVIEW OF THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK

The Programme of the Government of Albania for the period 2013-2017 made a reference to the Albanians living abroad in the context of improving the consular services in countries where large communities of Albanians live. Moreover, the programme stressed the improvement of border control as well as the efficiency of services provided by the border police. Several other policy documents were adopted with some scarce reference to migration.⁵⁸ The programme of the new government for the period 2017-2021 has a special section on the diaspora. A newly appointed minister of state for diaspora and the new government is planning to create a special agency for the Albanian diaspora, which will be in charge of the registration of all Albanian emigrants in the world. The main purpose seems to secure the right to vote of Albanians living abroad.

As far as legislation is concerned, Albania has adopted two laws, which are relevant to migration. These are Law No. 9668, dated 18.12.2006 'On emigration of Albanian citizens for Employment Purposes' (amended in 2011) and Law No. 14/2016 'On the identification and registration of addresses of Albanian citizens living out of the territory of the Republic of Albania'.

The policy and legislative documents distribute duties and powers among several line ministries and agencies. Traditionally, the Ministry of Interior together with the Ministry of Social Welfare (which has changed its name several times) have been the key factors in this respect. However, the new government, which emerged from the June elections of 2017, seems to have different plans in mind for the institutional setting.

58 Government of Albania, National Strategy for Development and Integration, 2015-2020. Retrieved from www.qbz.gov.al/botime/fletore_zyrtare/2016/PDF-2016/86-2016.pdf; Draft Policy Document on Engaging with Albanian Communities Abroad. This document paved the way for the appointment of a new minister of state for the diaspora and several other initiatives in the programme of the new government for the period 2017-2021.

6.5 POLICY FRAMEWORK

It should be noted from the outset that currently Albania does not have any valid policy document exclusively dedicated to migration. All relevant documents, which were adopted, have expired without any attempt being made to renew them or to adopt new documents. The National Strategy on Migration (NSM) 2005-2010,⁵⁹ which was adopted in 2004, has been the most significant policy document so far. The strategy followed the main principles on the matter stemming from the Stabilization and Association Agreement with the European Union. The NSM 2005-2010 on paper was comprehensive. It tackled many issues, such as the mapping of the migration flows, the determination of the root causes, the protection of rights of migrants abroad, the improvement in infrastructure for the returned migrants, better absorbance and distribution of remittances, the development of an appropriate institutional and legal framework and easing of visa regime. The strategy also contained a National Action Plan on Migration (2005-2010), which indicated the institutions responsible for the achievement of the objectives set out by the strategy, deadlines and an estimation of the budget needed (although not for every objective). However, the strategy was deemed to fail to produce concrete and tangible results, mainly because no funds were allocated for its implementation and there was no clear ownership.

The NSM expired in 2010 and since then no effort has been made to renew the strategy or to adopt a new one according to the very dynamic patterns of migration flows in Albania. Migration issues have been scattered through various policy documents and strategies concerning employment, integrated border management, fight against trafficking in human beings, pension rights, social inclusion, etc.

Another policy document in the field of migration worth mentioning is the Strategy on Reintegration of Returned Albanian citizens 2010-2015, which was adopted in June 2010 and was accompanied by an action plan.⁶⁰ Like the previous strategy, this one also mapped the migration flows and the institutional and legal framework existing at the time. It then set out priorities regarding the reintegration of the returned Albanian citizen. Those priorities concerned (i) improvement of the legal and institutional framework, (ii) capacity building of relevant structures and institutions, (iii) improvement in information channels regarding economic support, (iv) creation of employment promotion programmes, (v) inclusion of returnees into vocational training programmes, (vi) reintegration in the health care, social protection and social housing schemes, (vii) setting up agricultural investment promotion programmes and (viii) strengthening cooperation with the civil society.

59 See IOM, National strategy on migration and national action plan on migration. July 2005. Retrieved on 15 September 2017 from www.legislationline.org/documents/id/5540.

60 Republic of Albania, Strategy on reintegration of returned Albanian citizens 2010-2015. Retrieved on 15 September 2017 from: www.esiweb.org/pdf/schengen_whitelist_project_Strategy%20on%20Reintegration%20of%20Returned%20Albanian%20Citizens%202010-2015.pdf.

Unlike the previous strategy, the Strategy on Reintegration of Returned Albanian citizens had a clear ownership. The Ministry of Social Welfare and Youth was responsible for its implementation. Like the previous strategy, this one also failed to produce any tangible results, mainly because of the lack of funds. A network of migration counters was established, but they were never formalized and their capacity remains low. Another point of criticism concerns the low participation of the civil society and the non-governmental actors. The strategy expired in 2015 and again was not followed by a new one.

Maybe the only policy document which has produced concrete and tangible results in the field of migration is the National Strategy on Integrated Border Management 2014-2020.⁶¹ This is quite a comprehensive document and has been the basis for some legislative and institutional improvements in the field. The strategy is based on three pillars, namely *intra-service cooperation*, *inter-agency cooperation* and *international cooperation*. The three pillars are further broken down into strategic priorities and strategic goals with clear indicators. An important aspect of the strategy is the clear budgetary commitment of all the institutions and agencies involved. The strategy is aligned with the 2006 EU Council Conclusions on Integrated Border Management Strategy and the four-tier access control model.

6.6 INSTITUTIONAL FRAMEWORK

By default, migration is an issue which requires the involvement of several state institutions and agencies. Albania does not constitute an exception to this. As already mentioned in the introduction to this section, the Ministry of Internal Affairs (MIA) and the Ministry of Social Welfare (with all its different names throughout the years) are the institutions which bear the bulk of the competencies and duties on migration issues. However, with the new government, which was chosen in the June 2017 elections, the competencies of the Ministry of Social Welfare are scattered through several other ministries such as the Ministry of Health, Ministry of Economy, Ministry of Education and Ministry of Culture. However, at the time of writing, the concrete competences that these ministries will take over and the respective institutional shape were not clear yet. Until June 2017, the Ministry of Social Welfare traditionally covered aspects of labour migration policies, vocational education and training policies and social support to vulnerable categories of migrants. Through its National Employment Service (NES), the ministry also provided information on labour migration opportunities and information on re-integration programmes. The latter were not really materialized since the migration counters, which were designed to

61 National strategy on integrated border management & its action plan. Retrieved on 15 September 2017 from <https://shtetiweb.org/wp-content/uploads/2014/05/L2-National-Strategy-on-Integrated-Border-Management-its-Action-Plan-2006-2010.pdf>.

function within the structure of NES, were never formalized due to lack of funding. As it has been mentioned earlier, a new minister of state for diaspora has been appointed and the new government is planning to create a special agency for the Albanian diaspora, which will be in charge for the registration of all the Albanian emigrants in the world. However, the purpose of this endeavour seems to be largely electoral since as already mentioned the main goal is to secure a more accurate registration of the Albanian citizens living abroad and to secure them the right to vote. It remains to be seen how the traditional institutional framework already in place with the Ministry of Social Welfare will take shape in the new government formation.

The MIA covers several aspects of migration in Albania, which vary from prevention of irregular migration (in both reactive and proactive sense), transiting and staying in Albania, implementation of readmission agreements in cooperation with the Ministry of Foreign Affairs and enforcement of the requirements of a visa-free regime for Albanian citizens through the Border Migration Police. Another important function carried out by the MIA is the fight against the trafficking of human beings.

The Ministry of Foreign Affairs also plays a role in the migration management through mainly providing administrative and consular support to Albanians abroad as well as preparing the necessary acts for international cooperation in the field of migration.

Other ministries such as the Ministry of Economic Development, Tourism, Trade and Entrepreneurship; Ministry of Education and Sports; Ministry of Culture and Ministry of Health are also involved in the migration management. However, until now their involvement has been marginal. It remains to be seen what their role will be now that they have taken over competencies previously held by the Ministry of Social Welfare. It should be noted that no inter-institutional coordinating mechanism is in place on migration issues. Such a mechanism becomes even more necessary now that the Ministry of Social Welfare does not exist. It remains to be seen whether the coordinating role will be performed by the minister of state for the diaspora.

6.7 LEGAL FRAMEWORK

The legal framework concerning the emigration of Albanians is limited to regulating labour migration and registering Albanians living abroad. The labour migration is regulated with the Law of 20 March 2003 No. 9034 'On the emigration of Albanian citizens for employment purposes', which has been amended several times. The main purpose of the law is to recognize the right to emigration to Albanian citizens and create a legal framework for providing support and services to emigrants living abroad mainly through consular services. The Status of Emigrant is obtained in accordance with the alternative requirements of Article 13, namely (a) a work contract in the receiving country, (b) proof of being self-

employed in the receiving country and (c) proof of being a family member of an emigrant who has obtained the status. On the other hand, the Government of Albania is obliged to provide several specific services such as the official documentation needed to emigrate, setting up educational and cultural centres at receiving countries, prohibition of false information, agreements on social security and pensions, etc. However, the law is mainly on paper and no real efforts are made to implement it, except for several bilateral agreements on social security and pensions.

Law No. 14/2016 'On the identification and registration of addresses of the Albanian citizens living out of the territory of the Republic of Albania' obliges the MIA and the Ministry of Foreign Affairs to actively seek the identification and registration of Albanians living abroad with a purpose to secure their right to vote.

6.8 CONCLUSION

The current economic and social environment in Albania can easily explain the high emigration rate. Factors which motivate Albanians to leave the country have been analysed in the chapter, including a problematic job market situation; being overburdened due to high unemployment rate, nepotism and corruption; lack of an adequate social security system and poor health system. This is complemented by a lack of educational infrastructure and exclusion of minority groups in Albania.

Often emigration is motivated by the necessity to provide for older family members who cannot rely on the social security system in Albania. A failure to provide economic support might result in a significant decrease in the post-pension level of life. The same concern is valid for young parents worried about educational opportunities for their children.

However, it is clear that currently the push factors which motivate emigration in Albania are not specific for asylum emigration. They are rather of economic nature and do not call by themselves for a necessity to ask for an asylum. At least, none of the aspects of economic and social environment in Albania create grounds of eligibility for granting a status of an asylum seeker in EU. Although people belonging to the Roma minority or other such excluded groups as LGBT often face abuse from state authorities and exclusion of social benefits; they even rarely conform to the eligibility criteria which are required by the relevant legislation that regulates the asylum process in European countries.

Attempts to escape poverty and attain better living opportunities by means of applying for asylum often stem from lack of information on the nature of asylum and the absence of official state policies on the prevention of asylum trips. This combines with the limited abilities of would-be asylum seekers to analyse even the existing information due to their low educational level. The choice of asylum is mostly motivated by misinformation, wrong

judgement, lack of knowledge regarding the nature of asylum and requirements necessary to obtain it. Visa liberalization (no-visa policy for Albanians travelling to Schengen countries) facilitated such trips and made sure that preparing for the trips requires minimum efforts.

This problem can be tackled from different ends: distributing actual and accurate information of the real purpose of asylum, introducing and developing the working reintegration framework designed to prevent unsuccessful asylum-seeking trips and reintegrating returnees.

By observing the policy, legal and institutional frameworks provided above, it becomes clear that currently in Albania there are no mechanisms in place that are designed and implemented to prevent asylum migration. Even at present Albania does not offer a specific policy to address the problem of asylum-seeking trips. During interviews with representatives of immigration and border control authorities, they feel helpless before the wave of asylum immigration and do not have a clear understanding of preventive mechanisms that are required.

To prevent asylum immigration and to achieve better fulfilment of EU *acquis* standards in the area of migration, there are numerous necessary steps to be taken by the Albanian government. It is therefore necessary to adopt a more specific policy document which would focus on migration governance and embrace in itself problems enlighten in this submission and other specifics of Albanian migration situation, including reintegration of returnees, better integrated border management and control, and human trafficking. Creation of official state-sponsored educational programmes needs to become part of the immigration policy to provide relevant and up-to-date information about the nature and purpose of asylum protection and the criteria to meet to become eligible for the asylum seeker status.

REFERENCES

Albanian Coalition for Children Education, "Albania: The situation of Pre-University Education", Report, 2013.

Albanian Institute of Statistics (INSTAT), "Labour Market Dynamics 2001-2011", 2014. Retrieved from www.instat.gov.al/media/1574/labour_market_in_albania_marco_pranvera.pdf.

Albanian Institute of Statistics (INSTAT), "Labour market situation in Albania", Working paper, 2005.

Albanian Institute of Statistics (INSTAT) and International Organisation of Migration (IOM), “Return migration and reintegration in Albania”, Report, 2013.

Albanian Institute of Statistics (INSTAT), “Albania in figures”, 2014.

Albanian Institute of Statistics (INSTAT), International Organization of Migration National Survey, 2013. Retrieved from www.albania.iom.int/publications/reports/Return%20Migration%20and%20Reintegration%20in%20Albania%202013.pdf.

Amnesty International, “Submission to the European Commission against Racism and Intolerance”, Amnesty, Amnesty International, 2014.

Barjaba, K., Migration and ethnicity in Albania: Synergies and interdependencies, *Brown Journal of World Affairs*, Vol. XI, No. 1, Summer/Fall 2004, pp. 231-239.

Braga, M., “When the manna comes from abroad – remittances and youth labour market behavior in Albania”, Paolo Baffi Centre Research Paper, No. 2009-41, May 2009.

Braholli, M. S., “Social security system in Albania: An Alternative implementation”, *Interdisciplinary Journal of Research and Development*, Vol. IV, No. 2, 2017, pp. 18-25.

Committee of Nationwide Reconciliation, Report, “About the culture of law and rule of justice in facing crimes against human life”, 22 January 2010. Retrieved from <http://www.pajtimi.com/index.php?faqe=reportlast>.

Committee of Nationwide Reconciliation, The official address to the Secretary General of the UN. Retrieved from www.pajtimi.com/revistat/Letter_to_BANKI-MOON.pdf.

Danish Institute for Human Rights, Study on Homophobia, transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Sociological report: Albania. Retrieved from https://www.coe.int/t/Commissioner/Source/LGBT/AlbaniaSociological_E.pdf.

European Asylum Support Office, Asylum Applicants from the Western Balkans: Comparative analysis of trends, push-pull factors and responses (Update), May 2015. Retrieved from https://www.easo.europa.eu/sites/default/files/public/Asylum-Applicants-from-the-Western-Balkans_Update_r.pdf.

Government of Albania, National Strategy for Development and Integration, 2015-2020. Retrieved from www.qbz.gov.al/botime/fletore_zyrtare/2016/PDF-2016/86-2016.pdf.

Hackaj, A., Youth employment trends in Albania: What the market is looking for? Friedrich-Ebert-Stiftung, April 2015.

Hanns-Seidel Foundation, Comprehending Albanian Migration to Germany in the period 2014-2016, Berlin process series Working paper, Migration, February 2016.

Immigration and Refugee Board of Canada, "Albania, Blood Feuds", Issue Papers, May 2008.

Immigration and Refugee Board of Canada, Albania: Situation of Roma, including access to education, employment, housing and social services; treatment of Roma by society and authorities, 2014. Retrieved from www.refworld.org/docid/53b13bfb4.html.

International Organization of Migration (IOM), Background paper, "Following up on the 20130 Agenda for Sustainable Development's commitments towards migration: Challenges and Opportunities", 2016.

IOM, Gëdeshi, I., & Xhaferaj, E., Social and economic profile of the return migrants in Albania, 2016. Retrieved from www.albania.iom.int/images/profilu.PDF.

IOM, Migration governance in Albania. Report, December 2016.

IOM, Competing for Remittances, Study, 2005. Retrieved from www.albania.iom.int/publications/brochures/05%20-%20Competing%20for%20Remittances.pdf.

King, R., & Vullnetari, J., Working Paper C5 'Migration and Development in Albania', *Sussex Centre for Migration Research*, 2003. Retrieved from http://www.migrationdrc.org/publications/working_papers/WP-C5.pdf.

Kuntz, K., 'We'll Get You' an Albanian boy's life ruined by blood feuds", Spiegel Online, 6 June 2014. Retrieved from www.spiegel.de/international/world/blood-feuds-still-prevalent-in-albania-a-973498.html.

Save the Children, Inclusive education in Albania, Analytical Study, November 2012. Retrieved from https://resourcecentre.savethechildren.net/sites/default/files/documents/inclusive_education_in_albania_-_analytic_study.pdf.

Save the Children, Special Report on Problems and Situation of the Roma minority in Albania, 2013. Retrieved from <https://albania.savethechildren.net>.

UNDESA, Trends in International Migrant Stock: The 2015 revision (United Nations database, POP/DB/MIG/Stock/Rev.2015), 2015. Retrieved from http://www.un.org/en/development/desa/population/migration/data/estimates2/docs/MigrationStockDocumentation_2015.pdf.

UNESCO, Albania. Education policy review: Issues and recommendation, Review, April 2017. Retrieved from <http://unesdoc.unesco.org/images/0025/002592/259245e.pdf>.

Uruçi, E., & Scalera, F., "Health market in Albania, Problems and challenges", *Interdisciplinary Journal of Research and Development*, Vol. I, No. 2, 2014, pp. 86-91.

USAID, Monitoring of the primary health care system in Albania, Study, 2014. Retrieved from <https://www.usaid.gov/sites/default/files/documents/1863/KZLN-FinalReport-%20EN%20-%20FINAL%20LES%20.pdf>.

7 WHAT IS LEFT FROM ‘OFF THE RECORD’: POLITICS ABOUT ‘REFUGEE’ CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

Nilay Kavur

7.1 INTRODUCTION

This chapter¹ aims to illuminate the politics about ‘refugee’ children² in Turkey, which is the top child ‘refugee’ country as well as host to the largest number of ‘refugees’ in the world,³ in the immediate aftermath of refugee flows, which is coined by the term ‘crisis’. Research that was conducted in the summer of 2017, for this chapter, in the form of interviews, meetings and dialogues with NGOs which deal with the child ‘refugees’ in Turkey, has revealed that granting certain rights to children who are victims of war and migration cannot be squeezed merely into the normative and so-called universal rhetoric of children’s rights. On the contrary, politics, diplomatic relations and financial agreements between and within the EU, the UN, the Turkish state, NGOs and private donors all enter the fray, while toying with the issue of taking responsibility for the ‘refugee’ children.

Perhaps, the question ‘was there a refugee crisis and according to whom?’ demands us to contemplate on how the above-mentioned actors act with certain interests. Certain loaded terms such as ‘crisis’, or more precisely ‘European migrant crisis’,⁴ not only reflects but also *shapes* thinking and acting. For the EU, coining the terms ‘migrant’ and ‘crisis’ has given way to conceiving migration as a problematic phenomenon that has to be ‘solved’,⁵

1 I would like to thank Prof. Dr. Dina Siegel and Dr. Nagy for their constructive comments on the earlier versions of this chapter.

2 Though refugee children in Turkey are from various countries, as the issue gained recognition with the migration from Syria, the discussion below will be about the response generally to the Syrian-origin children unless stated otherwise.

3 V. Eşsiz, Overview of Turkey’s policies and practices pertaining to protection of refugees, International Conference, International Community and Refugees: Responsibilities, Opportunities and Human Rights Violations, Istanbul, Amnesty International Turkey Publications, 13-14 May, 2016.

4 As cited in the worldwide popular internet source Wikipedia. Retrieved from https://en.wikipedia.org/wiki/European_migrant_crisis.

5 Turhan criticizes approaching migration as a ‘problem to be solved’. E. Turhan, Kimdi Giden, Kimdi Kalan? Cop21 Sonrasi İklim Değişikliği ve Göç, *Saha*, Helsinki Yurttaşlar Derneği 2, 2016, p. 39.

during the process, before the border. The ‘crisis’ discourse has granted space to find solace in ad-hoc, short-term measures. From the point of view of the EU, so far, the state of play seems to subside, partly owing to the externalization policies and agreements signed by third countries, one being the EU–Turkey deal. Moreover, the exercise of the deal is in fact intertwined with the *diplomatic* crisis between the EU and Turkey, as I will address in the following pages. On the other side of the map, Turkey adopted the open-door policy. However, in 2017’s Turkey, apparently, addressing the needs of ‘refugee’ children within the discourse of ‘temporariness’ has resulted in ad-hoc, provisional measures that will require even more work to fix in the future.

For instance, what emerges to the surface about the ‘refugee’ children is, in fact, the tip of the iceberg. The rest, I believe, is a little bit more but *not totally* visible to people who actively work in the field. Delving into the issues concerning refugee children is opening a Pandora’s box, as one respondent said, in which education, accommodation, protection, labour and exploitation are all tied up in international and internal bureaucratic phases and diplomatic relations, and in which funding matters a great deal. It is an immensely complicated topic in terms of governmentality studies that incorporates many individual and organized actors in the international and transnational arena. And yet, according to the experts on migration in Turkey, the topic of migration has only recently become politicized.⁶ So, this chapter is reserved to acquaint the readers with the general overview of the politics over ‘refugee’ children in Turkey and some particular, important matters that deserve immediate attention. The issues that deserve immediate attention according to both the literature and the interviews with the NGO representatives are the ‘danger of statelessness’; ‘unaccompanied children’; low access to education and language; undocumented, cheap child labour; child marriage; child trafficking and the danger of radicalization. Finally, I would like to draw attention to the risk of criminalization and imprisonment which have not been covered in prior literature.

7.2 OVERVIEW OF ‘REFUGEES’ IN TURKEY

Following the high number of forced migrants arriving from its neighbour Syria since 2011, Turkey is in a transition period, transforming from a ‘transit’ country to a ‘receiving’ country, if not the original ‘target’ country. Besides those from Syria, there are refugees from Afghanistan, Iraq, Iran and African countries like Somalia who pass through Turkey and wait for the third country to be settled by the UNHCR. In 2017, Turkey hosted about 3.4 million ‘refugees’ without granting them refugee status. In recent years, Turkey has

6 A. İçduygu, Türkiye’deki Suriyeli Sığınmacılar: “Siyasallaşan” bir sürecin analizi, *Toplumbilim*, Vol. 140, 2017, pp. 27-41.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN
TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

become the largest refugee-hosting country in the world,⁷ with 3.4 million 'refugees' corresponding to more than 4% of its total population. Moreover, 'Turkey is home to more than 1.2 million child refugees, making it the top child refugee hosting country in the world',⁸ and this figure is highly likely to rise with new births. As children under 18 make up almost half of the 'refugees' in Turkey, the issue is one of child politics.

Due to the geographical limitation framed in the 1951 Geneva Convention and the 1967 Protocol, only those from the EU countries are entitled to refugee status in Turkey.⁹ Despite the fact that forced migrants arriving in Turkey from its eastern borders and African countries are not legally entitled to refugee status, they are intentionally or unintentionally referred to as 'refugees' by the media, by human rights organizations and by the public. Based on their countries of origin, 'refugees' exist under various statuses¹⁰ in Turkey.¹¹ Until 2011, this situation was not challenged to a great extent, meaning that the existence of 'refugees' with Afghan, Iraqi, Iranian, Yemeni or other origins who simply waited to be received by a third country did not constitute a major issue that needed immediate attention. As Korkut and Erder underline, since the formation of the Republic of Turkey, historically, immigration has taken place in nationalist tendencies; welcoming Bosnians, Bulgarian Turks, Kosovars and Ahıska Turks from Central Asia in selective openness.¹² Within this context, from 2011 to 2015, Turkey adopted an open-door policy to Syrians fleeing the violent unrest and welcomed the people as 'guests' for their temporary and short stay.¹³ The assumption was that the conflict in Syria would quickly come to an end.¹⁴ Within this framework, the speed of migration towards Turkey due to its geopolitical position has not immediately resulted in either an adequate legal guarantee in status for those seeking to be refugees or an adequate political and bureaucratic response.

7 ECHO Factsheet, July 2017. Retrieved on 20 August 2017 from http://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf.

8 "UNICEF: 40% of Syrian children in Turkey not in school". Retrieved on 20 August 2017 from <http://www.aljazeera.com/news/2017/01/unicef-40-syrian-children-turkey-school-170119175018121.html> (accessed 20.08.2017).

9 Besides granting refugee status, "two other notable long-term solutions are voluntary repatriation and resettlement to a third country." in M. Çorabatır, "The fall of Aleppo calls for new approaches to the refugee crisis", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 53-58.

10 As described under the 4 April 2014 Law on Foreigners and International Protection (LİFP) No. 6458.

11 Çorabatır, *supra* note 9.

12 U. Korkut, "Pragmatism, moral responsibility or policy change: The Syrian refugee crisis and selective humanitarianism in the Turkish refugee regime", *Comparative Migration Studies*, Vol 4, No. 2, 2016, p. 1; S. Erder, "Preliminary thoughts on the Syrian refugee movement", *New Perspectives on Turkey*, No. 54, 2016, pp. 119-130, p. 123.

13 A. İçduygu, & D. Şimşek, "Syrian refugees in Turkey: Towards integration policies", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 59-69.

14 M. M. Erdoğan, *Urban Refugees from "Detachment" to "Harmonization"- Syrian Refugees and Process Management of Municipalities: The Case of Istanbul*, Marmara Belediyeler Birliği Kültür Yayınları, January 2017.

Finally, the Law on Foreigners and International Protection¹⁵ was enacted in 2013 and came into force in April 2014. It provided ‘Temporary Protection’, which ensured both no forced return and no limit on the duration of stay in Turkey, but it is only reserved for Syrians. Forced migrants from other origins come under international protection, not temporary protection, meaning they have fewer rights and entitlements. On the other hand, for those who enter legally and who pay a yearly fee together with a health insurance are entitled to residence permits, which have to be renewed frequently. Simultaneously, the Directorate General of Migration Management (DGMM) was established. The DGMM¹⁶ took over the tasks of the Disaster and Emergency Management Authority (AFAD). However, DGMM was initially designed for individual protection cases, and not for such a mass influx, and the term ‘temporary protection’ suggests that Turkey perceived the Syrian refugees as a crisis and a temporary phenomenon.¹⁷ Today, the term ‘guest’, which simultaneously implies ‘host’ to define the receiving country, is criticized for embodying a hierarchical relationship that leaves the migrant in a ‘grateful’ situation, in the constant state of crisis, for an unpredictable amount of time.

Eventually, the registration process that grants refugees all rights, including access to health, shelter, education, higher education, subsistence and work permits, has taken place, but has been disorganized, and has not reached all refugees in the same manner. What is usually forgotten in the media but is underlined by the Syrians themselves and the NGOs in various conferences is that a whole country migrated and settled in Turkey with different socio-economic status and identities indicating totally different needs and aspirations. Those without financial capital are doomed to take over the lowest strata in poverty, open to all kinds of exploitation.

Approximately 8% of the ‘refugees’ reside in camps¹⁸ managed by the AFAD,¹⁹ while the 92% who prefer to live outside the camps are responsible for taking care of themselves. Currently, there are 26 temporary accommodation centres/camps located in 10 cities,²⁰ which have been recognized as five-star hotels by the European authorities.²¹ Migration management is perhaps not just about building camps, but about governing, in the meaning of looking out for the interests of a diverse and mobile population in a globalized world. As Köprülü states, ‘Turkey has been commended for its humanitarian response,

15 Law on Foreigners and International Protection (LIFP) No. 6458. 4 April 2014.

16 In cooperation with the UNHCR and International Organization for Migration (IOM), along with other international organizations and NGOs.

17 Çorabatır, *supra* note 9.

18 Erdoğan, *supra* note 14, p. 10.

19 AFAD is also responsible for the health expenses of Syrians.

20 L. İ. Öztüğ, ‘The Syrian conflict and Turkey’s humanitarian response’, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 139-147.

21 M. McClelland, ‘How to build a perfect refugee camp’, *New York Times Magazine*, February 13 2014.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

[but] policies for the long-term integration of Syrians have lagged'.²² Hence, Castles has argued that

governments of migrant-destination countries have often preferred temporary migration to permanent, both because it is supposed to minimize integration costs and because it is seen as more acceptable to existing populations.²³

Henceforth, building good camps is just a good start. Originally, the municipalities did not have the legal responsibility or the financial means to serve the foreign population.²⁴ Consequently, some important child protection mechanisms kept developing on the hoof through the patchwork of hundreds of NGOs with different priorities and different capacities.

7.3 IN THE AFTERMATH OF THE EU–TURKEY DEAL OR THE EU–TURKEY DIPLOMATIC CRISIS

Following the 'EU–Turkey deal', that is, the readmission agreement signed in spring 2016, the possibility of refugees settling to a third country has decreased, so conditions in Turkey as a host country deserve attention. Within the framework of the deal, to keep the 'refugees' in order to protect the borders of fortress Europe, Turkey agreed to admit irregular migrants and to send refugees to Europe for resettlement on a one-to-one swap basis. In return, the EU promised to liberalize visa restrictions for Turkish citizens and invest some €3 billion in refugees in Turkey.²⁵ This deal, which is seen as another example of externalization of the migration management processes of the EU, has received criticisms.²⁶

It has been stated that through 'coercive engineered migration (CEM)', a cross-border population movement has been manipulated by the states (EU–Turkey) and used as opportunities for other diplomatic deals. In this manner, migration has been weaponized for other political purposes.²⁷ Also, the deal is said to fail to contribute to the reallocation

22 S. M. Köprülü, "From the desk of the editor", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 7-13, p. 7.

23 S. Castles, "International migration at a crossroads", *Citizenship Studies*, Vol. 18, No. 2, 2014, p. 193.

24 Erdoğan, *supra* note 14, p. 40.

25 K. Rygiel, F. Baban, & S. Ilcan, "The Syrian refugee crisis: The EU-Turkey 'deal' and temporary protection", *Global Social Policy*, Vol. 16, No. 3, 2016, pp. 315-320, p. 316.

26 B. Frelick, I. M. Kysel, & J. Podkul, "The impact of externalization of migration controls on the rights of asylum seekers and other migrants", *Journal on Migration and Human Security*, Vol. 4, No. 4, 2016, pp. 190-220.

27 K. M. Greenhill, "Open arms behind barred doors: Fear, hypocrisy and policy schizophrenia in the European migration crisis", *European Law Journal*, Vol. 22, No. 3, 2016, pp. 317-332.

and resettlement of refugees to EU countries and has been attacked for treating migrants as interchangeable commodities.²⁸

A lot has been said on the successes and failures of the EU–Turkey deal, in terms of stopping the irregular flows, burden sharing among the EU member states, treating migrants as commodities and so on and so forth. However, these discussions are merely limited to who is opening and who is closing the borders and who is providing financial support. International migration is a never-ending and changing social process.²⁹ The regulation of flows has been aimed at without interpreting migration within a social transformation process.³⁰ Two years after the deal, the question is not about who is going to open or close the borders and not about humanitarian responses, but rather about how will this recently migrated population be governed, by whom and through which means? In other words, who will look out for the interests of the displaced children and through which means? In fact, the inflated focus on border control and the amount of aid money is a manifestation of a crisis in itself. Hence, in the aftermath of the EU–Turkey deal, it is important to put the governance of this vulnerable population under the microscope. So, this chapter is not about regulating migration across borders but about scrutinizing how the most vulnerable section of the displaced population, the children, and their rights are governed.

However, the answer to the question, ‘who should be taking responsibility and through which means?’ is not easy. Both the EU–Turkey diplomatic relations, which determines the allocation of funds, and the NGOs’ relations with the Turkish state and with their donors are determinant factors in governance of ‘refugee’ children in Turkey. So, below, I will touch upon both these topics. Then, I will elaborate on the effects of these conflicts and contestations on how ‘refugee’ children enjoy their so-called *universal* rights.

7.4 HOW WILL REFUGEE CHILDREN BE PROTECTED, BY WHOM AND THROUGH WHICH MEANS IN THE AFTERMATH OF THE EU–TURKEY DEAL?

For this chapter, the most important aspect of the repercussions of the EU–Turkey deal is the allocation of financial support to Turkey. There have been negotiations over some billions of euros; however, what has not received sufficient attention yet are questions of which actor receives the financial support, whether the actor is the state, the inter-governmental organizational powers, such as the UN and its branches, or the NGOs and what

28 Human Rights Watch, “Q&A: Why the EU-Turkey migration deal is no blueprint, 14 November 2016. Retrieved on 30 August 2016 from <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.”

29 S. Castles, “Towards a sociology of forced migration and social transformation”, *Sociology*, Vol. 37, No. 1, 2003, pp. 13-34.

30 D. Şimşek, “Göç Politikaları ve “insan güvenliği”: Türkiye’deki Suriyeliler örneği (Migration Policies and ‘human security’: the case of Syrians in Turkey)”, *Toplumbilim*, Vol. 140, 2017, pp. 11-26.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

these actors do with the money. The EU authorities have been giving signals to shift the allocation of funding for 'refugees' to the civil society in Turkey in accordance with their diplomatic stance against the current Turkish political regime.³¹ From the point of view of the EU, it is expected that bestowing the right and the financial capacity to certain NGOs will keep the balance against the strengthening of the current Turkish government. While the EU authorities persist in transferring the funds for the migrants through the NGOs, the current government stands against this decentralized form of allocation of funds and would like to centralize the governance of the new population, while allocating certain tasks to certain NGOs. The delivery of the funds to the Turkish state has seen a considerable backlash by the EU member states. So much so that, for instance, the IPLI Foundation felt the need to publish a report, to reveal that 'so far, four individually identifiable organizations have received the lion's share of Facility disbursements: The World Food Programme, World Bank, UNICEF and UNHCR'.³² Hence, the EU had officially declared the following in July 2016:

Funding under the Facility supports refugees in the country, it is therefore not a funding for Turkey. The support seeks to improve conditions for refugees in Turkey as part of the EU's comprehensive approach to addressing the refugee crisis inside and outside the EU.³³

In his article on the effect of EU–Turkey relations on the regional and global stability as well as the response to migration flows, Keyman draws attention to the need 'to revitalize Turkey–EU relations in a way [in which] trust and collaboration replaces skepticism and instrumentalism'.³⁴ Keyman states that

the recent tendency in the EU and Europe, as well as generally in the West, has been to see Turkey purely through a security lens as a container or as a strategic buffer state. ... Moreover, what has occurred in these relations instead is a *profound trust crisis* [emphasis added] strengthening skepticism and prejudice

31 AB Türkiye'ye mali yardıma yeni model arıyor, *Deutsche Welle Turkey*, 25 August 2017. Retrieved on 27 August 2017 from www.dw.com/tr/ab-turkiyeye-mali-yardima-yeni-model-ariyor/a-40238136 (originally shared by one of the NGO workers).

32 T. Reno, The EU facility for refugees in Turkey – Prevailing misperception, *Observatoire De La Turquie Et De Son Environnement Géopolitique*, 21 September 2017. Retrieved on 20 November 2017 from www.iris-france.org/wp-content/uploads/2017/09/Obs-Turkey-TReno-21-sept-2017.pdf.

33 European Commission-Press release, Facility for Refugees in Turkey: over €1.4 billion in support of education and health for Syrian refugees, Brussels, 28 July 2016. Retrieved on 20 November 2017 from http://europa.eu/rapid/press-release_IP-16-2661_en.htm.

34 E. F. Keyman, "Turkey's choice: Responding to security challenges through humanitarian norms with a revitalized EU anchor" *International Politics*, Vol. 54, No. 4, 2017, pp. 453-467, p. 453.

between Turkey and the EU at a time when collaboration and cooperation is much needed.³⁵

What has been named the ‘refugee crisis’ in the past few years, for the EU and for Turkey, is partly the repercussion of the accelerated diplomatic crisis between the two parties. Eventually, as part of the deal, while some amount is received by the state branches, a considerable amount is received by inter-governmental organizations such as the UN branches and later shared by and distributed to various NGOs through a tender system or pre-established partnerships. I would like to draw attention to some drawbacks of bypassing a centralized management that could be problematic in any context that negotiations over the allocation of financial support should consider. These shackles are the short-term, temporary nature of project-based funding schemes, the potential distance of these NGO programmes from the ministries of education, health, economics and social politics, the lack of cooperation and incoordination among different NGOs and the potentiality of some newly emerging commercial NGOs. Moreover, data from the fieldwork reveals that these issues raise scepticism among NGO workers themselves, who define NGOs ‘as organisations which prop up the State’. Here, Benhabib’s critical and constructive readings of Kant’s concept of cosmopolitan law and world’s citizenship and Arendt’s concept of ‘right to have rights’³⁶ are very relevant to the question of the governance of ‘refugee’ children. Accordingly, the Universal Declaration of Human Rights does not have specific addressees and does uphold the sovereignty of states.

After all, the human rights discourse which is prevalent in visioning of the protection of the displaced children, although being universal in character, in praxis, in terms of implementation, is intrinsically bound to states. So, the operationalization of human rights requires a legitimate authority with constitutional-legal boundaries to implement both the negative rights such as the civil, political and judicial and the positive rights, namely welfare rights. Soysal³⁷ points out the contentiousness of the relationship between citizenship and human rights and stresses that the lack of institutionalized enforcement mechanisms in the global arena poses limits in operationalization.

With regard to the ‘refugees’ in Turkey, Ulusoy³⁸ draws attention to the lack of experience of the Turkish DGMM, juridical lack of knowledge and experience and the absence of long-term planning while evaluating Turkey as a ‘safe third country’. Experience is in

35 Id., p. 457.

36 Ş. Benhabib, *The rights of others: Aliens, residents and citizens*, Cambridge, Cambridge University Press, 2004.

37 Y. Soysal, “Citizenship, immigration, and the European social project: Rights and obligations of individuality”, *The British Journal of Sociology*, Vol. 63, No. 1, 2012, pp. 48-53.

38 O. Ulusoy, Turkey as a safe third country?, Oxford University Faculty of Law Blogs, 2016. Retrieved on 15 October 2017 from <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

the making and expertise is developing at this very moment. However, I would also like to underline the deficits of an informal political economy that plays an important role in providing security for children of a displaced population.

7.5 INFORMAL POLITICAL ECONOMY IN WHICH NGOs FUNCTION

Opportunities and services provided to refugee children and their families depend to a great extent on the political economy of the country along with its politics on international migration. So, what is the political economy of the country that has received and absorbed the highest number of 'refugees' in the past few years? Scholars writing on Turkey's political economy have, until now, attributed characteristics of informality, residualism, dualism, eclecticism and immaturity to its capitalist welfare regime, underlining its non-universalistic character that reasserts social stratification.³⁹ Turkey's welfare regime has been identified as attributing the role of alleviating burdens of the state to the (extended) family, informal social ties, voluntary initiatives and the private sector.⁴⁰ Hence, Uluğtekin has drawn attention to the underdeveloped state of the social work sector in Turkey, despite its significance to support children against marginalization.⁴¹ In her analysis of the experiences of NGOs in the framework of youth justice system in Turkey,⁴² İrtiş underscores the ineffectiveness of the Turkish welfare state to support the marginalized children in almost all aspects of life.

39 A. Buğra, & Ç. Keyder, "The Turkish welfare regime in transformation", *Journal of European Social Policy*, Vol. 16, No. 3, 2006, pp. 211-228; A. Buğra, *Kapitalizm, Yoksulluk ve Türkiye'de Sosyal Politika* [Capitalism, Poverty and Social Policy in Turkey], Istanbul, İletişim, 2006; A. Buğra, & S. Adar, "Social policy change in countries without mature welfare states: The case of Turkey", *New Perspectives on Turkey*, Vol. 38, 2008, pp. 83-106; A. Buğra, & A. Candaş, "Change and continuity under an eclectic social security regime: The case of Turkey", *Middle Eastern Studies*, Vol. 47, No. 3, 2011, pp. 515-528; S. Coşar, & M. Yeğenoğlu, "The neoliberal restructuring of Turkey's social security system", *Monthly Review: An Independent Socialist Magazine*, Vol. 60, No. 11, April 2009. Retrieved on 1 May 2017 from <https://monthlyreview.org/2009/04/01/the-neoliberal-restructuring-of-turkeys-social-security-system/>; M. Eder, "Retreating state? Political economy of welfare regime change in Turkey", *Middle East Law and Governance*, Vol. 2, 2010, pp. 152-184; Z. Öniş, "The triumph of conservative globalism: The political economy of the AKP Era", *Turkish Studies*, Vol. 13, No. 2, 2012, pp. 135-152.

40 B. Yazıcı, "The return to the family: Welfare, state, and politics of the family in Turkey", *Anthropological Quarterly*, Vol. 85, No. 1, 2012, pp. 103-140.

41 S. Uluğtekin, "Kanunla İhtilaf Halindeki Çocuklar: Eleştirel Düşünme ve Türkiye'de Çocuk Adalet Sistemi'nin Bazı Özellikleri. [Children in Conflict with the Law: Critical Thinking and Some Aspects of the Youth Justice System in Turkey]" in P. Akkuş, & Ö. Başpınar Aktükün (eds.), *Sosyal Hizmet ve Öteki: Disiplinler Arası Yaklaşım*, İstanbul, Bağlam, 2014, pp. 193-223.

42 V. İrtiş, "Kanun Tarafından Suç Olarak Nitelendirilmiş bir Eylemde Bulunan Çocuklar için Çalışan Sivil Toplum Örgütlerinin Deneyimlerine dair Dair Bir İnceleme", in A. Ergür (ed.) *Buruk Şenlik: Enformasyon Toplumunda Anomi ve Yabancılaşmanın Yeni Biçimleri*, Phoneix Yayınevi, 2016, pp. 213-234, p. 215.

As highlighted by Canefe,⁴³ Turkey is able to absorb large number of newcomers due to its informal economy. Naturally, in this informal political economy, the management of the influx of newcomers is in continuous improvisation. So, I would like to draw attention to the following. Given the informal political economy of Turkey, in which protection of ‘refugee’ children is managed in an unsystematic and decentralized manner that is open to all kinds of exploitation, the EU’s plan to drain the funds through civil society bears the risk of injecting informality into the already informal and eclectic nature of child protection, which contradictiously stands in sharp contrast to the bureaucratic, formal, centralized protection practices embraced by the EU itself. Hence, the ‘refugee’ families and children are condemned to extracanonical rule, trapped between the EU, state, the UN and different NGOs with differentiated agendas and interests.

While the EU–Turkey diplomatic relations matter a lot to the governance of the newly arrived migrants in Turkey, no state, by itself, could have developed a perfect long-term response to the arrival of about 3 million displaced and uprooted people over the course of a few years. Ultimately, notwithstanding the above argument on the need for a strong welfare state, NGOs have played a very big role in the transition of Turkey from being a transit country to a host country. In this largely informal political economy of Turkey, where informal labour and family support matter a great deal, civil society organizations as local initiatives undertake important tasks. Hence, the aim of this chapter is not juxtaposing the state and the NGOs and to check them against each other; rather, the aim is to underscore the indispensability of their collaboration. İrtiş reminds us about the indistinction between the two concepts until the first half of the 18th century, and the organic ties between the two⁴⁴ as she elaborates on the significance of communication, trust and autonomy for the NGOs. NGOs in fact possess the most crucial knowledge and know-how at the local level. NGOs can offer the most up-to-date, most in-depth and most *off-the-record* information to understand the actors and the means to look out for the interests of the displaced population and the risks that concern the vulnerable population.

To begin with, there are hundreds and thousands of NGOs in Turkey, precisely 111,801 associations⁴⁵ and 5,081 charitable foundations,⁴⁶ that somehow find themselves in the realm of migration, even if they are not founded for the purpose of supporting ‘refugees’. Even those who are not experienced on either the field of ‘children’ or the field of ‘migration and asylum-seeking’ felt the need to reach out for the vulnerable displaced population and the ‘refugee children’. They predominantly deal with schooling and Turkish language

43 N. Canefe, “Management of irregular migration: Syrians in Turkey as paradigm shifters for forced migration studies”, *New Perspectives on Turkey*, Vol. 54, 2016, pp. 9-38.

44 İrtiş, *supra* note 42, p. 222.

45 Retrieved on 5 December 2017 from <https://www.dernekler.gov.tr>.

46 ‘New’ charitable foundations, founded according to the Turkish Civil Code. Retrieved on 5 December 2017 from <https://www.vgm.gov.tr/vakif-islemleri/vakif-istatistikleri/yeni-vakiflar>.

7 *WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS*

courses, fight against informal, cheap child labour, child marriages and refugee children as victims of sexual violence. So, the significance given to the NGOs in this study does not just stem from the fact that they are the target actors in this diplomatic game. But, also, even without the EU–Turkey diplomatic crisis, NGOs are the actors with the know-how.

7.6 REACHING OUT TO NGOs FOR A MORE SCRUTINIZED OVERVIEW

Within this context, I aimed to understand the politics around ‘refugee’ children in Turkey through contacting and getting into dialogues with NGO representatives during the summer of 2017,⁴⁷ which is a period that could be considered as a ‘post–refugee crisis’. So, the migrant flows towards Turkey and to the EU had already decreased significantly. However, the field research was not totally smooth for various reasons arising from the current international and internal political tensions. Firstly, Turkey has been under the ‘state of emergency’ rule over the course of more than a year since the attempted coup in July 2016, which makes people uneasy while talking about public policy issues. Secondly, and in relation to the current state of exception period, some NGOs have been closed by legislative decrees.⁴⁸ And thirdly, and partly related to the fragile situation of the NGOs, a considerable number of the NGO representatives are either reluctant or refusing to share information with academic researchers. While some find sharing data with academics risky for the sake of the NGOs, some are just ‘tired’ of allocating time and energy to researchers who do not give anything practical and immediate back. Furthermore, the formal but unclear request of the Turkish High Education Board from the universities to apply for permission⁴⁹ from the Ministry of Interior for conducting research on Syrians, which was silently withdrawn later on, slowed down this empirical research. In this very fragile political environment, I had to be absolutely transparent about my identity. Confidentiality and anonymity were requested by the majority of the research participants and are guaranteed for all participants in this output.

Not all of the potential participants I tried to reach responded positively. Eventually, around 15 potential participants turned me down either due to ‘tiredness’ of contributing to academic research or lack of time or by simply ignoring my request. As a first stage, attending two summer schools and various conferences at six universities in four different

47 I would like to thank Prof. Sevda Uluğtekin for her suggestions on the general approach to the topic and her support. I would like to thank Prof. Murat Erdoğan (Hacettepe University Migration and Politics Research Centre – Hacettepe Üniversitesi Göç ve Siyaset Araştırmaları Merkezi (HUGO)) for giving me advice on the research approach and field-research.

48 KHK ile kapatılan 375 dernek (Tam liste), *NTV*, 22 November 2016. Retrieved on 1 October 2017 from https://www.ntv.com.tr/galeri/turkiye/khk-ile-kapatilan-375-dernek-tam-liste,jYC_-WVKA0mGSslA4ABJw

49 See the annulment of the decision. Retrieved from www.hugo.hacettepe.edu.tr/tr/gecici_koruma_altindaki_suriyeliler_konusunda_yapi-10.

cities on this very specific topic of ‘migration’, ‘security’ and ‘childhood’ was very fruitful. Also, my previous volunteering and membership experiences in certain local Turkish NGOs provided trust for establishing contacts. Finally, online search and contacting by telephone worked as the best method to reach out to a diverse range of NGOs and helped to avoid over-representation of a sample.

Clearly, it was difficult for NGO representatives to openly talk about potential disputes over principles and priorities or political tendencies of the funding bodies, be it international or national donors. A frequent phrase in our talks was ‘off the record’, which was mostly related to horrifying cases of exploitation of ‘refugees’ in different forms or some secret news about money circulation. Henceforth, my dialogues with the NGO workers had to be more about how NGOs can have the financial means, capacity and ability to adopt to changing politics than about how they can support the ‘refugee’ children.⁵⁰

7.7 NON-GOVERNMENTAL ORGANIZATIONS OPERATING IN ALL SHAPES AND SIZES: DIFFERENCES IN BONDING, ORGANIZING AND OPERATING

Indeed, the term NGO is an all-encompassing concept that could refer to many different forms and sizes of institutions and networks.⁵¹ Besides varying in size, NGOs differ in legal forms. Elaborating on the differences is important and necessary for two reasons: first, to avoid creating a stereotypical image of an NGO, and second, to see how they react to the ‘refugee crisis’ in various ways according to their capacity and financial means. Some NGOs are *associations* based on human labour and capital, some are *foundations* with financial capital, some are *cooperatives* while some could be *informal loose networks*. Apart from

50 In this context, during the summer of 2017, I managed to reach out to 31 different NGOs via 35 interviews with NGO workers, volunteers and experienced individuals in four different cities of Turkey, namely Istanbul, Ankara, İzmir and Gaziantep. While Gaziantep is the border city with Syria, hosting a high number of migrants, İzmir plays an important role as the host and transit city to Greece, while Ankara as the capital houses the well-established NGOs besides the state organs, and Istanbul attracts around a million ‘refugees’ as it is a city known for its informal labour capacity.

51 To simplify, I will mention several categories, which are not necessarily mutually exclusive. First of all, there are the initiatives to form upper structures like the refugee council formed of many members. Second, there are the human rights-based international or national organizations that do not get involved in providing services. Third, there are the benevolent associations that could be divided into two subcategories: faith-based and secular. Fourth, there are associations founded by refugees/migrants themselves which could be small or medium-sized. Fifth, there are the international NGOs (hereafter iNGOs) that usually embrace the human rights-based rhetoric. Some iNGOs are also categorized as faith-based Christian-oriented NGOs formed for providing services. Sixth, there are the research centres on migration that are associated with universities or that could take other forms like a cooperation. Seventh, there are large-scale international Islamist NGOs that focus on providing services to vulnerable groups. Some of the Islam-oriented NGOs can have natural ties with the state. Eighth, there are local, secular, large-scale organizations that provide services and guidance to access the state’s services. I would like to thank Metin Çorabatur, the head of the Research Center on Asylum and Migration (ARCAM)/İltica ve Göç Araştırmaları Merkezi (İGAM), for explaining to me about the classification of these different organizations.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN
TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

the NGOs, there are the UN organs, such as the UNHCR, UNICEF, IOM or WHO. Besides these UN organs and the EU organs, like the ECHO, there are various funding institutions from various EU member states.

Eventually, I contacted the following different types of organizations: grassroots organizations founded or run by Syrians as community centres, who prioritize the feeling of belonging and community above any other service; national-secular NGOs; large-scale international Islamist organizations; a service centre associated with a municipality; research-based organizations; labour unions/union-like organizations for regulating decent labour; international NGOs and finally UN branches.

Speaking of varieties of NGOs, the starkest difference⁵² I have observed is the way in which 'local-national, secular and human-rights based NGOs' and religious, international organizations embracing Islamic values mobilize and organize themselves and the aid differently. Especially for organizations that are local-national, secular and service-oriented, which embrace human rights-based agendas as well as Syrian-founded grassroots NGOs, sustainability depends a lot on the success of project proposals and good relationships with donors, who can be foreign funding NGOs and/or local philanthropic businesspeople. Although uncertainty of sustainability, high circulation of employees and turnover rate are inherent in project-based work, the participants of this research did not mention the short-term nature of the project-based approach as a debilitating factor in their operations. For example, rent is a fundamental issue that is *somehow* managed.

Large-scale, religious, international organizations embracing the Islamic values that I have encountered and interviewed in this research work in a different manner. These NGOs, which were founded mostly in the form of 'charitable foundations', emphasize the importance of sharing similar traditional values within themselves and with the targeted populations in forming a league together. Accordingly, sharing similar cultural values and same religious values and brotherhood, being neighbours on borders and giving significance to strong family ties and solidarity in the neighbourhood and community are essential (notes from the interview with a representative of an international Islamist NGO, Gaziantep, 22 August 2017). Thus, according to the narratives of the representatives of Islamist NGOs, the organizational structure has settled slowly and strongly long time ago, which makes the facilitation of services less bureaucratic and much faster. These differences are worth noting but perhaps constitute a topic of discussion for another paper.

What is more worth elaborating is that both types of NGOs denounce their shortcomings in guaranteeing refugee children their positive rights of access to health care, education and protection from violence and crime. Both emphasize the need for the state will for

52 I would like to thank Prof. Murat Erdoğan (Hacettepe University Migration and Politics Research Centre – Hacettepe Üniversitesi Göç ve Siyaset Araştırmaları Merkezi [HUGO]) for drawing my attention towards the differences between various NGO approaches.

long-term governance. So, below, I would like to focus on different NGOs' commonalities that affect the approach to 'refugee children'.

7.8 SELF-PERCEPTION: WHAT IS THE ROLE OF AN NGO?

Self-perception is significant to make sense of how NGOs position themselves and which roles they play. Although 'the role of an NGO' – 'a civil society organization' – was never opened up as a subject to be articulated or was never asked as a leading question to elaborate on during the interviews and dialogues, a considerable number of participants referred to their role as 'assistance' to the state in resolving various issues for the uprooted and displaced people.

Due to the uncertainty in international politics of migration, until everything clicks into place, different organizations do patchwork across a variety of tasks. Besides the humanitarian aid in the first years, many organizations assist the refugees in following the ever-changing legal-bureaucratic procedures that they have to pursue in order to access health services, shelter, work, education, etc. However, there are problems regarding coordination, as some NGO workers underline.

This (migration) sphere is filled by the NGOs but there is no coordination amongst them. ... It is significant to unite. Everybody is supposed to be transparent and open to collaborate. ... It is not normal to work against the state; since the subjects of the matter are so neglected and unprotected. We need NGOs to work as government auditor. ... There is lack of coordination and we need to pay attention to the NGOs who receive double grants. Quantity is unimportant compared to the policy that you would like to create. (a lawyer/NGO worker tied to one of the municipalities in Ankara, 8 August, 2017)

Another NGO representative, working on health, legal rights, education and socio-economic needs, referred to 5-10 years' future projection and stated:

First target is to put pressure on the state to activate and mobilise and motivate everyone. Mobilising the state is more important than anything else. There is no sustainable system for the refugee problem in Turkey. We have no idea for the next 5-10 years. (a sociologist working in a migration consultancy organization, Istanbul, 4 August 2017)

7 *WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS*

In a similar manner, a representative of a research-oriented organization, recently focusing on the refugees, stated:

I always say, 'all NGOs are founded to be closed, to complete their mission! When our existence is not necessary anymore, that is when we are successful! An NGO does not have clients/customers; an NGO is an agent to make those unheard heard ... however, it is not enough to be their voice—the essence of the job is to make them talk and make them be visible! (a political scientist, experienced in civil society, Ankara, 8 August 2017)

Another respondent shared her views, complementing the above accounts:

The reason why the state lets NGOs operate (on a large scale) is that the numbers have risen enormously. The NGOs have got to work hard and coordinate. The biggest funding comes from the state. The NGOs have got to be tied to the state; otherwise the state would not provide funding. The state applies for funding from the UN, too. Our aim is to transform Syria into a liveable place. ... I do not believe that NGOs are useful. If a person is stateless, he/she worth nothing. May God not leave anybody stateless! (a representative of a Syrian-led service-based NGO, Istanbul, 18 August 2017)

Just like other kinds of NGOs, participants from religious NGOs emphasized the 'limits' of their role as 'assistance' to the state, until the state gives an exact definition and status to this anomie and strengthens its branches to undertake protection of refugees and refugee children.

The research-oriented NGO representative stated:

What is spoken about is the money. Germany, Lebanon, why don't you come here and transfer your technical knowledge with us? It should not be just about money, or the camps, or the vocational training, or the humanitarian aid. If that is the case, we cannot develop! Turkish civil society culture means 'philanthropy'! Thus, the NGOs have got no chance but to be project-based cause there is no funding allocated to the civil society, no arena to act, no words to say! What I mean by philanthropy is this; donations reach the associations and foundations or they are sponsored, which are short-term. These donations and sponsorships aim at subjects that you could observe the final result immediately, such as education, workshops for disabled children- even though the child will never experience another workshop, but be it- civil society receives financial aid but you need a team for the job. Travel costs, rents, basic needs are not

covered. You have got nothing but to be project-based! The state, though acknowledges you, does not allocate resources to you. (a political scientist, experienced in civil society, Ankara, 8 August 2017)

So, one issue pointed out by the NGOs is the difficulty of undertaking certain governmental tasks such as services on education, health, accommodation, etc. and the need for a strong state will to coordinate and collaborate. Therewithal, the other issue is potential problems with funding management. Some local small-scale NGOs have raised their concerns about short-term, tender-system funding of the NGOs. The following quote from one of their weekly held meetings crystallizes their concern:

Project comes to an end, community center closes, voluntarism ends. There is no sustainability. It is too alienated. ... In the aftermath of EU-Turkey deal, a sector (of funding NGOs) emerged. ... A sector on so-called 'integration' just occurred (notes from a weekly meeting of an NGO founded for refugees, Istanbul, 3 August 2017)

In this vein, some participants refer to the commercialization of project-based NGO work by some other NGOs: "Syrian NGOs in Turkey propose projects to receive funds but they do not care about humanity; the work has been commercialized." (a Syrian-NGO representative, Gaziantep, 23 August 2017).

Similarly, according to a legal expert in Ankara, some vigilant, profit-seeking entrepreneurs owning small NGOs continuously apply for funding for projects targeting refugees without being concerned about the outcome of the projects (a lawyer/NGO worker tied to one of the municipalities, Ankara, second meeting, 10 August 2017). More specifically, organizations may tend to keep silent over certain political decisions or systematic negligence of certain issues by either their international donors or the state for the sake of keeping the NGO running. From a means–ends analysis, the means to achieve the ends might become the ends itself. Basically, receiving financial support as a means to reach the goal of supporting the refugees might become the ends in the case of some organizations.

At the same time, some NGOs 'reject fundings from private companies and the EU, as these are seen as white-washing and insincere' (interview with a member of an NGO for migrants, Izmir, 7 August 2017). It must be noted that the majority of the NGOs in this research did not prioritize the EU–Turkey deal as a topic in itself, and several of the participants, when asked explicitly, stated that their knowledge on the deal is limited. In this manner, there was no explicit mention of how the EU's financial support shall be allocated and to whom. In other words, the NGOs in this research did not explicitly stress the significance of being the direct addressee of the funds, though having a considerable

7 *WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS*

restrain due to insufficient financial power. They did not take sides on the allocation of the funds directly to the state either.

The bottom line of the above accounts from the NGOs is ensuring the essential needs of every child, required to survive in this modern, globalized world; these needs are basically health care, education, language education and protection against exploitation, which require the state will to orchestrate the Ministry of Health, Education, Family and Social Policy, together with the police. Plus, NGOs underline the importance of a strong, centralized coordination among the state institutions, inter-governmental organizations like the UN and the NGOs.

On the other hand, though, as you may see below in the NGO accounts, the state's sceptical and selective approach to the NGOs, basically, delimits itself, as it is heavily dependent on the know-how of the local initiatives regarding the needs, priorities and cultural apprehensions of the 'refugees' and 'refugee' children.

7.9 DIVIDE BETWEEN THE POWER OF KNOWLEDGE FROM THE FIELD AND THE FINANCIAL POWER

The below statements from various NGOs reveal the dependency of the state to the local initiatives during this transition period. A representative of a local-national, human rights-based and research-based NGO narrates:

Do you know that our meeting with the officials (such as the governor of a city, district governorate or the police) is based on providing them information? Usually the governor says, 'do it, because we cannot, do it and share the data with us!' We have given all this information [pointing her finger to the data spread in the office] to the governor, to the development agency, municipality, city council, all.... We have produced maps, where they [refugees] are, where the school is, where the water is. ... The ministry called me recently to ask for the maps. I said, 'wait, don't try to go to field (agriculture areas) yourself, you cannot find the locations, not even with the GPS, our friend will assist you'. ... In fact, the local governors are so in need of data. They do not know what exactly to do for which exact place (a political scientist, experienced in civil society, Ankara, 8 August 2017)

Certainly, the officials are in need of data to develop long-term policies, for which they also fortunately consult various NGOs. Likewise, well-intentioned officials from the police reach out for local NGOs for emergency services. Regarding this aspect, another respondent states, 'The police call us. The police reach out for our lawyers responsible of protecting

the children' (an ex-employee of a large-scale national-secular NGO, Skype interview, 1 August 2017).

Yet, another NGO worker capsulizes the dependent relationship between the NGOs and the state,

I am speaking as a local NGO representative, the states have got to deliver policies, but the knowledge is possessed by the NGOs. If the state does not reach out to the NGOs, then the NGOs have to reach to the state. (a coordinator at a local NGO, Istanbul, 1 August 2017)

Moreover, as one expert bluntly puts it, 'Economic power is possessed by some, while the power of knowledge is in the hands of others' (an ex-employee of a large-scale national NGO, Gaziantep, 23 August 2017). This rich knowledge that is essential for governmentality is not transformative until it meets not only the financial capital but also well-coordinated human resources.

From the point of view of the NGOs, despite holding crucial know-how, their existence and survival depend heavily on their relationship and stance to the central state and on their negotiations with their donors. Those NGOs that are dedicated to supporting the Syrian 'refugees' under 'temporary protection' need to develop more affiliation with the state if they want to develop and expand. According to the participants of the research, the local and religious organizations and network are 'familiar' and more manageable internally while international connections of the iNGOs receive scepticism.

In the delicate process of assisting the migrants and sustaining adequate relations with the state and their international donors such as the UN branches and their partners, all NGOs in this research avoid visible, sensational human rights-based advocacy and do not use media channels to avoid conspicuous attitudes. This self-censorship clearly came to light during a discussion with two temporary workers who had just resigned from their jobs in one of the most prominent national large-scale NGOs with which I also have personal connections; they revealed the darkest scenes in the protection of migrant children segment. As the participants of the interview were no longer representing the NGO, they were not concerned about protecting their positions in the workplace. So, only by the sixth conversation,⁵³ (mostly sexual) exploitation of children by criminal organizations and the ignorance of the addressees towards these criminal acts could be mentioned openly. Moreover, the participants who were genuinely interested in assisting me to gather data suggested that I search especially for ex-NGO workers who would no longer be concerned about the security of their positions and the interest of their workplace or their donors.

⁵³ Personal communication with ex-employees of a large-scale, national NGO, 2 August 2017.

7 *WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS*

Sometimes, there was a large degree of self-censorship. What started as a dialogue consisting of very powerful statements on the graveness of some policies on the refugees slowly turned into explicit self-censorship, as the participant asked me to delete some of my interview notes and suggested that I should not go into further research on what I had just learned. Hence, when asked about how they deal with grave cases of either not receiving public services or experiencing sexual exploitation, the interviewee stated: 'We do not do human rights-based activism. We take the cases to the official correspondents and expect these individual cases to create transformation in the larger system' (a representative of an iNGO, 4 August 2017).

To put it more explicitly, unlike the human rights-based advocacy tradition that could turn into muckraking in the media, most of the NGOs do not share the systematic ignorance in issues of health care, child protection and exploitation in the media and tend to present social problems to the addressee state institutions via casework. In this manner, general public issues of social policy are boiled down to individual, isolated, discrete cases. To put it another way, as another respondent commented on the story above, '[The iNGOs] have just pacified the activism dimension' (political scientist, experienced in civil society, Ankara, 8 August 2017).

So, what are these public issues, the prioritized matters for 'refugee children' that are difficult to raise? Based on my interaction with the NGOs and the literature, I have determined, statelessness, being unaccompanied, undocumented cheap labour, early marriage, sex trafficking, language barrier, difficulties accessing education, criminalization, imprisonment and finally potentiality for radicalization as issues that need immediate attention. However, it must be noted that these matters do not get equal pertinence. In fact, the more violent and criminal the issue gets, as in the case of sex trafficking and radicalization, the less visible it is. In this arena of international relations and money circulation, where transparency is a distant concern, exploitation and criminal issues regarding the one and a half million 'refugee' children are imbricated and interlocked and can be ignored. That is why a respondent representing a very large-scale, iNGO depicted this arena of 'refugee' children as a 'Pandora's box' (an iNGO representative, Gaziantep, 23 August 2017).

The bulk of what I have written so far and what I write below is surely very familiar with the majority of the NGO workers. However, even the NGOs alike have difficulty interacting and collaborating in the everyday consuming workloads. In fact, as stated by various NGO workers, data recording and sharing are very rare and unsystematic. 'Some remain as 'closed boxes' towards each other' (a refugee-assistant expert, NGO worker, Istanbul, 20 August 2017). Accordingly, collaboration is conditioned to transparency within the NGOs, UN organs and the state institutions. As presented below, the issues concerning children are handled so dispersedly that it would be beneficial if each NGO appointed a representative of the 'refugee children' who could systematically share information with each other and with the DGMM.

7.10 PRIORITIZED MATTERS FOR ‘REFUGEE’ CHILDREN

7.10.1 *Statelessness*

In the modern world, registration is everything and statelessness has been an ever-increasing issue since the arrival of Syrian refugees. This issue of statelessness has not received enough recognition yet. In fact, it has been taken into the agenda only by one of the NGOs, which was later closed down. During the research, many NGOs, though being alert about the issue, were not totally aware of the consequences or did not have the capacity to solve this problem of bureaucracy and citizenship. According to the Agenda Children 2016 report, which is based on a comparative analysis of the Turkish Citizenship law with its Syrian counterpart, along with interviews with NGO workers, it is not certain that children born to Syrian parents outside of the camps in Turkey will be acknowledged by the Syrian authorities of the future or whether they will become citizens of Turkey. On top of this, since Syrian parents cannot carry their official marriage certificates as they flee, their marriage might not be recognized by the Turkish authorities, which might create a risk of children being stateless. All states have the right to determine the criteria to guarantee citizenship, mostly based on two principles: blood and place of birth.⁵⁴ Children receive citizenship from their parents or by virtue of their place of birth or both. Consequently, at times of forced migration, citizenship is at stake due to loss of registration documents, loss of parents or place of birth. A lack of birth certificate is a significant problem when trying to get citizenship in today’s modern bureaucracies. Birth at home and not taking the child to the hospital to be registered in a timely manner may result in the refusal of the hospital to provide birth certificate, which is necessary for registration, meaning the child may be undocumented and stateless. As a matter of fact, against this purely bureaucratic issue, NGOs’ hands are tied.

7.10.2 *Unaccompanied children*

Unaccompanied children is on the agenda of some NGOs who try to draw attention to the vulnerability of these children against criminal organizations. By law, unaccompanied ‘refugee’ children are received by the state institutions and state units, after their bureaucratic procedures are finalized. However, this does not mean that protection is guaranteed as some children might escape from these institutions and disappear.⁵⁵ NGOs, in this

54 E. Kırımsoy, Y. Mutlu, & Ş. AntakyaHoğlu, *Suriyeli Mülteci Çocuklar ve Vatansızlık Riski: Bulunık Mekanlarda Gölgede Kalanlar*, Report by Gündem Çocuk (Agenda Children), 2016.

55 Y. Yöney, “Refakatsiz [Mülteci] Çocuklar” Devlet Korumasında Olmalı, *Bianet*, 10 August 2015. Retrieved on 1 December 2017 from <https://m.bianet.org/bianet/cocuk/166703-refakatsiz-multeci-cocuklar-devlet->

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN
TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

regard, fall short of providing care and protection to unaccompanied children, which is an increasing problem worldwide. Unaccompanied children face the risk of struggling with below-mentioned issues to a greater extent. Meanwhile, the issues of language, education and child labour are the arenas in which NGOs can mobilize themselves for intervention the most and the fastest.

7.10.3 Education and language

Many NGOs have taken the initiative to teach children and their families Turkish and also to support the children to catch up with basic contents of the school curriculum. According to the accounts of NGO workers, kids become the translators for their families. However, language barrier is not solved immediately. Not being able to speak Turkish diverts the children from attending the official schools of the Ministry of Education. The Ministry of Education's unequipped condition and reluctance to welcome 'refugee children' into the schools as these children have been treated as 'temporary guests' have also contributed to the problem of schooling. According to UNICEF, in 2017, approximately, 380,000 children out of 870,000 school-age children do not go to school.⁵⁶ On the other hand, some 'refugee' children who attend schools might get discriminatory reactions from their peers. Many school-age children have been sent to Temporary Education Centres (TECs). Immigrant parents also preferred TECs, so that their children receive education in their mother tongue, while the curriculum does not match the Turkish Ministry of National Education (MoNE). Education in two languages is a challenge that Turkey has limited experience in. A considerable number of NGOs in this study stated their concerns about the speed of MoNE's decision to shift children to the national standard education without preparing the infrastructure.⁵⁷ In this uncertain, transitional period, almost all NGOs were involved in the education or at least language education of the refugee children until MoNE decided to rule the education itself in a centralized, standardized manner, albeit without infrastructure and professional labour power. During this process of centralization, when MoNE inhibited NGOs to provide education and language training services, NGOs found themselves between two fires: on the one hand, the risk of being closed due to illegal activity, and on the other hand, leaving children without the leastwise education that they could

korumasinda-olmalı; T.C. Aile ve Sosyal Politikalar Bakanlığı, Çocuk Hizmetleri Genel Müdürlüğü, Refaketsiz Çocuk Yönergesi. Retrieved on 1 December 2017 from <http://cocukhizmetleri.aile.gov.tr/data/544e26d9369dc318044059b0/REFAKATSIZ%20ÇOCUK%20YÖNERGESİ.pdf>.

56 UNICEF. Retrieved on 1 December 2017 from www.unicefturk.org/yazi/acil-durum-turkiyedeki-suriyeli-cocuklar.

57 Due to the differences in education given in these temporary education centres and as the doubts on temporariness increased, the government decided to close these centres in 2017 and shift all students to the national curriculum.

provide. So, some NGOs, ‘*off the record*, chose to continue their educational activities in concealed methods’ (a representative of a grassroots organization, Istanbul, 2 August 2017).

7.10.4 Undocumented child labour and child marriage

Almost half of school-age children do not attend school due to economic barriers. Instead, they, especially boys, become the breadwinners of their families. Without exception, all NGOs have touched the sore spot of undocumented cheap child labour. It was stated many times by the NGO representatives that the burden of paying for the rent and taking care of related expenses is transferred to children, who end up working in many informal jobs. Citizens performing low-skilled labour such as construction, manufacturing, textile and agriculture have found themselves in competition, which has resulted in even lower wages for Syrians.⁵⁸ Yalçın⁵⁹ draws attention to the already existing one million child workers in Turkey prior to the arrival of Syrian children. According to DISK’s (Confederation of Progressive Trade Unions of Turkey) interpretation of official data of TUIK (Turkish Statistical Institute), 78% of child workers work undocumented.⁶⁰ Hence, child labour in Turkey did not emerge as a result of migration flows from Syria. Eventually, Syrian children were welcomed in a setting in which child labour was already prevalent in the informal economy. Yalçın states that

Under Article 71 of the Labor Law, the minimum working age in Turkey is 15, children under the age of 16 are prohibited from employment in arduous or dangerous work, and the minimum age for hazardous works is 18. However, businesses with less than three employees, farms with less than 50 employees, and domestic services are exceptions to this law which means that the regulations for child labor do not apply in these circumstances.⁶¹

The labour conditions of Syrians officially remained *informal* for a considerable amount of time. The Regulation on Work Permits of Foreigners under Protection Act was introduced in 2016,⁶² five years after the first flow of Syrian arrivals.⁶³ Very importantly, especially

58 S. Y. Nielsen, “Perceptions between Syrian refugees and their host community”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 99-106.

59 S. Yalçın, “Syrian child workers in Turkey”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 89-98.

60 C. Bender, “Çocuklar çalışırken ölüyor” *Vesaire* magazine, 22 April 2017. Retrieved on 15 August 2017 from <http://vesaire.org/cocuklar-calisirken-oluyor/>.

61 Yalçın, *supra* note 59.

62 The International Labour Force Law ([ILFL], Law 6735.

63 N. Özcan, “Promoting decent work for Syrians: The ILO experience”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 37-42. This Act regulates work permits for Syrians who do not have a residence permit. It is not the migrants but the employers who can apply for the potential employees’ permit, which leaves the

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

for children, seasonal agricultural or livestock breeding activities are exempted from work permits,⁶⁴ which catalyse exploitation. Seasonal agricultural work is considered as one of the three worst forms of child labour.⁶⁵ As Kavak⁶⁶ states, agricultural work is tiring and generates a low income. Of the 1 million children, 400,000 do in seasonal agricultural work.

Besides seasonal agriculture, Syrian children are exploited in the supply chains of international brands.⁶⁷ Textile is one of the key sectors in Turkey that supplies products for European brands; in the textile industry, Syrian children work under exploitative conditions.⁶⁸ Confectionary, shoe production, service sector jobs, industrial sector jobs such as furniture production and automobile factories constitute the other main sectors that prefer child labour.⁶⁹ The wages remain below the minimum wage, working hours exceed the standards and hundreds of children are killed in work accidents, 10% of whom are Syrian.⁷⁰

This issue cannot be explained as 'parents' preference'. In fact, manufacturing companies prefer children rather than their parents, as it is easier to exercise domination on children. Indeed, a Syrian mother's statement in an NGO conference in Istanbul complements the NGO accounts, 'When I search for jobs [in textile and alike], they ask me to send my child to work, instead!' (field notes from a conference, Istanbul, 18 June 2017).

NGOs have started carrying out various methods to combat undocumented child labour. One method is to find donors to pay the amount of salary that the child would bring into the family or force manufacturing companies to sponsor children during school age, so that children could be kept away from work till they reach the age of legal work. Meanwhile, some NGOs have been searching for innovative methods to merge education and labour, in the form of vocational training. An initiative from an international, large-scale Islamist NGO in Turkey to turn the labour into vocational training by signing a protocol with the Turkish state is an example of this; I was told this during an interview

migrants in the hands of employers who might be habituated to undocumented and low-wage employment methods.

64 Id.

65 Yalçın, *supra* note 59.

66 S. Kavak, "Syrian refugees in seasonal agricultural work: a case of adverse incorporation in Turkey", *New Perspectives on Turkey*, Vol. 54, 2016, pp. 33-53.

67 Yalçın, *supra* note 59.

68 B. Yaghmaiam, "World Humanitarian Summit: Syrian child refugees in Turkey", *The Globalist*, 23 May 2016. Retrieved from www.theglobalist.com/world-humanitarian-summit-syrian-child-refugees, and Child refugees in Turkey making clothes for UK shops, *BBC*, 24 October 2016. Retrieved on 1 August 2017 from www.bbc.com/news/business-37716463.

69 Support to Life, Vulnerability assessment of Syrian refugees in Istanbul, April 2016. Retrieved from <http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/823/Vulnerability%20assessment%20of%20Syrian%20refugees%20in%20%C4%B0stanbul%20April%202016.pdf?sequence=1&isAllowed=y>.

70 Yalçın, *supra* note 59.

(notes from interview with a large-scale Islamist organization, Gaziantep, 23 August 2017). However, sending children to do heavy manual labour in the name of ‘vocational training’ bears the risk of concealing exploitative labour relationships.

While child labour affects boys more than girls, as girls are traditionally kept more at home for domestic labour, the issue of child marriage and child brides has reached unprecedented numbers, which are in fact not recorded and left to the ‘private’ sphere on purpose.⁷¹ Young girls mostly live the double burden of forced migration by ‘accepting’ early marriages and pregnancy and becoming the second/third/fourth wives through religious marriage.⁷² In contrast to the relative easiness of discussing the issue of undocumented child labour in agriculture and manufacturing, speaking of child brides is not easy. As NGO workers underline, marriage is seen as an issue of private sphere both by the families and by the state; it remains invisible to public scrutiny, which also prevents NGOs to fight against them.

In other respects, according to the NGO representatives, children are also known (though not proven) to be trafficked for sex work. This issue of sex trafficking has been raised by various NGOs along with a statement of conscious negligence by the police in investigating and prosecuting the perpetrators, who are obviously linked to organized crime and terror groups. Furthermore, an investigative journalist that I met during fieldwork claims to be threatened by the ISIS while investigating the selling of children at night (fieldnotes, Ankara, 2 June 2017). Though trafficking of children for sex was raised as one of the prioritized issues during the interviews, none of the NGOs, regardless of their size and capacity, could say that they could do anything about it.

7.11 CRIMINALIZATION AND IMPRISONMENT OF ‘REFUGEE’ CHILDREN

Being a victim of organized crime groups involved in trafficking for sex, begging or labour, being in conflict with the law and being criminalized in the Turkish youth justice system are other potential and real problems that have not been considered yet. Contrary to my expectations, none of the participants, except one in Gaziantep, problematized the probability of the ‘refugee’ children getting into conflict with the law due to drug use and petty offences like theft. Only in Gaziantep, one participant referred to children abusing very cheap chemical substances and committing petty theft to cover their expenses (fieldnotes, Gaziantep, 24 August 2017). On the other hand, the state authorities stress the low level of criminalization among the newcomers to prevent potential xenophobia and to keep the ‘high level of social acceptance in Turkey’⁷³ as it is.

71 Fieldnotes 2017. Istanbul August 2017.

72 Kırımsoy *et al.*, *supra* note 54.

73 Erdoğan, *supra* note 14.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

Following the question by an MP about Syrian-origin prisoners, it is publicly known that by April 2016, there were a total of 1,450 Syrian prisoners in Turkish prisons. 236 prisoners were related to terrorism, 4 were related to organized crime and 80 were below the age of 18 (3 girls and 77 boys). According to Turkey's Center for Prison Studies, by April 2016, there were a total of 141 foreign-born children in Turkish prisons. A great percentage of these foreign-born children were on pre-trial detention but were found guilty or sentenced. In 2015, foreign prisoners in Turkey made up 2.1% of the whole prison population. On 5 July 2017, the Ministry of Interior announced that Syrians are involved in 1.32% of all incidents.⁷⁴

Language problems occur in the criminal and youth justice systems just like in other spheres of life. The following anecdote reveals the seriousness of the communication barrier:

A Syrian boy's trial for murder was extended due to the translation problem. The child's sister was killed in the family. She was killed either by her father or by the child under the influence of the father because while the sister supported the Assad regime, the family supported the Free Syrian Army, or vice versa. So, the court had to arrange an Arabic translator somehow, who was actually the summoner in the court. The child's testimony changed from accepting the accusation to accusing his father for murder. Plus, the translator acted like an interpreter instead of one-to-one translation and ended up being kicked out of the court. The last sentence of the judge was, "Now that the translator is out, how do we explain the extension of the case to the child?" Security officers said, "Don't worry your Honour, we will explain somehow." (anecdote from the PhD fieldwork conducted in a juvenile heavy penal court, Çağlayan, Istanbul, 18 July 2014)

With this example, it is not hard to imagine the difficulties in terms of accessing legal aid/attorneys, receiving social inquiry reports from social work officials who should inform judges about the social environment of the child, accessing psychology services and libraries, and using health services inside the prisons.

Language is not the only obstacle while being in conflict with the law. Being a refugee, a migrant means not being registered at a permanent address like the citizens of the country, which leads prosecutors and judges to detain the suspect on remand, so that it is easier to 'find' the suspect for the testimony. So, the obstacles that come along with being a victim of war and migration start at the bureaucracy level before the language barrier

74 İçişleri Bakanlığı, Suriyeli mültecilerin suç oranını açıkladı, *Cumhuriyet* newspaper. 5 July 2017. Retrieved on 11 July 2017 from www.cumhuriyet.com.tr/haber/turkiye/774325/icisleri_Bakanligi__Suriyeli_multecilerin_suc_oranini_acikladi.html.

comes into the picture. In terms of the potential radicalization threat, Versavel⁷⁵ concludes that while the risk may not be high in the camps, ‘the risk of radicalization is still present for the 90 per cent that are not in camps’. Radicalization is presented as a potential threat targeting the Syrian children who cannot be included in the school system. However, just like criminalization and statelessness, many NGOs’ response to this problem is to nod and accept the severity of conditions.

7.12 TOWARDS THE CONCLUSION

The problems discussed above are the only tip of the iceberg, considering what one could share from what is off the record in the dialogues with NGOs and provided in the literature in the post-crisis and in the aftermath of the EU–Turkey deal. And yet again, how will the refugee children taken care of, in the meaning of lookout for, by whom and through which means? Considering the range of problems with regard to the protection of children who are victims of war and forced migration, the attempts, efforts and struggles of the NGOs as local initiatives stand out in enabling the continuity of everyday life with less hassle through dedicated patchwork. Moreover, these local and international civil society initiatives possess the field knowledge that is crucial in governing this new and growing population. Meanwhile, the existence of the NGOs and their work on ‘refugees’ and ‘refugee’ children depend heavily on two factors: their relationship with the state and their share in the circulation of financial capital, which renders their hard work unsustainable. Hence, according to different NGO representatives in this research, there is no sustainable governance of the ‘refugee’ population as it is framed within a discourse of crisis.

In this modern, disenchanted world of order, bureaucracy, rights and duties, legal status and public transparency matter significantly in the protection of ‘refugee’ children. Turkey’s welfare regime functions around informal social ties, voluntary initiatives and the private sector.⁷⁶ At this point, the EU authorities’ tenacity to allocate financial support in the short-term, temporary nature of project-based funding schemes stands contradictory to its principles of bureaucratic, formal, centralized protection and welfare practices and should be opened to questions. The issues concerning ‘refugee’ children, such as language, education, labour, protection against trafficking and involvement in crime cannot be handled by projects-based, short-term interventions.

However, at this moment of transition to become a host country, Turkey seeks assistance from various NGOs with the local know-how. The state’s sceptical relationship with the NGOs over a couple of years might jeopardize its own capacity to provide ‘refugee’ children

75 N. Versavel, “Reducing the risk of militarization in Turkey’s refugee camps”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 131-138.

76 Yazıcı, *supra* note 40.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN
TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

their rights. So far, the EU, Turkey, the UN and NGOs have not successfully orchestrated a solid plan to guarantee the rights of 'refugee' children. So, are 'refugee' children who are obliged to be bilingual, be enrolled in education, be the breadwinner and be protected from trafficking, criminalization and radicalization, by any means, the concern of international politics and states? If the answer is yes, if and when hell freezes over, then political interests, conflicts and contestations shall be replaced by transparency and collaboration.

REFERENCES

"AB Türkiye'ye mali yardıma yeni model arıyor", *Deutsche Welle Turkey*, 25 August 2017. Retrieved on 27 August 2017 www.dw.com/tr/ab-turkiyeye-mali-yardima-yeni-model-ariyor/a-40238136.

Annulment of the decision of permission request to do academic research on the topic of Syrian refugees. Retrieved on 15 August 2017 www.hugo.hacettepe.edu.tr/tr/gecici_koruma_altındaki_suriyeliler_konusunda_yapi-10.

Bender, C., "Çocuklar çalışırken ölüyor", *Vesaire* magazine. 22 April 2017. Retrieved on 15 August 2017 <http://vesaire.org/cocuklar-calisirken-oluyor/>.

Benhabib, Ş., *The Rights of Others. Aliens, Residents and Citizens*, Cambridge, Cambridge University Press, 2004.

Buğra, A., *Kapitalizm, Yoksulluk ve Türkiye'de Sosyal Politika*. [Capitalism, Poverty and Social Policy in Turkey], Istanbul, İletişim, 2006.

Buğra, A., & Candaş, A., "Change and continuity under an eclectic social security regime: The case of Turkey", *Middle Eastern Studies*, Vol. 47, No. 3, 2011, pp. 515-528.

Buğra, A., & Keyder, Ç., "The Turkish welfare regime in transformation", *Journal of European Social Policy*, Vol. 16, No. 3, 2006, pp. 211-228.

Buğra, A., & Adar, S., "Social policy change in countries without mature welfare states: The case of Turkey", *New Perspectives on Turkey*, Vol. 38, 2008, pp. 38, 83-106.

Canefe, N., "Management of irregular migration: Syrians in Turkey as paradigm shifters for forced migration studies", *New Perspectives on Turkey*, Vol. 54, 2016, pp. 9-38.

NILAY KAVUR

Castles, S., "Towards a sociology of forced migration and social transformation", *Sociology*, Vol. 37, No. 1, 2003, pp. 13-34.

Castles, S., "International migration at a crossroads", *Citizenship Studies*, Vol. 18, No. 2, 2014, pp. 190-207.

"Child refugees in Turkey making clothes for UK shops" BBC, 24 October 2016. Retrieved on 1 August 2017 www.bbc.com/news/business-37716463/.

Coşar, S., & Yeğenoğlu, M., "The neoliberal restructuring of Turkey's social security system," *Monthly Review: An Independent Socialist Magazine*, Vol. 60, No. 11, April 2009. Retrieved on 1 May 2017 <https://monthlyreview.org/2009/04/01/the-neoliberal-restructuring-of-turkeys-social-security-system/>.

Çorabatır, M., "The fall of Aleppo calls for new approaches to the refugee crisis", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 53-58.

ECHO Factsheet, July 2017. Retrieved on 20 August 2017 http://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf.

Eder, M., "Retreating state? Political economy of welfare regime change in Turkey", *Middle East Law and Governance*, Vol. 2, 2010, pp. 152-184.

Erder, S., "Preliminary thoughts on the Syrian refugee movement", *New Perspectives on Turkey*, No. 54, 2016, pp. 119-130.

Erdoğan, M. M., *Urban Refugees from "Detachment" to "Harmonization"- Syrian Refugees and Process Management of Municipalities: The Case of Istanbul*, Marmara Belediyeler Birliği Kültür Yayınları, January 2017.

Eşsiz, V., "Overview of Turkey's policies and practices pertaining to protection of refugees", International Conference, International Community and Refugees: Responsibilities, Opportunities and Human Rights Violations, Istanbul, Amnesty International Turkey Publications, 13-14 May, 2016.

European Commission-Press release, Facility for Refugees in Turkey: Over €1.4 billion in support of education and health for Syrian refugees, Brussels, 28 July 2016. Retrieved on 20 November 2017 http://europa.eu/rapid/press-release_IP-16-2661_en.htm.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN
TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

Frelick, B., Kysel, Ian M., Podkul, J., "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants", *Journal on Migration and Human Security*, Vol. 4, No. 4, 2016, pp. 190-220.

Greenhill, K. M., "Open arms behind barred doors: Fear, hypocrisy and policy schizophrenia in the European migration crisis", *European Law Journal*, Vol. 22, No. 3, 2016, pp. 317-332.

Human Rights Watch, Q&A: Why the EU-Turkey Migration Deal is No Blueprint, 14 November 2016. Retrieved on 30 August 2016 <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.

İçduygu, A., & Şimşek, D., "Syrian refugees in Turkey: Towards integration policies", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 59-69.

İçduygu, A., "Türkiye'deki Suriyeli Sığınmacılar: 'Siyasallaşan' bir sürecin analizi", *Toplumbilim*, Vol. 140, 2017, pp. 27-41.

İçişleri Bakanlığı, Suriyeli mültecilerin suç oranını açıkladı. Cumhuriyet newspaper. 5 July 2017. Retrieved on 11 July 2017 www.cumhuriyet.com.tr/haber/turkiye/774325/icisleri_Bakanligi__Suriyeli_multecilerin_suc_oranini_acikladi.html.

İrtiş, V., "Kanun Tarafından Suç Olarak Nitelendirilmiş bir Eylemde Bulunan Çocuklar için Çalışan Sivil Toplum Örgütlerinin Deneyimlerine dair Dair Bir İnceleme", in A. Ergür (ed.) *Buruk Şenlik: Enformasyon Toplumunda Anomi ve Yabancılaşmanın Yeni Biçimleri*, Phoneix Yayınevi, 2016, pp. 213-234.

Kavak, S., "Syrian refugees in seasonal agricultural work: A case of adverse incorporation in Turkey", *New Perspectives on Turkey*, Vol. 54, 2016, pp. 33-53.

Keyman, E. F. "Turkey's choice: Responding to security challenges through humanitarian norms with a revitalized EU anchor" *International Politics*, Vol. 54, No. 4, 2017, pp. 453-467.

"KHK ile kapatılan 375 dernek (Tam liste)", *NTV*, 22 November 2016. Retrieved on 1 October 2017 https://www.ntv.com.tr/galeri/turkiye/khk-ile-kapatilan-375-dernek-tam-liste,jYC_-WVKA0mGSslnA4ABJw.

NILAY KAVUR

Kırımsoy, E., Mutlu, Y., & Antakyalıođlu, Ő., Suriyeli Mülteci Çocuklar ve Vatansızlık Riski: Bulanık Mekanlarda Gölgede Kalanlar, Report by Gündem Çocuk (Agenda Children), 2016.

Korkut, U., “Pragmatism, moral responsibility or policy change: The Syrian refugee crisis and selective humanitarianism in the Turkish refugee regime”, *Comparative Migration Studies* Vol. 4, No. 2, 2016, pp. 1-20.

Köprülü, S. M., “From the Desk of the Editor”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 7-13.

Law on Foreigners and International Protection (LİFP) No. 6458. 4 April 2014. Retrieved from http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf.

Mcclelland, M., “How to build a perfect refugee camp”, *New York Times Magazine*. February 13, 2014.

Nielsen, S. Y., “Perceptions between Syrian refugees and their host community”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 99-106.

OECD, “Economic Survey of Turkey 2016”. Retrieved on 20 July 2017 www.oecd.org/turkey/economic-survey-turkey.htm.

Öniş, Z., “The triumph of conservative globalism: The political economy of the AKP Era”, *Turkish Studies*, Vol. 13, No. 2, 2012, pp. 135-152.

Özcan, N., “Promoting decent work for Syrians: The ILO experience”, *Turkish Policy Quarterly* Vol. 15, No. 3, 2016, pp. 37-42.

Öztiğ, L. İ., “The Syrian conflict and Turkey’s humanitarian response”, *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 139-147.

Reno, T., “The EU Facility for Refugees in Turkey – Prevailing Misperception”, *Observatoire De La Turquie Et De Son Environnement Géopolitique*, 21 September 2017. Retrieved on 20 November 2017 www.iris-france.org/wp-content/uploads/2017/09/Obs-Turkey-TReno-21-sept-2017.pdf.

Rygiel, K., Baban, F., Ilcan, S., “The Syrian refugee crisis: The EU-Turkey ‘deal’ and temporary protection”, *Global Social Policy*, Vol. 16, No. 3, 2016, pp. 315-320.

7 WHAT IS LEFT FROM 'OFF THE RECORD': POLITICS ABOUT 'REFUGEE' CHILDREN IN TURKEY IN THE MIDST OF THE EU, THE UN, THE STATE, NGOs AND DONORS

Şimşek, D., "Göç Politikaları ve 'insan güvenliği': Türkiye'deki Suriyeliler örneği, (Migration Policies and 'human security': the case of Syrians in Turkey)", *Toplumbilim*, Vol. 140, 2017, pp. 11-26.

Soysal, Y., "Citizenship, immigration, and the European social project: Rights and obligations of individuality", *The British Journal of Sociology*, Vol. 63, No. 1, 2012, pp. 48-53.

Support to Life, Vulnerability Assessment of Syrian Refugees in Istanbul", April 2016. Retrieved from <http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/823/Vulnerability%20assessment%20of%20Syrian%20refugees%20in%20C4%B0stanbul%20April%202016.pdf?sequence=1&isAllowed=y>.

T.C. Aile ve Sosyal Politikalar Bakanlığı, Çocuk Hizmetleri Genel Müdürlüğü, Refaketsiz Çocuk Yönergesi. Retrieved on 1 December 2017 <http://cocukhizmetleri.aile.gov.tr/data/544e26d9369dc318044059b0/REFAKATSIZ%20ÇOCUK%20YÖNERGESİ.pdf>.

Turhan, E., "Kimdi Giden, Kimdi Kalan? Cop21 Sonrası İklim Değişikliği ve Göç", *Saha-Helsinki Yurttaşlar Derneği*, Vol. 2, 2016, pp. 36-39.

Uluğtekin, S., "Kanunla İhtilaf Halindeki Çocuklar: Eleştirel Düşünme ve Türkiye'de Çocuk Adalet Sistemi'nin Bazı Özellikleri. [Children in Conflict with the Law: Critical Thinking and Some Aspects of the Youth Justice System in Turkey]", in P. Akkuş & Ö. Başpınar Aktükün (eds.), *Sosyal Hizmet ve Öteki: Disiplinler Arası Yaklaşım*, İstanbul, Bağlam, 2014, pp. 193-223.

Ulusoy, O. 2016 'Turkey as a safe third country?' Oxford University Faculty of Law Blogs. Retrieved on 15 October 2017 <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>.

"UNICEF: 40% of Syrian children in Turkey not in school". Retrieved on 20 August 2017 www.aljazeera.com/news/2017/01/unicef-40-syrian-children-turkey-school-170119175018121.html.

Versavel, N., "Reducing the risk of militarization in Turkey's refugee camps", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 131-138.

Yalçın, S., "Syrian child workers in Turkey", *Turkish Policy Quarterly*, Vol. 15, No. 3, 2016, pp. 89-98.

NILAY KAVUR

Yaghmaiam, B., "World Humanitarian Summit: Syrian Child Refugees in Turkey", *The Globalist*, 23 May 2016. Retrieved from www.theglobalist.com/world-humanitarian-summit-syrian-child-refugees.

Yazıcı, B., "The return to the family: Welfare, state, and politics of the family in Turkey", *Anthropological Quarterly*, Vol. 85, No. 1, 2012, pp. 103-140.

Yöney, Y., "Refakatsiz [Mülteci] Çocuklar" Devlet Korumasında Olmalı", *Bianet*, 10 August 2015. Retrieved on 1 December 2017 <https://m.bianet.org/bianet/cocuk/166703-refakatsiz-multeci-cocuklar-devlet-korumasinda-olmali>.

8 FRONTEx REBOOTED

The Securitization of Migration in the EU by the European Border and Coast Guard and Its Legal Implications in Terms of EU Competences and Social Legitimacy

Mairi Zoi

8.1 INTRODUCTION

In the light of the 2015 migratory influx, the characterization of the phenomenon as ‘migration crisis’ and ‘flood-like’ flow of migrants towards the EU, the Union sought to provide answers by formulating policies to deal with the systemic inefficiencies that had arisen. In this context, the new Regulation (EU) 2016/1624 on the European Border and Coast Guard (EBCG) was introduced in September 2016, repealing the former regulations concerning Frontex – the so-called agency of the Union’s external border control, formed in 2004.¹ Its basic objective is ‘to develop and implement European integrated border management, [which] is central to improving migration management ... and ensure a high level of internal security.’² Given the significance of the current migratory movements towards the EU and the international reports estimating an increase in those numbers in the years to come³ (e.g. climate migration, refugees’ diaspora due to civil conflicts and deteriorating living conditions in third countries), the reinforcement of the agency by the Union with the attribution of extended tasks turned Frontex into a profound actor in facing migratory influxes.

This chapter follows a single-case research design in order to explore the relation between migration and security in Europe, though from a narrow angle, concentrating on

1 The EU legislature wished to adhere to the initial name, since the new agency will continue to have the same legal personality with the old one ‘with full continuity in all its activities and procedures’. Hence, the names Frontex and EBCG will be used interchangeably in the chapter to refer to the same EU agency. See Recital (11) Regulation (EU) 2016/1624 of the European Parliament and the Council on the European Border and Coast Guard of 14 September 2016, OJ L251/1.

2 See Recital (2) Id.

3 In his interview in the German newspaper *Die Welt* on 29 March 2017, the president of the European Parliament, Antonio Tajani, claimed that potentially 30 million migrants will head towards the Union in the coming years. See C. Reuscher, & A. Tauber, Dann werden 30 Millionen Einwanderer in die EU kommen, *Die Welt*, 29 March 2017. Retrieved on 23 April 2017 from <https://www.welt.de/politik/ausland/article163215714/Dann-werden-30-Millionen-Einwanderer-in-die-EU-kommen.html>; International Organisation for Migration (IOM), World Migration report 2010, the future of Migration: Building capacities for change, 2010. Retrieved on 10 February 2018 from https://publications.iom.int/system/files/pdf/wmr_2010_english.pdf.

the new legislative regime of the EBCG. Firstly, it aspires to examine whether the tasks of the EBCG constitute securitization practices, intensifying the idea of migration as a security threat to the Union.⁴ Thus, it will analyse solely the case of Frontex and its contribution to the intensification of migration as a threat and not in general how migration has been created and further developed as a concept that threatens the Union through various discourses and practices.⁵ For this purpose, the securitization theory has been chosen, in particular practice analysis, to constitute the theoretical framework in order to scrutinize the tasks of the agency. Its delineation is to be found in the first part of the paper, where the necessary theoretical delimitations are made.

Secondly, an attempt will be made to explicate the interrelation of the findings of the previous analysis with the EU competences chosen to frame the new regulation and the effects on the latter's social legitimacy. The chapter will focus on the nature of the Union competences distinguished between purposive and sector specific.⁶ The author wishes to explore whether and to what extent the use of purposive competence, in order to create the EBCG and define its tasks, overlooked the tasks' impact on other subject matters besides border control, like asylum and immigration. And lastly, whether this outcome could influence the public's acceptance towards the new legislative act. For doing so, the official EU documents on the discussions made in the democratic process for the regulation's adoption will be examined in order to check whether the impact of the agency's tasks on the EU immigration and asylum policy was part of the deliberations.

The results of this analysis could further work as a problematique for the discussion opened regarding the narrative of the current 'migration crisis'. The new regulation of the EBCG is not merely a policy answer, an emergency-driven mobilization of the EU legislator to confront the so-called 'migration crisis', but – given its possible role in securitizing migration – it might also lead to the perpetuation and consolidation of a restrictive EU policy on migration, founding a hostile image towards immigrants, asylum seekers and refugees without any distinction, while solidifying any exceptional measure proclaimed to face the 'crisis', leading to a 'permanent state of emergency'. In that way, we may be witnessing a vicious circle, where policy responses are sought to face a phenomenon that allegedly bears the characteristics of a 'crisis', when at the same time this policy tool feeds the meaning of the 'crisis' and solidifies its existence.

4 The term *migration* in this chapter included both immigration and asylum.

5 It has been argued that the securitization of migration in the EU has started long before Frontex was launched back in 2004. See J. Huysmans, "The European Union and the securitisation of migration", *Journal of Common Market Studies*, Vol. 38, No. 5, 2000, pp. 751-777; J. Huysmans, *The politics of insecurity: fear, migration and asylum in the EU*, 1st edn., London, Routledge, 2006.

6 Following the categorization introduced by Gareth Davies. See G. Davies, "Democracy and legitimacy in the shadow of purposive competences", *European Law Journal*, Vol. 21, No. 1, 2015, pp. 2-22.

8.2 PRACTICE ANALYSIS IN SECURITIZATION THEORY

Within Critical Security Studies⁷, securitization theory plays a pivotal role in delineating the concept of security and how it is being constructed within society. The theory originated from the Copenhagen school of thought as a speech act that signifies an existential threat towards a referent object – an issue that is being threatened – by *implying a right to use extraordinary means to fence it off. The issue is then securitized – becomes a security issue, a part of what is ‘security’*.⁸ Therefore, securitization is an act by which an issue emerges as a ‘threat’ through *the emergency mobilization of the state*,⁹ meaning that it creates a situation by which the issue chosen to constitute the ‘threat’ is being raised to a state of emergency or exception. Such a realization places the securitization process in opposition to the normal, everyday politics, since it promotes an act, where extraordinary conditions demand extraordinary measures, thereof justified and legitimized.¹⁰

Apart from this discursive analysis to the securitization process, another strand of thought emerged within Critical Security Studies, acknowledged as the Paris school, which emphasized on practice analysis instead of speech acts. It brought to the forefront the idea of *security practices* as policing methods which manage the societal insecurities.¹¹ They contested the Copenhagen belief in the exceptionalism of the measures introduced by the securitizing actor to confront a ‘threat’.¹² Instead, they introduced the concept of ‘security professionals’ as those who produce the knowledge and ‘truth’ on what constitutes a threat to a secure society.¹³ If attention is to be given to the ‘security professionals’, as the ones that handle the ‘unease’ in everyday life by standardized means, then, they argue, security

7 Its emergence opposed the traditional approach to security in Europe. The latter had strong military orientation, whereas the emergence of the Critical Security Studies – identified after the end of the Cold War – brought a sociopolitical approach to security studies, based on the notion of social construction, the idea that social practices influence the perception people have for the world. See D. Mutimer, “Critical security studies” in M. D. Cavelty, & T. Balzacq (eds.), *Routledge handbook of security studies*, 1st edn., London, Routledge 2017, pp. 55-56.

8 O. Wæver, “The EU as a security actor: Reflections from a pessimistic constructivist on post-sovereign security orders” in M. C. Williams, & M. Kelstrup (eds.), *International relations theory and the politics of European integration: Power, security, and community*, London, Routledge, 2000, p. 251.

9 B. Buzan, O. Wæver, & J. Wilde, *Security: A new framework for analysis*, 1st edn., London, Rienner, 1998, p. 8.

10 C.A.S.E. Collective, “Critical approaches to security in Europe: A networked manifesto”, *Security Dialogue*, Vol. 37, No. 4, 2006, pp. 444-487, pp. 453, 464-466; C. Aradau, & R. van Munster, “Poststructuralist approaches to security”, in M. D. Cavelty, & T. Balzacq, *Routledge handbook of security studies*, 1st edn., London, Routledge 2017, p. 77; S. Léonard, “EU border security and migration into the European Union: FRONTEx and securitisation through practices”, *European Security*, Vol. 19, No. 2, 2010, pp. 237-238.

11 Huysmans, 2006, *supra* note 5.

12 C.A.S.E. Collective, *supra* note 10, pp. 465-466.

13 D. Bigo, “Globalised (in)Security: The field and the ban-opticon”, in D. Bigo, & A. Tsoukala (eds.), *Illiberal practices in Liberal regimes*, Paris, L’Harmattan, 2006, pp. 5-49; D. Bigo, “Security and immigration: Toward a critique of the governmentality of unease”, *Alternatives*, Vol. 27, 2002, pp. 174-178; C.A.S.E. Collective, *supra* note 10, pp. 457-460.

is taking another meaning.¹⁴ Examined in that perspective, the exceptional turns into routine, into a pattern that is being used to bring to the forefront the concept of ‘threat’ in a repetitive and standardized way.¹⁵ The idea of exceptionalism is, thus, grounded as an ordinary process of governmentality through practices and the production of security knowledge, and so it is stripped of its exotic and unique character.¹⁶

Even though both strands of thought offer the appropriate tools to holistically analyse an empirical phenomenon, for the purposes of this chapter, a practice analysis of the securitization process is proclaimed. The reason is that the idea of practices allows for a more empirical, down-to-everyday life experience of examining a threat, either as a newly constructed concept for the issue it seeks to address or as a continuation of an already existing construction¹⁷ – the latter being the aim of the current chapter, meaning the intensification of migration as a threat to the Union through EBCG’s tasks. That is because practices are the direct expression and implementation of the securitization process. They are the means chosen to address the threat, while simultaneously constituting the carriers of the meaning of the threat needed to be tackled.¹⁸ Furthermore, given that the introduction of an issue as a threat through speech acts does not necessitate its discursive continuation for the adoption of new measures sought to answer it,¹⁹ practices can be preferred to scrutinize the evolution of an established threat for they depict the entire spectrum of dynamics within the securitization process and highlight that it is not a fixed and static procedure.²⁰

Given this methodological choice, the definition of the securitization practice and the criteria that will be used to classify an act as such are crucial for the coherence of this chapter. However, because within the Paris school, the concept of practice was not clearly defined, recourse to the definition of securitization practice as given by Balzacq is proclaimed.²¹ The scholar tried to extend the theoretical framework of the Paris school and enhance the accuracy of the terms used, aiming to a transparent and more accurate research

14 C.A.S.E. Collective, *supra* note 10, p. 466.

15 Bigo, 2002, *supra* note 13, pp. 63-92.

16 T. Balzacq, “The three faces of securitization: Political agency, audience and context”, *European Journal of International Relations*, Vol. 11, 2005, pp. 175-201; D. Bigo, “When two become one: Internal and external securitisations in Europe”, in M. C. Williams, & M. Kelstrup (eds.), *International relations theory and the politics of European integration: Power, security, and community*, London, Routledge, 2000, pp. 171-205.

17 S. Léonard, “EU border security and migration into the European Union: FRONTEX and securitisation through practices”, *European Security*, Vol. 19, No. 2, 2010, p. 236.

18 T. Balzacq, “The policy tools of securitization: Information exchange, EU foreign and interior policies”, *JCMS: Journal of Common Market Studies*, Vol. 46, 2008, pp. 80-81.

19 For example, the evolution of migration into being a security threat within the Union. See S. Léonard, *The European Union and the ‘securitisation’ of asylum and migration: Beyond the Copenhagen school’s framework*, PhD thesis, University of Wales Aberystwyth, 2007; Huysmans, *supra* note 5; Léonard, *supra* note 17.

20 Balzacq, *supra* note 18, pp. 75-100.

21 Id; Léonard, *supra* note 17.

in the securitization field. In that context, he defined the securitization practice or tool, as he named it,²² as follows: ‘An identifiable social and technical “dispositif” or device embodying a specific threat image through which public action is configured in order to address a security issue.’²³

This definition indicates the transformative nature of a securitization tool, because of its capacity not only to contribute to the tackling of the existing threat, but also to mould the ‘image’ of the threat itself. Thus, the tool influences the ‘threat’ and so it actually securitizes. The observers of these practices can grasp which issue is threatening merely by the activities and the means undertaken, since the latter carry and convey the image of the threat they wish to challenge.²⁴

As the outcome of the theory described above, the criteria under which the tasks of the EBCG will be examined to check whether they constitute securitization practices to migration are to be delineated. Two parameters are considered important in this context: first, the use of means that are ordinarily deployed as a response to common security threats [e.g. military methods (tanks, weapons, armed units) to face armed foreign attacks or terrorism]. The projection of military forces and armoury to deal with matters falling outside criminal activities or national sovereignty challenges indicates the transformation of the latter into dangers which are equal to traditional threats. It amounts to the construction of those issues into security threats, since this process transmits the signal that the issues constitute menaces in need of a response corresponding to traditional security threats even if they are not commonly perceived as such. The second parameter is to avail of ‘out of ordinary’ means in order to face a problem.²⁵ The adoption of extraordinary measures demonstrates that the issue they are dealing with is also considered unique and exceptional. In other words, the attempt to respond to something with means surpassing the usual methods proves its peculiar nature. For the clarity of the term *extraordinary*, it must be stated that it is based on the definition of security as given by the Paris school in a quite broad sense. For its exponents, security is identified as moving within a ‘*continuum from normalcy to worrisome/troublesome, from risk to existential threat*’.²⁶ And so the term is rather meant as ‘out of ordinary’ in the sense that some practices are not merely chosen to tackle an emergency, but seen through their socio-political context; they are being deployed to face issues that were not being tackled with equivalent means before. These criteria, which do not need to be cumulatively fulfilled for an activity to be considered a

22 The term *practice* will, however, be used in the present chapter to serve the same purpose as the use of the term *tool* for the broader acknowledgement the first bears within the circles of Security Studies. See Léonard, *supra* note 17, p. 237.

23 Balzacq, *supra* note 18, p. 79.

24 *Id.*, p. 77.

25 To use the term as introduced by Léonard. See Léonard, *supra* note 17, pp. 237-238.

26 See R. Abrahamsen, “Blair’s Africa: The politics of securitization and fear”, *Alternatives*, Vol. 30, 2005, p. 59.

securitization practice, shall be the basis for the scrutiny of the ECBG's tasks in the attempt to examine their alleged characterization as securitization practices.²⁷

8.3 PURPOSIVE EU COMPETENCES

The term was introduced by Gareth Davies and explicated under the scope of Article 114 TFEU, granting the EU legislator the power to regulate the internal market.²⁸ The principal criterion for classifying Union competences under the term is the way they are being phrased in the text of the treaty. In cases where the EU legislator is being given the power to adopt measures in order to fulfil a specific purpose, however, in a broad way, we can identify the competence as being purposive.²⁹ This competence also has the characteristic of 'not being constrained on its subject matter or the breadth of its impact', but touching upon other issues as well, beyond those described in its legal base, as a result of its broad phrasing and the emphasis it gives to the objective it seeks to fulfil.³⁰ On the other side of the categorization lie *the sector-specific competences*, which describe precisely those measures that need to be adopted by the Union in the text of the treaty itself for the fulfilment of the objectives they pursue. Hence, the legislator is not given great discretion when exercising the power conferred to it by the treaty, but rather has a specific task of adopting explicit measures on a specific field.³¹ Thus, the first category of competence has the inherent characteristic of being broadly defined, granting the freedom to the EU legislator to take any measures necessary for the attainment of its objective, while the second is narrowly phrased and so it is constrained in fulfilling its objective in a specific and pre-determined direction.

8.4 SOCIAL LEGITIMACY

As has been defined, social legitimacy means the support that comes from the public for either particular decisions at the Union level or the regime as a whole, which would grant

27 This categorization follows the criteria introduced by Leonard. See Léonard, *supra* note 17, pp. 237-238.

28 Davies, *supra* note 6, pp. 2-22.

29 A clear example of this classification is the competence of Art. 114(1) TFEU, as mentioned above, where the European Parliament and the Council, as co-legislators, '*may adopt measures (...) which have as their object the establishment and functioning of the internal market*'. See also Art. 352(1) TFEU on the adoption of the '*appropriate measures to attain one of the objectives set out in the Treaties*'.

30 An example of that would be the social effects of the legislation on internal market, beyond its economic impact. See Davies, *supra* note 6, p. 3.

31 For example, Art. 113 TFEU -on the adoption of measures '*for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation*'-, and Art. 77(3) TFEU -for the establishment of measures concerning identity cards, passports and residence permits-, among others are indicative as sector specific competences. See Davies, *supra* note 6, p. 7.

compliance with the decisions made under normative criteria that check the substance of the regime as legitimate.³² Empirical research has indicated several parameters that influence European citizens when evaluating their embrace of Union action, namely democracy, the feeling of shared EU identity for the purpose of accepting the decision of the majority and the output performance of the Union action to adhere to the common objectives pursued, among others.³³ For the purpose of this chapter, the assessment of social legitimacy for the new Frontex regulation will be examined in the sense of democracy.³⁴ The factors chosen for its definition are the public feeling of adherence to a representative democratic process for the adoption of the act and the inclusion of the public's values, perceptions, social and historical beliefs on the subject matter to be legislated at the time the act is adopted **both during the legislative process and in the final outcome.**

As a demarcation, it should be noticed that this analysis cannot replace empirical findings on the public's support to the regulation. Nevertheless, it aims to present *in abstracto* the tendency of the citizens to either approve or disapprove the new EBCG and its specific impact on migration management.³⁵

8.5 THE TASKS OF THE EBCG AS SECURITIZATION PRACTICES OF MIGRATION

This section shall examine the core tasks of the agency in the light of the criteria listed above as the outcome of the securitization theory to check whether and to what extent they constitute securitization practices to migration. These criteria are the deployment either of means that are 'out of ordinary', meaning that they were not used to face the same issues in the past, or of means that were used to deal with traditionally perceived security threats, such as terrorism or military foreign attacks.³⁶ It should be clarified that the agency's tasks were chosen to be examined, because they dictate the activities of the agency. Frontex cannot act beyond the limits of the tasks assigned to it by the EU legislator as it is these tasks that fulfil the objectives of the agency.³⁷ The different tasks under scrutiny are: (a) risk analysis and vulnerability assessment; (b) coordination of operational cooperation on

32 A. Follesdal, *Legitimacy Theories of the European Union*, 2004, ARENA working papers WP 04/15, p. 13; E. Piret, "Competing models of EU legitimacy: The test of popular expectations", *Journal of Common Market Studies*, Vol. 46, No. 3, 2008, pp. 621-623.

33 Piret, *supra* note 32, pp. 619-640.

34 This choice has as a prerequisite the belief that European Union, even if it is not a state, should be scrutinized under the same standards as the liberal Western nation-state, given the breadth of impact of its actions on the life of European citizens. See *Id.*, p. 625; C. Beetham, & D. Lord, *Legitimacy and the EU*, London, Longman, 1998. See differently G. Majone, "The rise of the regulatory state in Europe", *West European Politics*, Vol. 17, No. 3, 1994, pp. 77-101.

35 *Id.*

36 Following the criteria introduced by Léonard. See Léonard, *supra* note 17, pp. 237-238.

37 Art. 6(1) Regulation (EU) 2016/1624 states: *Its activities shall be based on this Regulation.*

external border management, namely joint operations and rapid border interventions; (c) return cooperation; (d) information exchange and surveillance and (e) cooperation with third countries and international organizations.

8.5.1 Risk analysis and vulnerability assessment

8.5.1.1 Risk analysis

Article 11 of the newly introduced regulation describes the risk analysis for monitoring the migratory tendencies with special reference to the establishment of the common integrated risk analysis model (CIRAM), a model already used by Frontex for defining the risks, threats and challenges facing the Union's external borders on an annual basis. The agency's Risk Analysis Unit (RAU) is in charge of producing the annual risk analysis as well as its subdivisions for regions of special interest,³⁸ while collaborating with networks in third countries or in specific countries within Europe.³⁹ In 2008, Frontex introduced intelligence support officers in member states of profound geographical importance for the acquisition of detailed and intelligence-oriented data, enriching its expanded network for gathering and assessing information,⁴⁰ which are the basis for the operational activities of the EBCG.⁴¹

This complex and multidimensional procedure to monitor the situation on external borders, with emphasis on monitoring the 'migratory flows',⁴² is very closely connected to intelligence-oriented practices that are applied in cases of traditional security threats.⁴³ Intelligence does not include the mere collection of information and data related to security,

38 Like the joint risk analyses on the Western Balkan Route, on the African countries and on the European Eastern Partnership borders.

39 To that regard, the agency's RAU works on information gathered within the Frontex's Risk Analysis Network, which is formulated by the participating member states and the countries in the Schengen *acquis*. It also uses information and data gathered in collaboration with networks established in third countries, like the Africa-Frontex Intelligence Community, and geographically targeted networks, like the Eastern Partnership Risk Analysis Network and the one for the Western Balkans. See Frontex, Publications. Retrieved on 6 April 2017 from <http://frontex.europa.eu/publications/?c=risk-analysis>.

40 Intelligence Support Officers are to be found in Greece, Italy and Spain. See S. Peers, E. Guild, & J. Tomkin (eds.), *EU immigration and asylum law (text and commentary)*, Vol. 1, 2nd edn., Leiden, Martinus Nijhoff Publishers, 2012, p. 145; Frontex, General Report 2008, p. 29. Retrieved on 5 May 2017 from http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2008/frontex_general_report_2008.pdf.

41 See Peers *et al.*, *supra* note 40, p. 143. The agency's risk analysis is also the basis for broader European decision making, such as its influence on the assessment of member states for the respect of the Schengen *acquis* and the parameter for the funding shares of the External Borders Fund. See S. Horii, "The effect of Frontex's risk analysis on the European border controls", *Europeans Politics and Society*, Vol. 17, No. 2, 2016, pp. 242-258.

42 The title of Art. 11 of the regulation leads to that direction: 'Monitoring of migratory flows and risk analysis'.

43 P. Gill, & M. Phythian, *Intelligence in an insecure world*, Cambridge, Polity 2006, p. 1; Léonard, *supra* note 17, p. 242.

but it primarily concerns their evaluation. The intelligence picture produced by the assessment of the competent agent shall lead to a possible policy response to the identified threat.⁴⁴ This practice was usually undertaken by intelligence agents ‘to prevent military surprise and terrorist attacks’.⁴⁵ Even if no reference to ‘intelligence’ is made in the regulation, in Frontex’s Single Programming Document for 2016–2019,⁴⁶ the situational picture of the external borders is referred to as the Common Pre-frontier Intelligence Picture (CPIP) on migration and crime,⁴⁷ while reference to intelligence is made several other times in the document.⁴⁸ Hence, the deployment of those means to check migration resembles measures usually undertaken to face traditional security threats on the national borders, like foreign armed forces challenging the integrity of a sovereign state, emitting a hostile and defensive European preconception for migrants, being either asylum seekers, refugees or immigrants without any distinction.⁴⁹ Thus, risk analysis can be considered a securitization practice, which constructs the idea of migrants being a threat to the Union, since they are conceptually treated in the same way as criminals and terrorists.

8.5.1.2 Vulnerability assessment

This newly introduced task was granted to the EBCG with the latest legislative amendment described in Article 13. Based on the risk analyses, the agency shall ‘assess the Member States capacity and readiness to face upcoming challenges’⁵⁰ at least once a year, based on an evaluative method equal to CIRAM. Special regard will be given to the readiness of the member states to face possible influxes of vast numbers of persons on their borders,⁵¹ where the influence of the latest events in the Mediterranean routes of migrants trying to access Greece and Italy and therefore European ground is evident.

The regulation is, however, introducing a profound change, a procedure by which the results of the vulnerability assessment might lead to a proposal of measures by the EBCG

44 *Id.*, pp. 5, 7. Gill and Phythian define intelligence as follows: ‘Intelligence is the umbrella term referring to the range of activities – from planning and information collection to analysis and dissemination – conducted secretly and aimed at maintaining or enhancing relative security by providing forewarning of threats in a manner that allows for the timely implementation of a preventive policy or strategy, including, where deemed desirable, covert activities’, *Id.* 7.

45 Leonard, *supra* note 17.

46 Frontex, Single Programming Document 2016-2019, 24 December 2015. Retrieved on 2 January 2016 from http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2016/Programme_of_work_2016.pdf.

47 *See* indicatively *supra* document, pp. 13, 16, 35.

48 The concept is also used several times with reference to the information gathering in the context of the objectives of the agency’s risk analyses and the training standards of the European Border Guard Teams. *See Id.* pp. 23, 28, 29, 43, 50, emphasis added (‘participants learn how to debrief migrants by systematic extraction of information, for intelligence purposes, from migrants willing to cooperate’).

49 Léonard, *supra* note 17, pp. 240, 242-243.

50 Art. 13(2), (4) Regulation (EU) 2016/1624.

51 Art. 13(4) *id.*

in order to enhance the capacity of the evaluated member state to deal with the situations at the external borders.⁵² This is referred to as the agency's 'right to intervene'.⁵³ Nevertheless, what is striking is the continuation of this process in case the relevant state refuses to act according to the suggested measures. In a labyrinthian way, reference to Article 19 of the regulation is made, where the Council may adopt an implementing act as an answer to the risk that might threaten the 'functioning of the Schengen Area'⁵⁴ based on the agency's report for the European external frontiers. If the concerned state refuses to adhere to that decision, the procedure of Article 29 of Regulation (EU) 2016/399 (Schengen Border Code) is instigated. The Council may as 'a last resort and as a measure to protect the common interests within the area without internal border control'⁵⁵ recommend the partial or total reintroduction of internal border control in the territory of the member state concerned. This drastic action of seizing the free movement – which constitutes the backbone of the EU's construction – needs to be justified by an exceptional situation that would existentially jeopardize 'the internal security or public policy'⁵⁶ of the Union. In the most grotesque scenario of the member state's refusal to take Council's recommendation into account, the Commission would take appropriate action against the referent state informing the European Parliament and the Council the grounds of its decision.⁵⁷

What this entire web of provisions actually manages to do is the direct connection of the threats – as identified by Frontex's vulnerability assessment – with the Union's internal security in a way that would justify the seizure of free movement for a particular member state, through the Council's decision for the reintroduction of internal border controls accompanied by the pressure of the Commission's sanctions if the member state opposes, even without the latter's consent.⁵⁸ In an area of shared competence, such as the In an area of shared competence, such as the Area of Freedom, Security and Justice (AFSJ),⁵⁹ and with the stated prime responsibility of the member states to manage their external borders,⁶⁰ the Union legitimized a procedure by which Frontex's assessment of the existence of a

52 The measures and the time frame for their implementation, brought forward by the Agency's executive director, are to be referred to the Agency's management board, which can take a binding decision for the Member State concerned. *See* Art. 13(6), (8) *id.*

53 S. Carrera, S. Blockmans, J.-P. Cassarino, D. Gros, & E. Guild, *The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean?* CEPS Task Force Report (CEPS official website), 1 February 2017, p. 46. Retrieved on 1 February 2017 from <https://www.ceps.eu/publications/european-border-and-coast-guard-addressing-migration-and-asylum-challenges>.

54 Art. 19(1) Regulation (EU) 2016/1624.

55 Art. 29(2) 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) [2016] OJ L77/23.

56 Art. 29(1) *id.*

57 Art. 29(3) *id.*

58 *Id.*

59 Art. 4(2)(f) TFEU.

60 Art. 5(1) Regulation (EU) 2016/1624.

serious threat may lead to the extreme measure of resetting internal borders. That could lead to the identification of migration as a threat of such a scale that can justify the closing of borders for the sake of internal security. Never before was migration a possible reason for closing the internal borders. The securitization of migration by the deployment of ‘out of ordinary’ means is evident and is instigated by the ‘knowledge’ produced by the agency and the potential rejection of a member state to abide to the measures suggested by Frontex. The deployment of this unique measure to confront migratory flows demonstrates the construction of the latter as a threat that demands this extraordinary measure.

8.5.2 *Coordination of operational cooperation on external border management*

8.5.2.1 **Joint operations**

One of the most essential tasks of Frontex is the enactment of joint operations (JOs), constituting one of the core operational activities of the agency,⁶¹ also justified by the funding spent on it.⁶² At the request of a member state, Frontex may offer its operational assistance at sea, land or air borders after a decision is made by its executive director based on the situational picture granted to the agency by its risk analyses for the relevant member state.⁶³ A detailed action plan is set up, aiming to assist the concerned state to face ‘upcoming challenges, including illegal immigration, present or future threats at the external borders ... or to provide increased technical and operational assistance’,⁶⁴ which includes the appropriate number of EBCG⁶⁵ and technical equipment.⁶⁶ In the former state of play, the consent of the member state was needed for the plan to be valid and binding for all the relevant operative actors.⁶⁷ The new regulation introduced a new competence for the executive director to recommend on his/her own initiative JOs to a particular member state, based on the agency’s situational picture when it is considered necessary for confronting challenges on its borders, threatening the Union’s internal security.⁶⁸

61 Peers *et al.*, *supra* note 40, p. 126.

62 The biggest part of the agency’s funding is spent on this task. In 2016, over 120 million Euros were given for joint operations. See Frontex, Amended Budget 2017, 28 February 2017, p. 3. Retrieved on 28 February 2017 from http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2017_N1.pdf.

63 Art. 15(1) Regulation (EU) 2016/1624.

64 *Id.*

65 Arts. 16(3)(e) and 20(3) *id.* The latter article stated that the number of the agency’s border and coast guards through the attribution of the member states shall be determined by ‘annual bilateral negotiations and agreements’.

66 Arts. 16(3)(g) and 39 *id.*

67 The agency, the host member state, but also any other participating member state. See Art. 16(2) *id.*

68 Art. 15(4) *id.*, introducing the agency’s ‘right to intervene’.

8.5.2.2 Rapid border interventions

On the same operational basis, but in order to face exceptional frontier situations of urgent nature, the member states may request the temporary intervention of the agency's staff and equipment.⁶⁹ Article 15(2) of the new regulation explicitly mentions the task's objective to be an answer to 'disproportionate challenge, especially the arrival at the external borders of large numbers of third-country nationals trying to enter the territory of that Member State'. The task has a direct link to the influx of migrants, which is perceived as an exceptional and critical situation for the cohesion of the external borders, justifying the establishment of a separate task to deal with it. With the latest amendments, the executive director is given the power to recommend, without the prior request of a member state, the instigation of a Rapid Border Intervention (RABIT) based on the results of the risk analysis and vulnerability assessment, as in the case of Jos.⁷⁰ Additionally, the agency has at its disposal a rapid reaction pool composed of a minimum of 1,500 national guards,⁷¹ with a possibility of supplementary forces,⁷² as well as a rapid equipment pool⁷³ for achieving this task.

In Frontex's history, a RABIT was requested only once back in 2010 from Greece as a response to the increased number of migrants trying to cross the land borders between Greece and Turkey.⁷⁴ In the agency's evaluative report, its contribution was characterized as having a 'deterrent effect' ceasing the extensive human mobilization on the specific part of the external borders with the assistance of intensive use of surveillance equipment for the 'systematic screening of migrants'.⁷⁵ Prior to that incident, though, there had been various training operations for the preparation of the border and coast guard teams in the case of a real need for a RABIT.⁷⁶ The development of common training standards aims

69 See Art. 15(2) *id.*, where it is stated that RABITs can be deployed only 'for a limited period of time'. It should be noticed that RABITs were not part of the initial tasks of the agency. They were introduced in 2007 with the amending regulation. See Regulation (EU) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of RABIT teams and amending Council Regulation (EC) No 2007/2004 with regard to that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/1.

70 Art. 15(4) *id.*, referred to as the agency's 'right to intervene'.

71 Arts. 17(5), 20(5) and Ann. I *id.* The EBCG members comprise of all member states according to their capacities and the situational picture. As Léonard mentions, this practice can be characterized as 'compulsory solidarity', through which the exceptional migratory circumstances must be tackled with the necessary contribution of all member states. See Léonard, *supra* note 17, p. 245.

72 Arts. 17(5) and 20(8) *id.*

73 Arts. 17(5) and 39(7) *id.*

74 The operation lasted four months, from 2 November 2010 to 1 March 2011. See Frontex, RABIT operation 2010 evaluation report, August 2011. Retrieved on 5 May 2017 from http://frontex.europa.eu/assets/Attachments_News/fer_rabit_2010_screen_v6.pdf.

75 *Id.*, p. 8, 12.

76 Frontex, General Report 2009, p. 42. Retrieved on 5 May 2017 from http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2009/gen_rep_2009_en.pdf.

to harmonize the techniques and the situational know-how of dealing with the threats as perceived by the agency, which, as indicated above, are mainly migration related.⁷⁷

8.5.2.3 JOs and RABITs as securitization practices

For accomplishing both tasks, the amount of information and data collected beforehand and their evaluation by Frontex through the risk analyses and vulnerability assessments, as well as the number of member states involved in the operations, the deployment of specialized and trained European border and coast guards and the equipment occupied for the performance of the operations indicate the securitization character of the tasks. Their deployment to tackle migration threats, especially in the case of RABITs, as demonstrated by the objectives of the tasks, brings the securitization of migration to the heart of these activities through the use of practices that are usually undertaken to face traditional security threats. The multilevel organization of the operations by the competent agency and the means provided – especially the military and paramilitary nature of some national coast guards⁷⁸ deployed by Frontex in the sea border operations⁷⁹ – resemble practices of international coalitions and organizations dealing with military and war affairs, like the North Atlantic Treaty Organization (NATO) or the United Nations Security Council.⁸⁰ All these practices contribute to the consolidation of the perception that migrants, in general and without distinction, are security threats to the Union and are better dealt by military forces.

8.5.3 Return coordination

The latest legislative amendment to Frontex's regime brought drastic changes to its competences on the returns of those migrants illegally staying in the member states. This made various commentators to suggest Frontex's transformation to a 'European Returns Agency'.⁸¹ Article 27 refers to the coordinative competences of the agency in order to

77 Frontex has developed a harmonized model for training its border and coast guards, named Common Core Curriculum (CCC) for three levels of training. See Frontex, Educational standards. Retrieved on 12 May 2017 from <http://frontex.europa.eu/training/educational-standards/>; Léonard, *supra* note 17, p. 241.

78 Like the *Guardia Civil* in Spain or the *Guardia di Finanza* in Italy. See D. Lutterbeck, "Policing migration in the Mediterranean", *Mediterranean Politics*, Vol. 11, No. 1, 2006, pp. 59-82.

79 For example, the joint sea operation Triton in Italy, initiated in 2014 with the participation of 15 member and non-member states and the joint sea operations Hera, Indalo and Minerva currently deployed in Spain. See European Commission, EU operations in the Mediterranean Sea, 4 October 2016. Retrieved on 10 May 2017 from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf.

80 Léonard, *supra* note 17, p. 243.

81 This characterization is supported by the use of Art. 79(2)(c) TFEU as a legal basis for the new regulation and the operational archive of Frontex, which proves the increase in the agency's return operations. See Frontex, Archive of operations for the year 2016. Retrieved on 6 May 2017 from <http://frontex.europa.eu/oper->

achieve an ‘integrated system of return management’, where the authorities of third countries can also participate. The breadth of its competences has been expanded to cover not only financial and coordinative assistance to the national authorities, but also information exchange with ‘other relevant shareholders’, like the Commission and the European Migration Network that indicates the centralization of return powers attributed to the EBCG.⁸² Most importantly, the new regulation foresees three different types of return operations and different pools of return staff available for each one of them. On a monthly basis, member states should inform the agency of their national return plan as well as their needs, and either on their request or in case the agency deems it necessary to propose assistance to the former, Frontex shall coordinate or organize the return operations to the third countries.⁸³ Apart from the return operations of Article 28, return interventions and rapid return interventions are envisaged with their deployment varying depending on potentially exceptional circumstances in the member states either in the form of a ‘burden’⁸⁴ or as ‘specific and disproportionate challenges when implementing the obligation to return’.⁸⁵ A great range of return experts is also introduced for the accomplishment of the task, namely a pool of forced return monitors, escorts and return specialists, along with the European return intervention team.⁸⁶

The sophistication of the return task of those migrants illegally staying in the Union cannot be missed with the new legislative amendment. The information gathering, debriefing, acquisition of best practices and cooperation not only with the member states and the relevant European actors, but also with third countries on the matter indicate a well-orchestrated procedure in which Frontex holds the primary role. In combination with the different return operations, designed to fit different national conditions, the pools of various experts ready to deal with these circumstances and the agency’s ‘right to intervene’ and take initiatives, based on the situational picture of the member states, lead to the establishment of a unique scheme aiming to repatriate those illegally occupying European ground. It is a formation that has not been met elsewhere in the world, a scheme ‘out of ordinary’, since no other regime resembles its organizational and technical structure for the tackling of illegal migration and the preservation of internal security.⁸⁷ Hence, these practices, with their unprecedented character to face the same phenomenon, indicate the

ations/archive-of-operations/?p=10&year=2016. See also Carrera *et al.*, *supra* note 53, p. 47; S. Carrera, & L. den Hertog, A European border and coast guard: What’s in the name?, 8 March 2016, CEPS Papers in Liberty and Security in Europe (SSRN official website), p. 4. Retrieved on 20 November 2016 from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745230.

82 Arts. 27(1)(d) and 27(3) Regulation (EU) 2016/1624.

83 Art. 28 *id.*, introducing the return operations.

84 Art. 29(1) *id.* Only on member states’ request.

85 Art. 29(2) *id.* In the case of both the member state’s request and the agency’s own initiative.

86 All contributed by the member states. See Arts. 29, 30, 31, 32 *id.*

87 Léonard, *supra* note 17, p. 246.

qualitative (more thorough and planned operations) and quantitative (increase in the number of return operations) change in the mechanism and, thus, the intensification of the securitization of migration, as an outcome of the recent developments.

8.5.4 Information exchange and surveillance

The new regime is also introducing a refined framework for information exchange between Frontex, the Commission, the member states and relevant Union agencies⁸⁸ with the aim to establish an ‘information system for exchanging classified information and personal data’,⁸⁹ only concerning the performance of its tasks, where the EBCG shall have the primary organizational role. Special reference is made to the personal data gathered by the migration management support teams, proving the extra weight given to migration management by the new legislation.⁹⁰ Additionally, the cooperation of Frontex with the European Fisheries Control Agency and the European Maritime Safety Agency is being launched regarding to assist the coast guard functions of the member states.⁹¹ This collaboration is based on surveillance mechanisms and information gathering, sharing and analysing by ‘state-of-the-art technology’ located in space, on the ground and on vessels.⁹² Lastly, Frontex was granted access to the Eurosur information system, a network of all national border control actors – the National Coordination Centers (NCC) – and to the Eurosur Fusion Services, a framework for information gathering from satellites and surveillance systems.⁹³ In that way the agency is given the power to formulate a holistic European situational picture of the external borders.

The intricacy of the agency’s information exchange task must be highlighted. The entire well-tuned scheme described above, with numerous sources (Commission, national networks on border controls, specialized EU agencies) and their multidimensional nature (satellites, drones, thermometric cameras, advanced IT systems), resembles the Foucauldian perception of the ‘Panopticon’⁹⁴ or, as Bigo refined it when talking about the surveillance

88 Art. 44(1) Regulation (EU) 2016/1624. The relevant Union agencies are EASO, Europol and Eurojust, among others, as described in Art. 46(1)(c) id.

89 Art. 44(1) id.

90 Arts. 47, 48 id.

91 Art. 53(1) id.

92 Art. 54(1)(a)(b) id.

93 See Frontex, Eurosur. Retrieved on 6 May 2017 from <http://frontex.europa.eu/intelligence/eurosur/>, for the sophistication of the surveillance systems, including vessel detection and meteorological and oceanographic information.

94 A metaphor used by the philosopher to indicate how the hierarchical institutions within society, like schools, hospitals, jails and armies are constructed in a way that resembles the Benthamian original design. That was meant as building a structure that allows a watchman found in the centre of the construction to observe those being in it without their knowledge on the timing of the event. See M. Foucault, *Discipline and punish: The birth of the prison*, New York, Vintage Books, 1977.

in the ‘transversal field of security’, the ‘Ban-opticon’.⁹⁵ It is a system that revolves around the central collection of information, which finally allows the classification of those under its surveillance as either wanted or unwanted entities within its power nexus.⁹⁶ In the same manner, Frontex centrally gathers all the relevant information, analysing them into producing the knowledge on migration management and the ‘appropriate’ solutions to the identified problems. Information exchange is argued to be securitization practice, constituting an extraordinary scheme to tackle migratory flows in such a qualitatively different manner, with a highly technologically developed and globally connected system that cannot be equated to those used before on the same issue.⁹⁷

8.5.5 *Cooperation with third countries and international organizations*

Articles 54 and 55 of the discussed regulation set the range of competences the agency has been given regarding the cooperation with third countries. Apart from the former models, like the working arrangements between Frontex and third countries,⁹⁸ the deployment of liaison officers to these countries⁹⁹ and the invitation of foreign observers to participate in joint operations, risk analyses and training activities,¹⁰⁰ the new regime was broadened to also cover status agreements, joint operations on the territory of third countries and invitation of observers during joint return operations and interventions.¹⁰¹ With the much needed attention concerning the activities undertaken on non-European ground,¹⁰² the latter developments will facilitate the better management of the external borders and boost the return standards, while also founding contacts with third countries, usually as countries of origins of migrants and transit states, in order to tackle illegal immigration and the return of those that need to be returned.¹⁰³

95 In the words of the scholar, ‘This formulation of the Ban-opticon allows us to understand that the surveillance of everyone is not on the current agenda but that the surveillance of a small number of people, who are trapped into the imperative of mobility while the majority is normalized, is definitely the main tendency of the policing of the global age.’ See Bigo, ‘Globalized (in)Security’, supra 13, pp. 34-35.

96 Bigo, 2002, *supra* note 13, p. 81.

97 Léonard, *supra* note 17, p. 244.

98 Art. 14 Council Regulation (EC) 2007/2004, Art. 1(19) Regulation (EU) 1168/2011 amending Art. 14 of FRONTEX’s founding Regulation.

99 Art. 1(19) Regulation (EU) 1168/2011.

100 *Id.*

101 Art. 54(3), (4) and (7) Regulation (EU) 2016/1624.

102 In order to uphold the institutional checks and balances in the EU external relations policy, status agreements are to be concluded between the Union and the third countries concerned, when the EBCG members are to have executive powers in actions taken on the territory of the third state. For the same reason, joint operations between Frontex, the member states concerned and neighbouring third countries shall be organized and coordinated by the agency, subject to the consent of the member state and a prior agreement with the third country, given that they may be performed on foreign ground. See Art. 54(4), 54(10) *id.*

103 Arts. 54(1) and 55(3) *id.*

The range of operational coalitions sought with third countries in order to face migratory challenges and gain knowledge for best practices on return operations of irregular migrants indicates the deployment of extraordinary means, which were not used before on such a scale to address migration. The externalization of solutions on border management via operations designed with the participation of the agency, the member states and third countries creates the perception that migration is a significant threat to the Union such that its management must be sought at the stage before entering the European ground. The deployment of liaison officers and invitation of third observers for the acquisition and development of best practices to answer migratory issues with regard to return operations and information for the situation in third countries prove that the threat is identified as being so profound that the interference of these parties coming from the source of the threat – as countries of origin and transit of migrants – is pivotal for the threat's confrontation. Therefore, this unique set of cooperation, with its sophistication and upgrade, contributes to the further and more intense construction of the notion that migrants are a threat to the Union, and are thus securitized.

In the context of cooperating with third parties, reference should be made to the agency's potential cooperation with international organizations competent to deal with matters relevant to Frontex's regime, as described in Article 52(1) of the latest regulation. The analysis of a current development in this field sheds some light on the discussion made. In March 2016, NATO and Frontex cooperated for assistance in migration management in the Aegean Sea of East Mediterranean.¹⁰⁴ This constitutes a unique phenomenon, since NATO – as an intergovernmental military organization – in its operational history in the Mediterranean was aiming at dissuading maritime terrorism, especially with regard to weapons of mass destruction.¹⁰⁵ It can be argued that when cooperating with international organizations of military nature to tackle migration, Frontex transforms the issue it deals with to a threat equal to commonly perceived security threats, like terrorism, since the means proclaimed amount to those used to face the latter threats, so it manages to further securitize migration.¹⁰⁶

104 They concluded a common understanding for cooperation and information exchange, in real time, to assist the agency and the Greek authorities in 'border surveillance and migrants' detection'. See Frontex, FRONTEX and NATO to cooperate in the Aegean Sea, 6 March 2016. Retrieved on 15 May 2017 from <http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nZMSYr>.

105 The peak of those operation was Operation Active Endeavour lasting from 2001 till 2016, constituting an answer to the terrorist attacks of 9/11. See NATO, Operation active endeavour, Archive, 27 October 2016. Retrieved on 15 May 2017 from www.nato.int/cps/eu/natohq/topics_7932.htm#.

106 Léonard, *supra* note 17, p. 243.

8.5.6 Concluding remarks

In the context of examining the main tasks of the EBCG under the securitization theory and their contribution to the intensification of the idea that migrants are a threat to the EU, a further remark should be made concerning respecting fundamental rights by the European agency. The development concerning the introduction of the EBCG's obligation to adhere to fundamental rights and the principle of non-refoulement¹⁰⁷ is, of course, a welcomed change after the intense critique coming from both academia and NGOs,¹⁰⁸ but also from the EU ombudsman.¹⁰⁹ However, the recourse to fundamental rights' protection cannot be seen in isolation from its effectiveness. The complaint mechanism, which was introduced to 'ensure the respect to the fundamental rights'¹¹⁰ is argued to constitute a mere administrative procedure with potential difficulties for the alleged victims to access it and be vindicated,¹¹¹ also regarding the lack of recourse to further legal remedies.¹¹² Moreover, the reference made in the regulation to the appointment of liaison officers to third countries, whose border management practices 'comply with minimum human rights standards', leaving these minimum standards undefined and whether they are enough for the cooperation of the agency with the latter states, is indicative of the agency's defective protection of human rights. In any case, this development, which is open to critique beyond the limits of this chapter, cannot change the fact that the new tasks of the agency are

107 See Recital (14) Regulation (EU) 2016/1624.

108 The biggest concern on the matter stems from the joint operations in high seas where there are doubts concerning the potential return of vessels carrying immigrants and refugees back to their countries of origin. See E. Papastavridis, "Fortress Europe' and FRONTEX: Within or without international law?", *Nordic Journal of International Law*, Vol. 79, 2010, pp. 75-111; L. Den Hertog, "Fundamental rights and the extra-territorialisation of EU Border Policy: A contradiction in terms?", in D. Bigo, S. Carrera, & E. Guild (eds.), *Foreigners, refugees or minorities? Rethinking people in the context of border controls and visas*, Farnham, Ashgate 2013, pp. 205-226; Carrera and den Hertog, *supra* note 81, p. 15.

109 European Ombudsman, Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013. Retrieved on 10 May 2017 from <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark>.

110 Art. 72 Regulation (EU) 2016/1624.

111 The newly introduced complaint mechanism of Art. 72 does not guarantee that potential victims of misconduct will reach the fundamental rights officer to report alleged violations of their rights. See Art. 72(2) *id.* It should additionally be mentioned that the agency has no effective and independent mechanism to report on its conduct on high seas. The agency's code of conduct is not a legally binding text for the members of the EBCG; Art. 22 states that they should report incidents of violation of fundamental rights. See Art. 22 FRONTEX Code of Conduct. Retrieved on 5 May 2017 from http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct.pdf.

112 S. Peers, The reform of Frontex: Saving Schengen at refugee's expense?, EU Law Analysis Blog, 16 December 2015. Retrieved on 6 May 2017 from <http://eulawanalysis.blogspot.nl/2015/12/the-reform-of-frontex-saving-schengen.html>.

emergency driven,¹¹³ introduced to confront the migratory challenge of the past years.¹¹⁴ The deployment of ‘out of ordinary’ measures and means, which were used to tackle traditional security threats to achieve it, lead to the conclusion that Frontex’s tasks are actually securitizing migration in a more intense manner than before, both in quality and in quantity, as the previous parts tried to indicate. This finding can also contribute to and advocate for the concerns raised among the scholarly regarding a possible imbalance in the areas of freedom, security and justice, where security is allegedly overshadowing freedom and justice.¹¹⁵

8.6 THE DEPLOYMENT OF PURPOSIVE EU COMPETENCE FOR THE ADOPTION OF THE NEW FRONTEx REGULATION AND ITS MEANING FOR THE REGULATION’S SOCIAL LEGITIMACY

Given the findings of the previous section on the impact the tasks of the agency are having on migration, not in a neutral way, but rather in securitizing the matter and constructing a negative image towards immigrants, asylum seekers and refugees, the nature of the EU competences used to frame the new regulation will be examined in order to highlight their possible contribution to this outcome. For doing so, the first part of this section shall delineate the nature of the EU competences chosen, as either sector-specific or purposive,¹¹⁶ and explicate how the deployment of a purposive competence might contribute to the disregard of the regulation’s secondary impact on migration management. The second part shall assess the impact this purposive competence may have on the public support for the regulation by examining the official EU documents from the legislative procedure for its adoption to check whether and to what extent the negative impact the tasks of the agency have on migration were included.

8.6.1 *The nature of competences to regulate the EBCG and their importance for the delineation of the regulation’s subject matters*

It is common knowledge within the EU legal field that any legislation adopted by the Union should base its power to act on explicit competences foreseen in the EU treaties. For this reason, certain articles in the EU treaties constitute the legal basis for specific action taken

113 Carrera and den Hertog, *supra* note 81, p. 16.

114 See European Council, Informal meeting of EU heads of state or government on migration, Press release, 23 September 2015. Retrieved on 24 September 2015 from www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/; and Recital (1) Regulation (EU) 2016/1624.

115 See P. Craig, G. De Burca, *EU Law, texts, cases and materials*, Oxford, Oxford University Press, 2015, p. 969.

116 Based on the categorization introduced by Gareth Davies. See Davies, *supra* note 6, pp. 2-22.

at the EU level. In case such power has not been attributed to the Union by the member states, its actions are not lawful and can be annulled by the Court of Justice of the European Union (CJEU).

The EBCG's regulation is invoking Articles 77(2)(b), 77(2)(d) and, for the first time in the legislative history of the agency, Article 79(2)(c) TFEU in order to 'develop and implement European integrated border management at national and Union level, [which] is central to improving migration management'.¹¹⁷ The first two legal bases fall under the title of EU policies on border checks, while the third one under the legal basis for immigration policy.¹¹⁸ Their wording is indicative of their nature as EU competences either sector-specific or purposive. Article 77(2)(b) states that the legislature shall have the power to adopt measures regarding 'the checks to which persons crossing the external borders are subject', whereas Article 77(2)(d) confers the power for the adoption of 'any measure necessary for the gradual establishment of an integrated management system of external borders'. In addition, Article 79(2)(c), which was introduced to fulfil immigration-related objectives, states that the legislature may adopt measures for 'illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation'. Articles 77(2)(b) and 79(2)(c) are sector-specific, in the sense that they describe specific measures for the attainment of the goals they serve, while Article 77(2)(d) is purposive, since it grants all the freedom to the EU legislator to adopt all the measures necessary to achieve an integrated system of external border management. However, this broad wording and in turn the broad discretion attributed to the Union to achieve the objective pursued (integrated system of border management) manages to affect other, distinct subject matters besides border checks, such as immigration and asylum,¹¹⁹ in a

117 Recital (2) Regulation (EU) 2016/1624. For the first time it is being given this meaning in its history, which could be explained by the current sociopolitical conditions. The previous regulations legislating on Frontex did not use the extension of migratory management within the meaning of integrated border management.

118 The previous amendment to the regulation on Frontex back in 2011 was based on the legal bases of the TFEU, as formulated after the Lisbon Treaty, and specifically on Arts. 77(2)(b) and (d), without recourse to 79(2)(c). The first regulation that introduced the Frontex in 2004, along with its first amendment in 2007, deployed Art. 62(2)(a) of the treaty, establishing the European Community, which referred to 'the standards and procedures to be followed by Member States in carrying out checks on persons at the external borders'.

119 The inclusion of border checks, asylum and immigration in Chapter 2 of Title V ('Area of Freedom Security and Justice') in the TFEU may imply a connection between the referent subject matters; however, the 'thematic coherence' of the AFSJ is debatable. Scholars have demonstrated their concerns on the way the subdivisions of the treaty title are brought together, given the different governmental organizations of the relevant national policies, which do not historically verify the coherence of the relevant matters. Additionally, the Stockholm Programme also verifies this argument by differently categorizing the subject matters put together in the TFEU, when examining the policy directions chosen to achieve the development of the AFSJ. Between the six distinct categories of policy aims, border management is put together with the cooperation in law enforcement, civil protection and criminal judicial cooperation in order to 'improve security in the Union', while immigration and asylum constitute a distinct category for the 'development of a comprehensive European migration policy'. Lastly, the different types of legislative acts traditionally used by the Union to regulate border management, on the one hand, and migration, on the other, can

negatively tainted manner, as the former part proved. However, the deployment of Article 79(2)(c), which is technical and sector-specific in nature, introduced to justify the return operations of the new agency,¹²⁰ might not be enough to justify the extended tasks of the agency in migration management, as indicated in the previous part. In this case, recourse to Article 77(2)(d) will be sought to justify Union's competence, given the breadth of its scope ('any measures necessary'). In other words, since Article 77(2)(d) is deployed, giving the legislator the freedom to adopt any measure necessary for the establishment of an integrated border management, the measures introduced by the regulation, which do not fall under the sector-specific competences of Articles 77(2)(b) and 79(2)(c), shall be examined under the former Article.

At this point it is important to explain how this check will be made. According to the case law of the CJEU, in cases where the Union competence to regulate various subject matters is under judicial scrutiny, attention is given to the measures adopted and whether they serve the objective pursued. The very first *Tobacco Advertising* case serves as an example of judicial control on the use of the purposive competence of the current Article 114 TFEU regulating the internal market. There it was ruled that 'the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature'.¹²¹ Consequently, the judicial control for the legality of the measure will be done in the light of the objective it seeks to fulfil, and in the case of Article 77(2)(d) TFEU, the freedom of the EU legislator to adopt any measures necessary to achieve an integrated border management will be done in the light of the exact objective. Nevertheless, the secondary impact of the adopted measures cannot influence their legality in terms of the Union's power to adopt them. That is because the CJEU has ruled that as long as the measures primarily serve the objective they pursue, any other secondary impact of the measures cannot overturn their legality regarding the EU competence to adopt them.¹²² In other words, the judicial control of a purposive competence is not dependent on the measures' impact on other subject matters, if they primarily serve the goal set in the legal base of the treaty.¹²³ That is why it is important to understand how the competences to regulate the new Frontex are phrased in the text of the treaty, so as to explicate the breadth

enhance the argument made. While the legislation on the former subject matter is being made in the form of regulations, that on the latter subject matter is made in the form of directives, aiming at setting minimum standards for the member states when crafting a common migration policy. Hence, the connection between the different subject matters of border and migration management is not *per se* given. See N. Walker N (ed.), *Europe's area of freedom, security and justice*, Oxford, Oxford University Press, 2004, pp. 5-7; Craig & De Burca, *supra* note 115, pp. 971-972; Council of the European Union, Stockholm Programme-An open and secure Europe serving and protecting the citizens, 17024/09, 2 December 2009, p. 4, 5.

120 See Carrera & den Hertog, *supra* note 81, p. 12.

121 C-376/98 *Tobacco Advertising* [2000] ECR I-08419, para. 85.

122 See Case C-338/01 *Commission v. Council* [2004] ECR I-04829, paras. 95, 69 and case C-376/98 *Tobacco Advertising* [2000] ECR I-08419, paras. 84, 95.

123 Davies, *supra* note 6, p. 9.

of the regulation's impact in legal terms. The check of the subject matter and the impact of the measures adopted under a sector-specific competence is way clearer than in the case of measures adopted under a purposive competence. That is because in the former situation, the measures are specified in the treaty, so the limitations for the Union to adopt measures are defined by the law (e.g. Art. 79(2)(c)), while in the latter case the measures are not specific from the beginning, but are proclaimed based on the treaty's objective, and the only criterion to check the Union's power to legislate the measures is the latter's capacity to fulfil that goal (e.g. 77(2)(d)).¹²⁴ Even if the regulation has a secondary effect on the subject matters of immigration and asylum, it does not need to include the concerned legal bases in order to be legal. Since the measures primarily aim to establish an integrated system of border management, recourse to Article 77(2)(d) is enough, when the measures do not fall under the sector-specific competences of Articles 79(2)(c) and 77(2)(b).

8.6.2 *Choice of legal basis and social legitimacy*

The democratic deliberations for the adoption of the new regulation shall be initiated based on the measures suggested, the subject matter they concern and the attainment of the relevant objectives as set in the text of the treaty.

Firstly, in the European Parliament, the discussion will be opened based on the legal bases proclaimed for the regulation, since they are indicative of the subject matters the regulation touches upon. Apart from Article 77, which concerns border controls, Article 79, which is also included in the regulation, concerns immigration policy from a specific angle, given its sector-specific character covering the return operations of the EBCG.¹²⁵ However, as it was proven above, all the tasks of the agency result in securitizing migration, including both immigration and asylum, indicating a very specific and negative policy direction taken on these subject matters. The regulation, though, does not necessitate recourse to the relevant legal bases in order to be legal if the tasks primarily aim at establishing an integrated border management, indicated above. The discussion shall not open up to include asylum and immigration, since there is no sign of their prime influence by the regulation (except for the return tasks of the agency related to Art. 79 TFEU). Hence, the parliamentarians who would wish to reflect on border control in a holistic way and express the voices of the citizens with broadened views on border controls, including asylum and immigration policy, shall be considered to step out of the subject matter, extending the competence of the Union to make decisions that are not relevant with the regulation discussed.¹²⁶ The examination of the official documents on the discussions made in the

¹²⁴ Id., 14.

¹²⁵ See Arts. 27, 28, 33 Regulation (EU) 2016/1624.

¹²⁶ Davies, *supra* note 6, p. 15.

European Parliament verifies this suggestion. The four different committees' report and opinions on the proposal,¹²⁷ the political debate between the members of the European Parliament¹²⁸ along with the amended text that was approved in the first reading of the regulation¹²⁹ focused on technical changes in the proposal, with special concern given to the highly debated Article 18¹³⁰ and the challenge it brings to the sovereignty of the member states. The Parliament was especially concerned with the transparency and external evaluation of the agency, the accountability of the agency to the Parliament and the Council, and the role of the Parliament in appointing the agency's executive director.¹³¹ The discussion did not open up to include wider concerns of the regulation's influence on migration management by scrutinizing the specific effects of the EBCG's tasks on migration.

On the national arena, parliamentarians can discuss over the regulation in the context of the early warning mechanism and the political dialogue.¹³² Given the thresholds needed to be reached and the narrow scope of checking the regulation's substance under the yellow-

127 Four different committees submitted their report and opinions on the Commission's proposal, suggesting amendments for specific articles and recitals. Draft Report of the Committee on Civil Liberties, Justice and Home Affairs of 6 June 2016. Retrieved on 18 June 2017 from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-578.803+01+DOC+PDF+V0//EN&language=EN; Opinion of the Committee on Fisheries of 20 April 2016. Retrieved on 18 June 2017 from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-578.545+02+DOC+PDF+V0//EN&language=EN; Opinion of the Committee on Budgets of 26 April 2016. Retrieved on 18 June 2017 from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0200+0+DOC+XML+V0//EN#title4; Opinion of the Committee on Foreign Affairs of 20 May 2016. Retrieved on 18 June 2017 from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-580.484+04+DOC+PDF+V0//EN&language=EN.

128 European Parliament, 'Debate CRE 05/07/2016-11', 5 July, Strasbourg.

129 European Parliament, 'Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (A8-0200/2016, 6 June 2016).

130 Art. 18 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (2015/0310 (COD) 15 December 2015), titled 'Situation at the external borders requiring urgent action', now Art. 19 of the new Regulation introducing the Agency's 'right to intervene'.

131 European Parliament, *supra* note 129.

132 The first procedure was introduced with the Lisbon Treaty and constitutes one of the constitutional reforms in order to boost the so-called democratic deficit of the Union. According to the process, national parliaments shall check the adherence to the principle of subsidiarity on the Commission's legislative proposals. See Art. 12 TFEU and Art. 7 of the Protocol No. 2 of the TFEU on the application of the principles of subsidiarity and proportionality. From 2006 and after the rejection of the Constitutional Treaty, an additional procedure was launched by the former president of the European Commission, José Manuel Barroso, that sought to ensure further democratic dialogue from the national parliaments on European acts. It is thus possible to open the political dialogue to express the national parliamentary opinions for any European document, at any time with regard to any aspect of the document, including its substance. See D. Jancic, 'The game of cards: National parliaments in the EU and the future of the early warning mechanism and political dialogue', *Common Market Law Review*, Vol. 52, No. 4, 2015, pp. 939-976.

and-orange card procedure,¹³³ the Commission's proposal on the EBCG did not instigate the process of the early warning mechanism.¹³⁴ However, in the context of the political dialogue, nine parliamentary chambers from six different member states, namely Poland, Italy, the Netherlands, Romania, Czech Republic and Portugal, issued opinions on the proposal, introducing issues regarding the subsidiarity and proportionality of the regulation, while addressing specific concerns and questions regarding the new regime. The opinions referred to severe doubts of the aforementioned member states related to Article 18 of the proposal – some highlighting the strong discontent for the role of the Commission in issuing binding implementing acts for the agency's intervention on national territories even without the consent of the concerned state at urgent circumstances¹³⁵ – the concept of shared responsibility,¹³⁶ the evaluation mechanism for vulnerability assessments¹³⁷ and the deployment of liaison officers on the territory of the member states, suggesting a possible consent of the member state for the appointed official.¹³⁸ Thus, the political dialogue was constrained to discuss specific aspects of the agency's tasks, highly related to politically sensitive issues, such as sovereignty and control over border management, missing the extended impact of the agency's new tasks on immigration and asylum.

-
- 133 See T. Van den Brink, "The substance of subsidiarity: The interpretation and meaning of the principle after Lisbon" in M. Trybus, & L. Rubini (eds.), *The treaty of Lisbon and the future of European law and policy*, Cheltenham, Edward Elgar, 2012, pp. 160-178; K. Fabbrini, & K. Granat, "Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike", *Common Market Law Review*, Vol. 50, No. 1, 2013, pp. 115-143.
- 134 European Parliament, 'Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (Relations with National Parliaments). Retrieved on 19 June 2017 from [www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2015\)0671](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2015)0671).
- 135 See Written Opinions of the Romanian Senate (14 March 2016), the Portuguese Assembleia Da República (8 March 2016), the Senate of the Republic of Poland (15 March 2016), the Resolutions of the Italian Senate (9 March 2016), the Senate of the Parliament of the Czech Republic (2 March 2016), the Parliament of the Czech Republic – Chamber of Deputies (4 February 2016) and the Letter of the Netherlands House of Representatives (18 February 2016) on the Commission's proposal for an EBCG regulation [COM(2015) 671 final]. Retrieved on 19 June 2017 from [www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2015\)0671](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2015)0671).
- 136 See Resolution of the Parliament of the Czech Republic – Chamber of Deputies (4 February 2016), Letter of the Netherlands House of Representatives (18 February 2016) on the Commission's proposal for an EBCG regulation [COM(2015) 671 final]. Retrieved on 19 June 2017 from [www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2015\)0671](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2015)0671).
- 137 See the Summary of the Opinion of the Romanian House of Deputies on the Commission's Communication [COM (2015)67] and Proposal for an EBCG Regulation [COM(2015) 671 and COM(2015) 673], and the Opinion of the Italian Chamber of Deputies (19 May 2016) on the Commission's proposal for an EBCG regulation [COM(2015) 671 final]. Retrieved on 19 June 2017 from [www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2015\)0671](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2015)0671).
- 138 Opinion of the Romanian Senate (14 March 2016) on the Commission's proposal for an EBCG regulation COM(2015) 671 final. Retrieved on 19 June 2017 from [www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2015\)0671](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2015)0671).

The results of the Council's deliberations resemble the opinions issued by national parliaments. The interest shown in the Council meetings was focused on the notion of shared responsibility, the attainment of Schengen's integrity, the compulsory contributions of national border and coast guards to the agency's rapid reserve pool and the meaning of the agency's highly debated 'right to intervene'.¹³⁹ The various discussions held on the reports of the working parties¹⁴⁰ and the member states' concerns on the proposed regulation demonstrate once again the strict view of the European border control.¹⁴¹ The co-legislator dealt with the regulation from a narrow perspective on border checks, discussing the textual legal amendments according to the member states' sovereignty concerns, while failing to identify and address the specific impact that all the main tasks of the agency bring to immigrants, asylum seekers and refugees, except only in the case of the joint return operations, when the Working Party on Integration, Migration and Expulsion was asked to examine the relevant legal provisions.

Lastly, in the light of the necessary consultations with the civil society, the European Economic and Social Committee granted its opinion on the legislative proposal of the EBCG.¹⁴² The committee showed a positive stance towards the agency's 'right to intervene' and the Commission's role in issuing the decisions for the deployment of the agency in the territory of the member states, as well as its support for the enhanced cooperation with other EU agencies and the increase in the number of European border guards.¹⁴³ It also welcomed the reinforced return powers of the EBCG and the provisions for the protection

139 Council of the European Union, 'Outcome of the Council Meeting, Justice and Home Affairs' [6462/16 (OR. en), 25 February 2016]; Council of the European Union, 'State of Play on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (6309/16, 22 February 2016).

140 Four different working parties were involved to examine specific aspects of the legal text. The Working Party on Frontiers, contributing the most to the procedure by focusing on the meaning of the integrated border management, shared responsibility and the composition of the EBCG, the Working Party on Integration, Migration and Expulsion, solely for the examination of the return tasks of the new agency and finally the Working Party on Internal and External Fisheries Policies as well as the Shipping Working Party, responsible for checking the compliance of the new Frontex regulation with the proposals amending the regulations on the European Maritime Safety Agency (EMSA) and the Fisheries Control Agency (EFCA).

141 See Id.; Council of the European Union, 'Presidency compromise suggestions on Section 3 of Chapter II of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (6319/16, 19 February 2016); Council of the European Union, 'Extracts concerning the establishment of the Frontex Return Office on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (6106/1/16 REV 1, 17 February 2016).

142 Opinion of the European Economic and Social Committee of 25 May 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2016] OJ C 303/109.

143 Id., p. 114.

of the fundamental rights.¹⁴⁴ However, it criticized the EU migration management and urged for its improvement.¹⁴⁵ Hence, the committee was able to express its concerns on the holistic management of migration in the Union. Nonetheless, the discussion did not open up to include comments concerning all the various tasks of the agency in handling migration, proving that the influence of the agency's main tasks on migration was not obvious enough in order to evaluate its overall contribution and provoke a constructive dialogue.

This disregard of the negative impact that the regulation bears on migration through all the main tasks of the agency, as an outcome of the broad power given to the Union to adopt any measure for the establishment of an integrated border management, may lead to a creak in the public's support towards the regulation. The citizens may be unable to see a policy direction set in holistic terms, without thorough scrutiny of the impact the agency's tasks have on migration management and a fruitful dialogue on the legislative process.

8.7 CONCLUSION AND DISCUSSION

The new regime that introduced the EBCG came to be closely connected to migration management along with the management of the EU's external frontiers. This chapter aimed to deepen the perspective under which these changes can be assessed by identifying the qualitative differences the new regulation brought. The course of the analysis about the agency's main tasks proved that the continuation of the construction of migrants is a threat to the Union in a more intense way based on the sophistication and complexity of the means used to deal with migration at the EU external borders and the introduction of means which were deployed to confront traditional security threats.¹⁴⁶

However, it was argued that the choice of the purposive competence of Article 77(2)(d) TFEU, sought to establish an integrated system of border management among the member states, neglected the inclusion of different legal bases that would allow the connection of

144 *Id.*, pp. 114-115.

145 With regard to the improvement of the Dublin system, the relocation programmes, the EU-Turkey deal and the unilateral closing of national borders. *See Id.*, p. 113.

146 For avoiding generalizations and arbitrary conclusions, it should be noted that the findings of this first part were based on a broader definition of security that is not only of exceptional nature, as developed within the Paris school. Rather they define security as moving within a 'continuum from normalcy to worrisome/troublesome to risk to existential threat' in an attempt to highlight the changes on the governing techniques of today's world, where 'unease' is handled in everyday life repetitively by standardized means. *See* Abrahamsen, *supra* note 26, p. 59; Léonard, *supra* note 17, p. 238; Bigo, 2002, *supra* note 13, pp. 63-92. A narrower definition of security, as the one given by the Copenhagen school, would presumably have different outcomes when examining one by one the tasks of the agency. *See* W. A. Neal, "Securitisation and risk at the EU border: The origins of FRONTEX", *Journal of Common Market Studies*, Vol. 47, No. 2, 2009, pp. 333-356.

the regulation with asylum and immigration. This choice led in turn to a partial inability¹⁴⁷ to include wider societal beliefs and ideals regarding the tasks of the agency on border control – including concerns on asylum and immigration – in the representative democratic process for the adoption of the regulation and thus allegedly damaging the public’s support to the regulation.¹⁴⁸

This negative policy outcome for migration does not limit its effects on regulating Frontex and handling the external EU borders. It is an EU policy direction that might influence the effective handling of the turmoil caused within the member states by the recent influx of migrants. It is no news that various EU states are refusing to comply with the relocation quotas for refugees,¹⁴⁹ while others are building walls to refrain migrants from entering their territory.¹⁵⁰ Even if the explanation of this stance is multidimensional – the rationale being political, historical and cultural – the question raised is how the Union can deal with these problems, emitting messages of solidarity between the member states and towards the refugees, when, at the same time, the Union’s policy is, even indirectly, constructing a hostile image for immigrants and refugees. This silyllic attitude is assisting neither the silencing of xenophobic and racist speech coming from within nor the effective resolution of the migratory management through monitoring and control.¹⁵¹ It rather enhances the segregation between ‘us’ and the ‘other’, the wanted and the unwanted entities on European territory, hindering the integration and social inclusion of migrants, while it reinforces the image of ‘fortress Europe’, which fences off the newcomers.

In terms of border control and management, the discussion should be on how to desecuritize migration, that is, how to disentangle security as a policing method for

147 Partial in the sense that for the return tasks of the agency, the discussion included concerns on migration management, because of the use of the legal basis of Art. 79(2)(c) TFEU.

148 A further demarcation should be made for the part of the paper regarding social legitimacy. The findings of this analysis cannot substitute the empirical knowledge attained through the measurement of the public’s support towards the new Frontex regulation. Nevertheless, it serves the aim of presenting *in abstracto* the tendency of the citizens to either approve or disapprove the new EBCG and its specific impact on migration management, based on the extent to which the regulation includes wider sociopolitical concerns on border management in a genuine representative democratic process for its adoption. Also, only democracy was considered in the problematique raised by the author, whereas other parameters such as the output performance of the regulation could also play a significant role.

149 See G. Gotev, Refugee relocation very far from target, Commission admits, Euroactiv, 2 March 2017. Retrieved on 30 May 2017 from www.euractiv.com/section/justice-home-affairs/news/relocations-very-far-from-target-commission-admits/; Visegrád Four slam ‘blackmail’ by Brussels on migrants, Euroactiv, 29 March 2017. Retrieved on 20 May 2017 from www.euractiv.com/section/justice-home-affairs/news/visegrad-four-slam-blackmail-by-brussels-on-migrants/.

150 See G. Baczynska, & S. Ledwith, The walls go up in Europe, Reuters, 4 April 2016. Retrieved 30 May 2017 from www.reuters.com/investigates/special-report/europe-migrants-fences/.

151 See T. Spijkerboer, & T. Last, EU border plan is a textbook example of tunnel vision, Oxford University, Faculty of Law, Border Criminologies blog, 16 December 2015. Retrieved 2 May 2017 from <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/12/eu-border-plan>.

migration.¹⁵² A crucial turning point would be the attempt to correlate migration with human mobility in a positive connotation. Dealing with the crossing of borders as a normal state, which is not *a priori* connected with security concerns, such as criminality, terrorism or trafficking. For the latter purpose, shaping the meaning of citizenship could play a significant role in opening the term to include people regardless of their cultural differences or their place of origin, but rather focus on human mobility in political terms and its acceptance in whichever form as a normal part of the human condition.¹⁵³ Further research on this aspect would offer a tangible solution for the desecuritization of migration in the EU, especially now that the concept and meaning of EU citizenship is under construction.

REFERENCES

Abrahamsen, R., "Blair's Africa: The politics of securitization and fear", *Alternatives*, Vol. 30, 2005, pp. 55-80.

Aradau, C., & van Munster, R., "Poststructuralist approaches to security", in M. D. Cavelty, & T. Balzacq (eds.), *Routledge Handbook of Security Studies*, 1st edn, New York, Routledge, 2017, pp. 75-84.

Balzacq, T., "The three faces of securitization: Political agency, audience and context" *European Journal of International Relations*, Vol. 11, 2005, pp. 175-201.

Balzacq, T., "The policy tools of securitization: Information exchange, EU foreign and interior policies", *JCMS: Journal of Common Market Studies*, Vol. 46, 2008, pp. 75-100.

Balzacq, T., *Securitization Theory*, 1st edn, New York, Routledge, Taylor & Francis Group, 2011.

Beetham, C., & Lord, D., *Legitimacy and the EU*, London, Longman, 1998.

Bigo, D., "When two become one: Internal and external securitisations in Europe" in M. C. Williams & M. Kelstrup (eds), *International Relations Theory and the Politics of European Integration: Power, Security, and Community*, London, Routledge, 2000, pp. 171-205.

152 J. Huysmans, & V. Squire, "Migration and security" in M. Dunn, & T. Balzacq (eds.), *Routledge handbooks of security studies*, New York, Routledge, 2017, pp. 166-167.

153 See Id., p. 167; Huysmans, 2000, *supra* note 5, p. 765; Bigo, 2002, *supra* note 13, p. 64.

Bigo, D., "Security and immigration: Toward a critique of the governmentality of unease" *Alternatives*, Vol. 27, No. 1, 2002, pp. 63-92.

Bigo, D., "Globalised (in)security: The field and the Ban-opticon", in D. Bigo & A. Tsoukala (eds.), *Illiberal practices in liberal regimes*, London, Routledge, 2006, pp. 5-49.

Buzan, B., Wæver, O., & Wilde, J., *Security: A New Framework For Analysis*, 1st edn, Boulder, Rienner, 1998.

C.A.S.E. Collective, "Critical approaches to security in Europe: A networked manifesto" *Security Dialogue*, Vol. 37, No. 4, 2006, pp. 444-487.

Carrera, S., & Hertog, L. den, "A European border and coast guard: What's in the name?", 8 March 2016, CEPS Papers in Liberty and Security in Europe, (SSRN official website) Retrieved on 20 November 2016 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745230.

Carrera S, et al., The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean? CEPS Task Force Report (CEPS official website 1 February 2017). Retrieved on 1 February 2017 <https://www.ceps.eu/publications/european-border-and-coast-guard-addressing-migration-and-asylum-challenges>.

Craig, P., & De Burca, G., *EU Law, Texts, Cases and Materials*, Oxford, Oxford University Press, 2015.

Davies, G., "Democracy and legitimacy in the shadow of purposive competences" *European Law Journal*, Vol. 21, No. 1, 2015, pp. 2-22.

Dunn Cavelty, M., & Balzacq, T, *Routledge Handbook of Security Studies*, 1st edn, London, Routledge, 2017.

Fabbrini, K., & Granat, K., "Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike", *CML Rev*, Vol. 50, No. 1, 2013, pp. 115-143.

Føllesdal, A., "Legitimacy theories of the European Union", ARENA working papers WP 04/15, 2004.

MAIRI ZOI

Foucault, M., *Discipline and punish: The birth of the prison*, New York, Vintage Books, 1977.

Gill, P., & Phythian, M., *Intelligence in an insecure world*, Cambridge, Polity, 2006.

Hertog, L den, "Fundamental rights and the extra-territorialisation of EU Border Policy: A contradiction in terms?" in D. Bigo, S. Carrera & E. Guild (eds.), *Foreigners, refugees or minorities? Rethinking people in the context of border controls and visas*, Farnham, Ashgate, 2013, pp. 205-226.

Horii, S., "The effect of Frontex's risk analysis on the European border controls", *Europeans Politics and Society*, Vol. 17, No. 2, 2016, pp. 242-258.

Huysmans, J., "The European Union and the securitisation of migration", *Journal of Common Market Studies*, Vol. 38, No. 5, 2000, pp. 751-777.

Huysmans, J., *The politics of insecurity: Fear, migration and asylum in the EU*, 1st edn, New York, Routledge, 2006.

Jancic, D., "The game of cards: National Parliaments in the EU and the future of the early warning mechanism and political dialogue", *CML Rev*, Vol. 52, No. 4, 2015, pp. 939-976.

Léonard, S., "The European Union and the 'securitisation' of asylum and migration: Beyond the Copenhagen school's framework", PHD thesis, University of Wales, 2007.

Léonard S, "EU Border Security and migration into The European Union: FRONTEX and securitisation through practices", *European Security*, Vol. 19, No. 2, 2010, pp. 231-254.

Lutterbeck, D., "Policing migration in the Mediterranean", *Mediterranean Politics*, Vol. 11, No. 1, 2006, pp. 59-82.

Majone, G., "The rise of the regulatory state in Europe", *West European Politics*, Vol. 17, No. 3, 1994, pp. 77-101.

Mutimer, D., "Critical security studies" in M. D. Cavelty & T. Balzacq (eds.), *Routledge Handbook of Security Studies*, 1st edn, New York, Routledge, 2017, pp. 54-63.

Neal, W. A., "Securitisation and risk at the EU border: The origins of FRONTEX", *Journal of Common Market Studies*, Vol. 47, No. 2, 2009, pp. 333-356.

Papastavridis, E., “‘Fortress Europe’ and FRONTEX: Within or without international law?” *Nordic Journal of International Law*, Vol. 79, 2010, pp. 75-111.

Peers, S., Guild, E., & Tomkin, J., (eds), *EU Immigration and Asylum Law (Text and Commentary)*, Vol. 1, 2nd edn, Leiden, Martinus Nijhoff Publishers, 2012, pp. 119-160.

Peers, S., “The reform of Frontex: Saving Schengen at refugee’s expense?”, *EU Law Analysis Blog* 16 December, 2015. Retrieved on 06 December 2016 <http://eulawanalysis.blogspot.nl/2015/12/the-reform-of-frontex-saving-schengen.html>.

Piret, E., “Competing models of EU legitimacy: The test of popular expectations”, *Journal of Common Market Studies*, Vol. 46, No. 3, 2008, pp. 619-640.

Schmitt C., *Political theology: Four chapters on the concept of sovereignty*, George Schwab tr, Cambridge, MIT Press, 1985.

Spijkerboer, T., Last, T., “EU Border Plan is a Textbook Example of Tunnel Vision” Oxford University, Faculty of Law, Border Criminologies blog, 16 December 2015. Retrieved on 2 May 2017 <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centre-border-criminologies/blog/2015/12/eu-border-plan>.

Van den Brink, T., “The substance of subsidiarity: The interpretation and meaning of the principle after Lisbon” in M. Trybus & L. Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, Edward Elgar, 2012, pp. 160-178.

Wæver, O., “The EU as a security actor: Reflections from a Pessimistic Constructivist on post-sovereign security orders” in M. C. Williams & M. Kelstrup (eds.), *International Relations Theory and the Politics of European Integration: Power, Security, and Community*, London, Routledge, 2000.

Walker, N. (ed.), *Europe’s Area of Freedom, Security and Justice*, Oxford, Oxford University Press, 2004.

MAIRI ZOI

International Reports

International Organisation for Migration (IOM), World Migration report 2010, the future of Migration: Building capacities for change, 2010. Retrieved on 23 April 2017 www.unhcr.org/excom/unhcrannual/5808d8b37/report-united-nations-high-commissioner-refugees.html.

Case Law

Case C-338/01 *Commission v. Council* [2004] ECR I-04829.

Case C-376/98 *Tobacco Advertising* [2000] ECR I-08419.

EU Legislation

Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1.

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC' (2015/0310 (COD) 15 December 2015).

Regulation (EU) 863/2007 of the European Parliament and of the Council of the 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/1.

Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1.

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) [2016] OJ L77/1.

Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard of 14 September 2016, OJ L251/1.

EU Official Documents

Committee on Budgets, Opinion on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 26 April 2016. Retrieved on 18 June 2017 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0200+0+DOC+XML+V0//EN#title4.

Committee on Civil Liberties, Justice and Home Affairs, Committee Draft Report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 6 June 2016. Retrieved on 18 June 2017 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-578.803+01+DOC+PDF+V0//EN&language=EN.

Committee on Fisheries, Opinion on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 20 April 2016. Retrieved on 18 June 2017 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-578.545+02+DOC+PDF+V0//EN&language=EN.

Committee on Foreign Affairs, Opinion on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 20 May 2016. Retrieved on 18 June 2017 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-580.484+04+DOC+PDF+V0//EN&language=EN.

Council of the European Union, “Stockholm Programme-An open and secure Europe serving and protecting the citizens” (17024/09), 2 December 2009.

Council of the European Union, “Examination of Articles 4, 7 (1)(q) and 52 of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC” (5479/16), 27 January 2016.

Council of the European Union, “Extracts concerning the establishment of the Frontex Return Office on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC” (6106/1/16 REV 1), 17 February 2016.

Council of the European Union, “Presidency compromise suggestions on Section 3 of Chapter II of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC” (6319/16), 19 February 2016.

Council of the European Union, “State of Play on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC” (6309/16), 22 February 2016.

Council of the European Union, “Outcome of the Council Meeting, Justice and Home Affairs” (6462/16 [OR. en]), 25 February 2016.

European Commission, “EU operation in the Mediterranean Sea”, 4 October 2016. Retrieved on 10 May 2017 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf.

European Council, Informal meeting of EU heads of state or government on migration (Press release, 23 September 2015). Retrieved on 24 September 2015 www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/.

European Parliament, ‘Debate CRE 05/07/2016–11’, 5 July –Strasbourg. Retrieved on 18 June 2017 from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20160705+ITEM-011+DOC+XML+V0//EN&language=EN>.

European Parliament, “Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC” (Relations with National Parliaments). Retrieved on 19 June 2017 [www.connefof.europarl.europa.eu/connefof/app/exp/COM\(2015\)0671](http://www.connefof.europarl.europa.eu/connefof/app/exp/COM(2015)0671).

European Parliament, “Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC” (A8-0200/2016), 6 June 2016.

European Ombudsman, “Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)”, 12 November 2013. Retrieved from 10 May 2017 <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark>.

FRONTEX, “General Report 2008”. Retrieved on 5 May 2017 http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2008/frontex_general_report_2008.pdf.

FRONTEX, General Report 2009. Retrieved on 5 May 2017 http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2009/gen_rep_2009_en.pdf.

FRONTEX, RABIT Operation 2010 Evaluation Report, August 2011. Retrieved on 5 May 2017 http://frontex.europa.eu/assets/Attachments_News/fer_rabit_2010_screen_v6.pdf.

FRONTEX, Common Integrated Risk Analysis Model: A comprehensive update, 2012. Retrieved on 23 May 2017 <https://europa.eu/capacity4dev/ibm-eap/document/71-common-integrated-risk-analysis-model-ciram-comprehensive-update>.

FRONTEX, Single Programming Document 2016-2019, 24 December 2015. Retrieved on 2 January 2016 http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2016/Programme_of_work_2016.pdf.

FRONTEX, Amended Budget 2017, 28 February 2017. Retrieved on 28 February 2017 http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2017_N1.pdf.

NATO, Operation Active Endeavour, Archive, 27 October 2016. Retrieved on 15 May 2017 www.nato.int/cps/eu/natohq/topics_7932.htm#.

MAIRI ZOI

Opinion of the European Economic and Social Committee of 25 May 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2016] OJ C 303.

Written Opinions of the Romanian Senate (14 March 2016), the Portuguese Assembleia Da República (8 March 2016), the Senate of the Republic of Poland (15 March 2016), the Resolutions of the Italian Senate (9 March 2016), the Senate of the Parliament of the Czech Republic (2 March 2016), the Parliament of the Czech Republic -Chamber of Deputies- (4 February 2016) and the Letter of the Netherlands House of Representatives (18 February 2016) on the Commission's Proposal for a EBCG Regulation [COM(2015) 671 final]. Retrieved on 19 June 2017 [www.connefof.europarl.europa.eu/connefof/app/exp/COM\(2015\)0671](http://www.connefof.europarl.europa.eu/connefof/app/exp/COM(2015)0671).

9 LET SLEEPING DOGS LIE: THE DOCTRINE OF TEMPORARY PROTECTION IN EU ASYLUM LAW

Salvatore Nicolosi

9.1 SETTING THE SCENE: THE CONTOURS OF A CRISIS

In 2016, more than a million asylum seekers crossed the external borders of the European Union (EU) to apply for international protection, a number which is almost double that of 2014.¹ Overall, the number of people who sought protection in the EU from third countries especially in Africa and the Middle East during the second quarter of 2017 reached 149,000.² The former UN secretary-general, Ban Ki-Moon, addressed such an emergency as the ‘the biggest refugee and migration crisis since the end of the Second World War’.³

While the migratory pressure remains steady, the EU has been struggling to design adequate solutions in the light of the European Agenda on Migration.⁴ In response, some scholars⁵ have emphasized the need to implement the Temporary Protection Directive

- 1 European Asylum Support Office (EASO), ‘Annual Report on the Situation of Asylum in the European Union 2016,’ 30 June 2017. Retrieved from <http://publications.europa.eu/webpub/easo/annual-report-2016/en/>. Established in 2010, pursuant to Regulation 439/2010, 19 May 2010, Official Journal (OJ) [2010] L 132/11-28, EASO is a Regulatory Agency of the European Union (EU), which plays a key role in developing practical cooperation among EU Member States on asylum, by facilitating exchange of information, training of asylum officials and assisting in the relocation of beneficiaries of international protection. For references see R. K. Visser, ‘Naissance d’une agence : le cas EASO’, *Revue du droit de l’Union européenne*, 2013, pp. 441-454.
- 2 For an overall overview of asylum statistics, see Eurostat. Retrieved from http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Further_Eurostat_information.
- 3 See UN Secretary-General address to the Italian government in Rome, *UN Daily News*, 16 October 2015. Retrieved from www.un.org/News/dh/pdf/english/2015/15102015.pdf; see also the statement of the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the EC, Federica Mogherini, Opening remarks, Press conference, Informal meeting of Ministers of Defence in Luxembourg, 3 September 2015, video tape. Retrieved from <http://ec.europa.eu/avservices/video/player.cfm?ref=I108183>. For a critical appraisal, see G. Gilbert, “Why Europe does not have a refugee crisis”, *International Journal of Refugee Law*, Vol. 27, 2015, pp. 531-535.
- 4 European Commission, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.
- 5 See especially M. Ineli-Ciger, “Time to activate the temporary protection directive”, *European Journal of Migration and Law*, Vol. 18, No. 1, 2016, pp. 1-33; see also M. Ineli-Ciger, “The missing piece in the European agenda on migration: The temporary protection directive”, *EU Law Analysis*, 28 July 2015. Retrieved from <http://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html>; C. Akkaya, “Why is the temporary protection directive missing from the European refugee crisis debate?”, 7 October

(TPD),⁶ which was adopted in 2001 by the Council of the EU as one of the first instruments in the area of asylum and refugee protection and that has remained dormant within the debate on the EU migratory crisis. The TPD aims to provide displaced persons from non-EU member states who are unable to return to their country of origin with immediate and temporary protection by setting a comprehensive framework to deal with mass influx situations.⁷

Despite its alleged potential as ‘an exceptional tool for mass flight of persons’,⁸ the TPD has never been put into play. Moreover, earlier in 2016, the European Commission published a study⁹ which delves into the strengths and weaknesses of the TPD and concludes that, instead of ‘spending political capital’ in amending the TPD, some elements of this instrument could be incorporated into the proposed relocation mechanism within the recast Dublin Regulation.¹⁰

This research, therefore, pursues the twofold goal of clarifying, on the one hand, the meaning of temporary protection in international refugee law and of investigating, on the other hand, whether an alternative theoretical and operational frame to reconceive temporary protection in EU law can be feasible and compatible with international law standards, especially the 1951 Refugee Convention.¹¹

To this extent, it will be posited that an effective temporary protection mechanism as a way for the EU to cope with mass influx situations must not undermine the broader protection paradigm established in the international refugee law and must adequately

2015. Retrieved from <http://atha.se/blog/why-temporary-protection-directive-missing-european-refugee-crisis-debate>.

- 6 Council Directive 20 01/55/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, 7 August 2001, OJ [2001] L 212/12-23.
- 7 For a recent commentary on the TPD, see A. Skordas, “Temporary protection directive”, in D. Thym, & K. Hailbronner (eds.), *EU immigration and asylum law. Commentary*, 2nd edn., Baden-Baden/Oxford, Nomos/Hart Publishing, 2016, pp. 1058-1070.
- 8 J. Pirjola, “Temporary protection as a future model for asylum?”, *Nordic Journal of International Law*, Vol. 64, 1995, p. 427.
- 9 H. Beirens, S. Maas, S. Petronella, & M. van der Velden, “Study on the temporary protection directive”, Final Report, published by European Commission, January 2016. Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm.
- 10 European Commission, Proposal for the regulation of the European Parliament and of the Council 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), COM(2016) 270 final. For a critical assessment see F. Maiani, ‘The Reform of the Dublin III Regulation’, Study published by the European Parliament, June 2016. Retrieved from [www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).
- 11 United Nations Convention relating to the Status of Refugees, *opened for signature* 28 July 1951, 189 U.N.T.S. 150 (*entered into force* 22 April 1954) [hereinafter ‘Refugee Convention’], supplemented by the Protocol relating to the Status of Refugees, *opened for signature* 31 January 1967, 606 U.N.T.S. 267 *entered into force* 4 October 1967.

address the different needs for protection, in compliance with international human rights obligations.¹²

In an attempt to shed light on the strengths and weaknesses of the TPD and reconsider the doctrine of temporary protection in EU asylum law, this research first introduces and defines the concept of temporary protection in international refugee law, and then examines the temporary protection model established through the TPD and distinguishes it from other temporary protection regimes developed at the domestic level, such as the Temporary Protected Status (TPS) in the United States.¹³ Such a comparative approach is especially illustrative of the role as a crisis-relief instrument that temporary protection is supposed to play within EU law. This is not necessarily true at the domestic level, in which TPS may also be granted as an alternative form of protection to refugee status.¹⁴

Eventually, the main features of the TPD will be compared to the current proposals tabled by the Commission to reform the Common European Asylum System (CEAS),¹⁵ and especially the Dublin Regulation, in order to see whether an alternative model of temporary protection can be acceptable in EU law. Overall, the narrative on temporary protection contributes also to the framing of a situation of migratory emergency as a crisis, likely to thrust a quick fix instead of designing viable long-term solutions.

9.2 TEMPORARY PROTECTION IN INTERNATIONAL REFUGEE LAW

Despite gaining special momentum in the 1990s, following the mass inflows of people displaced by the war in the former Yugoslavia,¹⁶ temporary protection draws its conceptual origins from the practice of ‘temporary refuge’ especially developed between the 1970s and 1980s in Southeast Asia,¹⁷ and earlier from the states’ engagement in granting temporary refuge since as early as 1936, when both France and Britain provided a safe haven to persons

12 In this regard, see J. Hathaway, & A. Neve, “Making international refugee law relevant again: A proposal for collectivized and solution-oriented protection”, *Harvard Human Rights Journal*, Vol. 10, 1997, pp. 115-211.

13 Immigration and Nationality Act (INA), 244 Temporary protected status Sec. 244. 1/[8 U.S.C. 1254a].

14 In this regard, see extensively J. MacAdam, *Complementary protection in international refugee law*, Oxford, Oxford University Press, 2007.

15 European Commission, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final. Apart from the TPD, the Common European Asylum System (CEAS) includes the following binding acts: Regulation 604/2013 [2013] OJ L180/31 (Dublin III Regulation); Regulation 603/2013 [2013] OJ L180/1 (Eurodac Regulation); Directive 2011/95 [2011] OJ L337/9 (Qualification Directive); Directive 2013/33 [2013] OJ L180/96 (Reception Directive); Directive 2013/32 [2013] OJ L180/249 (Procedures Directive). For an updated commentary on the CEAS toolbox, see especially Thym and Hailbronner (eds.), *supra* note 7.

16 J. Fitzpatrick, “Temporary protection of refugees: Elements of a formalized regime”, *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 279.

17 See in particular P. Kourula, *Broadening the edges: Refugee definition and international protection revisited*, Leiden, Nijhoff, 1997, pp. 104 and 111.

fleeing the Spanish Civil War, or later, following the influx of Hungarian refugees into Austria in 1957 and the refugee flows from East Pakistan to India in 1971, and across Africa, owing to widespread armed conflicts throughout the continent, especially during the decolonization period.¹⁸

9.2.1 *Conceptual origins*

The principle of temporary refuge found expression in the first International Conference on Indochinese Refugees organized by the UNHCR in 1979 in order to provide relief and interim protection to claimants fleeing the war-torn countries of Vietnam, Laos and Cambodia.¹⁹

On that occasion, the temporary nature of asylum or refuge was, for the first time, specifically introduced as an exceptional form of protection in cases of large-scale influx. As stated by the UNHCR Executive Committee, temporary refuge is based on ‘the essential need for persons to whom temporary refuge has been granted to enjoy basic humanitarian standards of treatment’.²⁰ The concept of temporary refuge was therefore carved out as a practical answer to a situation of exceptional nature.

By drawing from the international practice some cases of temporary refuge, including the aforementioned influx of Hungarian refugees into Austria in 1957, the refugee flows from East Pakistan to India in 1971 and Indo-Chinese Refugee Crisis in the 1970s and 1980s, Cole concluded that temporary refuge is ‘a means to facilitate the scrupulous observance of the principle of *non-refoulement*’.²¹ As emphasized in the doctrine, in fact, the latter utmost principle of international law facilitates the admission of people in need for protection, while a durable solution is pursued.²² Temporary refuge can be therefore defined as ‘that protection characterized by the principle of *non-refoulement* which is accorded a person and which is temporary, pending the obtaining of a durable solution’.²³

By elaborating on the obligations under the principle of *non-refoulement*, Perluss and Hartman even maintained that temporary refuge emerged as a binding principle of cus-

18 For an extensive analysis of the practice of states in granting temporary refuge, see especially D. Perluss, & J. Fitzpatrick Hartman, “Temporary refuge: Emergence of a customary norm”, *Virginia Journal of International Law*, Vol. 26, 1985-1986, pp. 559 ff.

19 See Kourula, *supra* note 17, p. 104.

20 UNHCR, Executive Committee (ExCom), Conclusion No. 19 (XXXI), Temporary Refuge, (16 October 1980), para. (ii) (e). Retrieved from www.refworld.org/docid/3ae68c443b.html.

21 G. J. L. Coles, “Temporary refugee and the large scale influx of refugees”, *Australian Year Book of International Law*, Vol. 189, 1978-1980, at p. 199.

22 G. S. Goodwin-Gill, & J. McAdam, *The Refugee in International Law*, 3rd edn., Oxford, Oxford University Press, 2007, at pp. 343-344, highlight that ‘*non-refoulement* through time is... the core element both promoting admission and protection, and simultaneously emphasizing the responsibility of nations at large to find the solutions.’

23 Coles, *supra* note 21, at p. 199.

tomary international law, documenting a widespread practice over different geographical regions, including Europe and the Americas, with states that do not engage in forced repatriation or rejection of civilians fleeing situations of generalized violence, such as armed conflicts.²⁴

The 1990s marked a conceptual shift from temporary refuge to ‘temporary protection’, emphasizing the need to provide a broader framework that, apart from the mere admission to the territory of the host states, incorporates the human rights legal-political idiom, which was predominant during that time, and specific standards of treatment for recipients of temporary protection.²⁵

Such a conceptual shift was especially triggered by the humanitarian crisis in the former Yugoslavia: In 1992 the UNCHR, acknowledging the temporary emergency nature of the situation, urged governments to provide protection on a temporary basis, stressing that on that occasion it was not practical to use individual asylum procedures.²⁶ Thus, it became clear that new solutions were necessary and the UNHCR recognized the crucial role of temporary protection as a strategy to cope with large migratory influx. The breakup of wars in Yugoslavia constituted the context which prompted European states to carve out a harmonized temporary protection framework,²⁷ whose distinct features will be delved into after an overview on the international legal principles underpinning the practice of temporary refuge.

9.2.2 *The international legal framework*

Temporary protection in situations of mass influx has been subject to studies by UNHCR since the 1980s.²⁸ Nonetheless, the efforts to formalize temporary protection mechanisms did not result in a specific hard law regime. International law has not articulated the legal basis for temporary protection mechanisms in mass influx situations nor has the relationship

24 Perluss and Fitzpatrick Hartman, *supra* note 18, at p. 624.

25 M. Ineli-Ciger, “Revisiting temporary protection as a protection option to respond to mass influx situations”, in J.-P. Gauci, M. Giuffrè, & E. Tsourdi (eds.), *Exploring the boundaries of refugee law: Current protection challenges*, Leiden/Boston, Brill/Nijhoff, 2015, 197, at 199.

26 UNHCR, A comprehensive response to the humanitarian crisis in the former Yugoslavia, 24 July 1992, HCR/IMFY/1992/2. Retrieved from www.refworld.org/docid/438ec8aa2.html.

27 The first step in this regard was the Joint Action 1999/290/JHA of 26 April 1999 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo, OJ L 114/2-6, 1 May 1999.

28 *Cf. supra* note 17.

between the 1951 Refugee Convention and temporary protection been yet settled, apart from the obligations stemming from the principle of *non-refoulement*.²⁹

Generally, temporary protection frameworks have emerged to cope with emergency situations, such as mass influx, for which the Refugee Convention, as an instrument for individualized refugee status determination,³⁰ is unlikely to offer suitable solutions. Indeed, when mass influx situations undermine the orderly functioning of national asylum systems, individualized assessments may become nearly impracticable. In contrast, temporary protection is a group-based regime used by states in such emergency situations to avoid overwhelming their domestic asylum system.³¹

The fact that temporary protection has been regarded as an exceptional measure in the event of mass influx situations has prevented its formalization within international refugee law, allowing instead for domestic or regional solutions. The latter models will be examined in greater detail through a comparative analysis in the next section, whereas it is worth stressing that at the international level, the question of temporary protection has been especially endorsed by the UNHCR Executive Committee in a number of conclusions,³² which, even without establishing binding obligations for states, as they constitute sources of soft law,³³ set minimum standards for temporary protection frameworks.

In particular, Conclusion No. 19, adopted in 1980, provided that the principles of *non-refoulement* and burden-sharing constitute a general framework to cope with the mass refugee influx situations,³⁴ even in case of asylum seekers rescued at sea.³⁵

The core principles of temporary protection have been reiterated in subsequent conclusions, and especially in Conclusion 22, which recalled the need to admit displaced people on a temporary basis and provide protection according to basic human rights standards.³⁶ Accordingly, the UNCHR set out the measures for the treatment of asylum

29 M. Ineli-Ciger, “A temporary protection regime in line with international law: Utopia or real possibility?”, *International Community Law Review*, Vol. 18, No. 3-4, 2016, pp. 278-316, at 278, stressed that ‘there is no structured legal framework regulating temporary protection at an international level.’

30 It is worth recalling that Art. 1 A (2) of the Refugee Convention, *supra* note 11, defines a refugee as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.’

31 Temporary protection is defined by UNHCR, ‘Master Glossary of Terms’ (June 2006), Rev.1. Retrieved from www.refworld.org/docid/42ce7d444.html, as ‘an arrangement developed by States to offer protection of a temporary nature to persons arriving en masse from situations of conflict or generalized violence, without prior individual [refugee] status determination.’

32 A first reference was in UNHCR, Executive Committee (EXCOM), Conclusion No. 5 (XXVIII) – 1977, in which the UNHCR appealed to governments to ‘follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory.’

33 For references on the distinction between hard and soft law, *see* especially A. N. Pronto, “Understanding the hard/soft distinction in international law”, *Vanderbilt Journal of Transnational Law*, 2015, pp. 941-956.

34 UNHCR ExCom, *supra* note 20 at a.

35 UNHCR ExCom, Conclusion No. 23 (XXXII) – 1981, at p. 3.

36 UNHCR ExCom, Conclusion No. 22 (XXXII) – 1981.

seekers who have been temporarily admitted to the country pending arrangements for a durable solution, including, *inter alia*, ‘all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities ... and the necessary facilities to enable them to obtain a satisfactory durable solution’.³⁷

Nevertheless, it must be stressed that, although it is emphasized that asylum seekers shall enjoy internationally recognized fundamental civil rights,³⁸ the level of protection set out by UNHCR does not offer the same guarantees provided in the Refugee Convention. This is due to the fact that temporary protection mechanisms are conceived of as a special tool to apply in emergency situations for the purpose of facilitating admission of displaced persons. More importantly, as concluded by the Group of Experts of the UNHCR Standing Committee in 1997, ‘the risks in the formalization of the concept of temporary protection lie in the potential for it to dilute the protection of the 1951 Convention and reduce the incentive of States to accede to the Convention’³⁹ since temporary protection regimes effectively offer only some of the rights enumerated in the Refugee Convention.

9.3 THE FORMALIZATION OF TEMPORARY PROTECTION REGIMES: A COMPARISON BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

International law has not been able to formalise temporary protection, due to the exceptional character of the latter, allowing instead for domestic or regional solutions.⁴⁰ Apart from the EU temporary protection regime, which will be examined in greater detail, assimilation of temporary refuge into the general refugee protection framework advanced in regions particularly affected by large-scale influx, such as the African continent. In this context, it is worth noting that, without formalizing specific temporary protection mechanisms at the regional level,⁴¹ the 1969 Organization of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa expanded the traditional definition of a refugee to include those fleeing armed conflicts, occupation, external aggression, foreign

37 *Id.*, at c) and n).

38 See F. Crépeau, & L. Holland, “Temporary protection, continuing insecurity: a regime replacing convention protection of refugees in violation of international law”, *Canadian Journal of Law and Society*, Vol. 12, No. 1, 1997, at p. 239, 244.

39 UNHCR, Standing Committee, Progress report on informal consultations on the provision of international protection to all who need it, 30 May 1997, UN Doc. EC/47/SC/CRP.27. Retrieved from www.unhcr.org/en-us/excom/standcom/3ae68cfc0/progress-report-informal-consultations-provision-international-protection.html.

40 See J. Fitzpatrick, “Flight from asylum: Trends toward temporary “refuge” and local responses to forced migrations”, *Virginia Journal of International Law*, Vol. 13, 1994, at p. 43.

41 See T. Wood, “Developing temporary protection in Africa”, *Forced Migration Review*, 2015, p. 23.

domination or events seriously disturbing public order,⁴² thereby ensuring group determinations of *prima facie* refugee status.

At the domestic level, instead, these impulses towards the establishment of a group-based status determination process inspired the introduction of the TPS in the United States. The special features of this status will be dealt with in the next subsection.

9.3.1 *The temporary protected status in the United States*

The U.S. refugee policy grants permanent protection to refugees through refugee status and asylum and provides protection for an indefinite period of time through withholding of deportation.⁴³ Refugee status and asylum protect persons by showing that they face a well-founded fear of persecution on account of their political beliefs, race, nationality, religion or membership in a particular social group. To qualify for withholding, instead, the claimant must establish that his or her life or freedom would be threatened if deported, a measure that has been interpreted by U.S. courts to mean that persecution would be more likely than not.⁴⁴

As a consequence, the United States is one of several states that introduced a temporary protection regime in order to fill the gap in domestic legislation as to the protection of individuals fleeing generalized danger.⁴⁵ TPS, which was introduced in 1990 as an amendment to the Immigration and Nationality Act (INA), constitutes the landing place of a practice that for decades has granted individuals displaced by humanitarian crises or environmental disasters a form of protection known as Extended Voluntary Departure (EVD).⁴⁶

42 Cf. Convention governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (1969 Convention), Art. I (2): 2. The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality. See *amplius* T. Wood, “Expanding protection in Africa?: Case studies of the implementation of the 1969 african refugee convention’s expanded refugee definition”, *International Journal of Refugee Law*, Vol. 26, No. 4, 2014, pp. 555-580. The OAU definition of refugee was less formally echoed later in the Americas by the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984. The declaration was adopted at the conclusion of a colloquium organized by the National University of Colombia and the Centro Regional de Estudios del Tercer Mundo.

43 See, *inter alia*, D. Anker, *Law of asylum in the United States*, 8 edn., New York, Thomson/Reuters, 2015.

44 T. A. Aleinikoff, & D. A. Martin, *Immigration process and policy*, St. Paul, West Publishing Co., 1985.

45 B. Frelick, & B. Kohnen, “Filling the gap: Temporary protected status”, *Journal of Refugee Studies*, 1995, pp. 339-363.

46 See in particular E. Segerblom, “Temporary protected status: An immigration statute that redefines traditional notions of status and temporariness”, *Nevada Law Journal*, 2007, pp. 664-684; see also C. Krombel, “The prospective role of temporary protected status: How discretionary designation has hindered the United

Following the 2003 reform of U.S. Immigration Law, TPS is administered by the Department of Home Security (DHS), replacing in this role the Department of Justice, which is thus not anymore involved. Originally, designed in particular for nationals of El Salvador who could not be returned to their country, because of a civil war,⁴⁷ over the last three decades TPS has been extended to nationals of other countries (currently 10).⁴⁸ TPS is granted based on a statutory framework, according to which the Secretary of Homeland Security can designate a country, whose conditions temporarily prevent its nationals currently in the United States from returning safely or, in certain circumstances, when the country is unable to handle the return of its nationals adequately. More specifically, temporary conditions for which a country may be designated for TPS include: (1) an ‘ongoing armed conflict’, such as a civil war; (2) ‘an environmental disaster’, such as an earthquake, flood, drought, epidemic, or other calamity that makes the state temporarily unable to accept the return of its nationals; or (3) ‘extraordinary and temporary’ conditions in a state, which prevent its nationals from returning safely.

Designation of countries for the purposes of granting the TPS is recommended to the Secretary of Homeland Security by the U.S. Citizenship and Immigration Services (USCIS), a DHS branch that carries on regular meetings with other governmental units, but also with representatives of the civil society, which can influence the process of country designation. This dialogue was extremely important, for instance, as regards the designation of Syria or in cases of environmental disasters.⁴⁹ It is worth noting that a country can be designated even when only a part of its territory is affected by one of the conditions that would hinder the return of its nationals.

As has been said, TPS is a discretionary procedure which responds to the need to protect *de facto* refugees that cannot fall within the scope of the Refugee Convention.⁵⁰ From this perspective, it is clear that the TPS is not conceived of as an emergency-relief tool, as it rather constitutes an alternative and complementary form of protection for those individ-

States’ ability to protect those displaced by environmental disaster”, *Connecticut Journal of International Law*, Vol. 28, 2012, pp. 153-175.

47 On the legislative history of TPS and the discussion of a few cases, see E. Segerblom, *supra* note 46, at pp. 665-667.

48 As of October 2017, approximately 437,000 foreign nationals from the following 10 designated countries have TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Yemen. See J. Wilson, Temporary protected status: Overview and current issues, Congressional Research Service’s Report for Members and Committees of Congress, 2 November 2017. Retrieved from <https://fas.org/sgp/crs/homesecc/RS20844.pdf>. For additional specific country information, see the Official Website of the Department of Homeland Security. Retrieved from www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS.

49 Information on the procedural and administrative aspects of the TPS are partly based on an interview conducted with Ms. Molly Groom from the USCIS on 21 September 2016, during the research stay as EU Fulbright-Schuman Scholar at Michigan University Law School and the Program on Asylum and Refugee Law. I am the sole responsible of any possible mistake.

50 Frelick and Kohnen, *supra* note 45, at p. 343.

uals who cannot qualify as refugees, a circumstance that under EU law is covered by the Qualification Directive.

Still, the practice of granting TPS confirms that this status has been having a rather limited impact with a scant number of beneficiaries, due to the fact that TPS does not allow immigration status adjustment. In other words, TPS ‘does not confer permanent residency, citizenship or any right to ongoing immigration status’⁵¹; once the TPS ends, an individual reverts to the immigration status he or she had before. The only possibility available is to apply lawful permanent resident through an American sponsor, such as a relative or an employer. However, the latter hypothesis is rather controversial, because U.S. immigration law provides that noncitizens are generally not permitted to apply for adjustment of status within the country unless they had been formally admitted or paroled into the United States; this is not the case of TPS. TPS beneficiaries who initially entered the country unlawfully are generally not eligible to adjust status, even if a U.S. family member or employer petitions for them.⁵² In this context, some recent case laws are worth mentioning especially within the jurisdiction of the Sixth U.S. Circuit Court of Appeals, which accepts that TPS did constitute formal admission or parole.⁵³

On the other hand, if the country of origin remains designated, TPS allows for possible renewals, thereby creating a situation of ‘permanent temporariness’. Some Somali TPS holders, for instance, have been in the United States for more than 20 years, as Somalia’s TPS designation has been continuously renewed since 1991.⁵⁴

In the light of such difficulties, despite it is clear that TPS was originally designed to fill a normative gap in U.S. domestic law, its level of protection is not only not comparable to refugee status, but also risks deteriorating the situation of many people who find themselves stuck into a limbo without the possibility of status adjustment. The latter is definitely the most important element on which a reform of TPS shall be based, even though the current political trends do not seem to confirm such an optimistic expectation.

9.3.2 *The temporary protection directive in EU law*

Within the EU, a temporary protection regime was first formalized, as is known, in the early 1990s after the mass influx of people fleeing the war in former Yugoslavia. On that occasion several European states implemented national forms of temporary protection

51 M. Messick, & C. Bergeron, Temporary protected status in the United States: A grant of humanitarian relief that is less than permanent, Migration Policy Institute, 2 July 2014. Retrieved from <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

52 Id.

53 Id.

54 Id.

with different characteristics in terms of duration, access to asylum procedures and status.⁵⁵ This resulted in imbalances in the distribution of people seeking protection and in secondary movements, since people sought the most generous states (asylum shopping).⁵⁶

Based on the 1997 Treaty of Amsterdam⁵⁷ and the goal set out in the Tampere Programme of 1999 to establish a CEAS,⁵⁸ a harmonization process in the area of temporary protection was undertaken and resulted in the adoption of the TPD in 2001. The Directive (Art. 2 (a)) defines temporary protection as

a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

Article 5(1) provides a specific procedure to determine the existence of a mass influx situation and thus trigger the TPD. Upon a state's request, the European Commission can propose activating the directive, while the Council of the EU shall decide by a qualified majority: (1) the specific groups of persons to whom the temporary protection will apply; (2) the date on which the temporary protection will take effect; and (3) an estimation of the scale of the movements of displaced persons.⁵⁹ Once activated, the TPD provides harmonized rights – such as the right to work, education, suitable accommodation, medical care and necessary social assistance – for the recipients for up to three years. It has been argued that temporary protection does not constitute a third status of protection in EU asylum law, along with refugee status and subsidiary protection, as regulated by the Qualification Directive.⁶⁰ Nonetheless, there are at least two elements which, in fact, allow

55 As to the previous practice of European states in granting temporary protection, see particularly J. Cels, "Responses of European States to De Facto refugees", in G. Loescher, & L. Monahan (eds.), *Refugees and international relations*, Oxford, Clarendon Press, 1989, at p. 187.

56 Cels, *supra* note 55, at p. 187.

57 *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, Official Journal C 340/1, 10 November 1997.

58 Council of the European Union, *Presidency Conclusions*, Tampere (Finland), 15-16 October 1999. Retrieved from www.consilium.europa.eu/en/european-council/conclusions/1993-2003/. In application of the Treaty of Amsterdam, the European Council adopted a series of measures with a view to establish a genuine area of freedom, security and justice within the European Union. A. Peltomäki, 'What did Member States actually intend at Tampere?', *ERA-Forum: scripta iuris europaei*, 2002, pp. 138-141.

59 For a systematic analysis, see S. Boutruche-Žarevac, *La protection temporaire des personnes déplacées en droit de l'UE? Un nouveau modèle en cas d'afflux massifs?*, Éditions universitaires européennes, Sarrebruck, 2012.

60 See, e.g., the European Commission's Proposal for the TPD, COM(2000) 303 final, 24 May 2000.

for considering temporary protection as a separate status: on the one hand, the Treaty on the Functioning of the EU (TFEU) calls the EU to ‘develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement’; on the other hand, and from a more substantial perspective, as also emphasized by Skordas, the TPD creates a specific temporary status which is distinct in terms of rights, benefits and procedure, from refugee status and subsidiary protection.⁶¹ By and large, Article 3 of the TPD confirms that temporary protection is not derogatory from refugee status⁶²; a decision on the granting or termination of temporary protection shall not influence the refugee status determination, according to the Qualification Directive.

The most original feature of the TPD lays in the solidarity mechanism foreseen in Chapter VI, which is significantly entitled ‘Solidarity’, which, as recently confirmed by the European Commission, makes the TPD the sole legal act that foresees an in-built binding form of solidarity mechanism.⁶³ In particular, the TPD establishes a twofold form of solidarity: financial solidarity and material solidarity. Article 24 formulates the principle of financial solidarity between member states and relying on the European Refugee Fund.⁶⁴ Article 25 provides for the relocation of asylum seekers across the EU based on the mutual consent between the receiving state and the asylum seeker. The latter element is a breakthrough in that it posits the principle according to which recipients of temporary protection ‘cannot be forced to be received in a certain Member State’⁶⁵; this is definitely a relevant feature that has never been taken seriously into consideration in developing the CEAS.

9.4 THE TEMPORARY PROTECTION DIRECTIVE AND ITS PRACTICAL OBSOLESCENCE

Since its entry into force the TPD has never been implemented, although a few member states, like Italy or Malta in 2011, expressly invoked it, following the flows of migrants arriving after the Arab Spring in North Africa, especially in Tunisia.⁶⁶ Many factors, at

61 Skordas, *supra* note 7, at p. 1058.

62 Art. 3 (1) TPD states, “Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.”

63 See Beirens *et al.*, *supra* note 9, at p. 23.

64 Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund, OJ L 252, 6 October 2000, pp. 12-18. For the period 2014-2020, the fund has been replaced by the Asylum, Migration and Integration Fund (AMIF).

65 Skordas, *supra* note 7, at p. 1099.

66 In this regard, see B. Nascimbene, & A. Di Pascale, “The ‘Arab Spring’ and the extraordinary influx of people who arrived in Italy from North Africa”, *European Journal of Migration and Law*, Vol. 13, No. 4, 2011, pp. 341-360.

both political and legal levels, have influenced the lack of implementation of the TPD.⁶⁷ In particular, from a legal perspective, the lack of clear guidelines regarding how to measure the existence of a mass influx has made it difficult for member states to activate the TPD. Article 2(d) vaguely defines ‘mass influx’ as the arrival of large numbers of displaced persons, who come from a specific country or geographical area, as a consequence of either spontaneous migratory flows or aided evacuation program.⁶⁸

In this regard, the concept of emergency due to mass influx of people has been recently addressed by the European Court of Justice (ECJ) in a recent ruling on action for annulment concerning the recent relocation measures⁶⁹ adopted by the Council of the EU in favour of frontline states, namely Italy and Greece.⁷⁰ One of the arguments of Slovakia was that in a situation of migratory pressure, the TPD would have been the ideal instrument to be implemented, as ‘that directive is less harmful to the sovereign right of each Member State to decide freely on the admission of nationals of third countries to its territory, above all because it permits the Member States to decide themselves, in view of their reception capacity, how many persons are to be relocated to their territory’.⁷¹

While confirming that the missed implementation of the TPD is an ‘essentially political choice’, the Court contributed to clarify how a situation characterized by the sudden inflow of asylum seekers must be understood. In this regard, it is relevant to highlight that the Court did not rely on a quantitative criterion, as it opted for a definition based on the impact that the migratory pressure has on the asylum system of a member state, thus taking

67 See, *inter alia*, M. Ineli-Ciger, “Has the temporary protection directive become obsolete? An examination of the directive and its lack of implementation in view of the recent asylum crisis in the Mediterranean”, in C. Bauloz, M. Ineli-Ciger, S. Singer, & V. Stoyanova (eds.), *Seeking asylum in the European Union: Selected protection issues raised by the second phase of the common European Asylum System*, Leiden, Brill/Nijhoff, 2015, pp. 226-246.

68 N. Arenas, “The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System”, *European Journal of Migration and Law*, Vol. 7, 2006, pp. 435-450.

69 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 September 2015, p. 146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 248, 24 September 2015, p. 80. On the legal challenges stemming from such measures, including the relationship with the TPD, see in particular S. Nicolosi, “Emerging challenges of the temporary relocation measures under EU asylum law”, *European Law Review*, Vol. 41, No. 3, 2016, pp. 338-361.

70 Judgement of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*. For a preliminary commentary, see especially H. Labayle, Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v. Council), in *European Immigration and Asylum Law and Policy*, 11 September 2017. Retrieved from <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>.

71 C-643/15 and C-647/15, *supra* note 70, para. 227.

into account factors including ‘structural defects in those systems in terms of lack of reception capacity and of capacity to process applications’.⁷²

Secondly, at the procedural level, there is the difficulty of securing a qualified majority within the Council. This challenge is particularly great, since a majority vote presumably requires the favour of member states, which, despite not being directly affected by a mass influx, would likely need to commit themselves to the redistribution responsibilities of the TPD solidarity mechanism. Consequently, as long only a few member states are at risk, the TPD will not be implemented.⁷³ Beyond mere activation, the whole TPD procedure is highly vulnerable to political discourse,⁷⁴ including the ever-present claim that the activation of the TPD will create a ‘pull factor’ to a host state, thus opening the floodgates to more migrants. Even the solidarity mechanism, which leaves it to member states to establish their own capacity for relocation, is effectively useless without clear criteria for calculating allocations and reception capacity.

The structural weaknesses of the TPD – coupled with the political arguments flagged by member states – have therefore made it exceptionally difficult to trigger the directive. The lack of substantial practice to test its effectiveness in the field has consequently undermined the primary objective of harmonizing domestic rules on temporary protection and has condemned the TPD to legal obsolescence, or a mere ‘term of art’, as Durieux has expressively concluded.⁷⁵

9.5 TEMPORARY PROTECTION AND THE REFORM OF THE CEAS

Considering the weaknesses in the original structure of the TPD, current institutional debates within the EU have been focusing on the need to reconsider the directive. In its recent Study,⁷⁶ the European Commission suggested re-examining the continued relevance of the TPD in the light of the current state of the CEAS reform.⁷⁷ It is thus worth comparing the directive with the measures proposed by the European Commission to enhance solidarity across the EU and alleviate the pressure of mass arrivals on some member states.

In this context, it is relevant to briefly analyse the new corrective mechanism under the Dublin system,⁷⁸ which would have the same function as the ‘crisis relocation

72 Id. para. 256.

73 Ineli-Ciger, *supra* note 67, at 235.

74 See E. R. Thielemann, “How effective are national and EU policies in the area of forced migration?”, *Refugee Survey Quarterly*, 2012, pp. 21-37.

75 J.-F. Durieux, “Temporary protection: Hovering at the edges of refugee law”, *Netherlands Yearbook of International Law*, Vol. 221, 2014, at p. 250.

76 Beirens *et al.*, *supra* note 9.

77 COM (2016) 197 final, *supra* note 15.

78 European Commission, Proposal for the regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application

mechanism' proposed by the Commission in September 2015,⁷⁹ and will replace the recent decisions on provisional measures regarding relocation adopted for Greece and Italy that were in force until September 2017.⁸⁰

Like the TPD, the suggested mechanism aims to cope with the 'disproportionate inflow of third-country nationals or stateless persons', which places significant demands on the asylum system of a member state. Nonetheless, unlike the TPD, the proposed mechanism foresees an automatic trigger, thereby avoiding the lengthy activation procedure under the TPD. The proposal, in fact, includes an 'automated system for registration, monitoring and the allocation mechanism' (Art. 44), which would assign 'unique application numbers' to each application for international protection lodged with a member state. As highlighted in a recent study,⁸¹ it would be capable of indicating in real time the total number of applications lodged in the EU, the number lodged in each member state, the number of third-country nationals resettled by each member state, the number of applications to be examined by each member state as responsible and the share of applications in each member state (see Art. 22 and 23).

The corrective mechanism, like the TPD, does not limit relocation to applicants who belong to nationalities with recognition rates of 75% or higher – based on the latest Eurostat available data – as the current provisional measures and the proposed crisis relocation mechanism do. Instead, all new applications lodged in a member state experiencing disproportionate pressure will be allocated to other member states whose asylum systems have excess capacity. Furthermore, the mechanism would guarantee that eligible persons have the chance to submit an asylum claim and have full access to international protection (refugee status or subsidiary protection) in line with the Refugee Convention instead of a form of temporary protection which is generally based on lower standards.

Despite these interesting features, it is difficult to gauge that the correction mechanism, if adopted, will be an effective tool to cope with mass migratory flows. The mechanism, in fact, remains highly dependent on the strict logic of responsibility allocation, characteristic of the Dublin system, which does not leave room for asylum seekers' preferences as to the host state and thus allows for random relocation. Moreover, the proposed system does not substantially depart from the fact that applications in the EU have always been concentrated

for international protection lodged in one of the member states by a third-country national or a stateless person (recast) COM (2016) 270, 4 May 2016.

79 COM (2015) 450 final, 9 September 2015.

80 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 September 2015, pp. 146-156; 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 September 2015, pp. 80-94. For references see Nicolosi, *supra* note 69.

81 F. Maiani, The Reform of the Dublin III Regulation, Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2016. Retrieved from [www.europarl.europa.eu/Reg-Data/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).

in a few member states – notably border states – which, under the new proposal, still have the primary responsibility of determining whether an application is admissible before proceeding with any transfer required by the allocation mechanism. As a result, the added value of the automatic trigger is likely to be watered down in its ‘administrative unworkability’, since before the applicant can start status determination, a process of admissibility screening, automatic allocation and transference has to be performed.

It therefore seems that, on the one hand, the incorporation within the Dublin system of a mechanism to cope with mass migratory flows may better implement the principle of ‘protection for the duration of risk’,⁸² which is required by international refugee law. On the other hand, the transformation of the TPD into an effective solidarity mechanism which fully ensures access to international protection would be recommended, provided that such mechanism departs from the existing logic of responsibility allocation and addresses the different needs for protection among asylum seekers. Regarding the needs of children, for example, any protection solution must involve the facilitation of family reunification or access to a guardian at the earliest stage possible, as recently suggested by the UN high commissioner for refugees, Filippo Grandi.⁸³

9.6 A FINAL RESISTANCE TO THE FASCINATION OF TEMPORARY PROTECTION

Temporary protection has been traditionally seen as a legal tool to cope with mass refugee flows; nonetheless, as the comparative analysis on the U.S. and EU mechanisms confirms, the formalization of such an instrument has been rather different from its scope. As has been argued, temporary protection in the United States is more a complementary and special form of protection rather than a specific crisis-relief mechanism, as in EU asylum law.

Focusing on the latter body of law, the most recent practice demonstrates that this instrument has become obsolete, despite a few opinions urging the implementation of the TPD, as the most suitable instrument to cope with a crisis.

However, in a fragmented legal landscape characterized by ongoing reforms and attempts to develop new strategic solutions to a crisis which has become a constant feature for the EU, despite its potential, the implementation of the TPD can deteriorate the situation. Temporary protection, in fact, is a concept that can distract from the core content of international protection under the Refugee Convention. This could explain why the liter-

82 J. Hathaway, “The meaning of repatriation”, *International Journal of Refugee Law*, 1997, p. 551.

83 Speech by Filippo Grandi, United Nations High Commissioner for Refugees, at the European Policy Centre, Brussels, Protecting refugees in Europe and beyond: Can the EU rise to the challenge?, 5 December 2016. Retrieved from www.unhcr.org/admin/hcspeeches/58456ec34/protecting-refugees-europe-beyond-eu-rise-challenge.html.

ature has not emphasized the potential of temporary protection frameworks since the 1990s.

As well explained by Hathaway, states must not deny the refugee character of migratory flows, and must accordingly consider providing, at best, access to the protection established by the Refugee Convention.⁸⁴ To that extent, a more cautious approach must be taken when designing temporary protection frameworks.

From this perspective, as long as a system is proposed which copes with mass influxes by establishing an effective relocation mechanism that allows eligible applicants to have access to international protection in line with the Refugee Convention and other human rights instruments, it is to be preferred to temporary protection regimes. The latter, in fact, risks authorizing a person who is a refugee to remain in a state's territory without granting access to most convention rights. Moreover, a robust and integrated asylum regime seems to be the only solution likely to comply with the requirement of Article 78 of the TFEU, which calls upon the EU to develop a common policy on asylum, subsidiary protection and temporary protection 'with a view to offering appropriate status to any third country national requiring international protection', while ensuring a responsible compliance with the Refugee Convention.

At a very critical time for the future sustainability of the CEAS and the international refugee system in general, it is easy for states to fall into the fascination of alternative protection labels. This is why it is necessary to reiterate that if the goal of these alternative forms of protection is 'to avoid the need to recognize most Convention rights, they are legally untenable'.⁸⁵ In this case, instead of unearthing potentially dangerous concepts, it is really better to let sleeping dogs lie!

REFERENCES

Akkaya, C., "Why is the temporary protection directive missing from the European refugee crisis debate?" 7 October 2015. Retrieved from <http://atha.se/blog/why-temporary-protection-directive-missing-european-refugee-crisis-debate>

Arenas, N., "The concept of 'mass influx of displaced persons' in the European Directive establishing the temporary protection system", *European Journal of Migration and Law*, Vol. 7, 2006, pp. 435-450.

Beirens, H., Maas, S., Petronella, S., & van der Velden, M., "Study on the temporary protection directive", Final report, published by European Commission, January 2016.

⁸⁴ J. Hathaway, "What's in a Label?", *European Journal of Migration and Law*, Vol. 1, 2003, at p. 18.

⁸⁵ *Id.*, at p. 5.

Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm.

Boutruche-Žarevac, S., *La protection temporaire des personnes déplacées en droit de l'UE? Un nouveau modèle en cas d'afflux massifs?* Éditions universitaires européennes, Sarrebruck, 2012.

Cels, J., "Responses of European states to de facto refugees", in G. Loescher & L. Monahan (eds.), *Refugees and International Relations*, Oxford, Clarendon Press, 1989, pp. 187-216.

Crépeau F., Holland, L., "Temporary protection, continuing insecurity: A regime replacing convention protection of refugees in violation of international law" *Canadian Journal of Law and Society*, Vol. 12, No. 1, 1997, pp. 239-261.

Durieux, J-F., "Temporary protection: Hovering at the edges of refugee law", *Netherlands Yearbook of International Law*, 2014, pp. 221-253.

Edwards, A., "Temporary protection, derogation and the 1951 refugee convention", *Melbourne Journal of International Law*, Vol. 13, 2012, pp. 595-635.

Fitzpatrick, J., "Temporary protection of refugees: Elements of a formalized regime", *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 279-306.

Fitzpatrick, J., "Flight from Asylum: Trends toward temporary 'refuge' and local responses to forced migrations", *Virginia Journal of International Law*, Vol. 13, 1994, pp. 1-70.

Gilbert, G., "Why Europe does not have a refugee crisis", *International Journal of Refugee Law*, 27, 2015, pp. 531-535.

Hartman, F., "Temporary refuge: Emergence of a customary norm", *Virginia Journal of International Law*, Vol. 26, 1985-1986, pp. 559-626.

Hathaway, J., "What's in a Label?" *European Journal of Migration and Law*, Vol. 1, 2003, pp. 1-21.

Hathaway, J., "The meaning of repatriation", *International Journal of Refugee Law*, 1997, pp. 551-558.

Hathaway J., & Neve, A., "Making international refugee law relevant again: A proposal for collectivized and solution-oriented protection", *Harvard Human Rights Journal*, Vol. 10, 1997, pp. 115-211.

Ineli-Ciger, M., "Time to activate the temporary protection directive", *European Journal of Migration and Law*, Vol. 18, No. 1, 2016, pp. 1-33.

Ineli-Ciger, M., "A temporary protection regime in line with International Law: Utopia or real possibility?", *International Community Law Review*, Vol. 18, No. 3-4, 2016, pp. 278-316.

Ineli-Ciger, M., "The missing piece in the European Agenda on Migration: The temporary protection directive", *EU Law Analysis*, 28 July 2015. Retrieved from <http://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html>.

Ineli-Ciger, M., "Has the temporary protection directive become obsolete? An examination of the directive and its lack of implementation in view of the recent Asylum crisis in the Mediterranean", in C. Bauloz, M. Ineli-Ciger, S. Singer, & V. Stoyanova (eds.), *Seeking Asylum in the European Union: Selected protection issues raised by the second phase of the common European Asylum System*, Leiden, Brill/Nijhoff, 2015, pp. 226-246.

Ineli-Ciger, M., "Revisiting temporary protection as a protection option to respond to mass influx situations" in J-P. Gauci, M. Giuffr , & E. Tsourdi (eds.), *Exploring the boundaries of refugee law: Current protection challenges*, Leiden, Brill/Nijhoff, 2015, pp. 197-217.

K lin, W., "Temporary protection in the EC: Refugee law, human rights and the temptations of pragmatism", *German Yearbook of International Law*, 2002, pp. 202-236.

Kourula, P., *Broadening the edges. Refugee definition and international protection revisited*, Leiden, Nijhoff, 1997.

Krombel, C., "The prospective role of temporary protected status: How discretionary designation has hindered the united states' ability to protect those displaced by environmental disaster", *Connecticut Journal of International Law*, Vol. 28, 2012, pp. 153-175.

MacAdam, J., *Complementary protection in international refugee law*, Oxford, Oxford University Press, 2007.

Maiani, F., "The reform of the Dublin III Regulation", Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2016. Retrieved from [www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).

Messick, M., & Bergeron, C., "Temporary protected status in the United States: A grant of humanitarian relief that is less than permanent", Migration Policy Institute, 2 July 2014. Retrieved from <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

Nascimbene B., & Di Pascale, A., "The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa", *European Journal of Migration and Law*, Vol. 13, No. 4, 2011, pp. 341-360.

Nicolosi, S., "Emerging challenges of the Temporary Relocation Measures under EU Asylum Law", *European Law Review*, Vol. 41, No. 3, 2016, pp. 338-361.

Peltomäki, A., "What did Member States actually intend at Tampere?", *ERA-Forum: scripta iuris europaei*, No. 3, 2002, pp. 138-141.

Pirjola, J., "Temporary protection as a future model for asylum?", *Nordic Journal of International Law*, Vol. 64, 1995, pp. 423-427.

Pronto, A. N., "Understanding the Hard/Soft Distinction in International Law", *Vanderbilt Journal of Transnational Law*, 2015, pp. 941-956.

Thielemann, E. R., "How effective are national and EU policies in the area of forced migration?", *Refugee Survey Quarterly*, Vol. 34, No. 4, 2012, pp. 21-37.

Thym, D., & Hailbronner, K. (eds), *EU Immigration and Asylum Law. Commentary*, 2nd edn, Baden-Baden/Oxford, Nomos/Hart Publishing, 2016.

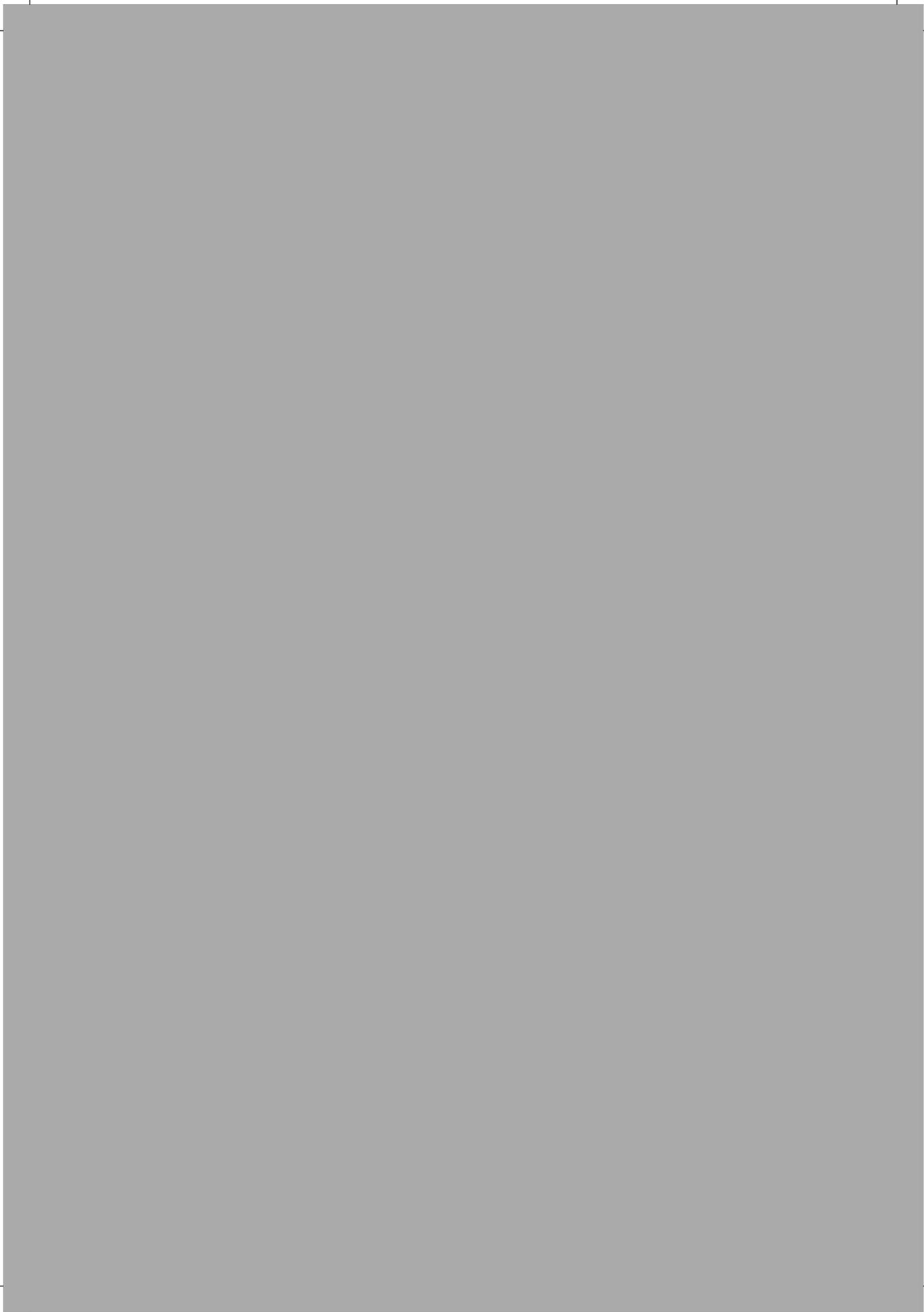
Visser, R. K., "Naissance d'une agence: le cas EASO", *Revue du droit de l'Union européenne*, 2013, pp. 441-454.

Wood, T., "Developing temporary protection in Africa", *Forced Migration Review*, No. 49, 2015, pp. 23-25.

Wood, T., "Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition", *International Journal of Refugee Law*, Vol. 26, No. 4, 2014, pp. 555-580.



PART II
'REFUGEE CRISIS' IN DESTINATION
COUNTRIES



10 CRIMES OF SOLIDARITY IN TIMES OF A 'MIGRANT CRISIS'

Dina Siegel

'O young woman, throw yourself into the water again so that I may a second time have the chance of saving both of us!' (Albert Camus, The Fall)

It is July 10, 2016. I am at the railway station in Paris, waiting for the Thalys to Amsterdam. I arrived early because of the extra security checks in Paris during the European Football Championship and am now sitting on a bench among other passengers. I've just bought a sandwich at the local kiosk for on the way. It is crowded in the hall; some people are sitting on the floor, others on their suitcases. Police are everywhere. Suddenly a dark-skinned boy of about eleven or twelve years old approaches me. He shows me his ticket without saying a word and points alternately from the ticket to the trains. On the ticket, I read the destination: Calais. I look at the schedule board, but there is no information. I ask another passenger near me whether he knows where the train to Calais is, he also looks at the ticket, then starts searching the schedule on his smartphone. I tell the boy: 'wait a moment, he is checking for you', but the boy does not respond, he obviously does not understand me. He sits down at the corner of the bench and calls somebody on his own phone. I cannot understand the language, but I see that he tries to read something from his ticket. On the other side of the line somebody gives him instructions and he looks around, searching for something. In the meantime, my neighbour has found the right platform: it is straight in front of us. The train is already there. 'It's leaving in three minutes', says the neighbour to me, and then repeats it to the boy. But the boy is too busy with his phone conversation and doesn't listen. After a minute, other passengers are becoming nervous: 'He will miss his train', 'Boy, you need to go'. The boy is still talking on his phone. My neighbour stands up and takes him by the elbow: 'Go, go, you will be too late'. The boy does not understand him, but lets the man lead him to the train. I notice a bag. 'He forgot his luggage', I run after them. 'No, no, it is not his, it's mine', somebody shouts behind me. The boy has no luggage; he has nothing in his hands. I approach the train and watch him board the carriage. At the last moment, I call him: 'Hey, take this' and hand him my sandwich, still unpacked. He takes it with a shy smile and disappears.

These are some observations recorded in my notebook in the summer of 2016. I just happened to help somebody find his way at a railway station, without any deep thoughts about

the actual complexity of the situation. According to Article 1 of the ‘Facilitators Package’, composed of Directive 2002/90/EC, which established a common definition of the offence of facilitating unauthorized entry, transit and residence, and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence,¹ my fellow passenger and I had just committed the crime of ‘facilitating irregular migration’, or even human smuggling. Although none of us gained any financial advantage, we had committed a so-called *délit de solidarité*, as many other Europeans have done over the past few years.

The debate on the right of citizens to assist irregular immigrants began after the 2011 prosecution of several ‘good Samaritans’ who had helped irregular migrants in France by providing them with food and shelter or recharging their mobile phones.² The subject matter of the popular film *Welcome*³ about a swimming instructor who taught an illegal Iraqi immigrant to swim in order for him to cross the English Channel and reunite with his girlfriend in the UK, and who was accused of aiding illegal migration, also helped to heat up the debate, which centred on the discrepancy between the principle of fraternité (the right to assist another person) and the integration of the EU Facilitation Directive into French law.⁴ In 2015, the first year of the ‘migrant crisis’ in the EU, a number of reports on this alleged crime began to appear in the media.

Based on these reports, two main categories of ‘perpetrators’ of so-called crimes of solidarity can be distinguished: (1) individuals (volunteers,⁵ philanthropists, fishermen, tourists or local villagers) helping migrants on their way from one place to another by providing transportation, shelter, food or other practical assistance; (2) NGOs and other aid groups who plan and provide aid to migrants at specific ‘hubs’ of migration.

The first category includes examples of individuals who captured the headlines of the international media, such as Lisbeth Zornig Andersen, Denmark’s former children’s ombudsman, who gave a lift to a Syrian family, took them to her house, gave them coffee and cake and then brought them to the train station to continue their journey to Sweden. Together with her husband, she was accused of human smuggling and fined €3,000.

1 European Commission, EU Action Plan Against Migrant Smuggling (2015-2020) Brussels, 27 May 2015, Com (2015) 285 Final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2015.

2 J. Allsopp, “The European facilitation directive and the criminalisation of humanitarian assistance to irregular migrants: Measuring the impact of the whole community”, in S. Carrera, & E. Guild (eds.), *Irregular migration, trafficking and smuggling of human beings. Policy Dilemmas in the EU*, Brussels, Centre for European Policy Studies, 2016, pp. 47-56.

3 Christophe Rossignon (Producer), Philippe Lioret (Director). *Welcome*, France, Nord-Ouest Productions, 2009.

4 Allsopp, *supra* note 2, p. 50.

5 The difference between ‘volunteer’ and ‘activist’ is discussed by Tsoni. I. Tsoni, “‘They won’t let us come, they won’t let us stay, they won’t let us leave’. Liminality in the Aegean borderscape: The case of irregular migrants, volunteers and locals on Lesbos”, *Human Geography*, Vol. 9, 2016, pp. 34-46.

Andersen was one of 279 people who were charged under people trafficking laws between September 2015 and February 2016 in Denmark alone. In France, a retired British soldier was brought to trial for attempting to transport a four-year-old Afghan girl from the Calais refugee camp to reunite her with her family in the UK. A similar case took place in Norway, where Merete Eriksson and Eirik Nilsen were arrested by police for helping asylum seekers leave a camp before their planned deportation to Russia. Nilsen was charged with violating Norway's immigration act, which forbids anyone from helping foreigners to stay in the country illegally.⁶

All around Greece, a country whose islanders were nominated for the Nobel Peace Prize in 2016 for their massive volunteer response to the influx of migrants, activists constructed 'solidarity centres', providing shelter, food and medical care to newcomers. Rozakou⁷ gives a number of examples of people who were arrested in Lesbos for assisting migrants. In January 2016, Greek police pressed charges carrying prison sentences of up to 10 years against a group of Spanish lifeguards for towing a stranded dinghy with 51 refugees on it near Lesbos.⁸

In the first two months of 2017 several judicial cases regarding citizens facilitating migrants to cross the French-Italian border appeared in the media. Cedric Herrou, a French farmer from the Roya Valley, was sentenced for helping eight Eritrean migrants cross the border by car and for opening up an empty holiday village belonging to the state railway company for a group of immigrants. Under Article 1622-1 of France's immigration law anyone who 'facilitates or attempts to facilitate the illegal entry, movement or residence of a foreigner in France shall be punished by imprisonment for five years and a fine of 30,000 euro'. Félix Croft, another French activist, was arrested by Italian police in Ventimiglia for helping a family (two little children, their pregnant mother, their father and their uncle) cross the border to France. He was prosecuted for 'aiding illegal migration' and became the first *passeur solidaire* to be charged in Italy. The public prosecutor demanded three years and four months' detention and a €50,000 fine and justified his request by emphasizing that Croft had helped people on the move who 'pose a threat to national security' and by equating activists to members of an organized criminal network. Another individual case widely discussed in the media was that of Pierre Mannoni, a professor of geography, who was arrested on a motorway while driving three injured Eritrean teenage girls to Nice for medical treatment.⁹

The second category of perpetrators of 'crimes of solidarity' includes non-governmental and charity organizations. Groups like the *Collectif de Chapelle Debout* in France provide

6 T. Nilsen, "We had to help them", *The Independent Barents Observer*, 21 January 2016.

7 K. Rozakou, "Crafting the volunteer: Volunteer associations and the reformation of sociality", *Journal of Modern Greek Studies*, Vol. 34, No. 1, 2016, pp. 79-102.

8 *Ekathimerini.com*, January 14, 2016.

9 RFI, 7 January 2017, www.rfi.fr.

shelter and food to migrants because, in their words, ‘the French government does not do it’ (*Al Jazeera*, 25 January 2017). Voluntary acts of ‘civil disobedience’, whereby people help migrants to cross borders clandestinely, were also reported in other countries. In 2015, the German *Peng-Collective* called on people to help migrants cross Europe by giving them lifts in private cars. The initiative’s website is titled *Fluchthelfer.in*, a name that refers directly to Germany’s history of ‘humanitarian smuggling’. The *Fluchthelfer* (‘escape helpers’) facilitated the movement of people from East Germany to the West after World War II. If caught, they risked serving long sentences in East German prisons. On their website, the activists of *Fluchthelfer* openly give practical advice on how to escape the police and prosecution.¹⁰ All such initiatives are considered illegal in Germany and those dealing in this form of ‘humanitarian smuggling’, if caught, can end up serving a prison sentence of up to 10 years.

Facilitating irregular entry and stay¹¹ has been criminalized in all member states. Rescuing migrants from sinking boats, providing them with legal assistance, renting accommodation to migrants or transporting them are all punishable by law.

Some EU Member States punish facilitation of entry and stay with fines or imprisonment, others with both in combination. The penalty scales vary greatly. The maximum fine for facilitating entry and stay is €78,000 euro in the Netherlands. In Spain, the fine for facilitating entry and stay can be up to €100,000. ... Prison terms for facilitating entry can be up to 10 years in Greece and 14 years in the United Kingdom.¹²

European officials have accused various NGOs in the media for undermining their efforts and the European migration policy by operating in the Mediterranean without coordinating with authorities and of cooperating with criminal human smugglers. Thus, the European Border and Coast Guard Agency Frontex accused *Médecins Sans Frontières* (MSF), one of the biggest NGOs, of colluding with criminals and being ‘responsible for more deaths at sea’.¹³

Both categories – individual and collective – include people who are often not even aware of the fact that they are violating EU laws by helping migrants. Many volunteers and locals had never heard of these regulations, and those who had, considered them to be paradoxical and absurd. They could not identify themselves with stereotypes of ‘cruel and greedy smugglers who send their victims to die’, or with traffickers who exploit helpless migrants by profiting from their cheap labour.

10 See: www.fluchthelfer.in.

11 With the exception of Ireland.

12 FRA – European Union Agency for Fundamental Rights, *Criminalization of migrants in an irregular situation and of persons engaging with them*. Luxembourg, 2014, p. 9.

13 N. Sigona, “NGO’s under attack for saving too many lives in the Mediterranean”, *The Conversation*, March 29, 2017.

These crimes of solidarity, especially in regard to the criminological and judicial understanding of human smuggling as, allegedly, a form of transnational organized crime, pushed me to critically analyse and rethink existing theoretical approaches to this phenomenon. Therefore, the purpose of this chapter is twofold: first, to contribute to the literature that offers alternative approaches to the phenomenon of human smuggling; second, to analyse the 'old-new' phenomenon of crimes of solidarity as it emerged as an inevitable response to European migration policy. The data presented and analysed here are based on content analysis of media reports and my ethnographic research in several European countries, including Greece, Belgium, France and the Netherlands, conducted between 2015 and 2017, in the midst of the so-called 'refugee crisis'.

10.1 HUMAN SMUGGLING – CRIME OR NOT?

Human smuggling is a complicated phenomenon. As a practice, smuggling is rooted in a consensus between two or more actors, whereby one side cannot leave a country for a variety of reasons and/or enter another country on a regular basis. Thus, the practice of smuggling is directly related to the practice of 'beating' the existing migration system. In all times and all around the world, the smuggling of people has been a reaction to existing obstacles and barriers to mobility created by policy-makers and law enforcement agencies. The smuggling of migrants to Western Europe was a reaction to the repressive measures and inadequate policies of the EU and its member states, which started much earlier than the 'refugee crisis' of 2015–2017.

The phenomenon of human smuggling is deeply rooted and embedded in communities¹⁴ and can take place only where social ties and trust relationships exist. In many communities these are strong ties, such as relatives, close friends and neighbours, who not only facilitate the journey, but also provide guarantees for a successful operation. In some cases, the whole village is involved in planning and supporting smuggling operations.¹⁵

The picture of the smuggler that emerges from the numerous studies of human smuggling is that of a family member or a friend of a friend who supports migrants, guarantees their travel and 'makes their dream come true'. Not all smugglers are equally experienced and successful and sometimes they fail to complete their mission or make (sometimes fatal) mistakes during the trip. But in many cases, especially those that are not registered in police statistics and do not attract media attention, the smuggling operation is successful. In my own ongoing research (2015–2017) on refugees and volunteers, all my

14 S. Zhang, *Chinese human smuggling organizations: Families, social networks, and cultural imperatives*, Stanford, Stanford University Press, 2008.

15 Id.; S. Zhang, & K. L. Chin, "Enter the dragon: Inside Chinese human smuggling organizations", *Criminology*, Vol. 40, No. 4, 2002, pp. 737-768.

respondents told me that they had used the services of smugglers, and many argued that they could not imagine ‘making it happen’ without them. The relationship between smugglers and migrants is primarily based on an economic agreement, but often it involves more than just money. ‘My smuggler is my visa’; ‘My smuggler tried to transport me several times, he never asked for more money, he gave me a guarantee that the trip would be successful and he kept his promise’; ‘I trusted him (the smuggler) blindly, he brought my brother with his children, so I knew he was good’; ‘My smuggler asked only for payment that he knew a person could afford, if there was somebody who did not have enough money, he did it for less’ – these are some comments of respondents who were smuggled from Turkey to Greece and some of them further to the Netherlands and Belgium. A Syrian respondent in Antwerp gave the following account:

I did not know where to go, but the smuggler suggested bringing me to Belgium. I did not know anything about Belgium, but he said there would be fewer asylum seekers there than in Germany. He did not try to convince me; he was just thinking of what would be better for me, for my future.

From stories such as these, the smuggler emerges not as a callous money-making machine but as a ‘significant other’ in the process of migration. He¹⁶ can be a member of the community, or someone who enjoys the respect and trust of other migrants and whom one can meet somewhere along the way, for example in a transit country. Trust, reputation and personal relationships are key factors in understanding migrant smuggling. In Austrian research, smugglers were found to provide migrants with information about the legal situation in the destination country and practicalities on how to deal with the authorities, even though this information was not always correct.¹⁷ This type of ‘smuggler’ appears to contradict the image portrayed in the media and in the public and political debate of smugglers as cruel and greedy criminals who knowingly send people to their death on the open seas.

The definition of migrant smuggling in Article 3(a) of the United Nations Smuggling Protocol as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’ actually points to facilitating the movement of migrants without any specification on humanitarian or other aspects of this movement.¹⁸

16 In my study, all smugglers are male.

17 V. Bilger, M. Hofmann, & M. Jandl, “Human smuggling as a transnational service industry: Evidence from Austria”, *International Migration*, Vol. 44, No. 4, 2006, pp. 59-93.

18 L. Weber, & M. Grewcock, “Criminalizing people smuggling: Preventing or globalizing harm?” in F. Allum, & S. Gilmour (eds.), *The Routledge handbook of transnational organized crime*, London & New York, Routledge, 2012, pp. 379-485.

Various researchers have reinforced the negative stereotype of human smugglers as evil, violent men,¹⁹ who have no qualms about letting their victims/customers suffer or even die,²⁰ are often members of criminal organizations²¹ and/or are synonymous with human traffickers.²²

The prevalent argument in the literature and the public debate is that human smugglers profit from those who use their services. The question is whether this should be considered a problem. As Castells and Portes²³ argue, the migrant smuggler is a classic example of an actor engaged in informal economic activity, which usually takes place when state institutions fail to provide regulations. An example of such an opportunity to make money is that of taxi drivers in Lesbos in 2015, when thousands of migrants who had landed in the north part of the island were looking for transportation to the south-east port of Mytilene in order to continue their journey. At the time, the local authorities refused to arrange bus services for the newcomers and this provided the taxi drivers with a golden opportunity to charge excessive tariffs (around €300–400) for a 70-km trip.²⁴

-
- 19 D. Kyle, & M. Scarcelli, "Migrant smuggling and the violence question: evolving illicit migration markets for Cuban and Haitian refugees", *Crime, Law and Social Change*, Vol. 52, No. 3, 2009, pp. 297-311.
- 20 Sunderland, J. "Dispatches: A heinous act, more deaths on the high seas", *Human Rights Watch*, 16 September 16, 2014. retrieved from <https://www.hrw.org/news/2014/09/16/dispatches-heinous-act-more-deaths-high-seas>.
- 21 J. Kaizen, & W. Nonnema, "Irregular migration in Belgium and organized crime: An overview", *International Migration*, Vol. 45, No. 2, 2007, pp. 121-146; N. Narli, "Human trafficking and smuggling: The process, the actors and the victim pro le" in N. Narli (ed.), *Trafficking in persons in South East Europe—A threat to human security*, Vienna, National Defence Academy; Istanbul, Center for Strategic Research, 2006; K. C. Saha, "Smuggling of Indian citizens: preliminary findings", *Journal of Immigrant and Refugee Studies*, Vol. 5, No. 1, April 2007, pp. 55-69; A. Schloenhardt, *Organized crime and migrant smuggling: Australia and the Asia-Pacific*, Research and public policy series, No. 44, Canberra, Australian Institute of Criminology, 2002. Retrieved from www.aic.gov.au/en/publications/current%20series/rpp/41-60/rpp44.aspx; UNODC 2015; O. Sciopi, & A. Ionescu, "Migrants' smuggling is knocking at the Danube's Door. Threats at the Romanian State Border", *Journal of Danubian Studies and Research*, Vol. 5. No. 2, 2016, pp. 320-332.
- 22 A. Aronowitz, "Smuggling and trafficking in human beings: The phenomenon, the markets that drive it and the organisations that promote it", *European Journal on Criminal Policy and Research*, Vol. 9, No. 2, 2001, pp. 163-195; B. Bilecen, *Human smuggling networks operating between Middle East and the European Union: evidence from Iranian, Iraqi and Afghani migrants in the Netherlands*. COMCAD Working Paper, No. 62, Bielefeld, Centre on Migration, Citizenship and Development, 2009. Retrieved from www.unibielefeld.de/tdrc/ag_comcad/downloads/workingpaper_62_bilcen.pdf; B. Lintner, "Illegal aliens smuggling to and through Southeast Asia's golden triangle" in P. Nyiri, & I. Rostislavovich (eds.), *Globalizing Chinese migration: Trends in Europe and Asia*, Aldershot, Hampshire, Ashgate, 2002.
- 23 M. Castells, & A. Portes, "World underneath: The origins, dynamics, and effects of the informal economy" in A. Portes, M. Castells, & L. A. Benton (eds.), *The informal economy: Studies in advanced and less developed countries*, Baltimore, Johns Hopkins University Press, 1989, pp. 1-40.
- 24 Other examples of informal economies can be found in and around large concentrations of migrants, where a bottle of water is sold for dozens of euros and exaggerated amounts of money are being asked for charging telephone batteries or using restrooms inside cafes or private houses (observations in Greece, 2016 and 2017).

Other authors have similarly emphasized that human smuggling is a market and smugglers are economic actors filling a niche that governments cannot provide or regulate.²⁵ “There is now very substantial research evidence that many migrants and refugees are assisted by what David Spender referred to more than a decade ago as ‘cross-border cottage industries’; individuals or small groups see an opportunity to profit from the presence of irregular migrants by assisting them to cross an individual border or difficult stretch of terrain.”²⁶

Official reports on human smuggling indicate that ‘in 2015 alone, criminal networks involved in migrant smuggling are estimated to have had a turnover of between EUR 3-6 billion. This turnover is set to double or triple if the scale of the current migration crisis persists in the upcoming year’.²⁷ And ‘more than 90% of migrants are facilitated to the EU, mostly by criminal networks’.²⁸

Criminals are set to continue to exploit the migration crisis offering facilitation services and expanding their networks of migrant smugglers and associates. These criminal networks also exploit vulnerable migrants as part of labour and sexual exploitation and fraud schemes as well as many other types of crime. The scale of this exploitation is expected to increase significantly over the coming years unless decisive action is taken.²⁹

When there is such a huge discrepancy between official reports, on the one hand, and accounts given by respondents in different studies on smuggling, on the other, the effect of criminalizing human smuggling in order to combat organized crime is not only positive. It can also harm individuals who facilitate illicit travel, and sometimes the punishments may seem highly disproportionate.³⁰

Criminalization can also cause ordinary citizens to fear being accused of human smuggling, which often leads to confusion between their desire to help and their willingness to obey the law. This confusion undermines their trust in state institutions. Governments who prohibit their citizens from helping migrants push these migrants into the hands of organized crime. Various studies have shown that ‘cracking down on smugglers’ does not deter migrants from trying to reach Europe. On the contrary, one of the consequences of

25 A. DiNicola, & G. Musumeci, *Confessioni di un Trafficante de Uomini*, Chiarelettere, 2014; Zhang, *supra* note 15.

26 M. Collyer, “Cross-border cottage industries and fragmented migration” in S. Carrera, & E. Guild (eds.), *Irregular migration, trafficking and smuggling of human beings: Policy Dilemmas in the EU*, Brussels, Centre for European Policy Studies, University Press, 2016, p. 19.

27 EUROPOL, *Migrant smuggling in the European Union*. February 2016, p. 2.

28 *Id.*, p. 4.

29 *Id.*, p. 13.

30 Weber and Grewcock, *supra* note 18.

the criminalization of human smuggling is that migrants will start looking for more experienced and sophisticated smugglers, who can take advantage of restrictive government policies to make huge profits.

10.2 HUMANITARIAN SMUGGLERS?

More detailed and nuanced reports on the role of smugglers in migrants' cross-border movements, which include emic narratives instead of being limited to dry and often contradictory statistics, have created the idea of 'humanitarian smugglers' (or 'good' smugglers) as opposed to organized criminals. Media reports appear to have reinforced these perceptions. This category not only includes smugglers who organized the travel, but also the people who rescued and assisted migrants upon their landing, provided them with food, dry clothes, shelter and transport to immigration centres. Family members to whom migrants turn for help, official NGOs and independent volunteers, local citizens and tourists are all taking on the role of smuggler or facilitator. In the definition of migrant smuggling in Article 3(a) of the United Nations Smuggling Protocol, the aspect of humanitarian smuggling/facilitation of the movement of migrants is not specified.³¹

During the so-called refugee crisis (2015–2017) we can observe two contradictory processes: increased humanitarian smuggling, which became common in Europe, mainly as a protest against restrictive migration policies, on the one hand, and the criminalization of volunteers, as an attempt to deter them from getting involved in the 'migration scene' and as a manifestation of the power of the state(s) and an attempt to prevent opposition to the European tough line on migration, on the other hand. In specific situations, the decision to save or to 'let them drown' demonstrates how the right to life can be contested by the duty to obey the law, or in other words, 'governing indifference through law' or 'how indifference toward undesired populations can be advanced and enforced through the legal system'.³² There is a contradiction between a person's duty to rescue and assist those in need and sanctions for doing so. The result is either resistance and rebellion (crimes of solidarity) or collective disengagement and indifference.

During my fieldwork both arguments – against and in favour of continuing assistance to migrants – were strongly voiced by respondents from different organizations, both governmental and non-governmental, as well as local citizens, who, often unwillingly, find themselves faced with this dilemma.

³¹ Id.

³² T. Basaran, "The saved and the drowned: Governing indifference in the name of security", *Security Dialogue*, Vol. 46, No. 3, 2015, pp. 206, 207.

10.3 'LET THEM DROWN' – THE CRIMINALIZATION OF SOLIDARITY

The four most common arguments put forward to justify the legal and practical prohibition of facilitating and assisting migrants are as follows: firstly, that such criminalization will dissuade potential migrants from coming to Europe; secondly, rescue operations by professional state and EU organizations will no longer be disrupted by 'amateur' volunteers; thirdly, the local population will be shielded from the arrogant behaviour of an army of uninvited NGOs and other volunteers; fourthly, the negative image of 'refugee islands', full of humanitarian workers spreading images of misery, which harms tourism and business in these areas, will disappear.

The main argument for criminalizing humanitarian assistance is that rescuing migrants, facilitating their stay and move and helping them in their daily needs will only attract more of them. The suspicion is 'that our humanitarian impulses only attract an undeserved mob of unwanted "economic migrants."' ³³ Two aspects are relevant to this argument: firstly, economic migrants – and they are the majority – are not escaping war and therefore their lives are not in danger; secondly, that there are 'too many of them', meaning the receiving countries are unable to host them all, as they are often struggling with their own economic difficulties. In this context, the level of victimhood becomes relevant: as long as a migrant can be considered a 'pure victim', a kind of 'universal' refugee, stereotypically escaping war and death, he or she has a right to be helped. When the European Union declared some geographical areas – namely Syria and Eritrea – as producing the most victims, it consequently excluded other countries from which migrants were arriving in the same period (2015–2017), such as Afghanistan, Iraq, Albania and a number of African countries, which were deemed 'safe' or 'less problematic'. ³⁴ Therefore 'being a victim' in these countries counted for less and most asylum applications were refused. Promoting a distinction between 'good refugees' (who are entitled to asylum) and 'bad migrants' (who are not) leads to black–white stereotypes whereby the nuances, agency and specific contexts of individual migrants are neglected in a process described by Malkki as 'dehistoricizing universalism'. ³⁵

Whenever the image of 'economic migrants' becomes prevalent, especially when more and more people arrive from these countries, migrants are viewed not as objects for positive humanitarian action, but more in terms of 'exploitation of the European economic system', 'taking advantage of our good hearts and hospitality' and 'creating economic competition

33 K. Folles, "Ethnography up the stream. The UK 'let them drown' policy and the politics of bordering Europe" in R. Zaiotti (ed.), *External migration management. Europe, North America and the spread of 'remote control' practices*, London and New York, Routledge, 2016, p. 84.

34 Only a very small percentage, mainly of 'vulnerable' persons from these countries, successfully applied for asylum in Europe in these years.

35 L. Malkki, "Speechless emissaries: Refugees, humanitarianism, and dehistoricization", *Cultural Anthropology*, Vol. 11, No. 3, 1996, p. 378.

by offering low-paid services, which undermines the salaries and the economic survival of the locals'.³⁶ Criminalizing humanitarian assistance to these migrants is therefore a logical conclusion for people who are worried about economic competition, possible unemployment and the economic survival of their families. According to a Dutch respondent,

When they know that NGOs will satisfy all their needs, the moment a migrant arrives with the whole family and 8-9 children, he tells it on Facebook to his relatives in his country, and they want the same. So, they come with their families, and so on and so on. If there were no volunteers, there would be no encouragement for them to come, because they would get nothing here.

The second argument in support of criminalizing assistance to migrants, mainly expressed by official rescue agents, is that amateur NGOs disturb the smooth running of rescue operations.

They come with their small boats and block our passage to the sinking boat. How many people can they save? 5 to 10? There are hundreds of people there. ... They don't have the capacity, skills, equipment and also do not coordinate their actions with us.³⁷

The creation of the 'refugee crisis', which started with the media coverage of the mass migration to Greece in June 2015 and reached its culmination with the photo of a drowned Syrian boy Alan Kurdi, who became a symbol of the migration tragedy, drew large numbers of international NGOs, organized and unorganized volunteers, and numerous agents from national governments, the EU and the UN to the Greek islands. The presence of so many actors, the 'non-professionalism' of many of these organizations and the internal quarrels between individuals and between large and middle-sized NGOs, soon after the beginning of the migrant influx, is considered to have resulted in 'extra troubles and extra work' for the professional rescuers. A representative of the Hellenic Coast Guard told me,³⁸

One night we rescued a boat with 57 people north of Lesbos; among them a lot of children. When we arrived on the coast, there was an army of volunteers waiting. Huge chaos, children crying. Nobody knew who was who and who was doing what. They (NGOs) provided contradictory information to refugees:

³⁶ Personal communication with local residents in Greece, the Netherlands and Belgium.

³⁷ Personal communication with representatives of Frontex, July 2016, Athens.

³⁸ Personal communication with Hellenic Coast Guard officer in Lesbos, June 2017.

one said that there were no busses, the other said that there were busses to transport them to Mytilene, one said the road was blocked, the other said that the roads were free; they made these poor people totally confused.

The third argument for the criminalization of assistance to migrants, especially aimed at the NGOs, comes mainly from representatives of the local communities. In the beginning of 2016 there were 81 NGOs operating on the island of Lesbos, only 30 of which were registered with the local authorities. For a long time, the Greek government has 'promoted volunteerism and a reinforced civil society through legislative frameworks and the establishment of relevant institutions'.³⁹ NGOs had to be certified, and they were required to attend numerous courses and training sessions organized by state organizations in order to strengthen their professionalism. According to Rozakou, volunteerism in Greece has been 'marked by the professionalization of unpaid and disinterested work'.⁴⁰ This situation created a distinction between big NGOs who are financially funded by governments and receive special privileges, including legal immunity from charges of facilitating migration, and small independent volunteer groups, who are not subsidized by the EU or government funds but are instead supported by private funds and liable to prosecution for humanitarian smuggling.

The interdependence between the state and non-governmental organizations created a position of power for some NGOs that was not appreciated by the local residents in Lesbos during the 'migrant crisis'. The mayor of Lesbos was cited as follows in the media: 'I have seen many NGOs and individuals showing no cooperation with our municipality ... their presence is disruptive rather than useful'.⁴¹ During my fieldwork, the locals described the problems caused by the massive influx of volunteers as follows: 'They created total disorder. Who gave them the authority to come here and do whatever they want?'; 'they ignored the locals, they entered other people's property'; 'they parked in my yard without asking me, just like that'; 'there were more volunteers than refugees, and they behaved as if they had a right to do anything they wanted, entering our property, leaving garbage behind, using facilities, though nobody invited them'; 'we had more troubles from NGOs, who were having parties all the time, than from refugees'.⁴² In this context, it was not the acts of solidarity, but their behaviour towards the local residents that led to a general negative attitude towards the aid organizations. Another respondent stated:

These bureaucrats in Brussels are calculating numbers of migrants and they decide who is allowed to live and who should drown in the sea, and how many

³⁹ Rozakou, *supra* note 7, p. 87.

⁴⁰ *Id.*, p. 85.

⁴¹ Refugees in Lesbos: Are there too many NGOs on the island? *The Guardian*, 5 January 2016.

⁴² Personal communication during my fieldwork in Athens, 2016, and Lesbos, 2017.

will be returned to Turkey or resettled in Europe, where nobody wants them anyway. At the same time the migrants are suffering and the locals are totally ignored and forgotten.

The fourth and perhaps strongest opposition to the assistance agents came from the tourist sector. In September 2015, when around 2,000–3,000 migrants were arriving on the island every day, there were more refugees in Lesbos than vacationers. Some tourists volunteered by meeting boats as they landed, handing out food at the roadside or even distributing their own clothes and shoes. However, many tourists cancelled their reservations and this trend continued over the next two years. Local hotels, restaurant owners and taxi drivers noticed a sharp decrease in tourism. However, in contrast to anti-migrant attitudes such as ‘They (refugees) are sinking our island’ and ‘Let them go back to Turkey’,⁴³ many respondents viewed NGOs as the real problem and accused them of creating an image of the island as a miserable place full of problems and in need of help. Another restaurant owner in Lesbos said in June 2017:

The tourists are not coming, they are afraid. We don't have problems with refugees, they are now living in camps, not on the streets [...] but tourists are not coming even if there are no problems with refugees. It is the image of the island, a bad image, because there are so many aid organizations, it attracts negative attention.

NGOs are dependent on money, many have no money. In 2015, they were coming to my restaurant: please give refugees food, we will pay you later. They never paid. These NGOs are beggars, especially those who do not receive EU money, they are here only to make photos of misery in order to apply for private funds, or even work for the government: how can it be that non-governmental organizations are paid by the government, this is absurd!

According to some locals in Lesbos, there was not just a ‘refugee crisis’, but a crisis affecting the local community as a whole, because the Greek and European authorities were slow in responding to the problem, while the NGOs and the media were only reinforcing the island’s negative reputation, thereby damaging local businesses and the tourist industry. Hotels and restaurants were competing for Frontex officials and NGO workers to make up for the lack of tourists at the peak of the tourist season. According to a restaurant owner in Lesbos,

43 Id.

I need 200 clients per day if I want my restaurant to survive, the taxes are huge in Greece, but there are no tourists. Since the refugee crisis fewer and fewer are coming, not even the repeaters who have spent their vacation here for the last 20 years. This year (2017) is even more dramatic than the last one. Now the big NGOs are also leaving, because they don't get European subsidies any more. I cannot live only from Frontex and Greek tourists who come from Athens for long weekends. At the time when refugees started to come, 80% of European tourism was cut off, now it is 50% more, there's almost nothing left.

The criminalization of assistance to migrants can be analysed in two geographical contexts: at the so-called 'hotspots', where large numbers of migrants are concentrated, such as Greece's Eastern Aegean islands or Calais in France, and in the destination countries in West Europe. On the Aegean islands, the intense presence of volunteer groups who make their activities public through media and social media has had direct consequences for the local population, who have witnessed the reputation of their islands deteriorate. Crimes of solidarity with migrants were regarded as 'acts of anti-solidarity' with the local population. Furthermore, the 'NGO wars', which are fought out at hotspots, undermined confidence in the good intentions of these 'humanitarian helpers', at least from the perspective of independent volunteers and local authorities. As one respondent told me:

I came to volunteer, not to deal with conflicts between organizations, their self-interests and political games. At the end of the day they (the big NGOs) are the 'good guys' and I am a criminal because I am not authorized to provide help.

The real victims, however, remain the migrants, who are not being provided with enough assistance either by individual volunteers, as they are legally prohibited from helping migrants, or by the established NGOs, who have other priorities, such as fighting for funds. For their part, the Greek and French authorities are not receiving enough financial and moral support from the European Union to solve the problem.

In the destination countries, the official policies of creating sober circumstances for asylum seekers are being met with protests from volunteers who are trying to make migrants' lives more bearable. In the Netherlands, as in other destination countries, migrants are not allowed to work or study while they are waiting for legal status. They do not receive enough financial support to travel, even inside the country. When the migrants started to arrive in the country from 2015 to early 2016, hundreds of individual volunteers as well as NGOs got involved in organizing social and cultural activities for them. However, the number of volunteers and active NGOs decreased significantly after April 2016, when the COA (Central Organ for Asylum Seekers) became the only central institution authorized

to control and regulate such activities. All 'unauthorized' persons assisting migrants could now be treated as perpetrators of crimes of solidarity and suffer the consequences. A former Dutch volunteer stated in August 2016:

I used to take refugee children to the swimming pool once a week to teach them how to swim and to take them out of their 'prison'.⁴⁴ These are small children, they need to play; they need to be children, not sit in a cell with frustrated adults. Now they (COA) won't allow me to do this because I am not part of some bureaucratic organization.

The representatives of the COA justify this 'halt to unprofessional activities' as a government policy intended to reduce the number of official NGOs that are allowed to assist asylum seekers, from two perspectives. Firstly, there were too many volunteers and too many similar activities. According to a COA official:

How many times can you take a migrant to see Rembrandt or go to the Efteling?⁴⁵ You can never guarantee their safety and privacy if every volunteer does whatever he wants, even if he has the best intentions.⁴⁶

Secondly, there is no control on whether all migrants receiving assistance from volunteers are staying in the country 'legally'; some might be failed asylum seekers, which means that they are supposed to leave the country voluntarily: '*Helping them means facilitating illegal stay, and this is forbidden by law*'.⁴⁷ Thus, by controlling and regulating volunteer work, the state tries to prevent volunteers from committing occasional 'crimes of solidarity'. The state's response has been the institutionalization and selection of NGOs that are allowed to provide assistance to migrants, as opposed to those who are excluded from this game. This, however, does not seem to deter (potential) volunteers from disobeying the rules or even breaking the law.

10.4 SOLIDARITY IN SPITE OF CRIMINALIZATION

Solidarity, as one of the pillars of the social response to the 'migrant crisis' in Europe, has become a popular subject of multidisciplinary research. A special issue of *Social Anthropology* (2016, vol. 24 (2)) is dedicated to this 'other side of the crisis' and analyses the Greek

44 Some of the 'emergency locations' for refugees were set up in empty detention centres in the Netherlands.

45 A famous theme park for children.

46 Interview with a COA official in September 2016, Amsterdam.

47 Id.

context of solidarity during the recent influx of migrants. What becomes clear is that solidarity as a combination of new forms of collective action at a time of social emergency is about more than social cohesion and euphoric optimism. Papataxiarchis rightly advises researchers to remain critical of the ‘romance of solidarity’.⁴⁸ ‘Solidarity’ has a multi-faceted meaning, especially within the dynamic context of the EU’s political decision-making and ambivalent legal regulations. It has a negative connotation in the eyes of particular groups when it is associated with ‘unwanted’ NGOs or other activists who are allegedly violating the law by facilitating irregular migration. On the other hand, the demonization and criminalization of ‘solidarity’ is rejected by the volunteers, many of whom present the two following arguments to defend their own forms of humanitarian assistance.

Firstly, independent volunteers strongly emphasize that they see their actions as an inevitable form of solidarity in situations where neither the European Union nor the national institutions are able to meet the needs of migrants. An independent activist in Lesbos stated:

When migrants began arriving in Molyvos (on the north coast of Lesbos), the police were supposed to transport them to the Reception Centre, about 70 km away. When the municipality did not allow the transportation, we had no choice but to organize a ‘solidarity drive’, people were taking refugees by private vehicles. Many were stopped by police, or the roads were blocked, some were even arrested, but what else could we do?

This argument also contains criticism of the large NGOs that failed to do their work, given that providing assistance is the primary aim of non-profit organizations. This is especially true in circumstances where they are considered ‘immune’ to the criminalization of humanitarian aid and are permitted to engage in humanitarian smuggling, whereas independent volunteers and ordinary people are not.

On the Serbian border in October 2015, the only people who tried to help these hundred thousand migrants, who arrived there on foot, were independent volunteers. We did not have enough tools and goods to distribute. The big NGOs were nowhere to be seen, while they can do this job in these conditions, not us, according to another independent volunteer.

The second argument refers to the discrepancy between the criminalization of humanitarian assistance and one’s constitutional obligation to provide help to the needy. ‘The criminal-

48 E. Papataxiarchis, “Unwrapping solidarity? Society reborn in austerity”, *Social Anthropology*, Vol. 24, No. 2, 2016, p. 209.

ization of humanitarian assistance in particular – restricts the rights of each member of a community and may, in so doing, affect trust in public institutions.⁴⁹ According to an independent lawyer in Greece,

We have all invested our own personal funds into legal and non-legal aid to refugees, and we don't give a damn if they are Syrian or Algerian, or if we have to jump a fence illicitly, be smuggled into camps, or accept risk to life and limb to pull a child prostitute from a trafficker warehouse (all of which we've done): we will find a way to help.

The criminalization of human smuggling affects not only people with strong humanitarian motives (including religious ones), but also family members who send money and then get accused of financing smuggling, fishermen who rescue people from the waves without 'legal permission' to do so and lawyers who use unorthodox methods to defend cases, as mentioned in the previous quote.

The volunteers' emotions form a significant part of their response to government efforts to shut down their initiatives and should not be underestimated, as these efforts affect the dreams and life projects of many 'believers'. Not only their actual acts of solidarity, but also their ideologies and moral drives are being called into question. Their activities can therefore also be seen as acts of resistance.

10.5 CONCLUSION

The recent migrant crisis is obviously much more than just 'sophisticated' from a legal or criminological perspective. It is usually related to statistically large numbers of migrants arriving in the EU, to changing strategies and confrontations with new policies and restrictions. It is often discussed in terms of the 'unpreparedness' of member states to receive newcomers, a political 'clash of cultures' or the risks and fears of the receiving population. The present contribution does not analyse these aspects of the events of 2015–2017 as they have already been extensively discussed in the social science literature.

As I have tried to demonstrate, there are other 'crises' going on as well. Firstly, and I follow many other criminologists who have conducted empirical research on this subject, the human smuggler should be recognized as an important facilitator of migration and not blindly criminalized, as still happens in mainstream literature and in the public and political debate. Besides, many of those who only partially help migrants on their way into and within the host countries are legally categorized as human smugglers, which is another

⁴⁹ Allsopp, *supra* note 2, p. 54.

aspect to be re-considered. Secondly, the years 2015–2017 were also a period of a crisis of solidarity between different groups within local populations and a crisis of trust in governments and EU policies. Local populations felt abandoned by their authorities, local authorities felt neglected by their central governments and governments (especially the Greeks) felt that they were not being taken seriously by the EU. Thirdly, there was a crisis inside and between many NGOs, who became more and more dependent on state and EU funds and started competing with each other rather than devoting themselves to their primary task – helping migrants. In addition, cooperation between ‘established’ NGOs and independent volunteers deteriorated, as bureaucratic restrictions and power struggles put a strain on their relationship.

Was there a crisis in solidarity? There are still many people whose purpose is to help the needy. It can be extremely difficult for them, both emotionally and morally, to face restrictions and the criminalization of their ‘good deeds’. To put it in purely criminological terms: ‘crimes of solidarity’ are starting to resemble ‘crimes of passion’ when highly motivated activists are prevented from ‘saving the world’ from the ‘crimes of the powerful’.

REFERENCES

Allsopp, J., “The European facilitation directive and the criminalisation of humanitarian assistance to irregular migrants: Measuring the impact of the whole community”, in S. Carrera & E. Guild (eds.), *Irregular migration, trafficking and smuggling of human beings. Policy dilemmas in the EU*. Brussels, Centre for European Policy Studies, 2016, pp. 47-56.

Aronowitz, A., “Smuggling and trafficking in human beings: The phenomenon, the markets that drive it and the organisations that promote it”, *European Journal on Criminal Policy and Research*, Vol. 9, No. 2, 2001, pp. 163-195.

Basaran, T., “The saved and the drowned: Governing indifference in the name of security”, *Security Dialogue*, Vol. 46, No. 3, 2015, pp. 205-220.

Bilger, V., Hofmann, M., & Jandl, M., “Human smuggling as a transnational service industry: Evidence from Austria”, *International Migration*, Vol. 44, No. 4, 2006, pp. 59-93.

Bilecen, B., Human smuggling networks operating between Middle East and the European Union: evidence from Iranian, Iraqi and Afghani migrants in the Netherlands. COMCAD Working Paper, No. 62. Bielefeld, Centre on Migration, Citizenship and Development,

2009. Retrieved from www.unibielefeld.de/tdrc/ag_comcad/downloads/workingpaper_62_bilcen.pdf.

Castells, M., & Portes, A., "World underneath: The origins, dynamics, and effects of the informal economy" in A. Portes, M. Castells, & L. A. Benton (eds.), *The informal economy: Studies in advanced and less developed countries*, Baltimore, Johns Hopkins University Press, 1989, pp. 1-40.

Collyer, M., "Cross-border cottage industries and fragmented migration" in S. Carrera & E. Guild (eds.), *Irregular migration, trafficking and smuggling of human beings. Policy dilemmas in the EU*, Brussels, Centre for European Policy Studies, University Press, 2016, pp. 17-23.

DiNicola, A., & Musumeci, G., *Confessioni di un Trafficante de Uomini*, Milano, Chiarelettere, 2014.

EMSC, Activity Report, 2016/17, The Hague, European Migrant Smuggling Centre (EMSC)/Europol, 2017.

European Commission, EU Action Plan Against Migrant Smuggling (2015-2020) Brussels, 27 May 2015, COM (2015) 285 Final, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 2015.

EUROPOL, *Migrant smuggling in the European Union*. February, 2016.

Folles, K., "Ethnography up the stream. The UK 'let them drown' policy and the politics of bordering Europe" in Zaiotti, R. (ed.) *External migration management. Europe, North America and the spread of 'remote control' practices*. London and New York, Routledge, 2016.

FRA-European Union Agency for Fundamental Rights, *Criminalization of migrants in an irregular situation and of persons engaging with them*, Luxembourg, 2014.

FRONTEX, Bi-weekly analytical report, no. 22, November/December, Ref. 24459/2016 (weeks 47-48), 2016.

Kaizen, J., & Nonnema, W., "Irregular migration in Belgium and organized crime: An overview", *International Migration*, Vol. 45, No. 2, 2007, pp. 121-146.

DINA SIEGEL

Kyle, D., & Scarcelli, M., "Migrant smuggling and the violence question: Evolving illicit migration markets for Cuban and Haitian refugees", *Crime, Law and Social Change*, Vol. 52, No. 3, 2009, pp. 297-311.

Lintner, B., "Illegal Aliens smuggling to and through Southeast Asia's Golden Triangle" in P. Nyiri & I. Rostislavovich (eds.), *Globalizing Chinese Migration: Trends in Europe and Asia*, Aldershot, Hampshire, Ashgate, 2002.

Malkki, L., "Speechless emissaries: Refugees, humanitarianism, and dehistoricization", *Cultural Anthropology*, Vol. 11, No. 3, 1996, pp. 377-404.

Narli, N., "Human trafficking and smuggling: The process, the actors and the victim profile" in Narli, N. (ed.), *Trafficking in persons in South East Europe—A threat to human security*, Vienna, National Defence Academy/Istanbul, Center for Strategic Research, 2006.

Nilsen, T., "We had to help them", *The Independent Barents Observer*, 21 January 2016.

Papataxiarchis, E., "Unwrapping solidarity? Society reborn in austerity", *Social Anthropology*, Vol. 24, No. 2, 2016, pp. 205-210.

Rozakou, K., "Crafting the volunteer: Volunteer associations and the reformation of sociality", *Journal of Modern Greek Studies*, Vol. 34, No. 1, 2016, pp. 79-102.

Saha, K. C., "Smuggling of Indian citizens: Preliminary findings", *Journal of Immigrant and Refugee Studies*, Vol. 5, No. 1, April 2007, pp. 55-69.

Sciopi, O., & Ionescu, A., "Migrants' smuggling is knocking at the Danube's Door. Threats at the Romanian state border", *Journal of Danubian Studies and Research*, Vol. 5, No. 2, 2016, pp. 320-332.

Schloenhardt, A., *Organized crime and migrant smuggling: Australia and the Asia-Pacific*, Research and public policy series, No. 44. Canberra, Australian Institute of Criminology, 2002. Retrieved from www.aic.gov.au/en/publications/current%20series/rpp/41-60/rpp44.aspx.

Sigona, N., "NGO's under attack for saving too many lives in the Mediterranean", *The Conversation*, 29 March 2017.

Sunderland, J., "Dispatches: A heinous act, more deaths on the high seas", *Human Rights Watch* 16 September, 2014. Retrieved from <https://www.hrw.org/news/2014/09/16/dispatches-heinous-act-more-deaths-high-seas>.

Tsoni, I., "They won't let us come, they won't let us stay, they won't let us leave'. Liminality in the Aegean borderscape: The case of irregular migrants, volunteers and locals on Lesbos", *Human Geography*, Vol. 9, 2016, pp. 34-46.

Weber, L., & Grewcock, M., 'Criminalizing people smuggling: Preventing or globalizing harm?' in F. Allum & S. Gilmour (eds.), *The Routledge handbook of transnational organized crime*. London & New York, Routledge, 2012, pp. 379-485.

Zhang, S., *Chinese human smuggling organizations: Families, social networks, and cultural imperatives*, Stanford, Stanford University Press, 2008.

Zhang, S., & Chin, K. L., "Enter the dragon: Inside Chinese human smuggling organizations", *Criminology*, Vol. 40, No. 4, 2002, pp. 737-768.



11 COUNTERING 'CRISIS': IDENTIFYING THE COMPONENTS OF THE REFUGEE CRISIS IN GREECE

Vassilis Gerasopoulos

11.1 INTRODUCTION

Migration is hardly a recent phenomenon, and European history is no stranger to massive human flows – not only inward but also outward. As Papastergiadis notes, today there are more people living outside their homeland than in any previous historic era.¹ Movement and mobility have become such a pervasive characteristic of contemporary life that 'it can no longer be considered as the exceptional event in the otherwise long historical process of settlement'.² The everyday reality of the current migration crisis pinpoints to the importance of space and movement – and their limitations.

The term 'refugee crisis', one of the catchphrases of our time, has been met with significant scepticism by academics and practitioners alike. The designation of a certain state of affairs as 'crisis', inevitably, has political connotations and consequences. Language has the power to structure the way reality is perceived and any given diagnosis requires a set of measures to be adopted – measures proportional and equally radical to the gravity of the diagnosis.³ During this European 'refugee crisis', the migrants' influx has been presented and experienced as an external event over which national and European institutions had no control – an interesting metaphor explored by Habermas⁴ regarding the parallels invoked by the term 'crisis' as used in medicine and in society. The title of 'crisis' – perpetually used in the public, media and political discourse – creates uncertainty, unpredictability, helplessness and even panic. Regarding Greece, though, the country's history of oppression, wars and emigration justifies the initially more welcoming attitude of the Greek population – as it has been captured in the national and international media. According to the director

1 N. Papastergiadis, *The turbulence of migration: Globalization*, Oxford, Oxford University Press, 2000.

2 Id., p. 24.

3 C. Codrea, "Law, 'crisis' and ad captandum vulgus discourses", *Revista Universul Juridic*. 2016. Retrieved from <http://revista.universuljuridic.ro/supliment/european-refugee-crisis-legal-framework-european-political-effects/>.

4 J. Habermas, "What does a crisis mean today? Legitimation problems in late capitalism", *Social Research*, 1973, pp. 643-667.

of the Hellenic Observatory, '[The refugees'] background was acknowledged as being desperate, their motivation borne out of a survival instinct and Greece only a stop along the way'.⁵ However, these flows grew larger and, most notably, perpetual while the influx includes populations who are not refugees per se. As the (legal) pathways towards Europe are becoming scarce, the refugees are increasingly seen as a divisive and problematic presence. The policy and legal framework as well as societal matters and attitudes are bound to experience many alterations in the years to come, given that most experts predict that the current flow will keep the European Union busy for the coming decade. Acknowledging the complexity and fragmentation of the phenomenon, the aim of this chapter is to delve into a set of highly problematic aspects of the situation that can potentially pinpoint to the pre-existence of other 'crises', the combination of which manifests now as the 'refugee crisis'.

Thus, if migration is not a novel phenomenon but Europe's reactions to it are gradually becoming harsher, can these past two years be perceived as such as a threatening 'crisis' or should we carefully trace other, latent and deeper, dynamics at play before placing the 'crisis' label? In other words, which are the components of the current crisis in Greece and, consequently, how could these crisis components affect the symbiosis between the host society and the migrants in the near future?

The chapter's structure aims to utilize a *retrospective* analysis of the predominantly negative attitudes towards migration in Greece – when the incoming influx was not, at least logistically, such a 'crisis' – and combine it with *present* policy and legal challenges which potentially legitimize and provide an excuse for pre-existing hostilities to manifest. Connecting the legal and societal status quo, albeit appearing as conceptually distinct aspects of analysis, is one of the main objectives of this chapter, since the proclaimed refugee crisis poses as a unique opportunity to showcase the interactions between the macro- and micro-level and, most notably, the effect of the former on the latter.

11.2 A CRISIS OF POLICY AND MANAGEMENT

The idea of open political and geographical borders has served to enhance European integration and interdependence, creating the cultural myth of a cosmopolitan European Union full of transnational citizens.⁶ Yet, these past years of 'crisis' have managed to crystallize a paradox of late modern capitalist societies – already traced earlier in the previous decade. That is, even though Western citizens are 'governed through the neoliberal

5 O. Gill, Refugee welcome begins to wear thin in Greece, *DW*, 28 April 2016. Retrieved from www.dw.com/en/refugee-welcome-begins-to-wear-thin-in-greece/a-19222123.

6 S. Sassen, *Territory, authority, rights: From medieval to global assemblages*, Princeton, Princeton University Press, 2008.

imperatives of flexibility, individual freedom, economic initiative [and] social mobility',⁷ as soon as non-Western migrants appear to embrace these principles and resolve to move – or are forced to move – in search of a better life, European societies utilize any available technology and expertise to control and confine such movement.

In order to start exploring the paradox, the general policy framework of the European Union, as re-configured during the first two years of the refugee crisis, must be put under the analytical lens. According to the European Commission, the road towards the reform of Common European Asylum System (CEAS) and the enhancement of legal pathways to Europe boils down to a set of top priorities in order to address the 'structural shortcomings' as acknowledged by the Commission.⁸ These priorities revolve around:

- a. Establishing a sustainable and fair system for determining the member state responsible for asylum seekers
- b. Reinforcing the EURODAC system
- c. Achieving greater convergence in the EU asylum system
- d. Preventing secondary movements within the EU

In the following pages, I wish to draw the most salient connections between the EU priorities and the Greek status quo, alluding to the feasibility of the EU goals as well as the balances, imbalances and inequalities they potentially create for Greece. Each of these policy 'shortcomings' carries significant implementation 'baggage', while it becomes evident that these priorities – although seemingly fundamental and logical – are, inescapably, met with significant practical and ideological scepticism. Furthermore, they interlock with Greece's inability to manage the incoming flows as well as create a policy and implementation framework that can withstand the burden of being the country of first entry for most of those seeking asylum or protection. In other words, through the four points cited above, we witness how the policy crisis of the distressed European Union intertwines with the management crisis of a country which struggles with a prolonged financial and political crisis, a frustratingly bureaucratic public sector and an unsuccessful policy past in handling human flows.

11.2.1 *Politics of immobility*

As Franko Aas⁹ has argued, the restriction of movement tends to become a central mechanism of social stratification and exclusion. She views the current fixation with border

7 A. De Giorgi, "Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe", *Punishment & Society*, Vol. 12, No. 2, 2010, p. 152.

8 COM, 2016, 197 final, of 6 April 2016.

9 K. F. Aas, "Analysing a world in motion: Global flows meet criminology of the other", *Theoretical Criminology*, Vol. 11, No. 2, 2007, pp. 283-303.

protection as an intrinsic aspect of the present global condition, where one ‘does not need prisons to be, or feel, incarcerated in the locality’.¹⁰ Borders attempt to establish the limits of community through a selection process of who is allowed to enter and who is supposed to remain outside – see, poignantly, the quotas on the relocation schemes according to which the ‘deservedness’ of applying for the possibility to relocate inside the EU is based on. Such vehement defence of the borders, in their practical and symbolic understanding, is realized in what Simon termed ‘governance through crime’.¹¹ Quite simply, the increasing penal severity points to a crisis of governance within the EU.¹²

Indicatively, the Geneva Convention, prescribing the responsibility to protect individuals at risk of persecution, adopted by the Union and made into EU law, did not specify whether the potential refugees should have a choice on the country responsible to handle their application. The European Union attempted to resolve this vagueness through the Dublin System (discussed below) and, especially since 2015, with a number of legal instruments – directives, court decisions, etc. – which decide and pinpoint the nation-state, *ad hoc* competent to deal with each migrant. The migrant is required to abide by this decision on jurisdiction. The European Union text explicitly refers to ‘proportionate sanctions’ that should be attached to failure by an applicant to remain in the member state responsible for his application. Moreover, it dictates that

an applicant who has absconded or is likely to abscond should be assigned to a designated area in the Member State, or detained if necessary, and, where possible, material reception conditions could be provided only in kind.¹³

The proclaimed objective is to ‘ensure that the functioning of the Dublin mechanism is not disrupted by abuses and asylum shopping by applicants for and beneficiaries of international protection’.¹⁴

The *modus operandi* of the Union is neither downright illogical nor cruel. In the face of a massive human flow, at least a semblance of order and structure needs to be retained for the receiving societies to be at least better equipped to provide the necessary services to the incoming populations. Yet, the plan crafted by the CEAS refers to active, independent

10 Id., p. 293.

11 J. Simon, “Governing through Crime”, in L. Friedman, & G. Fisher (eds.), *The crime conundrum: Essays in criminal justice*, Boulder, Westview Press, 1997, pp. 171-189. For relevant discussion, see also W. Walters, “Secure borders, safe haven, domopolitics”, *Citizenship Studies*, Vol. 8, No. 3, 2004, pp. 237-260; K. F. Aas, “‘Getting ahead of the game’: border technologies and the changing space of governance”, *Global Surveillance and Policing: Borders, Security, Identity*, 2005, pp. 94-214.

12 V. Barker, “Global mobility and penal order: Criminalizing migration, a view from Europe.” *Sociology Compass*, Vol. 6, No. 2, 2012, pp. 113-121.

13 COM, 2016, *supra* note 8, p. 11.

14 Id., p. 6.

agents that possess their own set of incentives, goals and desired routes of movement. As Collett¹⁵ pointed out,

The self-determination of individuals to achieve the best personal outcome – a quality usually lauded in popular culture – has become a thorn in the side of European countries attempting to establish an orderly system of collective solidarity on asylum.

In other words, human agency is a factor that the EU policy has acknowledged and tried to circumvent – but has had only limited success in its efforts. She concludes that, given the lack of internal EU borders, the legal appointment of a country responsible for granting protection becomes redundant. Such a realization was the driving force behind developments such as the closure of the Balkan route, the rise of fences in Hungary or even Brexit. However, Greece – for political, geographical and infrastructure reasons that are too complex to be discussed satisfactorily here – did not really have the political 'bargaining chips' to react in such radical manner. Rather, the situation in Greece very much corroborates the EU narrative and vindicates Aas's claim about the incarceration in the locality. That is, during 2016, Greece set up hotspots in five Eastern Aegean islands, to serve as Reception and Identification Centers (RICs). The EU–Turkey statement, however, changed the nature of the hotspots. Arriving migrants were kept in de facto detention, in the sense that they were not allowed to travel to the mainland; they were forced, instead, to lodge an asylum claim in the island's hotspot, and while their application was pending, they underwent a limitation of movement (the so-called geographical restriction).¹⁶ Obligated to remain in the islands, they ended up stranded in the hotspots which eventually became overcrowded, thus causing justified criticisms on the living conditions and the subsequent infringements of rights of the migrants. During 2017, according to legal aid workers and volunteers I interviewed in Lesvos and Athens, the situation is slightly changing, with refugees seeking accommodation outside the hotspots. Yet, the refugees remain immobile in the islands, where they have limited, if any, choice as to their future route of mobility and equally limited outlets as to how they can creatively spend their time. In that sense, they are essentially confined in the few square kilometres of an island – put simply, the dimensions of the cage are unimportant since it remains a cage.

15 E. Collett, "The asylum crisis in Europe: Designed dysfunction", *Migration Policy Institute*, September 2015. Retrieved from www.migrationpolicy.org/news/asylum-crisis-europe-designed-dysfunction.

16 European Parliament, International protection in Greece: Background information for the LIBE Committee delegation to Greece 22-25 May 2017, 2017. Retrieved from [www.europarl.europa.eu/Reg-Data/etudes/STUD/2017/583145/IPOL_STU\(2017\)583145_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2017/583145/IPOL_STU(2017)583145_EN.pdf).

11.2.2 *The Dublin puzzles*

As regards the Dublin Regulation challenges, the term ‘shortcomings’ constitutes an understatement given the abundance of problems generated from when it was firstly implemented until the time of writing, regardless of the numerous amendments or the partial suspension. The European Commission recognized the significant implementation problems the regulation was faced with quite before 2015. In its report, the Commission concludes that

even with a more efficient and stricter enforcement by all Member States of the existing rules ... there is a high likelihood that the current system would remain unsustainable in the face of continuing migratory pressure.¹⁷

Furthermore, according to the report, a crucial obstacle to the efficiency of the Dublin system stems from the difficulty in transferring the applicants for international protection to member states that showcase systemic flaws in critical aspects of the asylum procedures or reception conditions. As early as in 2008, the European Council on Refugees and Exiles (ECRE) was issuing open letters to EU governments and the European Commission, calling for the red light on deportations back to the country until Greece fully complies with EU and international law.¹⁸ Transfers to Greece from other EU member states according to the Dublin Regulation have been suspended since 2011, following two judgements by the European Court of Human Rights and the Court of Justice of the EU¹⁹ which identified the systemic weaknesses in the Greek asylum system and acknowledged the country’s failure to meet its responsibilities.²⁰ At that time, the extremely problematic Dublin II was in effect, but even the newly formed Dublin III Regulation has not amended many of the controversial aspects of the system. The Dublin system divergences – that is, the differing treatment of asylum seekers across member states which actually encourages secondary movements – are a result of the, often, discretionary provisions described in the currently effective directives.

More importantly, it has been explicitly expressed that the regulation is placing a non-feasible burden on the countries of the Mediterranean – namely Greece and Italy. These ‘frontline’ states have been faced with the formidable challenge of organizing the first reception and identification of migrants – according to the Dublin III and EURODAC frameworks. Such a role carries the responsibility of fingerprinting the arriving populations,

17 COM, 2016, *supra* note 8, p. 4.

18 R. Goldirova, Greece under fire over refugee treatment, 3 April 2008. Retrieved from <https://euobserver.com/justice/25910>.

19 *M.S.S v. Belgium and Greece* (no. 30696/09); *NS v. Secretary of State for the Home Department* C- 411/10 & C-493/10.

20 European Parliament, *supra* note 16.

receiving their claims and properly processing these claims while attempting to organize long-term reception or return – since Dublin assigns all those responsibilities to the state of first entry.²¹ In other words, the hotspot scheme in the Greek islands is actually designed to shift and maintain the burden of the most contested EU legislation to its weakest links. As Collett stipulated,²² the political sanctity surrounding the Dublin system stumbles upon the realities of potential – and essentially permitted – noncompliance with its conditions, achieved through a deliberate ‘strategy of deafness’. Throughout 2015 and 2016, ensuring that – and enforcing – Greece ‘stem the flow’ was central to the European vocabulary and mentality. The lack of realism in such a goal is apparent, since the number of refugees arriving on European borders does not depend on the plans laid by European policymakers. Moreover, the burden of the whole process assigns overwhelming responsibilities on the basis of mere geographical location, while it is bound to force border states like Greece to look the other way in procedural omissions and mistakes. Even worse, it forces the country to scarcely admit to the smuggling of thousands of refugees into the Balkans.²³

Amidst this far-from-ideal implementation of the system, the European Commission announced that from March 2017 onwards countries in the EU will be able to return migrants to Greece, in the hopes of restoring the bloc’s migration policies – with human rights agencies warning that Greek facilities and reception centres are already vastly overcrowded to handle the prospect of even more migrants.²⁴ Likewise, the Greek authorities and several NGOs have resisted this development, calling attention to the fragility of the current state of the Greek asylum.²⁵ An interesting juxtaposition presents itself if one follows the announcements by EU officials addressing the very same issue. Indicatively, the European Commission’s deputy head Frans Timmermans posited that reinstating Dublin would ‘provide further disincentives against irregular entry and secondary movements,

21 F. Maiani, Hotspots and relocation schemes: The right therapy for the Common European Asylum System?, 3 February 2016. Retrieved from <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

22 Collett, *supra* note 15.

23 D. Howden, & A. Fotiadis, The Refugee Archipelago: The inside story of what went wrong in Greece, 6 March 2017. Retrieved from <https://www.newsdeeply.com/refugees/articles/2017/03/06/the-refugee-archipelago-the-inside-story-of-what-went-wrong-in-greece>.

24 EU says member states can start deporting refugees and migrants back to Greece from March, December 8, 2016. Retrieved from www.independent.co.uk/news/world/europe/europe-refugees-migrants-greece-march-a7462921.html. During the period between writing and publishing this contribution, further developments on the issue have occurred. See indicatively, H. Smith & P. Oltermann, EU states begin returning refugees to Greece as German reunions slow, 25 August 2017. Retrieved from <https://www.theguardian.com/world/2017/aug/25/eu-states-begin-returning-refugees-to-greece-as-german-reunions-slow>, where it is reported that “Germany has made nearly 400 resettlement requests, according to officials in Berlin and sources in Athens’ leftist-led government. The UK, France, the Netherlands and Norway have also asked that asylum seekers be returned to Greece. Greece’s migration minister told the Guardian the first returns were expected imminently.”

25 European Parliament, *supra* note 16.

and is an important step for the return to a normally functioning ... system'.²⁶ Germany's interior minister, Thomas de Maiziere, argued that

the EU has since then [2011] provided financial and other support for Greek efforts, given a lot of money to improve these conditions. That is why I would like to see the Dublin Convention implemented again. It would place Greece in line with all other European countries.²⁷

Moreover, it cannot be argued that the EU officials express their personal views since they only echo the Union's discourse, which has repeatedly declared the success of the Joint Declaration.²⁸

At the same time, it is impossible to ignore the magnitude of financial support given or planned for Greece. The funding should be adequate, since the total amount of money spent represents one of the most expensive humanitarian responses in history – yet, there is a widespread belief that the greater costs of operating in Greece are linked to the government's indecisiveness, while the long chain of bureaucracy, in order for the funds to be finally allocated to the receiving offices/organizations/NGOs, rather worsens the situation.²⁹ The obscurity of the public sector in Greece enhances the confusion as to the amounts that have been planned, made available and awarded; more importantly, when and how were the funds actually received or spent during the past two years? Furthermore, in line with the denial discourse mentioned earlier, we can trace an interesting EU mentality here: Roughly speaking, the bottom line is that since funding was made available, Greece is expected to handle the situation. In other words, Europe literally 'paid its dues'; the burden is completely on Greek shoulders now. This possible mentality begs the question: Is the EU role and assistance limited in a monetary support framework – and if yes, is that enough given that the country is under such pressure exactly because of a policy framework brought into force by the EU?

26 'Commission reports on progress made under the European Agenda on Migration', Press release of 8 December 2016, IP/16/4281.

27 S. Karakasidis, Thomas de Maiziere wants to reinstate Dublin rules, 3 October 2016. Retrieved from www.ekathimerini.com/212507/article/ekathimerini/comment/thomas-de-maiziere-wants-to-reinstate-dublin-rules.

28 COM (2017) 204 final, of 2 March 2017.

29 R. Banning-Lover, "Greek refugee camps remain dangerous and inadequate, say aid workers", *The Guardian*, 10 February 2017. Retrieved from <https://www.theguardian.com/global-development-professionals-network/2017/feb/10/greek-refugee-camps-dangerous-inadequate-aid-workers>.

11.2.3 The harmonization Utopia

As shown above, the European Union insists on the necessity of reducing the flows towards and within Europe. The Union aspires to achieve such endeavour in an effective manner by looking

at the migratory phenomenon in a broad and comprehensive perspective ... to enhance legal and safe pathways to Europe, to improve the use and implementation of existing legal migration instruments, to strengthen the Common European Asylum System.³⁰

The fourth priority mentioned earlier in this section exactly relates to that objective; the strengthening and harmonizing of the CEAS rules that could ensure more equal treatment across the EU. The call for harmonization, though, is far from being materialized – in its impossibility lies the most fundamental problem in the European legal construction and the CEAS, in particular. The challenges in the implementation of the relocation schemes is maybe the most eloquent way to showcase the 'harmonization utopia'.

The schemes were introduced and established by two decisions of the Council of Europe as emergency measures under Article 78(3) of the Treaty of the Function of the EU during September 2015. The relocation programme constitutes a derogation from the Dublin system, since for a number of applications there is a transfer of responsibility from the countries of first entry (such as Greece or Italy) to other member states.³¹ The European Commission had been publishing reports on the progress of the relocation and resettlement schemes during 2016 and 2017. Mainly during the first months of implementation, the rates of relocation were disappointingly low, given that some countries were properly receiving the refugees according to their minimum quotas but numerous others were simply rejecting the applications. In its eighth report, the Commission warned that it 'reserves the right to take action against those Member States not complying with their obligations'.³² Especially after the resumption of the Dublin system, the Commission was proclaiming that the fair sharing of responsibility comes only with solidarity, calling the nation-states to collectively implement the Council Decisions on relocation to alleviate Greece.³³ Still, the 11th report on relocation reads:

Hungary and Poland are still not participating in the relocation scheme therefore not fulfilling their legal obligations. The Czech Republic has not pledged since

30 COM, 2016, *supra* note 8, p. 3.

31 Maiani, *supra* note 21.

32 COM (2016) 791 final, of 8 December 2016.

33 COM (2017) 202 final, of 2 March 2017.

May 2016 and has not relocated anyone since August 2016 ... Bulgaria, Croatia and Slovakia are relocating on a very limited basis.³⁴

In a later report, the European Commission acknowledges that Czech Republic, Hungary and Poland are in continuous breach of their legal obligations, and thus, the Commission is forced to launch infringement procedures against these states.³⁵ As regards the Commission's warning, Collett explains that for countries who repel the possibility to host asylum seekers, the opportunity to 'buy out' of their responsibilities could actually pose an appealing scenario, if the alternative is to deal with the realities of adjudication, settlement and integration – not to mention the political advantages reaped by leaders of the non-cooperating countries after 'standing their ground' against the wave of migrants.³⁶ However, in realistic terms, it doesn't seem that the Commission is ready to impose sanctions and penalties or even use leverage to force countries as Czech Republic or Poland to receive refugees.³⁷ After all, Greece is again left to its own devices to deal with the situation.

The obstacles in relocation serve to raise two important points. The first refers to the clash between nation-state sovereignty and Europe's limit of influence and interference to that sovereignty. The second one – stemming from the first – refers to the criminogenic asymmetries of the globalized world as explained by Passas. Regarding the first point, it has been noted by Passas that the independence, sovereignty and autonomy of nation-states are systematically undermined by external actors and supranational bodies, as decisions which once symbolized sovereign powers are now shared and re-configured.³⁸ The EU construction tellingly illustrates this process of 'pooling of sovereignty' with more and more powers and functions gradually transferred to the administrative and legislative bodies of the Union in an effort to influence national regulation and promote processes of harmonization.³⁹ The criminalization or the expulsion of migrants enables member states to reassert their withering sovereignty and assert their control in their borders.⁴⁰ In this bargaining for interdependence, national authorities are likely to use highly excessive policy instruments to shore up public trust and confidence, resulting in dramatic displays

34 COM (2017) 212 final, of 12 April 2017, p. 3.

35 COM (2017) 330 final, of 13 June 2017.

36 Collett, *supra* note 15.

37 Greece left alone in the refugee crisis, December 8 2016. Retrieved from www.dw.com/en/greece-left-alone-in-the-refugee-crisis/a-36699740.

38 N. Passas, "Globalization, criminogenic asymmetries and economic crime", *European Journal of Law Reform*, Vol. 1, 1999, pp. 399-424.

39 *Id.*, p. 410-411.

40 Barker, *supra* note 12.

of power. The goal is to re-affirm the state's capacity to provide internal security, fulfilling the most basic condition of the social contract.⁴¹

These considerations lead to the second point – namely, the intensification of 'criminogenic asymmetries', multiplied by the forces of globalization.⁴² The term revolves around mismatches and inequalities in the fields of politics, culture and the law. Throughout this section, the notion of said asymmetries repeatedly appears. Greece struggles to face the challenge of Dublin or the relocation scheme, both legal systems introduced by a supranational legislative body, which cannot really enforce its member states to uphold their promises. Imbalances in influence and decision-making powers lead to asymmetric burdens carried by specific nation-states on the borders of Europe – in our case Greece. The asymmetries become more salient since the guidelines and suggestions of the EU are only occasionally followed by national governments. 'In effect ... regulatory ... functions are stubbornly in the hands of national bodies which pursue objectives and employ methods that are inconsistent with each other'.⁴³ Such confusing polynomie inevitably leads to relativization of norms and, essentially, to violations of the legal framework.⁴⁴

11.2.4 The case of the Appeals' Committees

The complex web and interconnections of asymmetric relations and inefficient policies is maybe best exemplified in a short story about the Appeals' Committees. Until the 'crisis' of 2015, the legal framework on migration in Greece was mostly regulated by Law No. 3907/2011.⁴⁵ According to this law, appeals against first-instance asylum applications in Greece were made before three-member administrative committees. Simultaneously, an 'old procedure' was in effect – competent on the applications lodged before the mandate of 3907/2011. Law No. 4375/2016⁴⁶ modified the operation of the Appeals' Committees (composed by one UNHRC official and two members proposed by the National Commission for Human Rights). Interestingly, the law also designated the function of transitional regimes, expecting the Backlog Appeal Committees (responsible for 'old procedure' appeals) to also undertake the task of examining the applications lodged after the entry of the 4375/2016 law into force – until the establishment of the new committees was completed. As a result, the 'Backlog' committees judged the appeals of individuals arriving after the

41 T. Lappi-Seppälä, "Penal policy in Scandinavia", *Crime and Justice*, Vol. 36, No. 1, 2007, pp. 217-295; see also T. Lappi-Seppälä, "Trust, welfare, and political culture: Explaining differences in national penal policies", *Crime and Justice*, Vol. 37, No. 1, 2008, pp. 313-387.

42 Passas, *supra* note 38.

43 Id., p. 412.

44 R. J. Michalowski, & R. C. Kramer, "The space between laws: The problem of corporate crime in a transnational context", *Social Problems*, Vol. 34, No. 1, 1987, pp. 34-53.

45 L3907/2011, 7/A/26-01-2011.

46 L 4375/2016, 51/A/3-4-2016.

EU–Tukey joint declaration – that is, individuals who saw their application rejected on the grounds of inadmissibility for coming from a ‘safe third country’. However, an important number of these commissions issued decisions (between April and July 2016) which rebutted the ‘safe third country’ presumption, thus overturning the first instance decisions.⁴⁷

Before the committees under Law Np. 4375/2016 ever started operating, Law No. 4399/2016⁴⁸ amended their composition, introducing instead the Independent Appeals’ Committees, composed by two administrative judges indicated by the general commissioner for administrative courts and one member indicated by the UNHCR.⁴⁹ The amendment took place after ‘reported EU pressure on Greece to respond to an overwhelming majority of decisions’ that reversed the first decision of the asylum service.⁵⁰ During May 2017, several months after NGOs lodged their application, the Council of State ruled on the ministerial decision of the new composition under law 4399/2016. The decision rejected the application and concluded that the presence of judges in the Appeals’ Committees did not violate the constitution,⁵¹ even though the Court had ruled in past years with consistency on the unlawful establishment of committees with the participation of magistrates. Regardless, between July and December 2016, the Independent Appeals’ Committees recognized the status of international protection to a rate of 0.4%, in full compliance with the goals set by the European Union. This trend, as alarming as it is regarding the fairness and efficiency of the asylum procedure in Greece, was maintained during the first months of 2017, with all decisions issued until late February confirming the first-instance inadmissibility decision.⁵²

Meanwhile, from March 2017, a reform in the Greek law enabled EASO (European Asylum Support Office) staff to assist the new independent committees in examining the appeals, despite criticism from civil society organizations. Such reform again raised issues regarding its constitutionality, since it delegates responsibilities on an office that already possesses a significant, if not leading, role in adjudicating the decisions on the fast-track procedure (EASO conducts the interviews with international protection seekers and recommends a decision to the Greek Asylum Service officials), as provided by Law No. 4375/2016. In other words, the reform practically abolishes the distinct procedure between first instance and appeal since it allows EASO to pervasively influence both.⁵³ After a series

47 European Parliament, *supra* note 16.

48 L 4399/2016, Gazette 117/A/22-6-2016.

49 European Parliament, *supra* note 16.

50 Asylum Information Database (AIDA), Country Report: Greece, Greek Council for Refugees, 2016, p. 14-15. Retrieved from www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf.

51 Council of State. Plenary. Decision 1237/2017.

52 European Parliament, *supra* note 16.

53 D. Aggelidis, The asylum procedure is handed in to EASO, (trans. from Greek), 10 March 2017. Retrieved from www.efsyn.gr/arthro/i-diadikasia-asyloy-paradidetai-sto-easo.

of complaints, the European ombudsman is set to examine EASO practices mainly referring to the office's influence on inadmissibility decisions.⁵⁴

Firstly, what becomes evident is that for the best part of 2016, there were three different committees, with different mandates and compositions, who were dealing with appeals. This fact alone points to the inability, or unwillingness, of the Greek state to centralize and organize the handling of the asylum claims – it is, in other words, an indication of mismanagement of the crisis. At the same time, during a long period, throughout the months that the Council of State was in deliberations on the constitutionality of the committees under Law No. 4399/2016, most of the other committees refrained from issuing decisions, expecting the ruling of the Council, which would potentially set a precedent for all decisions. This delay further burdened the system. As shown above, many of these legislative developments came as the answer to the persisting calls of the European Union for the 'stem' of the flows. The implementation of the EU policies translates to low admissibility rates which are to be succeeded with any means. The power mismatch between the nation-state and the Union breeds the ground for criminogenic asymmetries to fester. That criminogenic effect is expressed through the maintenance of a policy framework that essentially violates the international law and the Greek Constitution – e.g. EU–Turkey deal. Greece has become a 'space of interventions that have repeatedly overridden territorial sovereignty',⁵⁵ and such override cannot be avoided exactly because the country has fulfilled, for the past years, the role of the European pariah who is in no position to challenge the policy framework and stand firmly in its sovereignty, in the way that other countries may afford to.

The asymmetry goes even further. The Greek Council of State may have decided on the constitutionality of the committees, but it has yet to rule on the safety of Turkey as a third country.⁵⁶ The nature of the EU–Turkey deal was also challenged before the Court of Justice of the European Union in early 2017, with the Court ruling that it lacked jurisdiction to determine on the topic.⁵⁷ According to the Court's argumentation, the participants

54 'Greek Hotspots: EU Ombudsman probes work of European Asylum Support Office (EASO)', where it is stressed that "EASO not only violates its own guidelines for conducting interviews, but its involvement in the procedure goes beyond the scope of its powers under EU law. Consequently, applicants for international protection are deprived of a fair hearing and denied the chance to present and substantiate their asylum case." Retrieved from <https://www.ecchr.eu/en/international-crimes-and-accountability/migration/greek-hotspots.html>.

55 Y. Christodoulou, E. Papada, A. Papoutsis, & A. Vradis, "Crisis or Zemblanity? Viewing the 'Migration Crisis' through a Greek Lens." *Mediterranean Politics*, Vol. 21, No. 2, 2016, p. 323.

56 During late September, between the time of writing and the time of publishing, the Greek Council of State ruled on the assumption of the 'safe third country' while judging the case of a Syrian refugee who. The Plenary deemed that geographical restriction of the Geneva Convention is not a sufficient reason to consider Turkey unsafe, and the majority concluded that Turkey falls under the umbrella of a safe third country according to the standards set by Directive 2013/32/EU. See, Council of State. Plenary. Decision 2348/2017.

57 Orders of the General Court (First Chamber, Extended Composition) of 28 February 2017. Cases T-192, T-103 and T-257/16 (*NF, NG and NM v. European Council*).

in the discussions for the deal acted under their mandate as government/state officials and not as members of the European Council; thus no European institution took part in deciding the EU–Turkey joint declaration – while the irony of the title of the deal itself is apparent. Practically, the Court employed a legalistic trick to avoid the political burden of ruling on such an ambivalent issue. Hence, the Greek Council of State is obliged to make a decision and bear the consequences. Here lies the paradox: If Greece implements the policy framework then it infringes human rights and constitutional provisions, but if it doesn't, then it violates its EU obligations. Such dead end constitutes an exemplification of criminogenic asymmetries.

11.3 OLD HABITS AND NEW CHALLENGES

After discussing the policy challenges of the current crisis, it is now time to take a closer look at the manner in which migration was (and is) contextualized in Greece – in order to connect the components of policy and management crisis to a crisis of politics and fear.

It has been long argued that Greek political elites lacked the will to adopt a proactive and manageable policy plan on migration in past decades.⁵⁸ Such unwillingness could be attributed to the fear that

stating publicly that Greece should accept economic immigrants through legal channels and that immigrants should become part of Greek society on a basis of equality and plurality would cost them votes.⁵⁹

What seems quite noteworthy is that 1975/1991 law – the first Greek law that was supposed to deal with incoming flows of migrants – did not really distinguish between economic immigrants, irregular immigrants or asylum seekers.⁶⁰ Instead, all categories were blurred under the general term 'aliens' and included in a single policing – repression scheme – in a typical essentialist, securitizing manner.⁶¹ This legislative choice speaks volumes about the societal perceptions of the migrant as the ultimate 'Other' – and I will return to that point at the end of this section. But first, I shall contextualize and explain these perceptions by discussing some key issues.

58 A. Triandafyllidou, "Greek immigration policy at the turn of the 21st century. Lack of political will or purposeful mismanagement?", *European Journal of Migration and Law*, Vol. 11, No. 2, 2009, pp. 159-177.

59 *Id.*, p. 177.

60 G. Karyotis, "Securitization of migration in Greece: Process, motives, and implications", *International Political Sociology*, Vol. 6, No. 4, 2012, pp. 390-408.

61 G. Karyotis, "European migration policy in the aftermath of September 11: The security–migration nexus", *Innovation*, Vol. 20, No. 1, 2007, pp. 1-17.

11.3.1 A matter of security

The first process that is worth following is that of the securitization of the migration discourse – as it was experienced from the 1980s onwards and influenced by the financial crisis that erupted in 2007. What has been repeatedly reported by migration academics is that Greece has traditionally – that is for the best part of the 20th century – been a sending country, a country of emigration. A survey by the European Parliament⁶² on the rise of fascism and racism in Europe in 1985 claimed that Greek people were 'tolerant and xenophilic and generally free of racial prejudice'. It was not until the late 1980s, though, that Greece saw a wave of immigration from Eastern Europe and the Balkans, upon the fall of the communist regimes.⁶³ A few years later, the sentiments were radically different than the 1985 survey, as Karyotis and Patrikios report.⁶⁴ A national survey in 1993 revealed that 90% of respondents thought that immigrants take jobs from Greeks, while 84% considered them a public danger.⁶⁵ The increase in migratory flows to Greece was as rapid as it was unexpected. In a surprisingly short time frame, Greece went from being a largely ethnically homogenous country – at least in popular perceptions – to one of the largest recipients of migrants in the EU with approximately 10% of its population comprised of those born outside the country.⁶⁶ Evidently, the discourse of migration by the elite and mass media was one of securitization, while it was accompanied by a policy framework which cast migration as a problem of security, policing, criminality and labour stability.⁶⁷ A revealing example involves the parliamentary speech of the governmental sponsor for the 1975/1991 law.⁶⁸ In that speech, he repeated the word 'problem' not less than 28 times – holding the migrants responsible for a wide array of societal ailments. As Swarts and

62 European Parliament, Report of the Committee of Inquiry into the Rise of Fascism and Racism in Europe, Strasbourg, Commission of the European Communities, December 1985, pp. 43-44. Retrieved from <https://www.scribd.com/document/224338556/Committee-of-Inquiry-Into-the-Rise-of-Fascism-and-Racism-in-Europe-European-Parliament-Dec-1985>.

63 See indicatively: L. K. Cheliotis, "Behind the veil of philoxenia: The politics of immigration detention in Greece", *European Journal of Criminology*, Vol. 10, No. 6, 2013, pp. 725-745; J. Swarts, & N. M. Karakatsanis, "Challenges to desecuritizing migration in Greece", *Journal of Balkan and Near Eastern Studies*, Vol. 15, No. 1, 2013, pp. 97-120; A. A. Ellinas, "The rise of Golden Dawn: The new face of the far right in Greece.", *South European Society and Politics*, Vol. 18, No. 4, pp. 543-565.

64 G. Karyotis, & S. Patrikios., "Religion, securitization and anti-immigration attitudes: The case of Greece", *Journal of Peace Research*, Vol. 47, No. 1, 2010, pp. 43-57.

65 P. Kiprianos, S. Balias, & V. Passas, "Greek policy towards immigration and immigrants", *Social Policy & Administration*, Vol. 37, No. 2, 2003, p. 154.

66 J. Swarts, & N. M. Karakatsanis, "Challenges to desecuritizing migration in Greece", *Journal of Balkan and Near Eastern Studies*, Vol. 15, No. 1, 2013, p. 98.

67 Karyotis, *supra* note 60; Karyotis & Patrikios, *supra* note 64.

68 Parliamentary Proceedings, Session B, 10 October 1991, p. 3, where the following quote is found: "There are many problems that our country is faced with because of the mass migration of these people to our country. These are social problems; employment problems; health problems; criminality problems, that we are all witnessing every day".

Karakatsanis eloquently assess, 'A society imbued with historical myths of ethnic homogeneity, cultural superiority ... will likely prove more susceptible to attempts to construct migration as an existential threat to its cultural integrity'.⁶⁹

At the turn of the century, political discourse acquired a more moderate character; the focus shifted from 'alien' threat to an attempt to deconstruct the myths which have rendered the immigrants dangerous and placed greater emphasis on migrants' rights and social inclusion. The elite discourse transformation though did not manage to alter the public attitudes towards migration, which remained among the most xenophobic within the EU and as anti-migrant as they have been during the 1990s. In explaining the discrepancy, Swarts and Karakatsanis maintain that since migration was constructed as an existential threat to the security, welfare and cultural integrity of the Greek society and state, the deconstruction and reconstruction of the discourse will be a much harder task. On the other hand, Karyotis and Patrikios poignantly hypothesized that in a culture where religion holds a prominent place in the public sphere, the influence of religious elites on public sentiments could even outweigh that of political elites. The authors' results attest to the importance of a non-political actor in the securitization process since they argued that religiosity is a strong predictor for anti-immigration feelings. Even more, religious elites will sustain the security framing of migration as long as they perceive themselves as guardians of national identity.⁷⁰

11.3.2 *Financial and political turbulence*

The second process that demands analysis is that of the financial and simultaneous political crisis – which has existed fully fledged since 2009 – to the extent that these crises interconnect with attitudes towards migration and influence the mechanisms of identity construction. Unavoidably, the threat of economic crisis was projected onto the migrant population. Immigrants became an internal 'significant other',⁷¹ against the backdrop of a faltering welfare state and withering social solidarity.⁷² Placing the blame for structural incapacities and complex dynamics to the easiest target is a typical step in the 'othering' process – and Greek people were certainly not new to it. It has already been concluded after an analysis of multiple public opinion surveys that Greeks were among the most likely of all Europeans to blame immigrants for high unemployment.⁷³ Along with the persistently negative public

69 Swarts & Karakatsanis, *supra* note 66, p. 111.

70 Karyotis & Patrikio, *supra* note 64.

71 A. Triandafyllidou, "National identity and the 'other'", *Ethnic and Racial Studies*, Vol. 21, No. 4, 1998, pp. 593-612.

72 A. Triandafyllidou, & H. Kouki, "Muslim immigrants and the Greek nation: The emergence of nationalist intolerance", *Ethnicities*, Vol. 13, No. 6, 2013, pp. 709-728.

73 Kiprianos *et al.*, *supra* note 65.

attitudes, the official political discourse once again took a turn to the worse since 2009, with racism and xenophobia manifesting in overt manners⁷⁴ and migration being reframed as an issue of security rather than integration.⁷⁵ Unsurprisingly, the economic recession and the xenophobic outburst in the face of new migration 'entries' paved the way for an acute political crisis. Such a crisis was by large a ticking bomb, since the Greek political system was already critiqued as suffering from high levels of clientelism and populism.⁷⁶ In a short time span of three years, the neo-Nazi party of Golden Dawn managed to multiply its electorate, getting almost 450,000 votes in the 2012 elections.⁷⁷ Besides Golden Dawn's anti-EU and anti-austerity message, Ellinas describes its rhetoric towards migration. The statutes of the party blatantly take position 'against the demographic alteration, with the millions of illegal immigrants, and of the dissolution of Greek society'.⁷⁸ What could be mentioned as particularly intriguing is the certainty and pride with which Greek people and their political representatives presented themselves in the past decade as immune to fascism and free of a racist political past. Indeed, a wide array of research⁷⁹ stipulates how Greeks were the least likely of all Europeans to identify as racist.

The economic insecurity was projected onto the migrant 'Other' and manifested in a renewed vehemence to target and exclude those perceived to threaten an already fragile society. The dynamics of criminalization and exclusion as employed by critical criminological theory are particularly didactic in trying to make sense of the hostile sentiments of Greek people. Young identified the necessary components to mobilize othering and aggression: the feeling of relative deprivation (economic insecurity) and of ontological insecurity. By convincing ourselves that our societal 'enemy' is a large part of our problems and that they are intrinsically different from us, our resentment grows to a dehumanization,

74 H. Smith, Greek crackdown on illegal immigrants leads to mass arrests, 7 August 2012, where the following quote by Nikos Dendias, then public order minister is found: "We will not allow our towns, or our country, to be occupied and become a migrant ghetto. ... The country is being lost. ... What is happening now is [Greece's] greatest invasion ever. Not since the Dorians invaded some 3,000 years ago has it received such a flow of immigration". Retrieved from <https://www.theguardian.com/world/2012/aug/07/greece-crackdown-illegal-immigrants-arrest>.

75 Swarts & Karakatsanis, *supra* note 66.

76 See indicatively: A. Papakostas, "Why is there no clientelism in Scandinavia? A comparison of the Swedish and Greek sequences of development", in S. Piattoni (ed.), *Clientelism, interests, and democratic representation: The European experience in historical and comparative perspective*, Cambridge, Cambridge University Press, 2001, pp. 31-53; T. Pappas, *Making party democracy in Greece*, London, Springer, 1999.

77 A. A. Ellinas, "The rise of Golden Dawn: The new face of the far right in Greece", *South European Society and Politics*, Vol. 18, No. 4, pp. 543-565.

78 Golden Dawn, 'Statutes of the Political Party with the name "Popular Association – Golden Dawn"' (translated from Greek), Athens, 2002, p. 2.

79 Kiprianos *et al.*, *supra* note 65, Ellinas, *supra* note 77; see also A. Triandafyllidou, "The political discourse on immigration in southern Europe: A critical analysis", *Journal of Community & Applied Social Psychology*, Vol. 10, No. 5, 2000, pp. 373-389.

which allows – or even calls for – a hardening of the self.⁸⁰ As Triandafyllidou and Kouki explain, ‘It is not a matter of “us” tolerating them by applying our democratic principles, it is rather about “them” who are “intolerable” because of their intrinsic cultural features’.⁸¹ Similarly, Aas⁸² viewed the targeting and stigmatizing of the migrants as a reassertion of cultural essentialism, as a purported grasp of some idealized notion of national belonging.⁸³ The Greek context is the perfect stage where Young’s bulimia of exclusion⁸⁴ can be played out since the Greek people themselves became the black sheep of Europe, the excluded Southern counterpart of the EU vehicle. Excluding an even weakest link in the societal chain is – to paraphrase Hayward⁸⁵ – nothing but an attempt to achieve a semblance of control over their spiralling national, political and, ultimately, individual identity in a time of rampant ontological insecurity.

It is essential then to indicate now specifically the tenets of the Greek national identity as they have been hinted throughout this section. Namely, after these tempestuous two and a half decades of dealing with waves of immigration, how is the Greek identity articulated and understood by the people. ‘Greekness has been defined as an amalgamate of (belief in) common ancestry, cultural traditions and religion’.⁸⁶ This multifaceted definition, per Gropas and Triandafyllidou, also allows for multiple boundaries which serve in distinguishing the Greeks from the neighbouring nations. In this national identity construction, the boundaries mentioned are not only of difference but also of superiority. Greek national identity is, therefore, believed to be significantly considered in ethno-cultural terms and frames.⁸⁷ Christopoulos⁸⁸ emphasizes that Greeks are people of Greek descent (regardless of where they were born) who are Christian Orthodox. The ethnic and religious elements are extremely crucial as they are intertwined in their use and connotations.⁸⁹ That is, Greek ancestry is essentially supposed to come together with an Orthodox religious identity. Religion thus appears as a necessary but not sufficient condition, while Greek descent is supposed to satisfy both conditions. The lines are not clearly demarcated though, since the attachment to tradition and to orthodoxy is often found at the core of a rigid conception

80 See indicatively: J. Young, *The exclusive society: Social exclusion, crime and difference in late modernity*, London, Sage, 1999; J. Young, “Merton with energy, Katz with structure: The sociology of vindictiveness and the criminology of transgression”, *Theoretical Criminology*, Vol. 7, No. 3, 2003, pp. 389-414.

81 Triandafyllidou & Kouki, *supra* note 72, p. 721.

82 Aas, *supra* note 9.

83 Barker, *supra* note 12.

84 Young, *supra* note 80; see also J. Young, *The criminological imagination*, Cambridge, Polity Press, 2011.

85 K. Hayward, *City limits: crime, consumer culture and the urban experience*, London, Routledge, 2004.

86 A. Triandafyllidou, & R. Gropas, “Constructing difference: The mosque debates in Greece”, *Journal of Ethnic and Migration Studies*, Vol. 35, No. 6, 2009, p. 962.

87 Triandafyllidou & Kouki, *supra* note 72.

88 D. Christopoulos, *Who is Greek citizen* (translated from Greek), Athens, Vivliorama, 2012.

89 Triandafyllidou & Kouki, *supra* note 72.

of national identity – to the extent that it is hardly possible to differentiate Greek ethnicity from orthodox religiosity.⁹⁰

11.3.3 *Boundaries on the borders*

Perhaps an all-encompassing viewpoint of the factors analysed so far in this section is that of symbolic boundaries. The vocabulary of motives of Greek people is probably best articulated through the symbolic boundaries discourse – for this approach incorporates the study of the significance of all the tenets on which a threat might be constructed. Quite simply, symbolic boundaries are 'conceptual distinctions made by social actors ... [that] separate people into groups and generate feelings of similarity and group membership'.⁹¹ Symbolic boundaries are subject to reshaping through classification struggles with majority groups vying for the preservation of the status privileges they enjoy.⁹² According to Bail's⁹³ comprehensive research, European countries can be categorized into three sets, based on their experiences and reactions to migration. Greece belongs to a set of countries that share the following characteristics: they are, geographically, in the outskirts of the EU, they used to be countries of emigration and only recently have become receiving destinations, the proportion of immigrants remains rather small and, finally, discourses on immigration are relatively unsophisticated compared to traditional immigration countries of Northern Europe.⁹⁴ In these countries, racial and religious symbolic boundaries are stronger than average, a trait potentially attributed either to the culturally homogeneous past or to the perceptions of 'group threat'⁹⁵ following the increase in migrant population's visibility, or even the fact that the antiracist discourse has not yet permeated the EU periphery.⁹⁶

The explanation is certainly not one dimensional or definitive, but the conclusions of Bail's research themselves are revealing. Basing his comparisons in six significant symbolic boundaries (race, religion, language, occupation, culture and education), Bail found that Greek people had among the highest scores in every category. Most notably, religion was relatively more salient, ranging as high as 5.87/10 in Greece when the EU was barely over

90 D. Halikiopoulou, *Patterns of secularization: Church, state and nation in Greece and the Republic of Ireland*, Farnham, Ashgate Publishing, Ltd., 2011.

91 M. Lamont, & V. Molnár, "The study of boundaries in the social science", *Annual Review of Sociology*, Vol. 28., No. 1, 2002, p. 168.

92 N. Eliasoph, & P. Lichterman, "Culture in interaction", *American Journal of Sociology*, Vol. 108, No. 4, 2003, pp. 735-794.

93 C. A. Bail, "The configuration of symbolic boundaries against immigrants in Europe", *American Sociological Review*, Vol. 73, No. 1, 2008, pp. 37-59.

94 Id., p. 54.

95 H. Blumer, "Race prejudice as a sense of group position", *Pacific Sociological Review*, Vol. 1, No. 1, 1953, pp. 3-7.

96 Bail, *supra* note 93.

3.5.⁹⁷ Moreover, the Greek score in culture (8.18/10) was again one of the top scores – verifying the analysis above regarding the construction of Greek national identity on the tenets of ethnocultural and religious notions. At the same time, the occupation ratio was the highest in Europe, and the race and education ratios were among the top three. Hence, the securitization debate that preceded is crucial in understanding the dynamics between the political elites and the population, but is not as poignant as the lens of ‘othering’, labelling and criminalization as framed by the critical criminological paradigm. The latter framework more vividly grasps the hostile sentiments – the fear, hostility and resentment – that are experienced regardless of a securitizing or desecuritizing discourse by the elites, regardless of the country of origin or the race of the migrant.

As the immigration law 1975/1991 paid no attention to the different motives of immigration or categories of migrants, Greek people aren’t that preoccupied with the specificities of migratory waves but with immigration itself. Such realization is very significant for the debate around this currently labelled ‘refugee’ crisis. That is, when it comes to theories of the racial threat perspective (such as Aas’s criminalization of the migrant), doubts are raised regarding the generalizability of the respective empirical support and the solidity of its underlying dynamic.⁹⁸ Barker highlights the discrepancies in ethnicity and socioeconomic status as having varying implications for social incorporation of migrants. She notes that ‘labor immigrants, political refugees, migrants seeking family reunification, and former colonial subjects’ are potentially treated ‘to a certain extent, as if they were all the same and equally threatening to the native population’.⁹⁹ Yet the Greek context might be proving that it is exactly the case, that advocating for the differences might disregard a nation’s horizontal unwillingness to accept incoming flows, that awareness of the said differences might be only a classification few acknowledge and even fewer care for.

11.3.4 *New challenges*

According to the European Commission, Greece remains under severe pressure with more than 60,000 migrants still present in the country, of which almost a quarter are located in the islands of the Northern Aegean. The policy nexus that is in effect at the time of writing suggests that this number shall fluctuate, but in realistic terms Greece will have to host most of these migrants for a long period of time. This means that, in the absence of a surprising development, the situation and the numbers are gradually crystallizing. But there is a danger inherent in that normalization for the Greek context – namely, the re-focusing

97 Id., p. 48.

98 Barker, *supra* note 12.

99 Id., p. 117.

on already existing societal ailments. As discussed above, before Greece became the locus of a refugee crisis, it was the stage for an acute political and economic crisis that put the social web under the test – and it continues to do so. A revival of old fears and hostilities might cause a radical deterioration as regards the attitudes of the Greek population towards the asylum seekers, once everyone realizes that an already problem-abundant society now has another permanent 'challenge' to struggle with. Taking under consideration the analysis that preceded, it would not come as a surprise if the migrants again became the 'symbol of and target for all social anxieties',¹⁰⁰ for the battle over scarce resources¹⁰¹ – financially and politically – is as present as ever in a country that has traditionally set boundaries between the Greek and the 'Other'.

In a way, migrants are caught up in the middle of a perilous mixture of ineffective national and European bodies and societal hostilities. A public attitudes survey published in the summer of 2016 brought some alarming results.¹⁰² Interestingly, two-thirds of those questioned admitted they perceive the large numbers of refugees from Syria and Iraq as a major threat for Greece. Religion and ideology heavily affect these results. That is, negative opinions about Muslim are much more common among respondents who fall on the right side of the ideological spectrum. For those Greeks, there is a clear link between the religion of the incoming flows and the threat they potentially pose, with 81% of right wingers expressing unfavourable views on Muslim migrants. Quite tellingly, Greek respondents are the most opposed to the possibility of an ethnically diverse country, with 6 out of 10 claiming that having people of different races and nationalities in Greece makes the country a worse place to live. In confirmation of the symbolic boundaries analysis above, Greece had the highest average in an index involving a set of questions on the importance of speaking the language, sharing traditions, being born in the country and being Orthodox. To give an example relating the 'expression' of the sentiments, a Greek institution mainly consisting of right-wing individuals – if not far right – is the Greek police. Expectedly, in May 2017, the commissioner of the Council of Europe addressed an open letter to the Greek government, expressing his concerns about reports of ill-treatment, even torture, of vulnerable individuals by Greek police officers, illustrating the persistent and systemic problem of excessive use of violence in law enforcement. The commissioner referred to

100 L. Wacquant, "Suitable enemies' Foreigners and immigrants in the prisons of Europe", *Punishment & Society*, Vol. 1, No. 2, 1999, p. 219.

101 Barker, *supra* note 12.

102 R. Wike, B. Stokes, & K. Simmons, "Europeans fear wave of refugees will mean more terrorism, fewer jobs", *Pew Research Center*, 11 July 2016. Retrieved from www.politico.eu/wp-content/uploads/2016/07/Pew-Research-Center-EU-Refugees-and-National-Identity-Report-EMBARGOED-UNTIL-1800EDT-2200GMT-July-11-2016.pdf.

‘well-documented cases of migrants, even minors, claiming they had been victims of severe beatings by police officers in the Northern Aegean islands’.¹⁰³

Meanwhile, as months go by and the flows of migrants alter in terms of the nationality of the incoming populations, attitudes are bound to be altered as well. The atrocities and developments of the situation in Syria were constantly presented and broadcasted by mass media for the public – thus, the response to the war-torn Syrians was one of sympathy and aid. At the time of writing, countries such as South Sudan or Afghanistan are in an equally dire situation. Yet, the images we have from the latter countries are far less. Therefore, anyone else, other than Syrians, is misrecognized as an illegal or economic immigrant, although they are in fact also eligible for international protection. Such misconceptions reinforce the xenophobic sentiment which has seldom manifested during the two years of crisis. Amnesty International documents a number of hate-motivated attacks against vulnerable groups (refugees, asylum seekers and migrants). Indicatively, in July 2016 a squat providing shelter to refugees in the city of Athens was targeted in an arson attack by members of a far-right group, while in November a group of suspected far-right extremists attacked refugees in a refugee camp in the island of Chios, injuring at least two.¹⁰⁴ Against this backdrop, neo-Nazi extremists impatiently await the opportunity to capitalize on people’s discontent over the possibility of a permanent presence of the refugees in their neighbourhood or city.

In interviews I conducted during my fieldwork in Athens and Lesbos, my respondents expressed the view that these attacks do not necessarily represent the majority, in the sense that besides its xenophobic sentiments, the majority of the people cannot be perceived as morally accordant with violent attacks and hate crimes. The events rather indicate a presence of small part of the population who takes advantage of the general insecurity bred by the solidification of the refugee situation in a manner that will further burden the country. Their goal is to gain legitimacy in what they perceive as a fair ‘crusade’ against the intruders who threaten to create their own communities and steal the virtually non-existent jobs. This notion of fairness serves as the façade for the most threatening societal impulses. Under the disguise of ‘protection’ and mere ‘reasonable worries’ lies the most important point: The policy inefficiency in dealing with a crisis makes extreme, ideologically charged reactions seem more and more sensible. Fear and exclusion become logical and xenophobia; even racism tends to become apolitical. Triandafyllidou and Kouki argued that ‘intolerance, as compared with tolerance, appears to be rooted into conceptions of nationhood’, present-

103 Commissioner concerned about ill-treatment by law enforcement officials in Greece, May 5, 2017. Retrieved from <http://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-ill-treatment-by-law-enforcement-officials-in-greece>, for the full text of the letter: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2968717&SecMode=1&DocId=2401540&Usage=2>.

104 Amnesty International, Amnesty International Report 2016/2017: The state of the world’s Human Rights, 22 February 2017. Retrieved from <https://www.amnesty.org/en/documents/pol10/4800/2017/en/>.

ing a 'coherent nationalist narrative'.¹⁰⁵ A generalized distrust towards national and European authorities creates the impression that it is 'common sense' to fear, exclude and reject the incoming populations; that is, it is justified to keep them away, treat them as the 'Others'. In any case, arguments in favour of non-tolerating migrants can be presented as apolitical reactions towards an 'objective' reality.

11.4 CONCLUSION

In the previous pages I attempted a two-dimensional analysis. On the one hand, I delved into the inherent systemic flaws of the policy and legal framework regarding the 'refugee crisis' as revealed after 2015 – invoking the macro/meso-level. On the other, by referring to the 'old habits' of the Greek society, as well as the Greek political elite and institutions, I tried to explain how xenophobic and exclusive attitudes constitute the default position of the Greek people, based on cultural and historic presuppositions – hence invoking the meso/micro-levels. My goal was to pinpoint how the diverse components of the so-called refugee crisis are becoming evident in the Greek society – namely how the persistent shortcomings in the policy and management domain interact with already existing societal fears and hostilities, and manifest in the numerous challenges that Greece is currently facing, while the country is moving in the third year of significant incoming flows. The aforementioned issues and occurrences stand as the quintessence of the discussion this contribution hopes to raise. The weaknesses and deficiencies reported in the policy framework coupled with management challenges give the impression that the crisis is a 'refugee crisis', a crisis, thus, that can be attributed to the people who arrive, instead of the laws that try to halt or regulate their mobility with limited success and through questionable means. The legal framework is irrevocably connected to and deeply affects the discourses on fears, hostilities and (in)securities 'with the unsettling effect that what should be a reference point becomes blurred and contaminated with uncertainty'.¹⁰⁶ This uncertainty bears increased significance when the blurring happens in a time of crisis. Because if the laws and the policies are failing to address the challenges, then other, less 'noble' or peaceful methods of handling shall appear, vying for legitimacy, stirring lower instincts and claiming urgency. In the current crisis, intolerance appears to be also rooted in the realization that the legal framework is not competent, or even that it becomes asymmetric and imbalanced, silently accepting that some countries have a worse fate than others.

¹⁰⁵ Triandafyllidou & Kouki, *supra* note 72, p. 722.

¹⁰⁶ Codrea, *supra* note 3.

REFERENCES

- Aas, K. F., “‘Getting ahead of the game’: Border technologies and the changing space of governance”, *Global Surveillance and Policing: Borders, Security, Identity*, 2005, pp. 94-214.
- Bail, C. A., “The configuration of symbolic boundaries against immigrants in Europe”, *American Sociological Review*, Vol. 73, No. 1, 2008, pp. 37-59.
- Barker, V., “Global mobility and penal order: Criminalizing migration, a view from Europe”, *Sociology Compass*, Vol. 6, No. 2, 2012, pp. 113-121.
- Blumer, H., “Race prejudice as a sense of group position”, *Pacific Sociological Review*, Vol. 1, No. 1, 1953, pp. 3-7.
- Cheliotis, L. K., “Behind the veil of philoxenia: The politics of immigration detention in Greece”, *European Journal of Criminology*, Vol. 10, No. 6, 2013, pp. 725-745.
- Christodoulou, Y., Papada, E., Papoutsi, A., & Vradis, A., “Crisis or Zemblanity? Viewing the ‘Migration Crisis’ through a Greek Lens”, *Mediterranean Politics*, Vol. 21, No. 2, 2016, pp. 321-325.
- Christopoulos, D., *Who is Greek citizen* (translated from Greek), Athens, Vivliorama, 2012.
- De Giorgi, A., “Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe”, *Punishment & Society*, Vol. 12, No. 2, 2010, pp. 147-167.
- Eliasoph, N. & Lichterman, P., “Culture in interaction”, *American Journal of Sociology*, Vol. 108, No. 4, 2003, pp. 735-794.
- Ellinas, A. A., “The rise of Golden Dawn: The new face of the far right in Greece”, *South European Society and Politics*, Vol. 18, No. 4, pp. 543-565.
- Franko Aas, K., “Analysing a world in motion: Global flows meet criminology of the other”, *Theoretical Criminology*, Vol. 11, No. 2, 2007, pp. 283-303.
- Halikiopoulou, D., *Patterns of secularization: Church, state and nation in Greece and the Republic of Ireland*, Farnham, Ashgate Publishing, Ltd., 2011.

Habermas, J., "What does a crisis mean today? Legitimation problems in late capitalism", *Social Research*, 1973, pp. 643-667.

Hayward, K., *City limits: Crime, consumer culture and the urban experience*, London, Routledge, 2004.

Karyotis, G., "European migration policy in the aftermath of September 11: The security-migration nexus", *Innovation*, Vol. 20, No. 1, 2007, pp. 1-17.

Karyotis, G., "Securitization of migration in Greece: Process, motives, and implications", *International Political Sociology*, Vol. 6, No. 4, 2012, pp. 390-408.

Karyotis, G., & Patrikios, S., "Religion, securitization and anti-immigration attitudes: The case of Greece", *Journal of Peace Research*, Vol. 47, No. 1, 2010, pp. 43-57.

Kiprianos, P., Balias, S., & Passas, V., "Greek policy towards immigration and immigrants", *Social Policy & Administration*, Vol. 37, No. 2, 2003, pp. 148-164.

Lamont, M., & Molnár, V., "The study of boundaries in the social science", *Annual Review of Sociology*, Vol. 28, No. 1, 2002, pp. 167-195.

Lappi-Seppälä, T., "Penal policy in Scandinavia", *Crime and Justice*, Vol. 36, No. 1, 2007, pp. 217-295.

Lappi-Seppälä, T., "Trust, welfare, and political culture: Explaining differences in national penal policies", *Crime and Justice*, Vol. 37, No. 1, 2008, pp. 313-387.

Michalowski, R. J. & Kramer, R. C., "The space between laws: The problem of corporate crime in a transnational context", *Social Problems*, Vol. 34, No. 1, 1987, pp. 34-53.

Papakostas, A., "Why is there no clientelism in Scandinavia? A comparison of the Swedish and Greek sequences of development", *Clientelism, interests, and democratic representation: The European experience in historical and comparative perspective*, 2001, pp. 31-53.

Papastergiadis, N., *The turbulence of migration, Globalization, deterritorialization and hybridity*, Oxford, Polity Press, 2000.

Pappas, T., *Making party democracy in Greece*, Berlin, Springer, 1999.

VASSILIS GERASOPOULOS

Passas, N., "Globalization, criminogenic asymmetries and economic crime", *European Journal of Law Reform*, Vol. 1, 1999, pp. 399-424.

Sassen, S., *Territory, authority, rights: From medieval to global assemblages*, Princeton, Princeton University Press, 2008.

Simon, J., "Governing through Crime", *The Crime Conundrum: Essays in Criminal Justice*, Boulder, Westview Press, 1997, pp. 171-189.

Swarts, J., & Karakatsanis, N. M., "Challenges to desecuritizing migration in Greece", *Journal of Balkan and Near Eastern Studies*, Vol. 15, No. 1, 2013, pp. 97-120.

Triandafyllidou, A., "National identity and the 'other'", *Ethnic and Racial Studies*, Vol. 21, No. 4, 1998, pp. 593-612.

Triandafyllidou, A., "The political discourse on immigration in southern Europe: A critical analysis", *Journal of Community & Applied Social Psychology*, Vol. 10, No. 5, 2000, pp. 373-389.

Triandafyllidou, A., "Greek immigration policy at the turn of the 21st century. Lack of political will or purposeful mismanagement?", *European Journal of Migration and Law*, Vol. 11, No. 2, 2009, pp. 159-177.

Triandafyllidou, A., & Veikou, M., "The hierarchy of Greekness: Ethnic and national identity considerations in Greek immigration policy", *Ethnicities*, Vol. 2, No. 2, 2002, pp. 189-208.

Triandafyllidou, A., & Gropas, R., "Constructing difference: The mosque debates in Greece", *Journal of Ethnic and Migration Studies*, Vol. 35, No. 6, 2009, pp. 957-975.

Triandafyllidou, A., & Kouki, H., "Muslim immigrants and the Greek nation: The emergence of nationalist intolerance", *Ethnicities*, Vol. 13, No. 6, 2013, pp. 709-728.

Wacquant, L., "Suitable enemies' foreigners and immigrants in the prisons of Europe", *Punishment & Society*, Vol. 1, No. 2, 1999, pp. 215-222.

Walters, W., "Secure borders, safe haven, domopolitics", *Citizenship Studies*, Vol. 8, No. 3, 2004, pp. 237-260.

Young, J., *The exclusive society: Social exclusion, crime and difference in late modernity*, London, Sage, 1999.

Young, J., "Merton with energy, Katz with structure: The sociology of vindictiveness and the criminology of transgression", *Theoretical Criminology*, Vol. 7, No. 3, 2003, pp. 389-414.

Young, J., *The criminological imagination*, Cambridge, Polity Press, 2011.



12 SECURITIZATION AND MILITARIZATION OF MIGRATION MANAGEMENT IN EUROPE: THE CASE OF REFUGEE MIGRATION THROUGH SLOVENIA IN 2015/2016

Aleš Bučar Ručman

12.1 HOW MIGRATION BECAME A PRIMARILY SECURITY ISSUE?

One of the key characteristics of sovereignty is the right and power of the state to determine who is allowed to enter, cross and reside, even just for a short and limited period of time, on its territory. Migration laws and their enforcement have become, as described by Dauvergne,¹ ‘the last bastion of state sovereignty’. However, as Wallerstein² observes, all states are theoretically sovereign, though strong states intervene and pressure weaker ones into adopting decisions and policies that are mostly in the interest of strong states. Beside (in)direct interference in economic field, over the past two decades this has become obvious also in migration control. The West has ‘expanded its control activities into the international domain’³ and build a complex system for migration management. In this process core countries cooperate and externalize policing tasks to neighbours, regardless of their known violations of human rights and low standards.⁴ This is the response to extensive pressures on nation-states through globalization, its transnational advocates and beneficiaries, which have transformed the political process and also the concept of sovereignty in core countries. States have become ‘weak states’,⁵ in which economy is separated from disempowered politics and the role of states’ institution primarily focused on assuring just appropriate conditions for conduct of global business. However, there is a specific paradox – states are

1 C. Dauvergne, *Making people illegal: What globalization means for migration and law*, Cambridge, Cambridge University Press, 2008.

2 I. M. Wallerstein, *World-systems analysis: An introduction*, Durham, Duke University Press, 2006.

3 K. F. Aas, “The ordered and the bordered society: Migration control, citizenship, and the northern penal state”, in K. F. Aas, & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford: Oxford University press, 2013, pp. 21-39, p. 26.

4 M. Albahari, *Crime of peace: Mediterranean migrations at the world's deadliest border*, Philadelphia, University of Pennsylvania, 2015; R. Andersson, *Illegality, Inc.: Clandestine migration and the business of bordering Europe*, Oakland, University of California Press, 2014.

5 Z. Bauman, *Work, consumerism and the new poor*, Maidenhead, Open University Press, 2005.

becoming weaker, governance and regulatory intervention is decreasing, though at the same time the control and repressive role of the state is expanding. This condition, which Balibar⁶ calls ‘the syndrome of the impotence of the omnipotent’, demonstrates that we are not experiencing the ‘withering away of the state’, but the transformation of its sovereignty and its use of power.⁷ All above-mentioned characteristics reflect eloquently in (im)migration policies.

Under the influence of neoliberalism as ‘a hegemonic mode of discourse’⁸ and its unseparated companion globalization, the state is withdrawing from economics, labour market, social provisions, education, health care and guaranteeing safety and (personal) security⁹ and compensates this loss with the increased control and suppression of marginalized local populations and, ideally, marginalized ‘others’, that is, ethnic minorities, foreigners, migrant workers, ‘illegal’ immigrants, asylum seekers and refugees. They are the perfect victims, the embodiment of ‘generalized social insecurity’ produced by erosion and mutations of stable and homogenous wage work.¹⁰ When social ties and solidarity dissolve, institutional protective net widens, alienation increases, responsibility for future individualizes, inequality rises and simultaneously the short-term economic surplus gets accepted as the dominant indicator and measure of success. As concluded by Bauman¹¹ in the case of influx of refugees in 2015 and 2016, existential frailty and precariousness of the local population is met with signs of additional competition on the labour market, increased uncertainty and no prospects for improvement. In other words, in these circumstances – described by a known statement of former UK Prime Minister and an advocate of neoliberalism, Margaret Thatcher – where there is “no such thing as society”, people protest against new participants in the society and local population show hardly any solidarity with them.

Compensation and diversion of attention towards constructed images of crime and threats to security are used to provide pretence of the legitimacy of state power and authority¹² and represent a response to the ‘perception of lost control over policy initiatives

6 E. Balibar, *We, the people of Europe? Reflections on transnational citizenship*, Princeton, Princeton University Press, 2004.

7 See K. F. Aas, *Globalization and crime*, London, Sage, 2007, pp. 130-149.

8 D. Harvey, *A brief history of neoliberalism.*, Oxford, Oxford University Press, 2007, p. 3.

9 Balibar, *supra* note 6; U. Beck, *What is globalisation?* Cambridge, Polity Press, 2000; Z. Bauman, *Globalization. The Human Consequences*, Cambridge, Polity Press, 1998; Bauman, *supra* note 5; Z. Bauman, *Strangers at Our Door*, Cambridge, Polity Press, 2016; Harvey, *supra* note 8.

10 L. Wacquant, *Punishing the poor: The neoliberal government of social insecurity*, Durham, Duke University Press, 2009, p. 5.

11 Bauman, 2016, *supra* note 9, p. 4.

12 L. K. Cheliotis, “The limits of inclusion: Globalization, neoliberal capitalism and state policies of border control” in L. Weber (ed.), *Rethinking border control for a globalising world: Rethinking globalizations*, London, Routledge, 2015, pp. 33-43.

in other areas'.¹³ This 'massive expansion of the penal fist ... is the bureaucratic response of political elites'¹⁴ to describe transformations of the state and new *de facto* conditions of sovereignty. Intensified border surveillance and division between 'us' and 'them' brings to the fore not only exclusion, but also works as a measure of community building, governance, a tool for intensified integration of the EU and creation of supranational structures and cooperation.¹⁵ The fight against the constructed image of a threat brings people together in a common defence and reconstitutes the idea of state's sovereignty and legitimization of control and disciplinary powers – in the first step over immigrants, refugees and asylum seekers and in the next one over local proletariat.¹⁶ In this way power holders use a simple magician's trick of diverted attention – they direct it away from all structural problems of neoliberal globalization, and instead of focusing on this malignant problem, they put under the spot lights various benign acts of powerless individuals.¹⁷ These 'suicidal policies, store up explosives for future detonation'¹⁸ and are the easiest, though short-sighted method of governance. According to Rahola,¹⁹ xenophobic nationalism unexperienced in Europe since the 1930s – and additionally exacerbated within few years after Rahola's conclusion – has much to do with elites promoting the division along the ethnic rather than class lines. In other words, it is a part of a Machiavellian divide-and-rule approach, where it is better to keep the local masses on your side, and this can be easily done by (ab)using national and ethnic identities and scapegoating the whole groups of 'others'.

Policy making has become populist and supported by provoked and frightened public. There are differences among countries, though the general trend can be concluded and this one is flagrant in the case of tightened crime control and criminal policy,²⁰ on the one hand, and stricter immigration policy and control, on the other. It is far from a coincidence that there is a significant overlap between these two spheres. Aas²¹ observes that we are experiencing the fragmentation and partial dissolving of the national penal domain, and simultaneously the novel configurations of the penal domain are being created. This amalgamation of internal and external, national and global, ordered and bordered, reflects

13 Dauvergne, *supra* note 1 2008.

14 Wacquant, 2009, *supra* note 10, p. 6.

15 K. F. Aas, "'Crimigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance", *Theoretical Criminology*, Vol. 15, No. 3, 2011, pp. 331-346, p. 334.

16 Z. Kanduč, Kriminološki pogled na svobodo in varnost v. *postmoderni družbi*. *Revija za kriminalistiko in kriminologijo*, Vol. 58, No. 3, 2007, pp. 231-245.

17 R. Michalowski, "Security and Peace in the US–Mexico Borderlands" in L. Weber (ed.), *Rethinking border control for a globalizing world: Rethinking globalizations*, London, Routledge, 2015, pp. 44-63.

18 Bauman, 2016, *supra* note 9, p. 18.

19 F. Rahola, 'The Detention Machine', in P. Salvatore (ed.), *Racial Criminalization of Migrants in 21st century*, Burlington, Ashgate, 2011, pp. 95-106.

20 See D. Garland, *The culture of control: Crime and social order in contemporary society*, Oxford, Oxford University Press, 2001; L. Wacquant, *Prisons of poverty*, Minneapolis, University of Minnesota, 2009.

21 Aas, *supra* note 3.

the global conditions, including global inequality and the corresponding power play reaction of the West to these challenges.²²

The merger of criminal and immigration legislation and their enforcement reflects plainly in the neologism coined by Stumpf²³: ‘cimmigration’. However, it is important to understand the connection and relationship between migration, crime, security and control in a broad context, which goes beyond the legal, criminal law perspectives and includes all other non-criminal aspects.²⁴ It is in this vein that Melossi²⁵ argues that the ‘degree of criminalisation of migrants became a function of attitudes towards them, legally, economically, socially and culturally’. Guilt and responsibility for various threats to cultural existence, security, safety, welfare state, economy, public health, etc. is often attributed to immigrants, asylum seekers and refugees – in the case of refugees arriving to Europe in 2015/2016, even surprisingly by some otherwise critical and progressive academics,²⁶ who preach about cultural incompatibility and reaffirm stereotypes about ‘them’. Refugees are removed from the political field and treated as an abstract category, some sort of mass without differences – ‘collective dangerous force’²⁷ – which represents ‘a security threat that is approaching external E.U. border’.²⁸ Migrants have become a perfect surrogate victim, an object for sacrifice with the purpose of keeping the communal unity.²⁹

12.2 MIGRATION MANAGEMENT IN THE 21ST-CENTURY EUROPE

A closer look at migration management reveals that immigration is not considered unwanted, unpleasant and therefore banned per se. Cohen³⁰ shows that the modern state differentiates between various groups of international migrants and allows, even encourages them like experts, to come. Furthermore, it includes them into the body politics, granting them civic and social rights, though at the same time excludes others. This exclusion is done in the most intolerant way, with an imposition of relentless requirements on immi-

22 Id.

23 J. Stumpf, “The cimmigration crisis: Immigrants, crime, and sovereign power”, *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419.

24 See M., Bosworth, & M. Guild, “Governing through migration control: Security and citizenship in Britain”, *British Journal of Criminology*, Vol. 48, No. 6, 2008, pp. 703-719; E. Kaufman, “Hubs and spokes: The transformation of the British Prisons”, in K. F. Aas, & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford, Oxford University Press, 2013, pp. 166-182.

25 D. Melossi, *Crime, punishment and migration*, London, Sage, 2015, p. xi.

26 For example, S. Žižek, *Against the double blackmail: Refugees, terror and other troubles with the neighbors*, London, Allen Lane, 2016.

27 J. Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, London, Routledge, 2006.

28 Andersson, *supra* note 4, p. 68.

29 Z. Bauman, *Liquid modernity*, Cambridge, Polity Press, 2006.

30 R. Cohen, *Migration and its enemies: Global capital, migrant labour and the nation-state*, Vurlington, Ashgate, 2006, p. 149.

grants,³¹ which often force people into immigration ordeal. One of the paradoxes of contemporary immigration policies is the flagrant contradiction governments face – on one side there is an impulse towards increased securitization of borders and on the other side are requirements of globalization and capitalist economy with pressures for free global flows.³² States try to fulfil the needs and requests of local economy and labour market for various profiles of legal and even ‘illegal’ migrant workers³³ and, of course, global consumers, investors and businessmen. Therefore, the role of the whole system for the management and control of migration is firstly the categorization of the population of ‘would be immigrants’ and their selection or, as Weber and Bowling³⁴ call it, ‘social sorting’.³⁵ The aim is ‘to control, select, and govern at a distance specific categories of people’.³⁶ Immigration management system filters among globally mobile and desired ‘tourists’ and undesired waste of the world, ‘vagabonds’³⁷ – or as Katja Franko Aas³⁸ puts it ‘bona fide travellers’ and ‘crimmigrants’. The whole system which operates at the various levels, and its final instance for selection, that is, borders, ‘have a function of a membrane which allows global flows to get through, but which keeps the unwanted ‘residue’ out’.³⁹

31 See K. Bade, *Migration in European history*, Malden, Blackwell Publishing, 2005.

32 L. Weber, & B. Bowling, “Valiant beggars and global vagabonds: Select, eject, immobilize”, *Theoretical Criminology*, Vol. 12, No. 3, 2008, pp. 355-375, p. 361.

33 See Albahari, *supra* note 4; A. Bučar Ručman, *Migracije in kriminaliteta: pogled čez meje stereotipov in predsodkov*. Ljubljana: Založba ZRC SAZU, 2014; A. De Giorgi, “Immigration control, post-fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe”, *Punishment & Society*, Vol. 12, No. 2, 2010, pp. 147-167; L. K. Cheliotis, “The limits of inclusion: Globalization, neoliberal capitalism and state policies of border control”, in L. Weber (ed.), *Rethinking border control for a globalising world: Rethinking globalizations*, London, Routledge, 2015, pp. 33-43.

34 Weber & Bowling, *supra* note 32, p. 360.

35 Hungary, a EU member state which in 2015 took a radical approach in to the prevention of entries and crossing of its territory to refugees, represents a quintessential hypocrisy of EU principles in control and selection in international migration and migrants. At the same time when refugees were depicted in public as a national security threat, terrorists, danger to European Christian culture, with their travel criminalized and penalized, and in the end when they were locked out by a fence and military patrols, the Hungarian government advocated “The Hungarian Investment Immigration Program” (Hungarian Government, 2017). As one of the designated companies that provides the service of organization organizing of the documents for this programme puts it, it is “the fastest track and the easiest way in the world to obtain lifelong permanent residence permit” and in addition it is not just for one person, but it includes “your dependent children and your dependent parents”. A person “only” needs €300,000 Euros for investment in Special Hungarian Government Bonds and €60,000 Euros for administrative fee (which differs among companies) or “only” €185,000 Euros for one-time non-refundable payment. And as the final comment says, “This is the cheapest offer in Europe”, which enables ensures that “you can freely travel within Schengen countries without visa and border control” (Residency Bond program, n.d.).

36 De Giorgi, 2010, *supra* note 33, p. 151.

37 Bauman, 1998, *supra* note 9.

38 Aas, 2001, *supra* note 15.

39 Aas, 2007, *supra* note 7, p. 33.

The idea of securitization of migration is built on the conviction that uncontrolled migration leads to social breakdown and therefore has to be prevented.⁴⁰ The system of refugee protection, which was created under the influence of bitter experiences of World War II and with the dedication of international community to prevent similar atrocities in the future, is dissolving in front of our eyes and reached the nadir in 2015 with the EU's reaction towards refugees mainly from Syria, Iraq and Afghanistan. It is becoming obvious that there are two worlds – the one of included people and the other of excluded ones. The mechanisms of otherness⁴¹ and dehumanization⁴² provide an alibi for the absence of moral obligation of much better-off Europeans to help another human. In the period post-9/11 and other terrorist attacks in the West, a new category of perfect victims for stigmatization and labelling appeared, that is, Muslim immigrants (including refugees) and their offspring. The reaction of states and the measures taken with the war on terror also influenced the public depiction of migrants. This time refugee migration is not considered only as way in for bogus asylum seekers, who are seen as social freeloaders, threat to native's jobs and wages, but is being commonly portrayed even as a route to the EU for extremists and terrorists.⁴³ Refugees are excluded from the category of 'legitimate human-rights holders'⁴⁴ and transformed into the category Agamben⁴⁵ described as *homini sacri*. This gradual though constant increase in intolerance, power abuse and deception of people through the policy of securitization leads to legitimation and reduplication of violence and belligerent behaviour from the top down (e.g. even in rising numbers of attacks on refugees, their homes, refugee centres and mosques in Germany in 2015/2016).⁴⁶

The consequences of these attitudes towards immigration and immigrants, the populist abuse of the issue for political gain and corresponding changes in policies are evident in the appearance of specific confined spaces, which I name *global* and *local total institutions*. They resemble the spirit and even appearance of Goffman's⁴⁷ total institutions. Locked doors, high fences, barbed wire and corresponding processes typical for Goffman's total institutions could also refer to the description of fenced external borders of the EU and

40 S. D. Watson, *The securitization of humanitarian migration: Digging moats and sinking boats*, New York, Routledge, 2009.

41 Cohen, *supra* note 30.

42 Bauman, 2016, *supra* note 9.

43 See Bosworth & Guild, *supra* note 24.

44 Bauman, 2016, *supra* note 9, p. 86.

45 G. Agamben, *Homo sacer: Sovereign power and bare life*, Stanford, Stanford University Press, 1998.

46 Bundeskriminalamt, *Kriminalität im Kontext von Zuwanderung: Kernaussagen*, 2016. Retrieved from https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/kernaussagenZuKriminalitaetImKontextVonZuwanderung.pdf?__blob=publicationFile&v=16; A. Kreuzer, "Fluchtlinge und Kriminalität: Angste – Vorurteile – Fakten", *Kriminalistik*, Vol. 7, 2016, pp. 445-450, p. 446.

47 E. Goffman, *Asylums: Essays on the social situation of mental patients and other inmates*, London, Penguin Books, 1961.

since 2015 also borders between EU member states (Hungary/Croatia; Slovenia/Croatia). Furthermore, as prisons, detention centres for asylum seekers and illegal immigrants, and refugee centres have become a fundamental element of contemporary immigration policies and their enforcement, this correlation appears even in a direct line. The primary task of this system is exclusion and ban-optic.⁴⁸ The idea is to ‘keep away undesirables and foreigners of all kinds – refugees, displaced, “rejected”⁴⁹ or, to use Bauman’s⁵⁰ terms, to exclude and lock out ‘human waste or wasted humans’. The global mobility of economically deprived groups (classes) is limited by immigration policies and also by economic and social capital.⁵¹ It is obvious that the poorest people do not even have the possibility to leave the global total institutions. The situation with Syrian, Iraqi and Afghanistan refugees who entered the EU smuggled on boats from Turkey to Greek islands passing the Balkans and Slovenia represents a direct conformation of this conclusion. People who did not have at least €3,000 were immobilized at the beginning and could not even start their journey.⁵²

12.3 REFUGEE MIGRATION THROUGH SLOVENIA, 2015/2016

The war in Syria and in parts of Iraq triggered the biggest refugee migration in Europe after World War II. Until March 2014 the cumulative number of Syrian asylum applicants in 38 European countries had not reached over 100,000 people, though only in three years the number surpassed 930,000, with the biggest increase in summer 2015. Most applications for asylum in European countries were filed in Germany (0.5 million) and Sweden (0.1 million).⁵³ Various explanations try to give an insight into why this increase happened in 2015. Battjes et al.⁵⁴ suggest that this is the result of co-influence of the European prohibi-

48 D. Bigo, “Security, exception, ban and surveillance”, in D. Lyon (ed.), *Theorizing surveillance: The panopticon and beyond*, Cullompton, Willan Publishing, 2006, pp. 46-68.

49 M. Agier, *Managing the undesirables: Refugee camps and Humanitarian Government*, Cambridge, Polity Pres, 2011, p. 4.

50 Bauman, *supra* note 5.

51 S. Castles, & M. J. Miller, *The age of migration: International population movements in the modern world*, New York, Palgrave Macmillan, 2009, p. 56.

52 The conclusion is based on the data gathered in conversations/interviews with refugees at various posts in Slovenia in the period from October to December 2015 (documented in field notes made by the author). Refugees described their journeys on sea and land, and explained that they had to pay 1,000-1,200 euros per person (with a chance of 50% discount for children) only to get on a boat from Turkey to Greece. In addition, they were paying hundreds of euros for ferries, trains, taxis, bribes to guards and other authorities, food and water, etc. They estimated the whole trip from Syria costed thousands of euros, whereas people from Iraq and Afghanistan spent an additional 1,000–2,000 euros.

53 UNHCR. Europe: Syrian Asylum Applications, 2017. Retrieved from <http://data.unhcr.org/syrianrefugees/asylum.php>.

54 H. Battjes, E. Brouwer, L. Slingenbergh, & T. Spijkerboer. The crisis of European refugee law: Lessons from lake success, 2016. Retrieved from <http://christenjuristen.nl/wp-content/uploads/2016/05/H.-Battjes-E.-Brouwer-L.-Slingenbergh-T.-Spijkerboer-The-Crisis-of-European-Refugee-Law.pdf>.

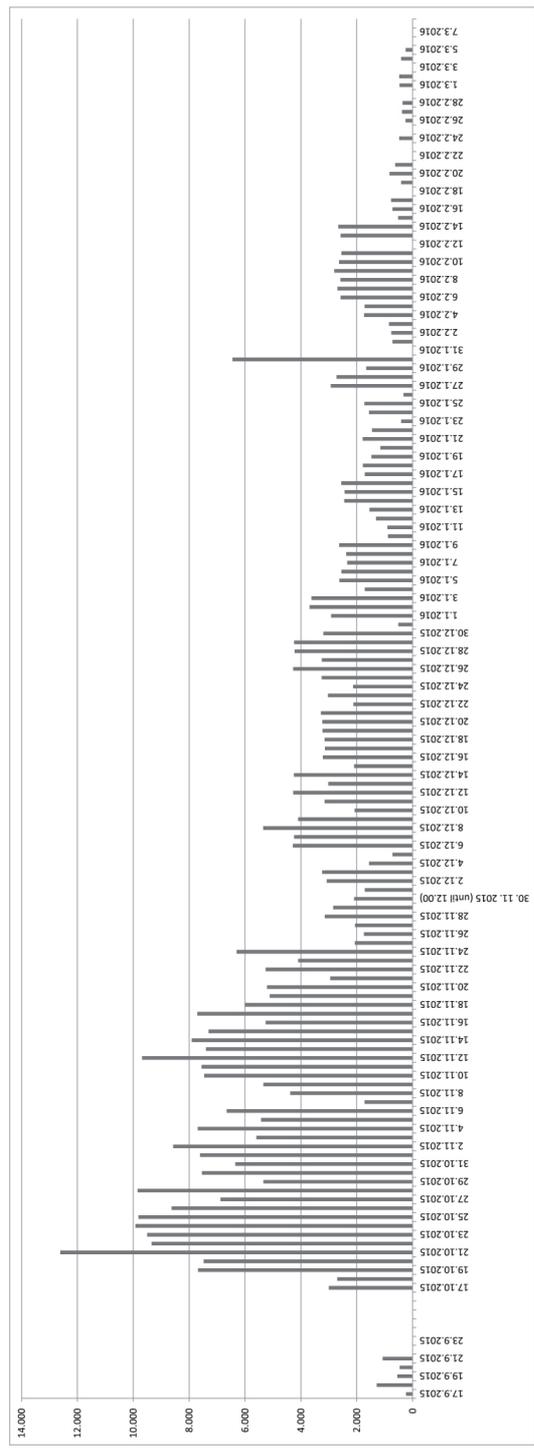
tionist approach to refugee migration, the absence of credible global resettlement programme and the lack of acceptable living conditions and no future prospects for refugees in the region of the conflict. These conclusions can be extended with the data gathered from the conversations with refugees passing through Slovenia, which corroborate the migration network theory.⁵⁵ First refugees, who successfully applied for asylum in Europe, took the biggest risk confronting the unknown situations during their travel and after arrival to destination countries. Then they spread information to their relatives, friends and the wider community. Beyond this point migration became self-perpetuating. Furthermore, people were – or at least they understood that they were – even encouraged to come to Germany. All these conclusions have to be reflected also through the political perspective, understanding the specific motivation of the Turkish government to use refugees and other migrants as a biopolitical tool and leverage for negotiations with the EU, the inability and lack of motivation of economically devastated and institutionally weakened Greece to perform the role of first-line selection and guard on behalf of the whole EU and of course the inability of the EU to act as a collective.

The journey of refugees and other migrants to northern European countries included the use of smugglers who transported people on boats from Turkey to Greek islands. After this risky, perilous and often deathly travel, the doors to northern countries were opened (at least until March 2016). It became obvious that they can come to Europe, but firstly they ‘only’ need to risk their lives on sea and secondly struggle on a road, undergo difficulties and also humiliation at check points for the next thousands of kilometres. Since the summer of 2015 until spring 2016 refugees from Syria, Iraq and Afghanistan – joined later by other migrants from Egypt, Morocco, Lebanon, Somalia and Eritrea⁵⁶ – came to Central and Northern European countries through Turkey, Greece, FYR of Macedonia, Serbia, Hungary, Austria and Germany. When Hungarian authorities finished building its fence along the whole border with Serbia in mid-September 2015, the migration flow redirected to Croatia and from there to Hungary and further on to Austria. In mid-October 2015 the Hungarian government fenced its border with another country, a EU member state, Croatia. From that moment on, this migration route went almost exclusively through Croatia, Slovenia and Austria. In nearly six months, over 476,000 migrants travelled through Slovenia to Austria (see Figure 1).

55 See D. S. Massey, J. Arango, G. Hugo, A. Kouaouci, A. Pellegrino, & E. J. Taylor, “Theories of international migration: A review and appraisal”, *Population and Development Review*, Vol. 19, No. 3, 1993, pp. 431-466.

56 Government of the Republic of Slovenia, *Informacija o veljavni evropski zakonodaji, bilateralnih sporazumih in nacionalni zakonodaji, ki določa obravnavo tujcev, ki na ozemlje RS vstopijo nezakonito ter njenem izva-
janju*, 2016. Retrieved from www.vlada.si/fileadmin/dokumenti/si/sklepi/seje_vlade_gradiva/dublin_6.69mnz.pdf; Battjes *et al.*, *supra* note 54.

Figure 1 Number of migrants arriving to Slovenia (source: Slovenian Police, 2016)⁵⁷



When people already managed to pass many borders, and found their way to the EU, it became clear that even bigger and stronger EU countries cannot prevent this massive migration without directly violating human rights and causing humanitarian catastrophe at their borders and on their territory. It became obvious that the complex migration management system is capable of controlling, selecting and deterring only when dealing with individuals or smaller groups. In the words of a senior representative of Slovenian police and later the chairman of Frontex's management board, Marko Gašperlin, when answering to the question if the Slovenian police is implementing Schengen rules on its border in October 2015⁵⁷:

Yes and no. Regarding regular crossings of the border, border control on the border crossings, it is all done according to regulations ... My no refers to, I might say, rather organised arrival of migrants to Slovenia or through Slovenia, almost all more or less in transit through Slovenia and further to Austria and other countries of Western Europe. ... It is not possible to precisely implement Schengen rules without causing serious humanitarian catastrophe

It was at this point in October 2015 when I started with my field research. I visited all locations (used at the time of research) connected to refugee migration in autumn/winter 2015/2016 (border crossings, registration and reception centres, temporary accommodation centres). After receiving an authorization from the Administration for Civil Protection and Disaster Relief, I went to nine locations, some of them on multiple occasions, spent hours conducting interviews/conversations and gathered data through participant observation. I talked to various individuals: heads of refugee accommodation centres, members of civil protection, police officers, custom officers, soldiers, technical support staff, medical staff, volunteers from different NGOs (Red Cross, Slovenska filantropija, ADRA, etc.), UNHCR representatives, 'uninstitutionalised' volunteers, journalists, photo reporters and, of course, refugees. I put down direct observations in a diary, recorded them on a dictaphone and created a photographic archive. Each evening after returning from the field, I wrote an entry into my research diary. I also followed and analysed various discourses connected to the refugee migration through Slovenia (political, media and civil society discourse, cyberspace and social media discourse) and placed them into a wider sociocultural frame and practice. The basic aim of this research has been the analysis of the reaction of Slovenian

57 According to Slovenian government 2016 and Slovenian Police, *Archive of press releases in connection with current migration flows*, 2016. Retrieved from www.policija.si/eng/index.php/component/content/article/6-bordermattersandforeigners-/1917-archive-of-press-releases-in-connection-with-current-migration-flows; Slovenia was a transit country for the vast majority of people (almost all who entered also exited the country in a couple of days).

58 *Odmevi* [Video file]. 2015, November 23. Retrieved from <http://4d.rtvsllo.si/arhiv/odmevi/174373053>.

society and especially the powerholders to the arrival of refugees and migrants at our borders. I focused on the use of power and the process of control of people arriving to Slovenia and by this I examined and contested the way power – or to be precise, violence – has been used.

After the initial chaotic situation and the lack of cooperation between Croatia and Slovenia in a period of approximately one week (until 27 October 2015), which resulted in hundreds of people crossing the ‘green border’, walking through fields,⁵⁹ the situation changed and a *de facto* corridor was established. People arrived to Slovenia by trains and sometimes by buses, got registered at registration centres or at temporary accommodation centres (their names and (sometimes) photographs were taken) and left Slovenia through three exit points on the northern border with Austria (Šentilj/Spielfeld; Gornja Radgona/Bad Radkersburg; Jesenice, Karavanke/Rosenbach). Until December 2015 Austria accepted all people who entered through the organized corridor (and all individual attempts were rejected and people placed inside of a corridor), but then they started to use interpreters for the selection and verification of personal information given by the people without documents. This was the first stage of gradual closure of the corridor, at the beginning of March 2016, with intensified control at FYR of Macedonia and with implementation of the EU’s deal with Turkey.

12.4 *SECURITIZATION AND MILITARIZATION OF MIGRATION CONTROL IN SLOVENIA*

When higher numbers of refugees arrived to Slovenia in October 2015, the authority’s perception of situation changed rapidly. It was above all considered to be security/safety threat and not a humanitarian issue. This led to the use of restrictive and authoritarian measures by the government and exploitation of the situation by various political decision makers, opinion leaders and the media. It was the unequivocal example of securitization and militarization of (refugee) migration management which in the end caused moral panic. The control over people who were in majority fleeing war and violence⁶⁰ was immediately taken over by the police and military. Already at the beginning a clear demonstration of power was seen on the symbolic level by the deployment of riot police units, soldiers with machine guns and for a short period even armoured vehicle. In just four days, the government proposed and the National Assembly adopted Amendments

59 This information was confirmed not only by the Slovenian government, but also by the people with whom I talked on the field just two or three days after the last incident (Red Cross volunteers, representatives of NGOs, locals).

60 Official statistic of the government of the Republic of Slovenia (2016) reveals that among people passing through Slovenia from 17 October 2015 to 25 January 2016, 45% had Syrian citizenship, 30% Afghanistani, 17% Iraqi, 1% Pakistani and 7% other countries. 48.7% of all were adult men and 51.3% women and minors.

to the Defence Act of 2004 (2015), granting specific police powers connected to border control also to the army.⁶¹ Furthermore, people who were passing only through Slovenia could not move freely outside of guarded premises or means of transport, although some of them – at least 144,588 (Government of the Republic of Slovenia, 2016a) – received the official document ‘permission to remain’, which formally allows them the right to free movement in Slovenia. In practice, all refugees during their stay in Slovenia were placed under control in conditions that resemble detention. They could not leave the premises, go to a local shop across the street to buy food and asked locals and volunteers, even me, to do that for them. People could pass through Slovenia only in an organized corridor. Even if they had resources to stay in a hotel, pay for bus or train tickets, they were not allowed to travel on their own. They had to follow the procedures inside of a corridor. To cap it all, people were guarded with greater strength and vigour than convicted criminals in prisons. Soldiers armed with machine guns were monitoring even the distribution of food and clothes and all of the time preventing people to leave centres. Although control was not the same in all centres (e.g. in one of the centres, there were no soldiers and only regular police officers; in another centre soldiers left their guns outside of the centre), the internalized control logic was identical. The following vignette based on my observation at a border checkpoint at the end of October 2015 captures the atmosphere at that time.

The train with approximately 1000 refugees arrived some minutes before 4.00 PM from Croatia to Dobova border checkpoint. At the platform, there were Croatian police officers, Slovenian regular police officers and riot police units, armed Slovenian soldiers, Red Cross volunteers, translator, journalists. Practically all of us were wearing respiratory masks. Each time when I took it down only for a short, I was warned by somebody that I have to use it, because we do not know what kind of diseases migrants might have. All of refugees were moved from Croatian train, coach by coach, to the other side of the platform where Slovenian train was already waiting. After exiting the train, security check was performed, and then they got food and water supplies and boarded Slovenian train. At the beginning everything ran smoothly, though rather fast this lead to a commotion. People did not queue right, waited when they were supposed to walk, walked when they should stop, could not board the train fast enough etc. Some police officers got nervous and started to yell at people,

61 The amendment was passed in an expedited legislative procedure, despite the fact that army already had legal grounds for cooperation with police in border protection tasks in the Defence Act from 2004. There was political consensus among the government and opposition – only one small left-wing political party (Združena Levica) voted against this amendment. However, because of referendum initiative and constitutional court complaint, the Act *commenced only two months after it was passed in the National Assembly. Therefore, almost all observation on the field includes procedures soldiers performed under authorization of the Defence Act 2004.*

sometimes in Slovenian language, sometimes in English, sometimes one could hear them scream 'yalla, yalla, yalla'. On the other side were people, a lot of them women and children, the youngest I saw on that occasion only three days old, who looked confused and exhausted. They were often pointing with their hands on other people and repeated the word 'family, family'. They did not want to get separated from them, although this happened frequently. When the coach on the Slovenian train was full, all compartments and all corridors jam-packed, police officers exited the coach and locked all doors from the outside. There was no going out four hours until the train arrived to Šentilj. The procedure was repeated with the next coach, and so on to the end of the train. A common question which could be heard in discussion among police officers was 'how many pieces do you still have there?'. In this confusion I noticed a young girl leaning through the window, crying and waving to police officers, volunteers. Nobody noticed her. After almost an hour, she was still at the window. I decided to step out of researcher's shoes and asked Red Cross volunteer to check with her. With the help of translator, they found out she got separated from two of her children, and one of them was still breastfed. Translator and volunteer went from couch to couch, screaming the name Ahmed and his family name. They found young boy and his brother with their father, locked in another coach. They all tried to convince the police to unlock the coach and join them together, but it was worthless. In the end the Red Cross volunteer took situation in her own hands and passed both of babies to the mother through the window [*from the filed notes in the research diary of the author*].

The above story exemplifies that the perception of situation as a security threat dominated over the humanitarian agenda. All used measures and procedures internalized this perspective and reflected the rigid logic of bureaucracy. Everything was subordinated to the efficiency, defined by the speed of 'transport' through the country and tightness of the corridor, which was considered a guarantee for safety. Humanitarianism, sympathy and empathy were subordinated to the rules and orders. Refugees were perceived and portrayed as potentially dangerous and a possible threat of victimization of Slovenian citizens. Authorities used immobilization and isolation of refugees from the local population and their premises, which was supplemented by strict surveillance. In places where refugees had to pass through local areas, they were escorted by riot police units, placed in convoys of buses, accompanied (at least) at the beginning and the end by police vehicles with constantly flashing emergency lights. For some months, this was the sight one could spot daily on Slovenian roads and highways.

On the second level of securitization there was a conviction that refugees represent a possible threat to public health. The National Institute of Public Health (2015) issued news and briefings with warnings about reports from other countries about cases of hepatitis A, typhus, influenza viruses and skin diseases. Professionals and volunteers had to use protective respiratory masks and rubber gloves. One could easily tell the difference between refugee and others just by looking at people's faces. On all of the days at the field I spotted only one refugee wearing this kind of a mask, despite the fact that they were constantly in contact with others and placed in crowded trains, buses and tents. On many occasions people involved in the situation (police, soldiers, cleaners, volunteers) expressed to me their concerns about diseases incomers might bring to 'us'. The issue of health concerns reflected on the field and additionally characterized the perception of refugees as a threat – if not criminal, terrorist or cultural threat, then they 'have to' be a health threat.

The securitization and militarization was completely integrated into the management of migration and only rare individuals reasoned against the use of dubious repressive practices. Furthermore, most of the people I talked to expressed their support for the use of armed soldiers and strict policing. They argued – even developed a sort of myth, which I have heard being repeated at various places – 'these people are coming from countries with corrupted police, with whom they can bargain, but it is different with armed soldiers. Back home in their countries soldiers are inexorable and people respect them, because they have the authorisation for the use of extreme, even deadly, force'. Arguments supporting the use of the same threat from which people were actually running away were made without discomfort or second thoughts. This was a clear sign of normalization of securitization and militarization practices in migration management and in addition a proof of strict division between 'us' and 'them'. It was possible to see that refugees were far from being considered equal or, to be precise, those who deserve the same treatment as 'we'. This was obvious from the words people used when describing them to me, expressing disapproval of their 'unreasonable decisions', although each of them had a simple and logical explanation (e.g. why did they sleep outside of the heated tents [because they never knew when the next group could leave for Austria; therefore, they waited just next to the gates]; why did they move portable beds and put them all together [because they wanted to be close to other family members]).

A specific relationship and power relation was clear in the direct interactions between two groups – the controlled and the controllers. When the highly sophisticated filtering and deterrence mechanisms of post-panoptical migration management capitulated, authorities resorted to the 'good old' Foucauldian disciplinary power. It did not rest on direct violence – only rare individuals (soldiers or police officers) showed signs of Zimbardo's cowboy type of a guard – but it incorporated seemingly 'neutral', 'fair', 'rational', 'only possible' procedures and measures. It imposed disciplines and demanded self-discipline, subordination and obedience. The vignette below clearly demonstrates the disciplinary

power used in the Šentilj/Spielfeld accommodation camp and the procedure used for controlling people when they were crossing the border between Slovenia and Austria at the beginning of November 2015:

It was a cold day with the temperature around 5° C. The accommodation centre was crowded. Premises were monitored by riot police and soldiers, most of them wearing balaclavas and respiratory masks, and of course their regular equipment (armour, helmets, batons, armament etc.). Refugees were held in a fenced and guarded area where they had a possibility to stay in heated tents. However, since there was no system of informing people when they can leave this place and the gates opened totally randomly (when Austrian side gave a signal that people can cross the border), a lot of them waited outside, close to the exit. From there they walked to a space for which an epithet 'no man's land' was used. When I entered into this area, I had been warned by Slovenian soldiers that they do not intervene behind the gates and inside I am on my own. I observed the situation directly in this area and from the other side through the fence [which was on my next visits covered with white sheets blocking the view and one had to climb on higher ground to see behind]. People were 'trapped' in this area for hours, therefore some burnt woods, paper and plastic to keep them and especially the children warm. At the end of 'no man's land' some 30 Austrian soldiers armed with side guns controlled the situation. They used a specific measure to discipline people and supposedly prevent a stampede. Hundreds of people had to sit or kneel on the ground in dirt and rubble and wait until they were individually allowed to stand up and go through the gates. This was the procedure everybody, old, young, women, children had to follow. Austrian soldiers standing in front of people constantly yelled in English 'sit down, sit down'. Additional explanations were given in Arabic by one of bilingual Austrian soldiers. He was also the one who acted as a gatekeeper, allowing those, who obeyed and waited long enough to stand up and proceed to Austrian side. This permission was given by directly pointing at them or touching their shoulder. There was also a punishment for disobedience. If somebody stood up or tried to push his/her way through, he/she was forced to the ground, placed on a side, and had to wait for the next group. (from the field notes in the research diary of the author)

The most symbolic demonstration of securitization of humanitarian migration was the placement of razor wire fence along the entire border with Croatia. The message sent through this notorious installation has been contributing to the depiction of refugees as a dangerous threat. It imposes a strict demarcation between 'us' and 'them' and yells to

everybody that somebody unwanted, dangerous is coming and we 'have to' protect ourselves with the modern-day version of imperial limes. On the other side, the sight of the wire quietly but strongly passes the message to refugees that they are unwanted and that 'we' see them all – since the razor wire is not selective – as a threat. Furthermore, since this fence is placed on the border with another EU member state, it divides the European polity and implants the logic of separation and hostility instead of cooperation, unity and friendship. It contributes to the moral panic and leads to brutalization of relationships between 'us' and 'them'.

12.5 DIVIDED PUBLIC: FROM SUPPORT TO REFUGEES TO MORAL PANIC AND PROLIFERATION OF HATE

Political discourse and all repressive measures used by authorities, accompanied by the specific media discourse and voices in cyberspace, contributed to the creation of moral panic. Some politicians and opinion makers connected them with terrorism and spread fear about cultural occupation and islamization of Europe. Some of them used different rhetoric, though by juxtaposing the words and actions, the predominant securitization approach becomes clear. Mass media discourse – language, word phrases, propositions (e.g. 'river of refugees splashed in Slovenia', 'migration crisis', 'Slovenia can become a pocket for unwanted refugees'), video material and the amount of total airtime dedicated to this topic could not but trigger fear among the audience. Images of soldiers, riot police, masses of incoming people and the placement of barbed wired fence on the border with Croatia resembled a state of emergency and convinced people we are facing a specific threat. Political opposition never doubted the use of repressive institutions and border fence. All but one coalition of left-wing parties (Združena Levica) got into a race to the bottom with populist solutions, for example proposed confiscation of money and goods worth over €750 from refugees (National Assembly, 2016a) and the establishment of Slovenian National Guard (National Assembly, 2016b). Political discourse and policy-making decisions moved to the far right. The most symbolic conformation of this can be seen in the joint cabinet meeting of two governments – Slovenian and Hungarian – on 22 January 2016. It was a clear message of support to Victor Orban's hard-line approach in solving 'the migration problem'.

Described actions and approaches caused moral panic and unleashed enmity in parts of Slovenian society. It was not just fear of the unknown and different, but hate and bigotry which dominated among some groups. General public and cyber-public discourses were marked by extreme, though unprosecuted examples of hate speech, which was no more anonymous as in the past. People did not hide under nicknames, but used their full names and identifiable social media profiles to call for vigilantism, massacres, shooting of refugees

and even literally Nazi Germany's solutions, Auschwitz, Hitler, etc. Because there was no official response and prosecution to these malign actions, a group of activists launched a shame campaign and exposed authors of hate speech through the web page Zlovenia (Evilvenia) and put some homemade billboards at different places in Ljubljana's city centre. On the local level, demonstrations against the opening of temporary refugee accommodation centres appeared. Aside Slovenian slogans and banners, demonstrators also used the same ones as Pegida protestors in Germany ('Rapefugees not welcome'; 'Islamist not welcome'). People (even high school teachers) protested and petitioned against the placement of a smaller group of unaccompanied minors applying for asylum in one of the high school dormitories. Furthermore, in January 2016 a racist incident occurred at the mosque construction site in Ljubljana, where numerous pig heads and jars filled with blood were dumped during the night (*Islamska skupnost v. Sloveniji*, 2016). The increase in intolerance and the use of repressive measures also triggered reactions of the parts of civil society which expressed pro-refugee views, organized protests and placed installations opposing the securitization of migration and especially barbed wire fence. The division of public was clear in protests organized in the capital city, where on a couple of occasions, anti- and pro-immigration protests occurred on the same day just some metres apart (e.g. on 25 September 2015 and 27 February 2016). A similar conclusion could be made by observing a graffiti in Ljubljana. On one side, they read 'Cerar=Orban', 'Stop militarisation' and 'Refugees welcome' and, on the other side, 'No to islamization', 'Stop islam', 'Stop migration'.

12.6 CONCLUDING DISCUSSION

The transformation of migration control from surveillance of individuals or specific groups to the management of populations brings to light Foucault's⁶² conclusions about the use of different forms of control and mechanisms for subordination. Foucault argued that powerholders firstly relied on disciplines, which trained the body of an individual and through this his mind. Later this power was altered by a more abstract and less visible form of control and regulation, that is, biopolitics. Aas⁶³ further elaborates this concept and includes Agemben's perception on zoepolitics and the differentiation between zoepolitics and biopolitics. She concludes that zoepolitics deals with banishment and denying entry, whereas biopolitics categorizes and regulates inside of the existing social body. In other words, zoepolitics is the 'preventive' and deterrence measure of global and territorial migration management, while biopolitics is the application of these measures in a specific

62 M. Foucault, *"Society Must Be Defended": Lectures at the College De France, 1975-76*, New York, Picador, 2003.

63 Aas 2011, *supra* note 15, pp. 339-340.

territory and includes exercise of power over peoples on this territory. However, we have to be precise; if the migration management system of Western countries is the brainchild of biopolitics and zoepolitics its inseparable companion, we can still find the overwhelming presence of disciplines. Our bodies are trained and we are made obedient and subordinated through numerous disciplines and control measures (body trainings) at border crossings, at the airports, etc. Let us just remember to pull out our belts, take off our shoes, lift our hands at body scanners, feel totally powerless each time we are pulled aside and our handbags searched in details, etc. These are extreme examples, to which even privileged global travellers ('tourists') are routinely exposed. However, those 'less lucky vagabonds' experience much worse disciplinary power. They face the abysmal lack of compassion and a bureaucratic urge to achieve efficiency – almost regardless of side effects and consequences. It was exactly these disproportional and alienated disciplines which were used to demonstrate a tough position in 'a fight' against (constructed) threats to security. It is a display of contemporary European version of the tough on crime mantra approach, delivered through the tough on refugee immigration approach.

The political and media depiction of refugee migration through Balkans, securitization and militarization of migration management led to what Bauman⁶⁴ called the moral adiphORIZATION of migrant issue. The moral significance of actions of individuals, wider public, governmental agencies, states, international or regional organizations, etc. is excluded from their evaluation. The aim – legitimization of governance through the securitization spectacle of protection of citizens from incoming refugees – justified the use of illegitimate means. The clearest and most noticeable example of this are militarized borders. They are the visual supplement to bureaucratic invisible control and nowadays often presented by political decision makers as the last line of defence of Western societies. However, it is exactly this proliferation of militarized borders, with walls, barbed wire fences and armed guards, and the denial of entrance even to the most vulnerable (e.g. refugees) that epitomizes the spirit of values on 'our' side of these walls. They also send the message about our political priorities in spending public budget. In times of strict austerity measures defended by Slovenian government, the expenditures for extreme and excessive measures and securitization of refugee migration control were never questioned. The irony of the situation is that in November 2015, Police Trade Unions went on strike, because they could not reach an agreement with the Slovenian government about the promised pay rise.

It cannot be overlooked that this kind of a measure – fencing of the whole border with another country – was not used in Slovenia even in authoritarian and socialist/communist times. Barbed wire was used the last time on such a large scale by the fascist Italian regime during World War II occupation of Slovenia, when they surrounded Ljubljana with barbed wire. Furthermore, the process of democratization of Yugoslavia, which was especially

64 Bauman, 2016, *supra* note 9.

strong in Slovenia, was closely connected to demilitarization, with non-military border control being one of the most important demands and achievements of this transition. Only 25 years later we found ourselves enclosed with a razor wired fence and armed soldiers on the borders and even in refugee centres. The indiscriminate use of such general prevention cannot be justified, especially because refugees did not represent real danger and the vast majority of them were obeying rules and orders given by the police or soldiers. Incidents appeared rarely⁶⁵ and even then – from what I have seen on the field – the protests and violence was the result of disorganization and lack of communication. People were afraid that the borders will be closed. The obliteration of the ‘Balkan route’ in March 2016 showed their fear was placed on a solid ground. In addition, the unreflected use of locked train coaches was simply wrong and no explanation can mitigate this measure. If not for many other reasons at least not because of the historical memory connected to the Nazi regime train ‘transports’ of locked innocent people. Reflecting all this, we have to bear in mind Reiman’s⁶⁶ felicitous conclusion:

If people believe that the most drastic of society’s weapons are wielded by the criminal justice system [and in this case even parts of national security system] *in reaction to the gravest dangers to society*, they will believe the reverse as well: that those actions that call forth the most drastic of society’s weapons *must be* those that pose the gravest dangers to society

Presented conclusions inevitably open one key question: Would we treat our own (Western European) refugees in the same way? If not, then we are dealing with a rather clear case of (neo)racism, and this, as Bauman⁶⁷ noted, is a policy first and only later becomes an ideology. Conditions in 2015–2016, and the way EU handled this forced migration of refugees, corroborate Hudson’s (2015) conclusions that ‘moral claims of universal ethics are, however, largely ignored and even denied by the present migration policies of the most powerful states’. Refugees were left on an empty field and in open waters, abandoned by ‘civilized’ Europeans.

What is obvious from the analysis of refugee immigration through the Balkan route in 2015/2016 is that EU and its member states lost their power and in the end relied mainly on violence. This differed among countries, though the common denominator was violence.

65 From October to December 2015 only two criminal offences were recorded (knife fights among refugees) and two group violations of public order (minor offence), and there were no attacks on police officers. Source: Ministry of the Interior, *Poročilo o opravljenih aktivnostih ob prihodu migrantov na ozemlje republike slovenije v času od 15.10.2015 do 8.12.2015 s predlogi sklepov*, 2016. Retrieved from www.vlada.si/fileadmin/dokumenti/si/sklepi/seje_vlade_gradiva/VRS-migrant2-3_20_68.pdf.

66 J. Reiman, *The rich get richer and the poor get prison: Ideology, class, and criminal justice*, 7th edn., Boston, Allyn & Bacon, 2004, p. 61.

67 Z. Bauman, *Modernity and the holocaust*, Cambridge, Polity Press, 2002.

Although it seemed for a short period of time that refugees have become the only emancipatory element in Europe – it appeared they act as an agency that defies the big powerful European states, the whole EU’s immigration policy, Schengen and Dublin regulations, etc. – it quickly became obvious that they are just an object in a biopolitical game of big and powerful. I began to see in them the modern version of Marx’s English and Irish workers, forced to enter the capitalist labour market. This time their ‘freedom’ is limited even more than in the past. Their subordination is clear from their depiction in the media, political and general public discourses, though the most symbolic confirmation is the provision of the EU–Turkey Joint Action Plan (European Commission, 2015), which gives ground for resettlement (‘trade’) of Syrian refugees between EU and Turkey. EU is just reusing the model of externalized migration control, which – in combination with later deportations – proved successful in stopping immigration to Spanish Canaries.⁶⁸ It is in this regard important to notice conclusions Arendt⁶⁹ wrote about. She argued that violence appears when power (support and legitimacy) is threatened and it can even lead to disappearance of power. Victory with the use of violence has a high price, and it is usually paid by those who support its use in the first place. Irony is that the ideologically misled European public does not recognize that it should defy violence against refugees because of basic human solidarity, humanistic and civilizational reasons, but also self-protective ones.

The way Slovenian authorities handled refugee migration in 2015/2016 and also measures taken after that (e.g. notorious change of Aliens Act in 2017) reveal that Slovenia is overtaking the role of the semi-peripheral guard of the core EU countries and is also prepared to do the ‘dirty work’. It is important to recognize that the control gaze, exclusion and repression never stop at the narrow group of temporary ideal victims (currently refugees and other migrants), but extend this perception on the whole migration process and even further beyond on the whole society. In the end, we all end up living in paranoid communities, distrusting everyone and starting to believe that we all ‘have to’ sacrifice our freedoms, because of the supposedly changed security situation. Changes in the police legislation in Slovenia in 2017, which granted additional repressive and control powers to police – this time not connected (only) to migration – are a clear demonstration of this trend. Once it becomes acceptable to use extreme measures against one group of people, then just one question remains: ‘Who is next?’

68 See Andersson, *supra* note 4.

69 H. Arendt, *On violence*, San Diego, Harcourt Brace Jovanovich, 1970.

REFERENCES

Aas, K. F., *Globalization and Crime*, London, Sage, 2007.

Aas, K. F., “‘Crimmigrant’ bodies and bona fide travelers: Surveillance, citizenship and global governance”, *Theoretical Criminology*, Vol. 15, No. 3, 2011, pp. 331-346.

Aas, K. F., “The ordered and the bordered society: Migration control, citizenship, and the Northern Penal State”, in K. F. Aas, & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford, Oxford University press, 2013, pp. 21-39.

Agamben, G., *Homo Sacer: Sovereign power and bare life*, Stanford, Stanford University Press, 1998.

Agier, M., *Managing the undesirables: Refugee camps and Humanitarian Government*. Cambridge, Polity Press, 2011.

Albahari, M., *Crime of peace: Mediterranean migrations at the world’s deadliest border*. Philadelphia, University of Pennsylvania, 2015.

Amendments to the Defence Act of 2004. *Official Gazette of the Republic of Slovenia*, 95/15, 2015.

Andersson, R., *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe*. Oakland, University of California Press, 2014.

Arendt, H., *On Violence*, San Diego, Harcourt Brace Jovanovich, 1970.

Bade, K., *Migration in European History*, Malden, Blackwell Publishing, 2005.

Balibar, E., “Racism and nationalism” in E. Balibar & I. Wallerstein (eds.), *Race, nation, class: Ambiguous identities*, London, Verso, 1991, pp. 37-68.

Balibar, E., *We, the people of Europe? Reflections on transnational citizenship*. Princeton, Princeton University Press, 2004.

Battjes, H., Brouwer, E., Slingenberg, L., & Spijkerboer, T., 'The crisis of European refugee law: Lessons from Lake Success', 2016. Retrieved from <http://christenjuristen.nl/wp-content/uploads/2016/05/H.-Battjes-E.-Brouwer-L.-Slingenberg-T.-Spijkerboer-The-Crisis-of-European-Refugee-Law.pdf>.

Bauman, Z., *Globalization. The human consequences*. Cambridge, Polity Press, 1998.

Bauman, Z., *Modernity and the holocaust*. Cambridge, Polity Press, 2002.

Bauman, Z., *Work, consumerism and the new poor*. Maidenhead, Open University Press, 2005.

Bauman, Z., *Liquid modernity*. Cambridge, Polity Press, 2006.

Bauman, Z., *Strangers at our door*. Cambridge, Polity Press, 2016.

Beck, U., *What is globalisation?* Cambridge, Polity Press, 2000.

Bigo, D., "From foreigners to abnormal aliens: How the faces of the enemy have changed following September the 11th", in E. Guild, & J. van Selm (eds.), *International Migration and Security. Opportunity and Challenges*, Oxon, Routledge, 2005, pp. 64-81.

Bigo, D., "Security, exception, ban and surveillance", in D. Lyon (ed.), *Theorizing surveillance: The panopticon and beyond*, Cullompton, Willan Publishing, 2006, pp. 46-68.

Bosworth, M., "Can immigration detention centres be legitimate? Understanding confinement in a global world", in K. Franko Aas & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford, Oxford University Press, 2013, pp. 149-165.

Bosworth, M., & Guild, M., "Governing through migration control: Security and citizenship in Britain", *British Journal of Criminology*, Vol. 48, No. 6, 2008, pp. 703-719.

Bučar Ručman, A., *Migracije in kriminaliteta: Pogled čez meje stereotipov in predsodkov*. Ljubljana, Založba ZRC SAZU, 2014.

Bundeskriminalamt, *Kriminalität im Kontext von Zuwanderung: Kernaussagen*, 2016, Retrieved from <https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/Jahres->

berichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/kernaussagenZuKriminalitaetImKontextVonZuwanderung.pdf?__blob=publicationFile&v=16.

Castles, S., & Miller, M. J., *The age of migration: International population movements in the modern world*. New York, Palgrave Macmillan, 2009.

Cheliotis, L. K., "Behind the veil of philoxenia: The politics of immigration detention in Greece", *European Journal of Criminology*, Vol. 10, No. 6, 2013, pp. 725-745.

Cheliotis, L. K., "The limits of inclusion: Globalization, neoliberal capitalism and state policies of border control", in L. Weber (ed.), *Rethinking border control for a globalizing world: Rethinking globalizations*, London, Routledge, 2015, pp. 33-43.

Cohen, R., *Migration and its enemies: Global capital, migrant labour and the nation-state*, Burlington, Ashgate, 2006.

Dauvergne, C., *Making people illegal: What globalization means for migration and law*. Cambridge, Cambridge University Press, 2008.

Dauvergne, C., "The troublesome intersections of refugee law and criminal law", in K. F. Aas & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford, Oxford University Press, 2013, pp. 76-90.

Defence Act, *Official Gazette of the Republic of Slovenia*, 103/04, 2004.

De Giorgi, A., "Immigration control, post-fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe", *Punishment & Society*, Vol. 12, No. 2, 2010, pp. 147-167.

European Commission, EU Turkey Joint Action Plan, 2015. Retrieved from http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

Foucault, M., *"Society must be defended": Lectures at the college De France, 1975-76*, New York, Picador, 2003.

Galtung, J., "Cultural violence", *Journal of Peace Research*, Vol. 27, No. 3, 1990, pp. 291-305.

Garland, D., *The culture of control: Crime and social order in contemporary society*. Oxford, Oxford University Press, 2001.

Goffman, E., *Asylums: Essays on the social situation of mental patients and other inmates*, London, Penguin Books, 1961.

Goris, I., Jobard, F., & Lévy, R., *Profiling minorities: A study of stop-and-search practices in Paris*, New York, Open Society Institute, 2009.

Government of the Republic of Slovenia, *Migracije v. številkah*, 2016b. Retrieved from www.vlada.si/fileadmin/dokumenti/si/projekti/2015/begunci/160202_migranti.pdf.

Government of the Republic of Slovenia, *Informacija o veljavni evropski zakonodaji, bilateralnih sporazumih in nacionalni zakonodaji, ki določa obravnavo tujcev, ki na ozemlje RS vstopijo nezakonito ter njenem izvajanju*, 2016a. Retrieved from www.vlada.si/fileadmin/dokumenti/si/sklepi/seje_vlade_gradiva/dublin_6.69mnz.pdf.

Harvey, D., *A brief history of neoliberalism*, Oxford, Oxford University Press, 2007.

Hudson, B., "Moral communities across the border", in L. Weber (ed.), *Rethinking border control for a globalizing world: Rethinking globalizations*, London, Routledge, 2015, pp. 116-132.

Hungarian Government, *The Hungarian investment immigration program*, 2017. Retrieved from www.mfa.gov.hu/NR/rdonlyres/1A5BB49E-75C4-429D-A6E0-0D3E753838BC/0/program_overview_EN.pdf.

Huysmans, J., *The politics of insecurity: Fear, migration and asylum in the EU*, London, Routledge, 2006.

Islamska skupnost v Sloveniji. Reporterjevo hujskanje in svinjske glave, 2016. Retrieved from www.islamska-skupnost.si/novice/2016/01/reporterjevo-hujskanje-in-svinjske-glave/.

Kanduč, Z., "Kriminološki pogled na svobodo in varnost v. postmoderni družbi", *Revija za kriminalistiko in kriminologijo*, Vol. 58, No. 3, 2007, pp. 231-245.

Kaufman, E., "Hubs and spokes: The transformation of the British prisons", in K. Franko Aas & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*. Oxford, Oxford University Press, 2013, pp. 166-182.

Kreuzer, A., "Fluchtlinge und Kriminalität: Ängste – Vorurteile – Fakten", *Kriminalistik*, Vol. 7, 2016, pp. 445-450.

Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., & Taylor E. J., "Theories of international migration: A review and appraisal", *Population and Development Review*, Vol. 19, No. 3, 1993, pp. 431-466.

Melossi, D., *Crime, Punishment and Migration*, London, Sage, 2015.

Michalowski, R., "Security and peace in the US–Mexico Borderlands" in L. Weber (ed.), *Rethinking border control for a globalising world: Rethinking globalizations*, London, Routledge, 2015, pp. 44-63.

Miller, J., Gounev, P., Pap, A. L., Wagman, D., Balogi, A., Bezlov, T., et al. "Racism and police stops: Adapting us and british debates to continental Europe", *European Journal of Criminology*, Vol. 5, No. 2, 2008, pp. 161-190.

Ministry of the Interior, *Poročilo o opravljenih aktivnostih ob prihodu migrantov na ozemlje republike slovenije v času od 15.10.2015 do 8.12.2015 s predlogi sklepov*, 2016. Retrieved from www.vlada.si/fileadmin/dokumenti/si/sklepi/seje_vlade_gradiva/VRS-migrant2-3_20_68.pdf.

National Assembly, *NSi – Poslanska skupina Nove Slovenije – krščanskih demokratov: Amandmaji k Predlogu zakona o mednarodni zaščiti (ZMZ-1)*, 2016a. Retrieved from <http://imss.dz-rs.si/imis/0af35c9cd0b8260f0656.pdf>.

National Assembly, *Zahteva za sklic nujne seje odbora za obrambo*, 2016b. Retrieved from <http://imss.dz-rs.si/imis/f32f64faf59434187842.pdf>.

National Institute of Public Health, *Migranti: Za zdaj nalezljive bolezni ne predstavljajo večjega tveganja za naše prebivalce*, 2015. Retrieved from www.nijz.si/sl/migranti-za-zdaj-nalezljive-bolezni-ne-predstavljajo-vecjega-tveganja-za-nase-prebivalce.

Odmevi [Video file]. 23 November 2015. Retrieved from <http://4d.rtvlo.si/arhiv/odmevi/174373053>.

Rahola, F., "The Detention Machine", in P. Salvatore (ed.), *Racial criminalization of migrants in 21st century*, Burlington, Ashgate, 2011, pp. 95-106.

ALEŠ BUČAR RUČMAN

Reiman, J., *The rich get richer and the poor get prison: Ideology, class, and criminal justice* (7th edn), Boston, Allyn & Bacon, 2004.

Residency Bond program, *Residency Bond EU*, (n. d.). Retrieved from www.residency-bond.eu/residency-bond-program.html.

Slovenian Police, *Archive of press releases in connection with current migration flows*, 2016. Retrieved from www.policija.si/eng/index.php/component/content/article/6-border-matters-and-foreigners-/1917-archive-of-press-releases-in-connection-with-current-migration-flows.

Stumpf, J., The crimmigration crisis: Immigrants, crime, and sovereign power, *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419.

Stumpf, J., "The process is the punishment in crimmigration law", in K. Franko Aas & M. Bosworth (eds.), *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford, Oxford University Press, 2013, pp. 58-75.

UNHCR, *Europe: Syrian asylum applications*, 2017. Retrieved from <http://data.unhcr.org/syrianrefugees/asylum.php>.

Van Dijk, T. A., *Racism and discourse in Spain and Latin America*. Amsterdam, Philadelphia, John Benjamins Publishing, 2005.

Wacquant, L., *Punishing the poor: The neoliberal government of social insecurity*, Durham, Duke University Press, 2009a.

Wacquant, L., *Prisons of poverty*, Minneapolis, University of Minnesota, 2009b.

Wallerstein, I. M., *World-systems analysis: An introduction*, Durham, Duke University Press, 2006.

Watson, S. D., *The securitization of humanitarian migration: Digging moats and sinking boats*, New York, Routledge, 2009.

Weber, L., & Bowling, B., "Valiant beggars and global vagabonds: Select, eject, immobilize", *Theoretical Criminology*, Vol. 12, No. 3, 2008, pp. 355-375.

12 *SECURITIZATION AND MILITARIZATION OF MIGRATION MANAGEMENT IN EUROPE:
THE CASE OF REFUGEE MIGRATION THROUGH SLOVENIA IN 2015/2016*

Žižek, S., *Against the double blackmail: Refugees, terror and other troubles with the neighbors*, London, Allen Lane, 2016.



13 ‘WELCOMING DISTANT REFUGEES, BARRING THE ARRIVAL OF NEIGHBOURING MIGRANTS’

Has the So-Called Refugee Crisis Shifted Spanish Migration Control Policies?

Cristina Fernández-Bessa and Jose A. Brandariz-García

13.1 INTRODUCTION

This chapter aims to analyse the influence of the so-called refugee crisis, which began in 2014–2015, on Spanish migration control policies. This crisis has had a relatively minor impact in Spain, which has received a number of asylum seekers far lower than those of countries such as Germany, Sweden, Italy, Austria, Hungary and Greece. A set of reasons, key among them the long geographical distance separating the Western Mediterranean from the countries of origin of the asylum seekers who arrive in Europe,¹ contributes to explain this secondary role.

Nonetheless, this alleged crisis has had implications in the Spanish case, particularly in the political sphere and consequently in the collective debate on human mobility and the ways to manage migration flows. Drawing on the (incomplete) available statistical data, we seek to scrutinize if and to what extent this crisis has also had a relevant effect on the field of migration enforcement.²

For these purposes, this chapter is structured in three different parts. Section 13.2 presents a summarized characterization of the Spanish asylum system, by placing it in the context of the EU scheme of international protection. Section 13.3 briefly analyses the available data on the nationality of the foreigners targeted by the Spanish migration

1 R. Lara, ‘Fuera de foco: la inmigración en España sigue siendo sinónimo de violaciones de derechos humanos, sufrimiento y muerte en 2015’ in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*. Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2016, pp. 49-65. Retrieved on 16 May 2017 from www.apdha.org/media/informe-frontera-sur-2016-web.pdf; According to Frontex data (Retrieved on 21 March 2017 from <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>), in 2015-2016 only 18,940 foreign nationals arrived into Spain through the Western African and Western Mediterranean migration routes. By contrast, in the same period 344,844 individuals arrived in Italy via the Central Mediterranean routes, 1,067,920 migrants and asylum seekers reached the EU territory through the Eastern Mediterranean route and 886,817 foreigners did it via the Western Balkan route.

2 By ‘migration enforcement’ we refer to the complex law enforcement apparatus that aims to control borders and to enforce immigration law, and that comprises a number of legal administrative devices, such as border checkpoints, immigration policing, detention facilities, removals of undocumented migrants and deportations based on criminal grounds.

enforcement apparatus, with a special focus on the recent past. Finally, section 13.4 explores the role of the deportation apparatus in the management and application of the right of asylum by comparatively considering the data on asylum-seekers as well as detained and deported migrants. This section concludes by delving into the current transformation of the Spanish asylum system.

13.2 ASYLUM IN SPAIN: A CLEARLY SECONDARY PHENOMENON

The most outstanding feature of the asylum system in Spain is the striking irrelevance of this legal and political institution.³ The available data show that Spain clearly plays a secondary role within the EU asylum and refuge regime, a fact that is rendered even more apparent when the number of asylum-seekers is compared with that of international migrants who have arrived in Spain since the beginning of this century.⁴

According to Eurostat data,⁵ an annual average number of 5,016 foreigners requested asylum in Spain from 2001 to 2013, equal to 1.7% of asylum applications presented in EU28 member states during that period. The comparison is even more striking in the recent past. As illustrated by Table 1, from 2014 to 2016 the annual average of asylum requests only amounted to 12,052, which accounts for a negligible 1.1% of applications presented in UE28 countries over the same time span. In both periods, Spain has ranked distinctly lower than EU countries critical for the EU asylum system (i.e. Austria, Denmark, France, Germany, the Netherlands, Sweden and the UK), but also lower than other Southern EU nations, such as Italy and Greece.

Table 1 Number of asylum applicants and international migrants (flow), 2001-2016

Year	Asylum applicants (Spain)	Asylum applicants (UE28)	International migrants (Spain)	International migrants (UE28)
2001	9,490	424,180	-----	-----
2002	6,310	421,470	-----	-----
2003	5,765	344,800	-----	-----
2004	5,365	276,675	-----	-----
2005	5,050	234,675	-----	-----

3 With regard to this, it should be stressed that the current Asylum Law (Law No. 12/2009), which was passed in October 2009, obliged the Spanish government to enact a Regulation developing the law during the first half of 2010, and this Regulation has not been enacted yet.

4 D. Boza Martínez, 'Migrantes económicos y refugiados: La interesada creación de una falta dicotómica' in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2017*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2017, pp. 42-46. Retrieved on 16 May 2017 from www.apdha.org/media/informe-frontera-sur-2017-web.pdf.

5 Retrieved on 17 April 2017 from <http://ec.europa.eu/eurostat>.

Year	Asylum applicants (Spain)	Asylum applicants (UE28)	International migrants (Spain)	International migrants (UE28)
2006	5,295	197,410	802,971	2,144,923
2007	7,195	222,635	920,534	2,781,761
2008	4,515	225,150	567,365	2,940,285
2009	3,005	263,835	365,360	2,260,589
2010	2,740	259,400	330,280	2,410,689
2011	3,420	309,820	335,881	2,439,810
2012	2,565	336,015	272,482	2,442,802
2013	4,495	432,055	248,350	2,563,999
2014	5,615	627,780	264,486	2,899,389
2015	14,785	1,323,465	290,005	3,762,502
2016	15,755	1,259,265	-----	-----

Source: Eurostat.

The comparison is no less telling when the data on the number of refugees living in Spain are taken into account. As shown in Table 2, an annual average number of 5,274 refugees resided in Spain from 2006 to 2016, which amounts to a mere 0.4% of refugees living in the EU during the same period.⁶ These figures are starkly disproportionate with regard to both the demographic weight of Spain within the EU (9.1% of the EU population in 2016; source: Eurostat) and the percentage of non-EU citizens residing in the country (11.9% of non-EU individuals living in EU member states in 2016; source: Eurostat). In fact, the number of refugees residing in Spain from 2006 to 2016 accounted for an insignificant 0.1% of the foreign population of the country, whereas the average in UE28 member states over the same period was 4.1%.⁷ If only recent data are taken into account, this disproportion is not significantly shifted. The number of refugees residing in Spain from 2014 to 2016 accounted for 0.2% of all foreign residents, while the UE28 percentage stood at 3.8% for the same period.

6 UNHCR. Retrieved on 17 April 2017 from www.unhcr.org/statistical-yearbooks.html.

7 In some EU countries, such as Sweden and the Netherlands, as well as Malta and Bulgaria, the ratio of refugees within the resident foreign population is more than 10 percent.

Table 2 Number of refugees, people in refugee-like situations and foreign residents (stock), 2006-2016

Year	Refugees and people in refugee-like situations (Spain)	Refugees and people in refugee-like situations (UE28)	Foreign residents (Spain)	Foreign residents (UE28)
2006	5,275	1,398,876	-----	-----
2007	5,147	1,365,184	4,449,431	28,669,986
2008	4,661	1,390,548	5,086,293	29,753,899
2009	3,970	1,414,743	5,386,659	31,195,751
2010	3,820	1,394,290	5,402,575	31,936,401
2011	4,228	1,356,007	5,312,439	31,414,345
2012	4,510	1,339,598	5,236,030	32,254,332
2013	4,637	977,025	5,072,680	33,115,313
2014	5,798	1,088,616	4,677,059	33,918,522
2015	6,457	1,329,524	4,454,354	35,123,216
2016	9,510	1,610,283	4,418,158	36,918,403

Sources: Eurostat; UNHCR.

These data uncover a dimension that should be further considered. A pivotal aspect of the anomalous Spanish asylum system is its irrelevance within the model of human mobility management.⁸ Even though Spain is a negligible country in terms of asylum, it has been a critical destination of international migrations since the onset of the century.⁹ Spain received an average of 597,302 international migrants per year from 2006 to 2010, which was equal to 23.8% of international migrants arriving into EU28 member states during that period.¹⁰ Migration flows have decreased significantly in recent years; however, 282,241 migrants received per year from 2011 to 2016 still accounted for 10.0% of the international migrants who arrived into the EU over the same time lapse.¹¹

8 By the wording human mobility management, we convey the wide range of policies geared towards handling international migrations, which encompass naturalisation policies, integration policies and immigration law enforcement and border control policies.

9 J. Arango, 'Después del gran boom: la inmigración en la bisagra del cambio' in E. Aja *et al.* (eds.), *La inmigración en tiempos de crisis: Anuario de la inmigración en España*, Barcelona, Cidob, 2010, pp. 52-73; W. A. Cornelius, "Spain: The uneasy transition from labor exporter to labor importer" in W. A. Cornelius *et al.* (eds.), *Controlling immigration: A global perspective*, Stanford, Stanford University Press, 2004, pp. 387-429.

10 Eurostat.

11 Only 0.9 percent of international migrants arrived in Spain from 2006 to 2013 presented an asylum request. This percentage rose to 3.7 percent from 2014 to 2015.

The insignificant role of the Spanish asylum system is further confirmed by the data on (first instance)¹² positive decisions to asylum applications. The Spanish government has granted international protection to an annual average of 1,416 asylum-seekers between 2008 and 2016, and this number only represents 0.8% of the positive decisions issued by UE28 member states during this time span.¹³

In order to characterize the Spanish asylum system, an additional facet should be addressed, i.e. the nationality profile of the refugees and asylum-seeking newcomers. In the EU28 countries between 2008 and 2013, the highest numbers of asylum seekers were Russians (7.9% of the number of applicants), Afghans (7.3%), Iraqis (5.5%), Syrians (5.3%), Somalis (5.1%), Serbians (5.0%) and Pakistanis (4.7%). By contrast, in Spain over the same period the highest numbers of applicants were nationals of Nigeria (10.4% of the number of asylum seekers), Ivory Coast (8.0%), Mali (8.0%), Colombia (6.5%), Syria (5.9%), Algeria (5.7%) and Cuba (5.7%).

This different citizenship profile is mirrored by the data on first instance positive decisions. According to Eurostat data, between 2008 and 2013 the foreign nationals who accounted for the highest percentages of international protection positive decisions issued by EU28 member states were Somalis (12.6% of the total number of positive decisions), Iraqis (12.3%), Syrians (12.1%), Afghans (11.6%), Eritreans (5.7%), Iranians (5.4%) and Russians (5.0%). By contrast, in the Spanish case international protection was granted over the same period to Cubans (26.5% of the total number of positive decisions), Palestinians (10.5%), Somalis (8.2%), Ivoirians (5.2%), Syrians (5.2%), Pakistanis (5.0%) and Colombians (4.6%).¹⁴ These divergences are somewhat surprising, since the Spanish administration, unlike other EU member states, has not issued any national list of safe countries of origin and safe third countries. Spanish legal provisions (Art. 20.1 of the Law No. 12/2009, of 30 October 2009, regulating the right of asylum and the subsidiary protection) define these concepts simply by referring to what is prescribed by the EU legal regulation (Arts. 36 and 38 of the 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).¹⁵

12 Eurostat data on final decisions are not particularly reliable with regard to a range of EU countries, Spain among them.

13 Eurostat.

14 This peculiar aspect of the Spanish asylum system, which is partially based on a post-colonial bias of the model of migration management (D. Moffette, *Governing Irregular Migration: Logics and Practices in Spanish Immigration Policy*. Unpublished PhD Dissertation: York University, Canada, 2015. Retrieved on 16 April 2017 from www.library.yorku.ca) was no less striking in the previous period. Most significant cases in this regard are those of Cuban nationals and Colombian nationals. Colombian applicants accounted for 24.3 percent of asylum requests presented from 2001 to 2007, whilst Cuban applicants accounted for 8.8 percent. Similarly, in that period international protection decisions issued to Colombian citizens amounted to 25.8 percent of all positive decisions, and those issued to Cuban citizens accounted for 5.9 percent.

15 See on this Accem, *Aida. Asylum Information Database. Country Report: Spain*, 2017. Retrieved on 16 April 2017 from www.asylumineurope.org/sites/default/files/report-download/aida_es_2016update.pdf.

To sum up, Spain has played a fairly marginal role within the EU asylum system in the last decades. The analysis of the reasons that explain this fact goes beyond the scope of this article. Yet, the pivotal reason surely has to do with the late democratization of the Spanish polity,¹⁶ which impeded the consolidation of the right of asylum during what may be termed its ‘golden age’, that is, before the Cold War era came to an end.¹⁷ This crucial historical circumstance explains why Spain shares with Portugal and Greece, as well as with the Eastern European countries that began their democratization by the late 1980s and early 1990s (some nuances regarding Bulgaria, Greece and Poland aside) a relatively insignificant status within the EU asylum system.

Notwithstanding the aforementioned features of the Spanish asylum regime, the so-called refugee crisis has entailed consequences for Spanish migration policies, especially in the political sphere. In a society that has been heretofore largely unaware of the refugee issue, it is the most extreme cases of exile experienced by Middle Eastern asylum seekers that has prominently taken centre stage within public discourse. More generally, the Spanish asylum system seems to have begun to evolve in line with the European model. Even though until recently the Spanish regime was to a great extent driven by national political interests determining the decisions on which foreign nationals deserved international protection and which ones did not – a policy largely conditioned by post-colonial relations with Latin American countries – this context appears to be changing.

13.3 THE NATIONALITY-BASED BIAS OF MIGRATION CONTROL POLICIES

As was previously mentioned, in contrast to the irrelevance of the asylum system, Spain has been a most popular destination of third-country nationals migrating to the EU, especially during the first decade of the century. Successive Spanish governments, socialists and conservatives alike, have coped with this prominent phenomenon of mobility by setting in motion a far-reaching system of border control, which has been focused on fighting against irregular migration. This striking disproportion between the scope of the asylum system and that of the apparatus aimed at tackling irregular migration flows leads one to hypothesize that in the Spanish case the former has been surely subordinated to the latter.

16 According to the ‘democratization waves’ theory (see S. Huntington, *The third wave: Democratization in the late twentieth century*, Norman, University of Oklahoma Press, 1991), the Spanish political regime should be included within the third wave of democratisation, which commenced in the 1970s. By contrast, the majority of Western European nations initiated their democratisation in either the first wave (from the early 19th Century to the early 20th Century) or the second wave (from the end of World War II to the 1970s) of democratisation.

17 J. Valluy, *Rejet des exilés. Le grand retournement de droit de l’asile*, Paris, Editions du Croquant, 2009; J. Valluy, ‘De l’asile aux répulsions: La radicalisation des frontières’ in M. Agier (ed.), *Réfugiés, sinistrés, sans-papiers. Politiques de l’exception*, Paris, Téraèdre-Le Sujet dans la cite, 2012.

This influence of the border control regime on the abnormal functioning of the Spanish asylum system may begin to be assessed by scrutinizing the data on the citizenship of the migrants targeted by migration control devices. Likewise, the data analysed in this section will subsequently allow for an examination as to whether or not the refugee crisis has altered migration enforcement policies. The detailed exploration of these data goes beyond the scope of this paper.¹⁸ However, some general trends that unveil the selectiveness of the Spanish border control regime should be pointed out.

Concerning migration policing, both Maghreb individuals (especially Algerians) and Sub-Saharan citizens (particularly, Cameroonians, Gambians, Malians, Nigerians and Senegalese) account for the highest rates of police arrests from 2004 to 2016.¹⁹ This fact, and even more conspicuously a number of profoundly high arrest rates affecting Sub-Saharan nationals in certain periods,²⁰ unveil that a significant part of these police interventions have not been carried out in urban settings, but on the southern border.²¹

The data on the citizenship of the migrants confined in detention facilities (CIE, for their initials in Spanish), albeit only pertaining to migrants detained since 2013,²² should also be analysed. These data unambiguously show that, at least in recent years, CIE have functioned first and foremost as sites of confinement for African individuals²³ (above all, Algerians, Cameroonians, Ivoirians and Guineans, together with Moroccans).²⁴ This corroborates that the border control apparatus as a whole, and especially the CIE, have been functionally associated to the governing of the southern border.

-
- 18 C. Fernández-Bessa, *El dispositiu de deportació. Anàlisi criminològica de la detenció, internament i expulsió d'immigrants en el context espanyol*. Unpublished PhD Dissertation, University of Barcelona, Spain. 2016. Retrieved on 15 April 2017 from diposit.ub.edu; C. Fernández-Bessa, & J. A. Brandariz García, "Profiles' of Deportability: Analyzing Spanish migration control policies from a neo-colonial perspective," in *Handbook on Criminology and the global South*. Palgrave, 2018. (forthcoming).
- 19 Sources: European Migration Network (EMN) (Retrieved on 29 November 2016 from [ec.europa.eu/dgs/home-affairs; extranjeros.empleo.gob.es](http://ec.europa.eu/dgs/home-affairs/extranjeros.empleo.gob.es)); Eurostat (Retrieved on 15 May 2017); INE (Spanish National Statistical Institute. Retrieved on 15 May 2017 from www.ine.es).
- 20 The most striking case concerns Malian citizens, whose rate of detection by the Spanish police was in 2004 720.8 per 1,000 fellow compatriots residing in Spain.
- 21 'Southern border' is the name commonly used to refer to the sea border between Morocco and Southern Spain (separated by the Mediterranean Sea) and between the Canary Islands and Morocco (split by the Atlantic Ocean), as well as to the land border walling off the Spanish enclaves of Ceuta and Melilla (see, e.g., C. Fernández Bessa, *et al.*, *Frontera sur*, Barcelona, Virus, 2008) and the annual reports on this border published by the Asociación Pro-Derechos Humanos de Andalucía (Retrieved on 17 May 2017 from apdha.org/fronterasur).
- 22 On the shortcomings of the statistical data on the operation of the Spanish migration control system, see E. Larrauri, *Introducción a la Criminología y al sistema penal*, Madrid, Trotta, 2015. M. Martínez Escamilla, *Mujeres en el CIE: Género, inmigración e internamiento*, Donostia-San Sebastián, Tercera Prensa, 2013.
- 23 Sources: Mecanismo Nacional de Prevención de la Tortura (National Mechanism of Torture Prevention; MNPT) (Retrieved on 30 April 2017 from www.defensordelpueblo.es/mnp); INE.
- 24 Most strikingly, the detention rate of Ivoirian nationals in 2015 was 17.3 detainees per 100 fellow nationals residing in Spain.

Additionally, the analysis of the selective operation of migration penalty needs to consider the data on the citizenship of the deported migrants. These deportation data verify again that African individuals are most affected by migration control measures, namely Algerians, Ghanaians, Malians, Moroccans, Mauritians, Nigerians and Senegalese.²⁵ The available statistical data, particularly the significant rates of deportation of certain African citizens,²⁶ confirm again the close links between the deportation system and the management of the southern border.

The available migration enforcement data allow us to further explore the factors determining the nationality-based biased functioning of the Spanish border control apparatus. In order to grasp this selectiveness, at least four aspects should be examined.

13.3.1 *Governing the southern border*

The sea and land border between Africa and Southern Spain, and most especially the enclave towns of Ceuta and Melilla, which are surrounded by the only land border separating Africa from the EU, are a critical site for border control. Therefore, it should come as no surprise that the management of this southern border has profoundly conditioned the working of the Spanish migration control system.²⁷ This border has enduringly been the 'ground zero' of border control in the Spanish case, that is, the liminal zone in which migration enforcement devices are immediately and mercilessly mobilized. By contrast, border crossings in international airports and the overstaying of former visitors have been largely monitored through risk criteria-based selective interventions.²⁸

These characteristics of the southern border contribute to explain that African individuals have been far more targeted in all stages of migration penalty than other foreign nationals, a fact substantiated by strikingly disproportionate rates of police detection, detention and deportation for these nationals in relation to the number of fellow compatriots residing in Spain. This sharp disproportion stems from the fact that a most significant

25 Sources: Spanish Home Office; EMN; Eurostat; INE.

26 The deportation rate of Senegalese nationals rose in 2006 to 16.4 deportees per 100 fellow countrypersons living in Spain, and in 2002, that of Nigerian nationals was 11.5 deportees per 100 fellow compatriots residing in the country.

27 The southern border has not ever been, though, the main 'source' of irregular migration into Spain (see C. Fernández Bessa, *El dispositiu de deportació. Anàlisi criminològica de la detenció, internament i expulsió d'immigrants en el context espanyol*. Unpublished PhD Dissertation, University of Barcelona, Spain, 2016. Retrieved on 15 April 2017 from diposit.ub.edu; C. González-Enríquez, 'Spain: irregularity as a Rule' in A. Tryandafyllidou (ed.), *Irregular migration in Europe: myths and realities*, Abingdon, Routledge, 2010, pp. 247-266; N. Wonders, "Sitting on the fence – Spain's delicate balance: Bordering, multiscale challenges, and crimmigration", *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 7-26.

28 G. Campesi, *Polizia della frontiera: Frontex e la produzione dello spazio europeo*, Roma, Derive Approdi, 2015.

number of these African citizens have been arrested and channelled into the system while irregularly entering Spain via the southern border.

This situation is especially telling with regard to the utilization of detention facilities, in which the overrepresentation of Maghreb and Sub-Saharan nationals is even more striking than in other fields of control. The increasing enforcement of the so-called 'express deportations',²⁹ in which the arrest of a deportable foreigner with a previously issued deportation order immediately (i.e. in less than three days) leads to his/her forced return, is undermining the former leading role of the CIE as preferred sites of confinement for preparing the enforcement of repatriations.³⁰ Deportations, especially the southern border-unrelated ones, are increasingly carried out from police units, or even prison facilities.³¹ Detention facilities, in turn, are gradually being transformed into 'shelters' for southern border arrestees.

13.3.2 *Crimmigration issues:³² The interplay between the deportation apparatus and the criminal justice system*

The Spanish migration control regime is essentially an administrative law system, since the irregular stay in the country is legally considered an administrative offence. There exists, though, a criminal law sub-system of migration control, that is focused on enforcing the deportation of (mainly irregular) foreigners convicted of a crime punishable by a prison sentence of one year or more (Art. 89 Penal Code, Art. 57.2 of the Law No. 4/2000, of 11 January 2000, on rights and freedoms granted to foreigners in Spain and their social integration). Still, this penal sub-system has been traditionally characterized by a deficient

29 Martínez Escamilla, *supra* note 22; Pueblos Unidos, *CIE y expulsiones exprés: Informe anual 2014*, Madrid, Pueblos Unidos, 2015. Retrieved on 22 May 2016 from www.entreculturas.org; H. C. Silveira Gorski, "La legalarbitrariedad como mecanismo jurídico de control de la inmigración irregular", *Crítica penal y poder*, Vol. 12, 2017, pp. 34-54; *see also*, L. Fekete, "Accelerated removals: The human cost of EU deportation policies", *Race & Class*, Vol. 52, No. 4, 2011, pp. 89-97.

30 J. A. Brandariz-García, & C. Fernández-Bessa, "The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis", *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219; *see also*, M. Martínez Escamilla, "Centros de internamiento para extranjeros: Estado de la cuestión y perspectivas de futuro", *Revista Electrónica de Ciencia penal y Criminología*, 2016, pp. 18-23, 1-38. Retrieved on 17 May 2017 from <http://criminnet.ugr.es/recpc/18/recpc18-23.pdf>.

31 E. Sainz de la Maza Quintanal, "*Ultima ratio*": *el proceso de expulsión de inmigrantes en situación irregular en España*. Unpublished PhD Dissertation, Complutense University of Madrid, Spain, 2015. Retrieved on 24 May 2016 from eprints.ucm.es.

32 The notion of crimmigration has rapidly gained momentum in the international academic debate to describe and analyse the growing intertwining of migration and border control and criminal law. *See on this* J. Stumpf, "The Crimmigration crisis: Immigrants, crime, and sovereign power", *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419; C. C. García Hernández, *Crimmigration Law*, Chicago, American Bar Association, 2015; M. J., Guia, M. van der Woude, & J van der Leun, (eds.), *Social control and justice. Crimmigration in the age of fear*, The Hague, Eleven, 2013; M. van der Woude, V. Barker, & J. van der Leun, "Crimmigration in Europe", *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 3-6.

level of enforcement³³ and generally regarded as a secondary component of the migration control regime.³⁴

These conditions have gradually shifted, especially in the recent past.³⁵ The need to enforce all crime-related deportations has increasingly influenced bordered penalty selectiveness. Interestingly, the Spanish Home Office has repeatedly emphasized in recent times that the detention of the so-called ‘convicted aliens’ and the enforcement of crime-based returns are critical priorities of its migration policy.³⁶ In fact, according to official data provided by the Spanish Home Office, crime-related deportations accounted for 14.6% of all deportations enforced in 2008, while in 2016 this percentage rose to 49.9%.³⁷

Consequently, the selectiveness of the criminal justice system has a growing influence on the biased operation of the migration control regime. In other words, the national groups particularly targeted by the penal system, most frequently for drug crimes,³⁸ tend to be overrepresented as well within the migration penalty apparatus.

13.3.3 *The efficiency-driven needs of the migration control regime*

An additional factor that conditions the nationality-based bias of the migration control regime is its inherent quest for systemic effectiveness and efficiency. As was previously pointed out, Spanish bordered penalty has been persistently characterized by a striking

-
- 33 J. A. Brandariz García, *Sistema penal y control de los migrantes: Gramática del migrante como infractor penal*, Granada, Comares, 2011; E. García España, ‘Extranjeros presos y reinserción: Un reto del siglo XXI’, in A. I. Cerezo Domínguez, & E. García España (eds.), *La prisión en España: Una perspectiva criminológica*, Granada, Comares, 2007, pp. 101-134.
- 34 A. Daunis Rodríguez, *El derecho penal como herramienta de la política migratoria*, Granada, Comares, 2009; M. Monclús Masó, *La gestión penal de la inmigración*, Buenos Aires, Del Puerto, 2008.
- 35 C. Fernández Bessa, “Il panorama dei Centri di internamento per stranieri in Spagna: Dal controllo delle frontiere alla gestione della criminalità”, *Antigone*, Vol. 8, No. 1, 2013, pp. 68-90.
- 36 J. A. Brandariz García, “Crimmigration policies and the great recession: Analysis of the Spanish case”, in M. J. Guia, R. Koulis, & V. Mitsilegas (eds.), *Immigration detention, risk and human rights*, New York, Springer, 2016, pp. 185-197.
- 37 J. A. Brandariz-García, & C. Fernández-Bessa, “The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis”, *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219; see also, D. Boza Martínez, *La expulsión de personas extranjeras condenadas penalmente: El Nuevo artículo 89 CP*, Cizur Menor, Thomson Reuters Aranzadi, 2016.
- 38 E. Bodelón González, ‘Mujer inmigrante y sistema penal en España: La construcción de la desigualdad de género en el sistema penal’ in E. Almeda Samaranch, & E. Bodelón González (eds.), *Mujeres y castigo: Un enfoque socio-jurídico y de género*, Madrid, Dykinson, 2007, pp. 105-132; K. Calavita, *Immigrants at the margins*, Cambridge, Cambridge University Press, 2005; C. Fernández Bessa, *El dispositiu de deportació. Anàlisi criminològica de la detenció, internament i expulsió d’immigrants en el context espanyol*, Unpublished PhD Dissertation, University of Barcelona, Spain, 2016. Retrieved on 15 April 2017 from diposit.ub.edu; In 2015, 15.6 percent of offenders convicted by the Spanish criminal justice system were non-EU foreign nationals, whereas in the case of drug crimes this ratio rose to 30.1 percent (Source: INE).

inefficiency, since a significant percentage of detainees are finally released,³⁹ not deported, and the vast majority of issued deportation orders end up being unenforced.⁴⁰ Efficiency concerns have clearly gained impetus in the recent past,⁴¹ both in Spain⁴² and more generally in the EU.⁴³

Therefore, the system's selectiveness is currently being moulded by a range of measures aimed at ensuring an increasingly effective and efficient migration control. Deportation enforcement is steered by the more or less collaborative attitude of the countries of migration origin. In fact, this cooperation in the field of migration control was a critical concern of the Spanish government by the mid-2000s, particularly with regard to African countries.⁴⁴ As a consequence, the citizens of the states that most easily accept deportations, by signing repatriation agreements and providing diplomatic cooperation to give travel documents to their deportable nationals, make up a key target of the detention and deportation system.

A search for a cost-efficient deportation regime has been recently added to these effectiveness-seeking efforts. Especially since the onset of the economic crisis, returns to neighbouring countries have been given prevalence,⁴⁵ which helps to explain the high numbers of Moroccan and Algerian deportees. What's more, the deportation apparatus has been guided in the recent past by the increasingly salient role played by joint return operations, which are largely funded by the EU agency Frontex and organized either solely by the Spanish Home Office or under a Frontex-coordinated international partnership.

-
- 39 For these released detainees, detention actually operates as a custodial sanction in itself, not as a precautionary measure geared towards preparing their coercive return (see on this Martínez Escamilla, 2009, 2016; Rodier, 2012; Sánchez Tomás, 2014). This punitive nature stands in contrast with both the EU regulation (Arts. 15-18 Return Directive 2008/15/EC, of 16 September 2008) and the Spanish regulation (Arts. 61-62 of the Law No. 4/2000, of 11 January 2000, on rights and freedoms granted to foreigners in Spain and their social integration) on the use of migration detention measures.
- 40 M. Monclús Masó, *La gestión penal de la inmigración*, Buenos Aires, Del Puerto, 2008; E. Romero, *Un deseo apasionado de trabajo más barato y servicial: Migraciones, fronteras y capitalismo*, Oviedo, Cambalache, 2010.
- 41 J. A. Brandariz-García, & C. Fernández-Bessa, "The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis", *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219; see also D. Moffette, "Governing immigration through probation: The displacement of borderwork and the assessment of desirability in Spain", *Security Dialogue*, Vol. 45, No. 3, 2014, pp. 262-278.
- 42 See Circular no. 6/2014 of the Spanish National Police, of 11 July 2014.
- 43 See Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council.
- 44 C. Fernández Bessa, & A. Manavella Suárez, "Controles migratorios en las fronteras euromediterráneas: Un análisis crítico desde la perspectiva de los derechos humanos" in C. Fernández Bessa *et al.* (eds.), *Contornos bélicos del Estado securitario: Control de la vida y procesos de exclusión social*, Barcelona, Anthropos, 2010, pp. 173-204; C. Rodier, *Xénophobie business*, Paris, La Découverte, 2012.
- 45 I. Barbero González, & C. Fernández Bessa, "Beyond surveillance: Racial profiled detention practices in everyday life" in C. William *et al.* (eds.), *Living in surveillance societies: The state of surveillance*, Seattle, CreateSpace, 2013, pp. 295-304; Romero, *supra* note 40.

The available data illustrate that this kind of joint operations give priority to returns to Maghreb nations, with Sub-Saharan countries and Latin America countries being a distant second.⁴⁶

13.3.4 Othering processes and post-colonial footprints

To understand the nationality-based selectiveness of the migration control system an additional aspect ought not to be overlooked, that is, its post-colonial dimension and the othering processes on which it has been based.⁴⁷

The Spanish colonial past is markedly different from those of other European states, since the vast majority of Spanish colonies gained independence two centuries ago, i.e. far before the commencement of what is generally known as the era of decolonization. Nevertheless, (post-)colonial marks are still present in Spanish society and politics, and they can be easily traced in the field of migration management, as well as in racial and ethnic relations more generally. Post-colonial footprints can be seen in the Spanish legal order, which favours Latin American citizens in a number of migration regulations and practices, such as the allocation of migration quotas, and the access to regularization and naturalization processes. Obviously, these disadvantages other foreign national groups, particularly Sub-Saharan and Maghreb individuals.⁴⁸

More precisely, in the field of border control the post-colonial dimension operates as a crosscut vector affecting all stages of bordered penalty. Post-colonial relations have tailored EU and Spanish political negotiations with the countries of migration origin, which in exchange for technical assistance, financial aid, migration quotas and commercial agreements, have been compelled to both accept repatriations and cooperate with their enforcement.⁴⁹

46 J. A. Brandariz-García, & C. Fernández-Bessa, "The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis", *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219.

47 See on this M. M. Ngai, *Impossible subjects: Illegal alien and the making of modern America*, Princeton, Princeton University Press, 2004; E. Rigo, "Citizenship at Europe's borders: Some reflections on the post-Colonial condition of Europe in the context of EU enlargement", *Citizenship Studies*, Vol. 9, No. 1, 2005, pp. 3-22; R. L. Segato, "El color de la cárcel en América Latina: Apuntes sobre la colonialidad de la justicia en un continente en desconstrucción", *Nueva Sociedad*, Vol. 208, 2007, pp. 142-161.

48 D. Moffette, *Governing irregular migration: Logics and practices in Spanish immigration policy*, Unpublished PhD Dissertation, York University, Canada, 2015. Retrieved on 16 April 2017 from www.library.yorku.ca.

49 E. Romero, *Quién invade a quién: Del colonialismo al II Plan África*, Oviedo, Cambalache, 2011; see also, S. Žižek, *Against the double blackmail*, London, Allen Lane, 2016. In the Spanish case, these political negotiations were essentially carried out in the framework of the so-called Africa Plan I (2006-2008) and Africa Plan II (2009-2012).

Additionally, post-colonial stereotypes have an impact on the decision making of migration enforcement agencies, namely of the police,⁵⁰ who intensively targets certain groups of foreigners. Phenotypical traits and skin colour condition these biased policing activities. Ethnic profiling has been widely and persistently utilized by Spanish National Police,⁵¹ an agency that is responsible for both crime prevention and migration law enforcement. Most interestingly, this ethnic profiling-based migration policing was upheld by the Spanish Constitutional Court (decision No. 13/2001, of 29 January 2001).⁵² Obviously, this has led to considerably significant arrest, detention and deportation rates of certain (racialized) national groups.

The post-colonial dimension influences the migration control regime in its entirety and the othering processes underpinning it. The preference given to Latin American citizens, which allegedly grounded in the cultural proximity rhetoric of the 'Motherland' has enduringly characterized Spanish migration policies, is based on the symbolic construction of (North-)Africans as insufficiently civilized individuals,⁵³ and this is mirrored in the 'profiles of deportability'. The high rates of Maghreb and Sub-Saharan denizens targeted by the border control system are, in this regard, conspicuous evidence of the persistence of racial stratifications and post-colonial traits in Spanish bordered penalty.

13.4 MIGRATION CONTROL POLICIES AND THE NEW MANAGEMENT OF THE RIGHT OF ASYLUM

A compelling question arises as to whether the asylum crisis witnessed in Europe since late 2014 has altered the above-described biased migration control policies. As has been previously elaborated, the right of asylum has been quite irrelevant as a political and legal issue in Spain. This insignificance is particularly apparent when the minor role of the asylum scheme is compared with the prominence and scope of the migration management system. It is thus unsurprising that the border control policies have been hardly affected,

50 L. Escudero, S. García, & N. Slepoy, "Los controles de identidad como expresión de la seguridad diferencial" in D. Ávila, S. García (eds.), *Enclaves de riesgo: Gobierno neoliberal, desigualdad y control social*, Madrid, Traficantes de Sueños, 2015, pp. 179-198.

51 Bradford, B. et al. *Identificación policial por perfil étnico en España: Informe sobre experiencias y actitudes en relación con las actuaciones policiales*, Valencia, Tirant lo Blanch, 2013; E. García España, L. Arenas García, & J. Miller, *Identificaciones policiales y discriminación racial en España: Evaluación de un programa para su reducción*, Valencia, Tirant lo Blanch, 2016.

52 This decision of the Spanish Constitutional Court was subsequently overturned by the United Nations Human Rights Committee (case *Rosalind Williams Lecraft v. Spain*, of 27 July 2009, communication No. 1493/2006), which ruled that the utilisation of ethnic profiling for migration control purposes violates Art. 26 of the International Covenant on Civil and Political Rights, and urged the Spanish administration to wholly ban this policing practice (see Bradford et al., *supra* note 51; Martínez Escamilla and Sánchez Tomás, 2013).

53 Moffette, *supra* note 48.

at least until recently, by the need to grant international protection to asylum-seeking newcomers.

Evident proof of the shortcomings of the Spanish asylum system, which has been persistently subordinated to the border enforcement policies, lies in the fact that a substantial number of asylum applicants present their requests while confined in detention facilities. From 2010 to 2014, 8.0% of asylum applications were presented in CIE.⁵⁴ In the same vein, the detention of asylum seekers is a law enforcement practice frequently used in Spain,⁵⁵ even though both the EU legal framework (Art. 8 of the 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) and even more evidently the Spanish legal framework (Art. 19 of the Law No. 12/2009, of 30 October 2009, regulating the right of asylum and the subsidiary protection) regard the detention of these international protection applicants as an exceptional measure.

On top of this, the high rate of negative decisions of the Spanish asylum system, that only recently has declined, cannot be ignored. As illustrated in Table 3, only 5.5% of asylum requests were accepted in the first instance from 2001 to 2009; however, this percentage significantly rose to 33.7% for the period between 2010 and 2016 (Source: Eurostat).

Table 3 First-instance positive decisions on requests of international protection, 2001-2016

Year	Positive decisions (Spain)	Positive decisions (EU)	Positive decisions rate (Spain)	Positive decisions rate (EU)
2001	430	-----	4.8%	-----
2002	275	-----	4.4%	-----
2003	405	-----	5.8%	-----

54 Ministerio del Interior, *Anuario estadístico del Ministerio del Interior 2015*, Madrid, Ministerio del Interior, 2016; see also Accem, *supra* note 15; CEAR, *Informe 2016: Las personas refugiadas, en España y en Europa*, Madrid, CEAR, 2016. Retrieved on 16 May 2017 from https://www.cear.es/wp-content/uploads/2016/12/informe_cear_2016_ok.pdf; This percentage dwindled to 5.3 percent in 2015 (Ministerio del Interior, 2016). See on this Ramajo, J., El derecho de asilo copa el 60% de las peticiones de los internados en el CIE Algeciras en los dos últimos años. *ElDiario.es*, 11 June 2017. Retrieved on 12 June 2017 from www.eldiario.es/andalucia/CIE-Algeciras_0_649885222.html.

55 CEAR, *Informe 2015: Las personas refugiadas, en España y en Europa*, Madrid, CEAR, 2015. Retrieved on 16 May 2017 from <https://www.cear.es/wp-content/uploads/2015/06/Informe-2015-de-CEAR2.pdf>; CEAR, *supra* note 54; M. “Martínez Escamilla, Centros de internamiento para extranjeros: Estado de la cuestión y perspectivas de futuro”, *Revista Electrónica de Ciencia penal y Criminología*, 18-23, 2016, pp. 1-38. Retrieved on 17 May 2017 from <http://criminnet.ugr.es/recpc/18/recpc18-23.pdf>; See on this the United Nations Human Rights Committee’s *Concluding observations on the sixth periodic report of Spain*, 20 July 2015. Retrieved on 17 April 2017 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ESP/CO/6; N. Cenizo, Un juzgado de Málaga encierra en el CIE de Tarifa a 20 solicitantes de asilo, *ElDiario.es*, 1 March 2017. Retrieved on 12 June 2017 from www.eldiario.es/desalambre/juzgado-Malaga-CIE-Tarifa-solicitantes_0_617339307.html.

Year	Positive decisions (Spain)	Positive decisions (EU)	Positive decisions rate (Spain)	Positive decisions rate (EU)
2004	365	-----	5.5%	-----
2005	345	46,725	6.7%	16.0%
2006	205	55,135	5.0%	23.2%
2007	245	-----	4.5%	-----
2008	275	57,945	5.4%	27.1%
2009	350	62,755	7.8%	27.2%
2010	610	55,575	21.9%	25.0%
2011	990	59,535	29.2%	25.1%
2012	525	91,010	20.2%	31.5%
2013	535	107,610	22.6%	33.3%
2014	1,585	167,385	43.8%	45.6%
2015	1,020	307,510	31.5%	51.9%
2016	6,855	673,060	66.9%	60.8%

Source: Eurostat. EU data correspond to EU27 countries until 2007 and to EU28 countries since 2008.

Given these elevated percentages of rejection, it can be assumed that the migration enforcement apparatus has been a critical device to manage a highly selective asylum regime. The data on the citizenship of the asylum seekers that have received a negative decision, though, do not unambiguously confirm this hypothesis. High numbers of rejections have been issued on applications presented by Colombian nationals (18.9% of all negative decisions issued from 2001 to 2016) and Cuban nationals (6.7%)⁵⁶ and both national groups, especially the latter, have played a relatively negligible role in the operation of the deportation system. On the contrary, two other national groups that stand out in terms of negative asylum decisions, i.e. Nigerians (15.6% of all negative decisions issued from 2001 to 2016) and Algerians (8.9%) have consistently had high arrest, detention and deportation rates.⁵⁷

In short, the data allow one to deduce that, against the backdrop of a significantly marginal asylum system, the border control apparatus, until recently, has operated as a tool to manage the arrival of asylum-seekers, at least in relation to some (racialized) national groups.

Nonetheless, the so-called refugee crisis has begun to shift the functioning of the Spanish asylum system. The right of asylum and the suffering of asylum-seekers have consolidated their positions within both the political agenda and the concerns of Spanish

⁵⁶ Eurostat.

⁵⁷ Fernández-Bessa & Brandariz García, *supra* note 18.

society. A widespread political campaign largely led by new-left alliances running local administrations in cities and towns such as Barcelona, Madrid, Valencia and Zaragoza – so-called ‘refuge cities’ – has for the first time allowed the right of asylum to gain momentum within public debate.⁵⁸ Furthermore, this new political stance has been concomitant to the historically minimal level of concern of the Spanish society about immigration,⁵⁹ an indicator that, perhaps paradoxically, has been declining since the beginning of the economic crisis.⁶⁰

The Spanish government has responded, albeit ambiguously, to this new political context. It has taken some logistical measures to shape a robust system of international protection, namely two asylum offices aimed at facilitating the presentation of protection requests were inaugurated in March 2015 in the enclave towns of Ceuta and Melilla. Yet, these offices have remained underused ever since.⁶¹

Most importantly, the Spanish government has begun in recent years to harmonize the Spanish asylum system with European standards. As clear evidence of this, positive decisions rates, which until recently were strikingly low, have almost risen to the EU average level in the last period (see Table 3). Moreover, the national profile of asylum-seekers and refugees is, some exceptions notwithstanding, more similar to those of other EU countries than it was in the previous decade. Syrians (25.8% of all asylum applications) Afghans (12.7%), Iraqis (8.6%), Kosovars (3.8%), Pakistanis (3.7%), Albanians (3.7%), Eritreans (3.3%) and Nigerians (3.1%) accounted for the highest percentages of asylum requests presented in the EU from 2014 to 2016. In the Spanish case, Syrians (28.2% of all asylum requests) Ukrainians (18.8%), Venezuelans (12.9%), Algerians (4.8%) and Palestinians (3.7%) presented the highest numbers of applications over the same time lapse.

58 J. De Lucas, *Una tragedia que es nuestra, no de ellos*. In: Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*. Sevilla: Asociación Pro-Derechos Humanos de Andalucía, 11-16, 2016. Retrieved on 16 May 2017 from www.apdha.org/media/informe-frontera-sur-2016-web.pdf; Wonders, *supra* note 27. The huge demonstration held in Barcelona on February 18, 2017, in which around 200,000 people called for a more supportive and rights-based asylum policy has been a key event of this political campaign.

59 See also Wonders, *supra* note 27.

60 According to CIS (Centro de Investigaciones Sociológicas; Centre for Sociological Research. Retrieved on 17 April 2017 from www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html) data, in 2016 only 3.3 percent of the surveyed individuals mentioned immigration as one of the three most concerning national problems. By contrast, in 2006 this percentage stood at 38.7 percent.

61 Defensor del Pueblo, *Estudio sobre el asilo en España. La protección internacional y los recursos del sistema de acogida*, Madrid, Defensor del Pueblo, 2016; Servicio Jesuita a Migrantes, *No protection at the border. Human rights as the southern frontier: Between Nador and Melilla*, 2016. Retrieved on 16 May 2017 from www.asylumineurope.org/sites/default/files/resources/no-protection-at-the-border_sjm.pdf; E. Tyszler, “La frontera hispano-marroquí, zona de selección de las personas candidatas a la inmigración hacia Europa”, in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2016, pp. 25-36. Retrieved on 16 May 2017 from www.apdha.org/media/informe-frontera-sur-2016-web.pdf.

Regarding positive decisions, in the EU international protection was especially granted in recent years (from 2014 to 2016) to Syrians (54.8% of all positive decisions), Iraqis (8.2%), Afghans (7.3%), Eritreans (6.5%) and Somalis (2.0%), together with stateless individuals (3.0%). In Spain, in turn, the vast majority of positive decisions were granted from 2014 to 2016 to Syrians (84.9% of all positive decisions), followed by Somalis (3.2%), Palestinians (2.3%), Pakistanis (1.7%) and Afghans (1.3%).

In short, the Spanish administration has begun to consolidate a consistent national asylum system. Yet, it is still a precarious scheme that continues to be largely subjected to the needs of border control policies. In this regard, it is particularly telling that an amendment of the Foreigners' Law (Law No. 4/2000, of 11 January 2000, on rights and freedoms granted to foreigners in Spain and their social integration), which was passed in March 2015, set out an alleged 'special legal regime' to be applied to the enclaves of Ceuta and Melilla. This reform has legalized so-called 'push-backs', which are instances when Spanish police officers immediately expel migrants who manage to penetrate the razor wire fences surrounding these North-African Spanish towns, back to Morocco, with no legal procedure. This border control practice, as has been stressed by numerous institutions (e.g. ACNUR, the Spanish Ombudsman, the General Council of Spanish Lawyers, the European Committee for the Prevention of Torture and the Commissioner for Human Rights of the Council of Europe⁶²), impedes border crossers from presenting asylum requests, in violation of international norms ratified by Spain.⁶³ Although push-back procedures had been frequently utilized to forcefully and expeditiously return irregular migrants to Morocco long before their legalization in 2015, some data suggest that they have been increasingly used thereafter.⁶⁴

In the framework of this protracted and controversial process of transformation, a reshaped model of nationality-based biased border management has been gradually cementing in recent years. As was previously examined, the deportation apparatus and its components of migration policing, detention and coercive return, continues to be the prevalent tool to govern the southern border and, in the same vein, the preferred legal

62 Retrieved on 17 April 2017 from <https://www.coe.int/en/web/commissioner/country-monitoring/spain>

63 Amnesty International, *Fear and fences: Europe's approach to keeping refugees at bay*, London, Amnesty International, 2015. Retrieved on 17 April 2017 from www.amnesty.eu/content/assets/Doc2015/2015_Documents/Report_-_Fear_and_Fences-EMBARGO.pdf; M. Martínez Escamilla, & J. M. Sánchez Tomás, *Devoluciones ilegales en la frontera sur: Análisis jurídico de las denominadas "devoluciones en caliente"*, 2015. Retrieved on 17 April 2017 from <http://eprints.ucm.es/28256/1/E%20print.%20DEVOLUCIONES%20ILEGALES%20EN%20LA%20FRONTERA%20SUR.pdf>; M. Martínez Escamilla, *et al.* "Rechazos en frontera": ¿Frontera sin derechos?, 2015. Retrieved on 17 April 2017 from <http://eprints.ucm.es/29379/1/Informe%20rechazo%20en%20frontera.pdf>.

64 C. Arce Jiménez, *Dos años de devoluciones en caliente "legales"*. In: Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2017*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2017, pp. 42-46. Retrieved on 16 May 2017 from www.apdha.org/media/informe-frontera-sur-2017-web.pdf.

instrument to tackle irregular immigration of Maghreb and Sub-Saharan origin.⁶⁵ Latin American nationals, who have always been favoured by the post-colonial model of migration management, are also targeted by policing and detention measures; however, the so-called ‘voluntary assisted’ return scheme⁶⁶ is almost exclusively applied to this group of foreigners, for whom it is often prioritized rather than the coercive return procedure. From 2014 to 2016, 90.2% of voluntary returns enforced in Spain involved Latin American nationals.⁶⁷ The asylum regime, in turn, has become the preferred sub-system to deal with the foreign nationals that are recognized as refugees in other EU countries, most especially Syrian citizens. Hence, this privileged migration status (i.e. asylum and international protection) has been clearly restricted to these foreign nationals, who are internationally acknowledged as asylum-seekers.⁶⁸

These data do seem to imply that a new nationality-based selective model of migration management is being crafted. In the current unstable situation, it would be too daring to state that the described tendencies are destined to persist. Yet, a national model of mobility management that has been based thus far on both a profoundly biased migration enforcement system and an even more selective asylum regime is not particularly suitable to evolve towards a ‘colour-blind’ scheme of government of migration flows.

REFERENCES

Accem, *AIDA, Asylum Information Database. Country Report: Spain*, 2017. Retrieved from 16 May 2017 www.asylumineurope.org/sites/default/files/report-download/aida_es_2016update.pdf.

Amnesty International, *Fear and fences: Europe’s approach to keeping refugees at bay*. London: Amnesty International, 2015. Retrieved on 17 April 2017 www.amnesty.eu/content/assets/Doc2015/2015_Documents/Report_-_Fear_and_Fences-EMBARGO.pdf.

Arango, J., “Después del gran boom: la inmigración en la bisagra del cambio” in: Aja, E., et al., eds., *La inmigración en tiempos de crisis: Anuario de la inmigración en España*, Barcelona, Cidob, 2010, pp. 52-73.

65 Tyszler, *supra* note 61.

66 B. Kalir, ‘Between ‘voluntary’ return programs and soft deportation: Sending vulnerable migrants in Spain back ‘home’ in Z. Vathi, & R. King (eds.), *Return migration and psycho-social wellbeing: Discourses, policy-making and outcomes for migrants and their families*, London, Routledge, 2017.

67 Eurostat.

68 CEAR, *supra* note 55; Tyszler, *supra* note 61.

Arce Jiménez, C., "Dos años de devoluciones en caliente 'legales'" in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2017*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2017, pp. 42-46. Retrieved on 16 May 2017 www.apdha.org/media/informe-frontera-sur-2017-web.pdf.

Asociación Pro-Derechos Humanos de Andalucía. Retrieved on 17 May 2017 <http://apdha.org/fronterasur/>.

Barbero González, I., & Fernández Bessa, C., "Beyond surveillance: Racial profiled detention practices in everyday life" in William, C. et al., eds., *Living in Surveillance Societies: The State of Surveillance*, Seattle: CreateSpace, 2013, pp. 295-304.

Bodelón González, E., "Mujer inmigrante y sistema penal en España: La construcción de la desigualdad de género en el sistema penal" in Almeda Samaranch, E. & Bodelón González, E., (eds.), *Mujeres y castigo: Un enfoque socio-jurídico y de género*, Madrid, Dykinson, 2007, pp. 105-132.

Boza Martínez, D., *La expulsión de personas extranjeras condenadas penalmente: El Nuevo artículo 89 CP*, Cizur Menor, Thomson Reuters Aranzadi, 2016.

Boza Martínez, D., "Migrantes económicos y refugiados: La interesada creación de una falta dicotomía" in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2017*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2017, pp. 42-46. Retrieved on 16 May 2017 www.apdha.org/media/informe-frontera-sur-2017-web.pdf.

Bradford, B., et al., *Identificación policial por perfil étnico en España: Informe sobre experiencias y actitudes en relación con las actuaciones policiales*, Valencia, Tirant lo Blanch, 2013.

Brandariz García, J. A., *Sistema penal y control de los migrantes: Gramática del migrante como infractor penal*, Granada, Comares, 2011.

Brandariz García, J. A., "Crimmigration policies and the great recession: Analysis of the Spanish case" in M. J. Guia, R. Koulisch, and V. Mitsilegas (eds.), *Immigration detention, risk and human rights*. New York, Springer, 2016, pp. 185-197.

Brandariz-García, J. A., & Fernández-Bessa, C., “The managerial turn: The transformation of Spanish migration control policies since the onset of the economic crisis”, *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219.

Calavita, K., *Immigrants at the margins*, Cambridge, Cambridge University Press, 2005.

Campesi, G., *Polizia della frontiera: Frontex e la produzione dello spazio europeo*, Roma, DeriveApprodi, 2015.

CEAR, *Informe 2015: Las personas refugiadas, en España y en Europa*, Madrid, CEAR, 2015. Retrieved on 16 May 2017 <https://www.cear.es/wp-content/uploads/2015/06/Informe-2015-de-CEAR2.pdf>.

CEAR, *Informe 2016: Las personas refugiadas, en España y en Europa*. Madrid: CEAR, 2016. Retrieved on 16 May 2017 https://www.cear.es/wp-content/uploads/2016/12/informe_cear_2016_ok.pdf.

Cornelius, W. A., “Spain: The uneasy transition from labor exporter to labor importer” in Cornelius, W. A., et al., eds., *Controlling immigration: A global perspective*, Stanford, Stanford University Press, 2004, pp. 387-429.

Daunis Rodríguez, A., *El derecho penal como herramienta de la política migratoria*, Granada, Comares, 2009.

Defensor del Pueblo, *Estudio sobre el asilo en España. La protección internacional y los recursos del sistema de acogida*, Madrid, Defensor del Pueblo, 2016.

De Lucas, J., Una tragedia que es nuestra, no de ellos. in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2016, pp. 11-16. Retrieved on 16 May 2017 www.apdha.org/media/informe-frontera-sur-2016-web.pdf.

Escudero, L., García, S., & Slepoy, N., “Los controles de identidad como expresión de la seguridad diferencial” in Ávila, D. and García, S., eds., *Enclaves de riesgo: Gobierno neoliberal, desigualdad y control social*, Madrid, Traficantes de Sueños, 2015, pp. 179-198.

Fekete, L., Accelerated removals: The human cost of EU deportation policies, *Race & Class*, Vol. 52, No. 4, 2011, pp. 89-97.

Fernández Bessa, C., "Il panorama dei Centri di internamento per stranieri in Spagna: Dal controllo delle frontiere alla gestione della criminalità", *Antigone*, Vol. 8, No. 1, 2013, pp. 68-90.

Fernández Bessa, C. *El dispositiu de deportació. Anàlisi criminològica de la detenció, internament i expulsió d'immigrants en el context espanyol*. Unpublished PhD Dissertation. University of Barcelona, Spain, 2016. Retrieved on 15 April 2017 www.diposit.ub.edu.

Fernández Bessa C., Brandariz García J.A., "Profiles' of Deportability: Analyzing Spanish Migration Control Policies from a Neocolonial Perspective', in Carrington K., Hogg R., Scott J. and Sozzo M. eds., *The Palgrave Handbook of Criminology and the Global South*, Cham: Palgrave Macmillan, 2018, pp. 775-795.

Fernández Bessa, C., & Manavella Suárez, A., "Controles migratorios en las fronteras euromediterráneas: Un análisis crítico desde la perspectiva de los derechos humanos" in C. Fernández Bessa, et al., eds., *Contornos bélicos del Estado securitario: Control de la vida y procesos de exclusión social*, Barcelona: Anthropos, 2010, pp. 173-204.

Fernández Bessa, C. et al., *Frontera sur*, Barcelona, Virus, 2008.

García España, E., "Extranjeros presos y reinserción: Un reto del siglo XXI", in A. I. Cerezo Domínguez, & E. García España, eds., *La prisión en España: Una perspectiva criminológica*, Granada, Comares, 2007, pp. 101-134.

García España, E., Arenas García, L., & Miller, J., *Identificaciones policiales y discriminación racial en España: Evaluación de un programa para su reducción*, Valencia, Tirant lo Blanch, 2016.

García Hernández, C. C., *Crimmigration Law*, Chicago, American Bar Association, 2015.

González-Enríquez, C., "Spain: irregularity as a Rule" in Tryandafyllidou, A., ed., *Irregular migration in Europe: Myths and realities*, Abingdon, Routledge, 2010, pp. 247-266.

Guia, M. J., van der Woude, M., & van der Leun, J., eds., *Social control and justice. Crim-migration in the age of fear*, The Hague, Eleven International Publishing, 2013.

Huntington, S., *The third wave: Democratization in the late twentieth century*, Norman, University of Oklahoma Press, 1991.

Kalir, B., "Between 'voluntary' return programs and soft deportation: Sending vulnerable migrants in Spain back 'home'" in Vathi, Z., & King, R., eds., *Return migration and psychosocial wellbeing: discourses, policy-making and outcomes for migrants and their families*, London, Routledge, 2017.

Lara, R., "Fuera de foco: la inmigración en España sigue siendo sinónimo de violaciones de derechos humanos, sufrimiento y muerte en 2015" in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*, Sevilla, Asociación Pro-Derechos Humanos de Andalucía, 2016, pp. 49-65. Retrieved on 16 May 2017 www.apdha.org/media/informe-frontera-sur-2016-web.pdf.

Larrauri, E., *Introducción a la Criminología y al sistema penal*, Madrid, Trotta, 2015.

Martínez Escamilla, M., Para que el derecho no se detenga a las puertas de los CIE: Análisis del régimen jurídico del internamiento de extranjeros. *Anuario de Derecho penal y ciencias penales*, Vol. 62, No. 1, 2009, pp. 253-281.

Martínez Escamilla, M., *Mujeres en el CIE: Género, inmigración e internamiento*, Donostia-San Sebastián, Tercera Prensa, 2013.

Martínez Escamilla, M., "Centros de internamiento para extranjeros: Estado de la cuestión y perspectivas de future", *Revista Electrónica de Ciencia penal y Criminología*, 2016, pp. 18-23, 1-38. Retrieved on 17 May 2017 <http://criminnet.ugr.es/recpc/18/recpc18-23.pdf>.

Martínez Escamilla, M., & Sánchez Tomás, J. M., "Controles de identidad, detenciones y uso del perfil étnico en la persecución y castigo del inmigrante 'sin papeles': Ilegalidad e inconstitucionalidad de determinadas prácticas policiales" in Álvarez García, F. J. et al., eds., *Libro homenaje al Profesor Luis Rodríguez Ramos*, Tirant lo Blanch, Valencia, 2013, pp. 1025-1054.

Martínez Escamilla, M., & Sánchez Tomás, J. M., Devoluciones ilegales en la frontera sur: Análisis jurídico de las denominadas "devoluciones en caliente", 2015. Retrieved on 17 April 2017 <http://eprints.ucm.es/28256/1/E%20print.%20DEVOLUCIONES%20ILEGALES%20EN%20LA%20FRONTERA%20SUR.pdf>.

Martínez Escamilla, M., et al., "Rechazos en frontera": ¿Frontera sin derechos?, 2015. Retrieved on 17 April 2017 <http://eprints.ucm.es/29379/1/Informe%20rechazo%20en%20frontera.pdf>.

Ministerio del Interior, *Anuario estadístico del Ministerio del Interior 2015*, Madrid, Ministerio del Interior, 2016.

Moffette, D., "Governing immigration through probation: The displacement of borderwork and the assessment of desirability in Spain", *Security Dialogue*, Vol. 45, No. 3, 2014, pp. 262-278.

Moffette, D., *Governing irregular migration: Logics and practices in Spanish immigration policy*. Unpublished PhD Dissertation: York University, Canada, 2015. Retrieved on 16 April 2017 www.library.yorku.ca.

Monclús Masó, M., *La gestión penal de la inmigración*, Buenos Aires, Del Puerto, 2008.

Ngai, M. M., *Impossible subjects: Illegal alien and the making of modern America*. Princeton, Princeton University Press, 2004.

Pueblos Unidos, *CIE y expulsiones exprés: Informe anual 2014*. Madrid, Pueblos Unidos, 2015. Retrieved on 22 May 2016 www.entreculturas.org.

Rigo, E., "Citizenship at Europe's borders: Some reflections on the post-Colonial condition of Europe in the context of EU enlargement", *Citizenship Studies*, Vol. 9, No. 1, 2005, pp. 3-22.

Rodier, C., *Xénophobie business*, Paris, La Découverte, 2012.

Romero, E., *Un deseo apasionado de trabajo más barato y servicial: Migraciones, fronteras y capitalismo*, Oviedo, Cambalache, 2010.

Romero, E., *Quién invade a quién: Del colonialismo al II Plan África*, Oviedo, Cambalache, 2011.

Sainz de la Maza Quintanal, E., "*Ultima ratio*": *el proceso de expulsión de inmigrantes en situación irregular en España*. Unpublished PhD Dissertation: Complutense University of Madrid, Spain, 2015. Retrieved on 24 May 2016 www.eprints.ucm.es.

Sánchez Tomás, J. M., "Hacia un sistema alternativo al internamiento de inmigrantes irregulares", *Eunomia*, No. 5, 2014, pp. 75-94.

Segato, R. L., El color de la cárcel en América Latina: Apuntes sobre la colonialidad de la justicia en un continente en desconstrucción. *Nueva sociedad*, Vol. 208, 2007, pp. 142-161.

Servicio Jesuita a Migrantes, *No protection at the border. Human rights as the southern frontier: Between Nador and Melilla*, 2016. Retrieved on 16 May 2017 www.asylumineurope.org/sites/default/files/resources/no-protection-at-the-border_sjm.pdf.

Silveira Gorski, H. C., “La legalarbitrariedad como mecanismo jurídico de control de la inmigración irregular”, *Crítica penal y poder*, No. 12, 2017, pp. 34-54.

Stumpf, J., “The Crimmigration crisis: Immigrants, crime, and sovereign power”, *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419.

Tyszler, E., La frontera hispano-marroquí, zona de selección de las personas candidatas a la inmigración hacia Europa, in Asociación Pro-Derechos Humanos de Andalucía, *Derechos humanos en la frontera sur 2016*. Sevilla: Asociación Pro-Derechos Humanos de Andalucía, 2016, pp. 25-36. Retrieved on 16 May 2017 www.apdha.org/media/informe-frontera-sur-2016-web.pdf.

Valluy, J., *Rejet des exilés. Le grand retournement de droit de l'asile*, Paris, Editions du Croquant, 2009.

Valluy, J., “De l'asile aux répulsions: La radicalisation des frontières” in Agier, M., ed., *Réfugiés, sinistrés, sans-papiers. Politiques de l'exception*, Paris, Téraèdre-Le Sujet dans la cite, 2012.

van der Woude, M., Barker, V., & van der Leun, J., “Crimmigration in Europe”, *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 3-6.

Wonders, N., “Sitting on the fence—Spain's delicate balance: Bordering, multiscale challenges, and crimmigration”, *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 7-26.

Žižek, S., *Against the double blackmail*, London, Allen Lane, 2016.

14 THE REFUGEE CRISIS AS A WINDOW OF OPPORTUNITY FOR URBAN EXPERIMENTS IN THE NETHERLANDS

Karin Geuijen

14.1 INTRODUCTION

During the recent 'refugee crisis', governments have been confronted with various problems concerning asylum reception. In several locations in the Netherlands, as well as elsewhere in Europe and beyond, new local forms of experimenting around the issue of asylum reception have begun. One example of this is Utrecht's 'Plan Einstein' or rather the Utrecht Refugee Launch pad (U-RLP), its official name. In Overvecht, a district of the city, an office building has been converted into asylum shelter, where 400 asylum seekers live together with 38 youths from this neighborhood. The Centre runs courses and activities, offered to both asylum seekers (including those who do not yet have a residence status) and local residents.

In this chapter, we will focus on this urban experiment, discussing how and why it came into existence as well as reflecting on its implications for democratic legitimacy. We will present the historic context of this case, being the way the reception of asylum seekers has been organized in the Netherlands since the 1990s and the problems this has been producing for refugees as well as for society at large. Plan Einstein was conceived as an experiment to try and deal with these problems. It starts from the assumption that local level urban solutions might have become more fit to deal with contemporary transnational problems than national level solutions.

In this perspective increasingly problems are perceived to not being limited to the territories and jurisdictions of states: climate change, terrorism and (forced) migration being a case in point. These transnational problems are often called wicked issues¹ or even super-

1 H. Rittel, & M. Webber, "Dilemmas in a general theory of planning", *Policy Sciences*, Vol. 4, 1973, pp. 155-169; B. Head, & J. Alford, "Wicked problems: implications for public policy and management", *Administration & Society*, Vol. 47, No. 6, 2015, pp. 711-739.

wicked issues.² Castells³ has rightly pointed out that there seems to be a growing gap between the place where these kinds of problems become manifest (at the local and the global level) and the place where they are managed (the national level). This is called a ‘scale mismatch’.⁴ These problems may need to be addressed by more than one governance level at the same time: multilevel governance, a concept developed to understand governance in the context of the EU.⁵ Multilevel governance is challenging because decisions are made and acted upon by many different actors in territorially overlapping jurisdictions. Politicians and policy makers who are acting in one place are not always aware of everything that is going on simultaneously in other places although these actions may very well influence one another. Less so are they able to (meta)govern these policies and actions. No ‘world government’ or other central authority is being built to deal with these issues top down. Some sustainability scholars, however, try to come up with ways in which to tackle (super)wicked issues focusing on the global level including the UN and international organizations, for example in a huge international research program called the Earth System Governance Project.⁶

A related approach to the multilevel governance of wicked issue is the perspective that starts bottom up. Barber⁷ has written a seminal book about the decentralizing tendency in governance, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities*. His point is that national states tend to get stuck in political battles and rivalries over sovereignty, while cities pragmatically and effectively take on the tasks at hand. His conclusion is that wicked issues are tackled more effectively at the local level. However, cities do not govern in isolation. They build networks of like-minded cities. Examples are the C40 network (86 megacities), ICLEI (International Council for Local Environmental Initiatives), UCLG (United Cities and Local Governments), Eurocities and Energy Cities.

From 2015–2016 onwards urban governance has been developed as a reaction to the refugee crisis, especially in the domain of the reception of asylum seekers.⁸ In this chapter we will explore how Plan Einstein was conceived, framed and organized. We will also explore its implications for democracy. This is important because representative democracy

-
- 2 K. Levin, B. Cashore, S. Bernstein, & G. Auld, “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change”, *Policy Sciences*, Vol. 45, 2012, pp. 123-152.
 - 3 M. Castells, “The new public sphere: Global civil society, communication networks, and global governance”, *The ANNALS of the American Academy of Political and Social Science*, Vol. 616, No. 1, 2008, pp. 78-93.
 - 4 K. Levin, B. Cashore, S. Bernstein, & G. Auld, “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change”, *Policy Sciences*, Vol. 45, 2012, pp. 123-152.
 - 5 L. Hooghe, & G. Marks, *Multilevel governance and European integration*, Lanham, Rowan and Littlefield Publishers.
 - 6 F. Biermann, *Earth system governance: World politics in the anthropocene*, Cambridge, MIT Press, 2014.
 - 7 B. Barber, *If mayors ruled the world: Dysfunctional nations, rising cities*, New Haven, Yale University Press, 2013.
 - 8 Geuijen, K., Moore, M., Cederquist, A., Ronning, R., Van Twist, M., “Creating public value in global wicked problems”, *Public Management Review*, Vol. 19, No. 5, 2016, pp. 621-639.

has for a long time been the classic way in which national problems were discussed and decided upon. However as Barber has shown, national representative democracies may not be the most suitable way to discuss and decide on transnational wicked problems. We explore if a local experiment as the one we will discuss in this chapter may weaken or strengthen democracy, and in which way.

This study builds on data which are generated in two phases. Research for the first case started in 1998 in the form of ethnographic research in two large-scale reception centres: (non-participant) observations as well as interviews with 86 asylum seekers, with 21 professionals working in reception centres, 2 location managers and 6 volunteers.⁹ In 2000 and 2001 we continued with a research project in four reception centres scaling from large to small.¹⁰ We interviewed 33 asylum seekers, 15 professionals and 4 location managers. Then we interviewed 51 professionals and managers in organizations with connections to these reception centres, like the police, health care, schools, etc. We also interviewed shopkeepers, people in churches and community centres as well as about 12 to 13 neighbours of each of the centres. Additionally, we analysed relevant policy documents on national asylum as well as organizational policies of the central organization for the reception of asylum seekers (COA). The case we present in this chapter is also based on subsequent research reports like that of the Advisory Committee on Migration Affairs.¹¹ This report confirmed that the analysis we had done around 2000 was still valid. The situation in reception centres (ASCs) had for some years been more austere, which meant activities were cut. Since 2013 COA had started offering some activities in the ASCs again as part of their small-scale program titled 'Activating Residents'. However, the general situation in ASCs was in 2013 like it had been around the year 2000.

The second case we present in this chapter is on Plan Einstein. It is based on the analysis of documents, plans, interviews with partners and stakeholders, presentations¹² and a website.¹³ Access to the documents and plans was granted as part of a monitoring and evaluation research project which started in June 2017.¹⁴ Additionally, some interviews were conducted with professionals working in the implementation and management of

9 K. Geuijen, "Wonen en werken in een asielzoekerscentrum", (Living and working in a reception center for asylum seekers), *Migrantenstudies* Vol. 14, No. 4, 1998, pp. 261-272.

10 M. Gastelaars, K. Geuijen, J. Van der Horst, & M. Van Leeuwen, *Tussen arena en netwerk: Leefbaarheid en draagvlak bij de lokale opvang van asielzoekers* (From arenas into networks: Quality of life and legitimacy in the local reception of asylum seekers), Amsterdam, SWP, 2002.

11 Advisory Committee on Migration Affairs (ACVZ), *Lost time: Advisory report on activities in reception facilities for aliens*, The Hague, ACVZ, 2013.

12 See www.uia-initiative.eu/sites/default/files/2017-04/U-RLPpresentation%20DG%20Home%2029-03-2017.pdf.

13 See U-RLP. Retrieved from www.uia-initiative.eu/en/uia-cities/utrecht.

14 This research and evaluation project is conducted by a team of researchers consisting of dr. Caroline Oliver (Roehampton University), dr. Rianne Dekker (Utrecht School of Governance) and dr. Karin Geuijen (Utrecht School of Governance).

the Utrecht Refugee Launch Pad (U-RLP). First reports will be published only in spring 2018.

14.2 CASE: RECEPTION OF ASYLUM SEEKERS

The reception of asylum seekers is a politically contentious issue. We may encounter two conflicting narratives each with particular values they want to protect or advance. The first would be the discourse that focuses on human rights and the protection of the safety and welfare of individual refugees. The second focuses on protecting (national) community interests, consisting of, firstly, economic interests and protecting the welfare state; secondly, sociocultural issues focusing on community identity; and thirdly, security interests.¹⁵ These play out in organizations dealing with this wicked issue and having to answer basic questions like who gets help, what type of help, who provides it, and for how long.

In the two cases presented below we will find these conflicting narratives being played out in different ways. In the first case the narrative on protecting national interests seems dominant. This produces certain problems. In the second case actors seem to aim to balance both narratives more equally and in that way try to solve these problems or even prevent these from surfacing.

14.2.1 *Reception of asylum seekers as a national task: The traditional situation*

In the Netherlands, the Dutch parliament decided that the reception of asylum seekers be done in asylum seekers' reception centres (ASCs). The mission of ASCs is to manage 'austere but humane' reception facilities. This mission itself expresses the above-mentioned conflicting values: protecting refugee rights by being humane in giving them shelter during the asylum procedure and simultaneously protecting community interests by being austere. Austere housing is expected to prevent many asylum seekers from coming to the Netherlands at all. After arrival it would prevent them from integrating into Dutch society as long as they would not have obtained a staying permit (which could take years). In this way they would not get connected to Dutch society, as connections would prevent them from leaving the country in case their asylum application would get rejected.

Asylum seekers' daily lives revolve around the ASC: eating, sleeping, waiting and raising children. Asylum seekers share rooms, as well as kitchen and sanitary facilities. They receive 'living money' and are obliged to report weekly (and sometimes daily) at the ASC. They

15 K. Geuijen, *De asielcontroverse: argumenteren over mensenrechten en nationale belangen*, (The asylum controversy: arguing about human rights and national interests) Amsterdam, Dutch University Press, 2004.

are allowed to do voluntary work. They can also do paid work, but starting only 6 months after their asylum application is filed, for a maximum of 24 weeks a year; they are allowed to keep 25% of their income with a maximum of €183 per month, and their employer needs to apply for a working permit for each asylum seeker separately. Very few asylum seekers have a paid job. Boredom, feelings of uselessness and loneliness are major problems for asylum seekers. Within the ASCs we encountered three coping strategies of asylum seekers living there for years, not being allowed to work or receive an education.¹⁶ The first strategy is to become active within the centre itself: participating in (semi)voluntary work like cleaning the premises, helping organize activities for children, taking Dutch classes from volunteers and so on. After a long time in waiting, and especially after the first rejection of their asylum application, some asylum seekers would either become angry and aggressive or become passive and depressed. In both cases, they might get ‘institutionalized’: accepting everything that happens to them while not being able to take control of their own lives anymore.

Professionals working at the ASCs have to deal with the Janus-faced mission ‘austere but humane’. They notice asylum seekers living in this ‘total institution’, while spending their lives in waiting. They too develop coping strategies to deal with this. We distinguished four strategies,¹⁷ which are similar to coping strategies of professionals in humanitarian organizations. Some professionals work their heads off to try and improve the situation as much as possible. After some time, they understand that this will not change the situation in any structural way. Some shut themselves off from their ‘clients’, for example by setting limited office hours in which clients can contact them. Others shift the blame on the ‘clients’: They don’t participate, they only complain; they don’t take responsibility for the premises. And some reframe the situation: Keeping in mind the general situation and our mission, we don’t do that bad at all.

The more asylum seekers become depressed or angry, the more professionals shut themselves off or shift the blame on them. These professionals increasingly come to believe in the need for austerity above humanity to dominate in ASCs. ASC managers generally have two strategies: Either they take the dominant ‘austerity’ path, or they try to bend the rules and facilitate connections between asylum seekers, civil society organizations and people in the community in which the ASC is located.

Some civil society organizations and actors outside of the ASCs are willing to work with and provide for asylum seekers. They do not deliver housing, but they do provide voluntary jobs, classes in Dutch and entertainment. Other civil society organizations like the Dutch Refugee Council provide legal and psychological support during the asylum application procedure. They also lobby with the national government for changing national

¹⁶ Geuijen, *supra* note 9.

¹⁷ Id.

asylum policies. Citizens, churches and civil society organizations are coming up with ideas and initiatives for improving physical and social conditions in ASCs and assisting refugees with their integration after receiving a stay permit. All this is done apart from the formal COA, which provides housing and some activities. So, it seems that the reception of asylum seekers is done by the COA, while other organisations deliver other relevant activities. These 'worlds' seem to be not related to one another.

However, these proposals are met with reluctance by some, to say the very least. Not everybody is comfortable with these initiatives, neither within the ASCs¹⁸ nor the politicians.¹⁹ Fostering cooperation between asylum seekers and society is perceived to have risks. Greater integration during the assessment process is expected to make deportation for asylum seekers whose claims are rejected even more difficult and traumatic. It raises the prospect of other forms of community action, as class mates, colleagues, friends and mayors might protest in the media. Furthermore, collaborative forms of service provision that focus on integration might detract from other equally valid purposes of the reception system, such as security and cost containment, or give the appearance of loss of control over an inherently governmental function (border control). But at the same time it might improve the quality of life in the ASC. It might help former asylum seekers build their lives after the asylum procedure, either in the Netherlands or in another country. It could even lower societal costs in the long term as it may help refugees to build a network, learn to speak Dutch and keep their skills up to date, which may facilitate finding a job and not needing social services. In the Netherlands, for refugees to find a job turns out to be very difficult. Research by Engbersen et al.²⁰ has shown that only one third of the refugees aged 15 – 64 years who have arrived in the nineties, has found a paid job. About one and a half years after being granted a staying permit about 90 percent of more recently arrived asylum seekers from Syria and Eritrea are dependent on social security.²¹

The controversy on asylum prevents organizations from cooperating in networks. They have opposing views on what the problem even is, let alone which solution would be best suited to deal with it. They inhabit multiple independent arenas for social deliberation and action. One could label these 'parallel worlds' of the formal national government institutions, on the one hand, and civil society organizations, on the other. They do not seem to be willing or able to collaborate or learn from each other.

18 Id.; Gastelaars *et al.*, *supra* note 10; ACVZ, *supra* note 11.

19 Geuijen, *supra* note 15.

20 G. Engbersen, J. Dagevos, R. Jennissen, L. Bakker, & A. Leerkens, *No time to lose: From reception to integration of asylum migrants*, WRR Policy Brief 4, The Hague, 2015. Scientific Council for Government Policy (WRR), Netherlands Institute for Social Research (SCP), Research and Documentation Centre, Ministry of Security & Justice (WODC).

21 CBS (2016), https://www.cbs.nl/-/media/_pdf/2017/25/van%20opvang%20naar%20integratie_incl%20erratum.pdf.

This issue is managed at the national level: the reception of asylum seekers is a matter of national policy and politics. Where is the local government in all of this? Within the Netherlands of old, local governments have only a specific minor role in the reception of asylum seekers: They have to decide if they accept that COA – the national government institution – starts and runs a reception centre on their local territory. After the asylum procedure is complete, local governments are expected to house accepted refugees in their social housing schemes. When asylum seekers are rejected, however, a problem arises for local governments. These rejected former asylum seekers are no longer entitled to live in ASCs as they are expected to leave the country. Some of them do, but many do not. These people stay within the Netherlands as undocumented migrants, many of whom live in one of the major cities in the country. Local governments are reluctant to accept having these people living rough on their streets so some provide shelter and food. This has led to some fierce tensions between local governments and civil society organizations, on the one hand, and the national government, on the other hand.

As we have described above, the reception of asylum seekers as a national task leads to several problems. First we saw problems in the well-being of asylum seekers. They experience their lives 'on hold'. Moreover, extended periods of not developing and maintaining skills has also led them to being ill prepared for integration in the labour market. And finally, when starting an ASC, relations with neighbourhoods generally are riddled with tensions. Local governments are confronted with these.

14.2.2 *Plan Einstein, an experiment*

The problems mentioned above are experienced daily, by asylum seekers, civil society organizations, neighbours and by local governments. That is why experimental ideas and initiatives often are thought up at the local, urban level.

One example is created in Utrecht, one of the major cities in the Netherlands. In this city an experiment was started in fall 2016. It is called Plan (or Project) Einstein, after its location on Einstein Street in Utrecht (the formal title is Utrecht Refugee Launch Pad, or U-RLP). It is meant to be an alternative to the traditional national reception centres we described above. Project Einstein wants to counter the problems this way of asylum seekers' reception produced. The experiment aims to support asylum seekers in preparing well for a future, either within the Netherlands (with a refugee status), in their country of origin (after denial of their asylum application and deportation), or in yet another country (after moving on). It also aims to enhance asylum seekers' skills by providing courses. And it wants to improve neighbourhood relations.

The experiment, therefore, is characterized by these aspects:

- a. Combined community: housing for asylum seekers and local youngsters: 400 asylum seekers living in the ASC and 38 youngsters living in apartments in a separate part of the building,
- b. Education for asylum seekers and local youngsters: courses in business English (given by Volksuniversiteit) and (international) entrepreneurship (by Utrecht University Centre for Entrepreneurship),
- c. Peer-to-peer coaching, internships in local businesses, and entrepreneurial network building in an international incubator space for new business startups (by Utrecht's Social Impact Factory).
- d. The Dutch Council on Refugees will contact the asylum seekers from the very beginning for an assessment of their skills and educational level (often asylum seekers do not bring formal document like diplomas) and help them select suitable courses and voluntary work.
- e. Crucial to the experiment is that courses are provided for asylum seekers as well as for people in the neighbourhood, which allows them to acquire 'future proof' skills they will benefit from, no matter whether they will integrate in Dutch society or will have to leave the Netherlands in case their asylum application would be rejected. Local government, civil society organizations and entrepreneurs develop this local experiment together with asylum seekers themselves as well as (young) citizens.

So, the experiment assumes that participating in courses and activities in the ASC results in asylum seekers being better equipped for the labour market in the Netherlands or elsewhere. It also assumes that co-learning and co-living will improve asylum seekers well-being in this new type of ASC. And finally it assumes that ASCs and asylum seekers will be accepted better within the Netherlands if at these locations apartments are made available for deprived local youngsters and if people from the neighbourhood are welcome to participate in any of the courses and activities that are provided for asylum seekers. It is assumed that neighbours will actually perceive this new type of ASC as improving rather than deteriorating their situation. This is assumed to lead to better neighbourhood relations with the ASC. It is expected that in this way the main problems which had resulted from the traditional national level reception of asylum seekers would be prevented from arising again.

14.2.2.1 Partners and framing

How did this experiment come into being? The first idea for starting the experiment Project Einstein was conceived by two entrepreneurial and innovative local civil servants who have been working together in the local domain of reception of asylum seekers and undocumented migrants for over 15 years. One of them is interested in concepts and the development of visions, while the other is more politically sensitive and able to connect

with people. They have been collaborating closely with several civil society organizations in this domain for a long time, not only on the case of the reception of asylum seekers but also on the shelter and food for undocumented migrants, many of whom are rejected asylum seekers. Their own ideological stance is to protect refugees, asylum seekers as well as undocumented migrants, much more than protecting national interests. Their advice to political superiors may be influenced by their personal stance on this issue. We might label them the champions (facilitators) and catalysts (producing out-of-the-box ideas and new motivational narratives)²² of Plan Einstein.

These two civil servants saw that the 'refugee crisis' of 2015–2016 might open a window of opportunities: 'As Winston Churchill already knew: never let a good crisis go to waste'. They saw the problems the traditional reception of asylum seekers resulted in and they had been in contact with civil society organizations with similar views on alternatives to this traditional reception locations. They perceived a lot of goodwill for refugees among Dutch citizens and expected that this would be a perfect moment to change the reception system in ASCs. They sought political support with the alderman and the mayor, as well as with the neighbourhood and business.

They framed the issue and its potential results differently with different stakeholders and partners in this project. With asylum seekers they framed the project as an opportunity to do meaningful courses during what would otherwise be a period characterized by waiting for the results of their asylum application, with their lives on hold. Asylum seekers would be able to maintain, develop or acquire skills that might prove useful when building a life in the Netherlands. These might also enable them to return to their country of origin with improved skills to contribute to that society by substituting anticipated remittances with earning capacity. This might facilitate their acceptance in the country of origin. The civil servants also assumed that meaningful activities might help some asylum seekers overcome their posttraumatic stress disorder and alleviate psychological disturbance by giving new meaning to their lives.

In speaking with the neighbourhood, the civil servants focused on the opportunities the project would bring for housing, education and employment for local youngsters. They expected that mixed living would possibly help to overcome the problem of segregation in the neighbourhood and might facilitate social bonding and bridging and reduce tensions between groups.

With the local council, in which the Green Liberal Party and Social Liberal Party (D66) have a majority, they framed the project in yet another way. In this forum the message was: It can help solve problems in a deprived neighbourhood in the city. This project might

22 Ansell C & Gash A. 2012. Stewards, mediators, and catalysts: Toward a model of collaborative leadership. *The Innovation Journal*, 17(1), p. 2. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.299.6717&rep=rep1&type=pdf>; Crosby, B., 't Hart, P., Torfing, J., "Public value creation through collaborative innovation", *Public Management Review*, Vol. 19, No. 5, 2016, pp. 655-696.

turn into a 'vibrant and innovative centre engaging the neighbourhood instead of being a separated entity'. The housing corporation will manage the housing of youngsters and the education rooms.

With alderman Kees Diepenveen, the framing by the civil servants was still different. Diepenveen is a member of the Green Liberal Party. Ideologically, he is involved with marginal people. He is proud of Utrecht as a 'human rights city', invoking human rights treaties like the Refugee Convention. He is also very much into Utrecht being an 'inclusive city'. With alderman Diepenveen, Project Einstein was framed as an opportunity to present his city as an inclusive human rights city. As he writes on the website:

The Utrecht Refugee Launchpad is an inclusive approach to facilitate integration from day one by introducing a shared living concept in which local youth and asylum seekers live together. It aims to create an innovative reception facility which is built upon social networks within the neighbourhood developing future proof skills together with asylum seekers. After the determination of an asylum status participants will have developed skills in self efficacy and resilience which can be used both in the Netherlands or elsewhere.²³

Diepenveen became one of the 'sponsors'²⁴ of Project Einstein, together with the mayor: he put his political authority to use to channel resources and legitimacy to this project. He was also helping to remove barriers and create political alliances.

The (non-elected) mayor was presented with yet another framing of Plan Einstein. The mayor is an important member of the Conservative Party which has been part of the national government for about 12 years. The Conservative Party thinks jobs and entrepreneurship are crucial in local societies. The framing for him was in this vein: Plan Einstein will focus on jobs and starting enterprises with local youngsters as well as with asylum seekers. In this way they will become less dependent on social services. The mayor became the other main sponsor of Plan Einstein. His political authority within the city, but also within his Conservative Party, helped to build legitimacy for the experiment and remove barriers against asylum seekers being allowed to work. The mayor certainly took some risks in doing this, especially within his own political party.

Civil society organizations discussed yet another framing: the Dutch Council on Refugees (VluchtelingenWerk) and Welcome in Utrecht were impressed by the promise that Plan Einstein's activities might lessen asylum seekers' feelings of uselessness, meaninglessness and boredom during the legal application procedure and help them get better

²³ See www.uia-initiative.eu/en/uia-cities/utrecht.

²⁴ Ansell & Gash, *supra* note 22; Crosby *et al.*, *supra* note 22.

prepared for integration after the procedure. These organizations became prominent partners of local government in thinking up the plan and implementing it.

The local (social) business community became involved in order to offer asylum seekers and youngsters peer-to-peer coaching. This might assist asylum seekers to come up with an idea for a startup and test it. Apart from this it could also enlarge and diversify the local business network. Utrecht University's Centre for Entrepreneurship provides courses on (international) entrepreneurship. For them the appropriate framing was 'valorization': turning academic knowledge into useful societal use.

The partners mentioned above created a local hybrid network. They filed an application with the Urban Action Initiative, a part of the EU Regional Development Fund (ERDF), and was granted about 2.7 million euros for a three-year project aimed at temporary reception of asylum seekers. Up until then the funding had been allotted to national governments, which applicants would need to address. Local governments had been lobbying with the ERDF for direct application procedures instead. With the growing prominence of the so called 'urban agenda'. ERDF gradually had become receptive to their arguments. ERDF also felt the need to take measures in order to facilitate local governments to deal with the large numbers of asylum seekers entering. In this way, the crisis turned out to be a window of opportunities for the Utrecht hybrid network. They had wanted to experiment with more inclusive forms of housing and education for asylum seekers and neighbourhood youngsters for a long time. Now these civil servants could become the 'policy entrepreneurs' who could frame the crisis to be the 'problem' to apply their 'solution' to. Other cities took similar actions and proposed several kinds of experiments. For the consortium which was established this meant that they no longer had to apply to the Dutch Ministry of Security and Justice for ERDF funding, but that Urban Innovative Action (UIA) itself decided on its funds. This turned out to be a crucial opportunity for consortia of local governments, civil society organizations, academic partners and social entrepreneurs to use a European pathway to be able to execute their own policies and practices.

Plan Einstein aims for a modest and pragmatic accumulation of small steps. Partners are invited to learn from the experience: If the experiment works, it can be transferred or up-scaled to other European cities, which is an explicit goal of the experiment.

In order to enhance the legitimacy and accountability of Plan Einstein, monitoring and evaluation is done by COMPAS of Oxford University. This renowned university was selected to take away all possible objections to not being objective in reporting on the results of the project. COMPAS is also expected to give evidence of the transferability of the project to other cities within and outside of the Netherlands.

14.3 URBAN EXPERIMENTS IN THE RECEPTION OF ASYLUM SEEKERS: IMPLICATIONS FOR DEMOCRACY

In this chapter, we analysed the reception of asylum seekers, an example of a wicked problem. In the first case, we encountered parallel worlds. In the first world, the national government organizes reception centres (ASCs) in which asylum seekers experience their lives on hold for the duration of the legal procedure. Reception centres are located far away from villages and cities to inhibit regular contacts between asylum seekers and citizens, in order to avoid problems in the case of deportation. In the other world, we found civil society organizations providing some activities to asylum seekers, offering legal advice and psychological support, and lobbying with the national government for shifts in national policies. This traditional way of reception produces problems with the well-being of asylum seekers, as well as with their integration in the labour market, and with neighbourhood relations.

In the second case we saw an experimental hybrid local network of civil society organizations (Dutch Council on Refugees, Welcome in Utrecht a.o.), business organizations (Social Impact Factory), knowledge institutes (Utrecht University and Oxford University) and local civil servants as well as elected local politicians (esp. alderman Diepenveen) and the (non-elected) mayor aiming to co-create and co-produce future-proof, innovative ways of co-housing and co-learning of asylum seekers and local youngsters and neighbours. This could be interpreted as a clear case of multilevel (vertical) and multi-sectoral (horizontal) governance in which a hybrid network of local authorities and civil society organizations use European legal and funding opportunities to decouple their local policy choices from the national ones. In the migration research literature, this decoupling is labelled 'the local turn'.²⁵ It entails new roles and power relations for all partners.

The traditional reception of asylum seekers in ASCs is the result of national political debates in which a restrictive perspective on the admission of asylum seekers dominates. The experimental reception of asylum seekers is the result of local political choices provoked by discussions between local civil servants, politicians, civil society organizations, social enterprises, (youngsters in) the neighbourhood and asylum seekers.

What are the implications of this case of experimental governance of wicked issues for democracy? We perceive two major shifts in democracy as a consequence of the development of experimental governance at the local–European nexus.

The first shift we perceive is the shift from national democracy safeguarded by national politicians as 'meta-governors' towards a form of democracy that is developing at the local level, collaborating with regional (European) actors. In the case we discussed, we saw how the reception of asylum seekers and the integration of refugees is increasingly perceived

25 See *International Review of Administrative Sciences*, special issue June 2017.

as being a local or urban issue, in which economic, social-cultural and security interests can be balanced with the local protection of refugees' human rights. While at the national government level the focus on national interests dominates, at the local level, choices are made to balance both kinds of interests. Local actors' frames seem to align, while at the same time these local-level frames seem to diverge increasingly from those at the national level. While the national representative democracy may get undermined by these developments, at the local level participative as well as representative democracy may get strengthened by these same developments. Relevant individual actors as well as organizations from civil society and business participate in building this experiment. Civil servants stimulate and facilitate it. Local politicians as well as the mayor are involved and help create and enhance its legitimacy. They will be accountable to the citizens as voters in the next elections. We see (vertical) multilevel links and (horizontal) multi-sector links reinforcing each other. The European level adds legitimacy to this experiment by financing it. It will also seek accountability.

In this way, we perceive a coupling of local and European policy and practices, and at the same time a decoupling of local and national policies and practices. This decoupling of the local and national level is in line with the 'local turn' we sometimes encounter in 'soft policies' like social services, education and housing, and also in immigrant integration policies.²⁶ What is innovative in this experiment is, on the one hand, that at the local level authorities form actual hybrid networks with non-state actors like civil society organizations: Multi-sectoral governance is being developed. On the other hand, it is innovative that the decoupling between the national and the local level is also expressed in 'hard policies': The reception of asylum seekers is part of the admission policy which used to be perceived as being at the core of national sovereignty. The way in which asylum seekers are received expresses how a national state wants to build its borders and boundaries. In the experiment discussed in this chapter, we see a shift of admission-related issues from the national towards the local level.

Elsewhere we have seen some initiatives which seem to take this even further. At a conference of mayors of 50 major European cities which was organized in September 2016 in Athens, mayors discussed how they might collaborate in relocating refugees who were stuck in Greece and Italy without even having gone through a legal procedure to apply for asylum, because these countries (esp. Greece) were not able and/or willing nor did they have the resources to organize an adequate asylum procedure. They discussed how they as mayors might skip the national-level politicians which seemed to be stuck in endless EU debates on national sovereignty without being able to act to protect refugees. The mayors were helped by civil society organizations and citizens who proposed to drive to

26 Gebhardt 2016. "When the state takes over: Civil integration programmes and the role of cities in immigrant integration", *Journal of Ethnic and Migration Studies*, Vol. 42, No. 5, pp. 742-758.

Greece and Italy and bring the refugees to cities in Europe. This example seems similar to the resistance against Trump's expulsion policy by 'sanctuary cities' in the United States. It might even be interpreted as a turn towards a post-modern era in which city asylum would become a replacement of – or an addition to – asylum by national states, taking after pre-modern times before sovereign national states came into existence, when ancient and mediaeval 'cities of refuge' existed. In this way, it seems that at some places at the local level inclusive cities may be created even when at the national level restrictive policies and narrowly defined national interests prevail. This might entail a major shift in democracy: from a national representative democracy to a local deliberative democracy (which might or might not become legitimized by local elections).

We find a second shift in democracy at the local level. In the case we presented, not only (national) citizens participate and deliberate but *all* affected interests are to be included, also the interests of asylum seekers and refugees. They are not citizens and therefore normally cannot voice their interests by voting in elections for politicians who create the rules with which they too have to comply. Through participating in this experiment, asylum seekers and refugees can voice their interests in an alternative way. Network democracy is broadened by this inclusion of people who normally are not included in the networks that affect them. Democracy also shifts in another way in this case. It shifts from knowing the public's preferences through elections (counting votes) towards 'calling a public into existence'.²⁷ It used to be taken for granted that elections established 'what the public values'.²⁸ This implied the assumption that the public would have pre-established preferences which needed to be expressed only through their voting behaviour. In this instance of experimental governance the public's preferences are not given but rather created or developed by way of doing the intervention. In doing the experiment, the public learns and develops its preferences into a shared idea of 'what is of value' to all affected interests, whether they are citizens or non-citizens. Transdisciplinary research – which combines multidisciplinary academic expertise and non-academic practitioners' and experiential insights – might be helpful in creating the intervention, as well as in developing ideas about what is important for whom, and in monitoring and evaluating what works in the experiment.

27 J. Dewey as cited in M. Moore & A. Fung, 'Calling publics into existence: The political arts of public management', in J. Donahue, & M. Moore (eds.), *Ports in a storm: Public management in a turbulent world*, 2012, pp. 180-197.

28 J. Benington, 'From private choice to public value?' in J. Benington & M.H. Moore (eds.), *Public value: Theory & practice*, Basingstoke, Palgrave Macmillan, 2011, pp. 31-51.

14.4 CONCLUSION

In this chapter, we presented an urban experiment which aims to take a small step towards tackling a major global wicked problem. It wants to overcome the scale mismatch between the place where problems are felt (the local and global level) and where they are managed (the national level). It is not claimed that innovative local experiments like this one in themselves would help solve the issue. Rather the experimenters hope that in case of success, the public might become more inclined to strike a more even balance between protecting national interests and protecting the human rights of refugees. It is also hoped that the deadlock of asylum debates at national level might be broken when local authorities, civil society organizations and others just start acting rather than keep on talking about the issue. New actors might open up the scene.

We saw that this urban experiment aimed to involve all stakeholders by building on their interests and preferences: neighbours, youngsters, asylum seekers, local politicians, local civil servants, the mayor, business organizations, civil society organizations, knowledge institutes and a European funding organization. This experiment may seem to somewhat undermine representative democracy at the national level. At the same time it seems to enhance representative democracy at the local level as well as a form of inclusive democracy in which all affected interests could have a voice, even those who could never be part of the democratic process in national representative democracies.

REFERENCES

- Advisory Committee on Migration Affairs (ACVZ), *Lost time: Advisory report on activities in reception facilities for aliens*, The Hague, ACVZ, 2013.
- Ansell C. & Gash A. Stewards, mediators, and catalysts: Toward a model of collaborative leadership. *The Innovation Journal*, Vol. 17, No. 1, 2012.
- Barber, B., *If mayors ruled the world: Dysfunctional nations, rising cities*, New Haven, Yale University Press, 2013.
- Benington, J. 'From private choice to public value?' in J. Benington & M.H. Moore (eds.), *Public value: Theory & practice*, Basingstoke, Palgrave Macmillan, 2011, pp. 31-51.
- Biermann, F. *Earth system governance: World politics in the anthropocene*, Cambridge, MIT Press, 2014.

KARIN GEUIJEN

Castells, M., "The new public sphere: Global civil society, communication networks, and global governance", *The ANNALS of the American Academy of Political and Social Science*, Vol. 616, No. 1, 2008, pp. 78-93.

Crosby, B., 't Hart, P., Torfing, J., "Public value creation through collaborative innovation", *Public Management Review*, Vol. 19, No. 5, 2016, pp. 655-696.

Engbersen, G., Dagevos, J., Jennissen, R., Bakker, L., Leerkens, A., *No time to lose: From reception to integration of asylum migrants*, WRR Policy Brief 4, The Hague, Netherlands, 2015, Scientific Council for Government Policy (WRR), Netherlands Institute for Social Research (SCP), Research and Documentation Centre, Ministry of Security & Justice (WODC).

Gastelaars, M., Geuijen, K., Van der Horst, J., Van Leeuwen, M., *Tussen arena en netwerk: Leefbaarheid en draagvlak bij de lokale opvang van asielzoekers* (From arenas into networks: Quality of life and legitimacy in the local reception of asylum seekers), Amsterdam, SWP, 2002.

Gebhardt, D., "When the state takes over: Civil integration programmes and the role of cities in immigrant integration", *Journal of Ethnic and Migration Studies*, Vol. 42, No. 5, 2016, pp. 742-758.

Geuijen, K., "Wonen en werken in een asielzoekerscentrum", (Living and working in a reception center for asylum seekers), *Migrantenstudies*, Vol. 14, No. 4, 1998, pp. 261-272.

Geuijen, K., *De asielcontroverse: argumenteren over mensenrechten en nationale belangen* (The asylum controversy: Arguing about human rights and national interests), Amsterdam, Dutch University Press, 2004.

Geuijen, K., Moore, M., Cederquist, A., Ronning, R., Van Twist, M., "Creating public value in global wicked problems", *Public Management Review*, Vol. 19, No. 5, 2016, pp. 621-639.

Head, B., & Alford, J., "Wicked problems: Implications for public policy and management", *Administration & Society*, Vol. 47, No. 6, 2015, pp. 711-739.

Hooghe, L., & Marks, G., *Multilevel governance and European integration*, Lanham, Rowan and Littlefield Publishers, 2001.

Levin, K., Cashore, B., Bernstein, S., & Auld, G., "Overcoming the tragedy of super wicked problems: Constraining our future selves to ameliorate global climate change", *Policy Sciences*, Vol. 45, 2012, pp. 123-152.

Moore, M., & Fung, A., "Calling publics into existence: The political arts of public management", in J. Donahue & M. Moore (eds.), *Ports in a storm: Public management in a turbulent world*, 2012, pp. 180-197.

Rittel, H., & Webber, M., "Dilemmas in a general theory of planning", *Policy Sciences*, Vol. 4, 1973, pp. 155-169.



15 THE SECURITIZATION OF ASYLUM SEEKING IN SWEDEN AFTER 2015 IN LIGHT OF EXPERIENCES OF ASYLUM-SEEKING ADOLESCENT GIRLS WITH ROOTS IN AFGHANISTAN¹

Ildikó Asztalos Morell and Mehrdad Darvishpour

15.1 INTRODUCTION

A gender perspective contributes to the critical studies of ‘securitization’.² The migration vogue of 2015 was constructed as a crisis, since it challenged the established systems of border control and surveillance over refugees. The vogue provoked tightening regimes throughout Europe, including the most liberal regimes. Securitized passage through borders and asylum regulation severed the conditions for reaching the most desired countries of the European ‘North’, which was seen as having contributed to the gendering of migration through the higher proportion of men from seven years of age to pensioners among those seeking asylum.³ Boys between the ages of 13 and 17 years dominated among unaccompanied asylum-seeking children (UASC). The proportion of girls declined from 25% in 2013 to 13% in 2015,⁴ a phenomenon that is related to girls’ gendered vulnerabilities in sending countries, as well as through transit and the asylum process.⁵ Feminist research has called attention to the under-researched issue of the adverse impact of securitization on migration

1 The research overview on Swedish research on gender and asylum-seeking children relies on an article written by Mehrdad Darvishpour and Elinor Brunnberg (2016). See E. Brunnberg, & M. Darvishpour, “Etnicitet, kultur och genus: Om ensamkommande barn och mötet med den svenska skolan” in P. Lahdenperä, & E. Sundgren (eds.), *Skolans möte med nyanlända*, Liber, 2016, pp. 111-132. The empirical material is based on the research project “Newcomer Children’s and Youth’s Inclusion and Gender Equality Development” led by associate professor Mehrdad Darvishpour and has been financed by “Samhällskontraktet” (societal contract) driven by Mälardalen University. Other members of the group are Ildikó Asztalos Morell, Magnus Hoppe, Niclas Månsson and Mohammadrafi Mahmoodian.

2 A. Gerard, *The Securitisation of Migration and Refugee Women*, Routledge, Abingdon, 2014; J. Freedman, *Gendering the international asylum and refugee debate*, London, Palgrave Macmillan, 2007.

3 Eurostat, 2018, Asylum and first-time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) Retrieved from: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

4 Migrationsverket. *Aktuellt om... ensamkommande barn & ungdomar*, 2016. Retrieved on 1 July 2016 from www.migrationsverket.se/download/18.2d998ffc151ac387159e6c/1452178480208/Aktuellt+om+ensamkommande+barn+januari+2016.pdf.

5 Freedman, *supra* note 2.

on female asylum seekers.⁶ Nonetheless, still more among the under-researched are asylum-seeking adolescent girls.

As a response to the great refugee vogue, also referred to as a ‘refugee crisis’, even countries with relatively generous refugee policies, such as Sweden, which granted the largest proportion of residency to asylum seekers in relation to its population,⁷ have reversed their regulations to the ‘European minimum standard’. This means even increased surveillance of applications by UASC.

There is solid trans-European research evidence indicating that women and girls experience specific forms of vulnerabilities throughout the asylum process, including reasons of flight, transit, claim-making and detention and resources for reception.⁸ Even Scandinavian research highlights gender-specific vulnerabilities for UASC girls as motivating their flight.⁹ Less explored are gender-specific conditions of reception.¹⁰ These indications support the interest in exploring in what ways have the migration crises of 2015 and its aftermath implicated the gender-specific vulnerabilities of UASC girls? Therefore, this chapter will explore:

1. In what gender-specific ways has the increase in securitization impacted the opportunities of new asylum-seeking girls’ reception in Sweden?
2. In what ways have their life trajectories, with a specific focus on their reasons for flight, corroborated with the experiences of reception?
3. In what ways have these profound changes impacted their psychological and social conditions?

This is to be explored by the life story analyses of two girls originating from an Afghan background, both brought up in Iran and both having arrived to Sweden in 2015.

6 A. Gerard, & S. Pickering, “The crime and punishment of Somali women’s extra-legal arrival in Malta”, *The British Journal of Criminology*, Vol. 52, No. 3, 2012, pp. 514-533.

7 M. Darvishpour, “Welfare State “stepchild”: An intersectional and structural perspective on ethnic relations and discrimination Sweden” in E. Brunnberg, & E. Cederström (eds.), *New tools in welfare research*, NSU Press, Århus, 2013.

8 A. Gerard, *The securitisation of migration and refugee women*, Routledge, Abingdon, 2014.

9 L. Stretemo, & C. Melander, *Får jag vara med? erfarenheter från ensamkommande barn och ungdomar i Göteborgsregionen och arbetet med denna grupp*, FoU i Väst, Göteborg, 2013.

10 A. Celikaksoy, & E. Wadensjö *De ensamkommande flyktingbarnen och den svenska arbetsmarknaden*. SULCIS Rapport 2015:2, Stockholm, 2015; I. Luthman, *The Gendered Implications of Securitized Migration: A qualitative look at how the securitization of migration affects women’s experiences of seeking asylum in one of the world’s most gender equal countries*, Uppsala University, Department of Government, Master thesis in Political Science, Uppsala, 2017.

15.2 THE SECURITIZATION OF THE SWEDISH ASYLUM SYSTEM AFTER 2015

Sweden has been recognized as one of the most generous countries in terms of the governance of migration.¹¹ Borevi¹² identifies as the most significant feature of Swedish exceptionalism the universal access to social rights for all citizens incorporating immigrants. The governance was described as lacking liberal pressures put on migrants for self-reliance and a maintained focus on multiculturalism, rather than assimilation as a form of inclusion of migrant groups in relation to the majority society.

Swedish people's attitudes towards the reception of refugees for a long time have been most positive and characterized by a tension between openness and generosity, on the one hand, and control and restrictions, on the other.¹³

Nonetheless, this liberal framework has been undermined by rising communitarian sentiments, 'a terrain shared with ill-famed radical anti-immigration nationalist-populist movements and parties across Europe'.¹⁴ After Sweden joined the EU, migration policies have become gradually more restrictive.¹⁵ Swedish policy has been in agreement with Schengen and the Dublin Convention. The purpose of the Schengen agreement is to promote the EU being a common market for goods, capital and labour. Meanwhile, EU is securitizing the entrance of third nationals. The goal of the Dublin Convention is to prevent an asylum applicant from seeking asylum in multiple countries. The Dublin Convention, sending back asylum seekers to the country of their first entry within the EU, applied even to UASC. As long as Sweden is seen as a desirable target for asylum seekers, the Dublin Convention implies that many venture onto challenging and dangerous routes to avoid being registered prior to entering.¹⁶

In Sweden, the portion of both foreign-born individuals and those born in Sweden to foreign-born parents was 22% in 2016. After gradual increases from 29,648 people per year in 2011, the number of asylum seekers doubled between 2014 and 2105, reaching more than 163,000 in 2015. By then Sweden had the highest proportion of refugees filing for asylum in relation to the population within the EU.¹⁷ Of these, approximately 70,000 were young people under the age of 18 years. During 2015, UASC increased the number of all those seeking asylum – from one-tenth to one-fifth, with 66% of UASC coming from

11 M. Darvishpour, & C. Westin, "Maktperspektiv på etniska relationer" in M. Darvishpour, & C. Westin (eds.), *Migration och etnicitet: perspektiv på ett mångkulturell Sverige*, Studentlitteratur, Lund, 2015.

12 Borevi, K. "Sweden: The flagship of multiculturalism", in G. Brochmann, & A. Hagelund (eds.), *Immigration policy and the scandinavian welfare state 1945–2010*, London, Palgrave Macmillan, 2012, pp. 25-96.

13 Darvishpour, *supra* note 7.

14 C-U. Schierup, & A. Ålund, 'From Paradoxes of Multiculturalism to Paradoxes of Liberalism. Sweden and the European Neo-Liberal Hegemony', *Journal for Critical Education Policy Studies* Vol. 9, No. 2, 2011.

15 Darvishpour & Westin, *supra* note 11.

16 U. Wernesjö, *Conditional belonging listening to unaccompanied young refugees' voices*, Uppsala, Uppsala Dissertations from the Faculty of Social Sciences, 2014, p. 93.

17 Migrationsverket, *supra* note 4.

Afghanistan (23,480). In the autumn of 2015, there was a breakdown of the previous rule system. Many refugees came to Sweden without registering themselves in another European country or at the Swedish border.¹⁸

The 2015 refugee stream, or the so-called refugee crisis, placed both service provision for asylum seekers and the Migration Board handling the applications into a ‘crisis situation’, mobilizing resources and civil society for the accommodation of refugees. Despite the pressure, to start, Sweden retained a positive attitude to refugees as reflected in the 6 September 2015 statement by Prime Minister Stefan Löfven: ‘My Europe does not build any walls’.

However, at the same time, a counter-mobilization and the increasing popularity of the right-wing xenophobic Swedish Democrat Party put pressure on breaking the political consensus on the welcoming of refugees. An anti-refugee discourse permeated other parties, opinions and media.¹⁹ The media image of refugees, especially the young group of men, presented an unbalanced and unfairly negative view of the group.²⁰

Thus, facing political pressure, on November 24 the government, based on a national consultation with all parties, though excluding the populist Swedish Democrats, declared a turnaround from the EU’s most generous migration policy to one comparable with the EU’s minimum standard.²¹ The Temporary Asylum Law implied an increase in the ‘securitization’ of the terms given for residency permits and an alliance with EU directives demanding the redistribution quotas for refugees. Combined with an increased securitization of borders, which ruled out the open internal borders under Schengen, the changes resulted in the ‘normalization’ of migration flows. The number of refugees coming to Sweden declined to 29,000 in 2016 and to 22,000 by 2017.²²

This new law had a specifically adverse impact on the opportunities for UASC. One important change was the increased securitization of age certification of UASC, a highly criticized method by the medical profession.²³ The age of the children is often discussed during the asylum process, and the child’s own information can be questioned. The ‘writing up’ of the age of minors implies that they lose special rights and protections in place for

18 Id.

19 F. Ahmadi, O. Mella, I. Palm, & M. Darvishpour, *Mångfaldsbarometern Tio år av attitydmätningar i Sverige*, Gävle University press, Gävle, 2015.

20 J. Strömbäck, F. Andersson, & E. Nedlund, *Invandring i medierna – Hur rapporterade svenska tidningar åren 2010-2015*, Delmi Rapport: 2017:6, Stockholm, 2017.

21 S. Löfven, & Å. Romson, November 24 2015, Regeringskansliet. Retrieved from Regeringen föreslår åtgärder för att skapa andrum för svenskt flyktingmottagande.

22 Migrationsverket, *Antal asylsökande – aktuell statistik*, 2017. Retrieved from <https://www.migrationsverket.se/Om-Migrationsverket/Statistik.html>.

23 A. Hjern, M. Brendler-Lindqvist, & M. Norredan, “Age assessment of young asylum seekers”, *Foundation Acta Paediatrica*, No. 101, 2012, pp. 4-7; B. Rai, J. Kaur, & H. Jafarzadeh, “Dental age estimation from the developmental stage of the third molars in Iranian population” *Journal Forensic Legal Medicine*, Vol. 17, No. 6, 2010, pp. 309-11.

those who are being classified as UASC, in terms of both accessing services and resources while waiting, and as special protection when deciding about rejecting the application. Those whose age has been written up most commonly soon received a rejection of their application.

Furthermore, the temporary stop in giving permits for family affiliation also makes the prospects for UASC to reunite with their families improbable. The length of the period asylum seekers have to wait for their trial has increased, thus exacerbating the period of uncertainty for applicants. The proportion of those receiving a permanent residence permit (PUT) declined drastically, since most applicants after 2016 obtained a temporary resident permit (TUT). In total, the proportion of children examined who received residence permit remained at a similar level (87% in 2014 and 86% in 2016). However, the proportion of children with permits from Afghanistan declined from 92% to 78%.²⁴ With the Temporary Law in place, the proportion of cases with granted permits have drastically declined, especially the proportion of permanent permits.

For those already in Sweden, the prospective chances of obtaining permanent residency declined, thus contributing to increased feelings of insecurity for the children still waiting on a decision by the Migration Board. This uncertainty is related to problems with the psychological health of asylum seekers, which has been associated with the increasing numbers of suicides, particularly among UASC.²⁵

15.3 GENDER-SPECIFIC VULNERABILITIES OF GIRLS AND WOMEN IN THE SECURITIZED ASYLUM PROCESS

Fear of global migration, from the Global South to the North, in particular, has provoked the mobilization of security responses within the EU, thus reinforcing images such as the fortress Europe in need of protection.²⁶ Especially after 9/11, the surveillance and control of the EU's external borders increased.²⁷ Migration and asylum became framed instead of human rights in terms of what Nyers²⁸ calls a 'ban-opticom', a profiling of surveillance for asylum seekers, non-status migrants and undocumented workers, constructing them as

24 Migrationsverket, *supra* note 22.

25 See www.dt.se/inrikes/vag-av-sjalvmord-hos-ensamkommande-barn-fran-afghanistan-de-far-ingen-karlek

26 J. Huysmans, "The European Union and the securitization of migration", *Journal of Common Market Studies*, Vol. 38, No. 5, 2000, pp. 751-777.

27 D. Bigo, & J. Julien, "Border Security, Technology and the Stockholm Programme", *Centre for European Policy Studies: INEX Policy Brief*, No. 3, November 2009; C. Cantat, *Contesting Europeanism: discourses and practices of pro-migrant organisations in the European Union*. PhD Thesis at the School of Law & Social Sciences, University of East London, London, 2015.

28 P. Nyers, "Abject Cosmopolitanism: The politics of protection in the anti-deportation movement", in N. De Genova, & N. Peutz (eds.), *The deportation regime: Sovereignty, space, and the freedom of movement*, Duke University Press, Duke, 2010.

'others' through abjection. Securitization has been legitimated by new waves of communitarian discourses. Instead of a liberal Europe, today migration is presented as a threat, especially from the Global South. The term 'securitization' describes the discourse that interprets global migration as destabilizing for cohesion in a country, and as a danger to public order.²⁹ In recent decades, the term has been used to an unprecedented extent.

A developing discourse in political debates is who can best 'protect' the country. More and more, parties are conspicuous about who wants more police officers to ensure safety. In this way, securitization is becoming increasingly posited as a necessity to combat increased international instability and perceived threats related to increased crime in the country, especially in segregated areas, from Islamic terrorism.

Feminist theorizing contributes to the critical studies on securitization by challenging the meaning of security. Ann Tickner, from a feminist perspective, associates security with emancipation and empowerment – a 'diminution of all forms of violence, including physical, structural and ecological'³⁰ – and explores the 'interrelation of insecurity across all levels of analysis'.³¹ Hence, the feminist perspective on security is revising the traditional state-centrism of security studies, and instead favouring a focus on individual or community relations and taking women's security as a central issue.³² Furthermore, feminist approaches explore from a process-oriented perspective how social and structural hierarchies interact with the international systems regulating migration³³ and how these produce gendered inequalities in the intersections of the private and public spheres contributing to the insecurities of women in particular.

The increase in the proportion of women during the past decades among labour migrants has prompted Castles and Miller³⁴ to talk about the feminization of migration. In contrast, men dominate among asylum seekers.³⁵ The increased securitization of migration, and the growth of border controls and surveillance, have both increased the costs of border crossings as refugees and made the crossing riskier. While the deterioration of the rights of asylum seekers impacts all, research exposed specific vulnerabilities and insecurities that women experience throughout the entire asylum process.³⁶ Concerning the gender-specific causes of flight, women's gender-specific vulnerabilities are emphasized, such as the occurrence of the GBV (gender-based violence) issues of forced marriage and

29 Cantat, *supra* note 27.

30 A. Tickner, "You just don't understand: Troubled engagements between feminists stokes and IR theorists", *International Studies Quarterly*, Vol. 41, No. 4, 1997, pp. 611-632, p. 625.

31 Tickner, 1997. Id., p. 625.

32 P. Roe, "Gender and 'positive' security", *International Relations*, Vol. 26, 2014, pp. 116-138, p. 17.

33 Freedman, *supra* note 2.

34 S. Castles, M. J. Miller, & G. Ammendola, in P. Marfleet (E.) *The Age of Migration: International Population. Refugees in a global era*, Basingstoke, Palgrave Macmillan, 2005, pp. 57-140.

35 EU 2016. Permits are also granted on the so-called subsidiary protection and on humanitarian grounds.

36 Gerard, *supra* note 8.

genital mutilation. Meanwhile, women's weaker socioeconomic status and access to resources have been named as a hindrance to cover the expenses of flight. Women are exposed to GBV during transit³⁷ and experience special hindrances while in detention upon arrival to first countries waiting for decisions.³⁸ Women asylum seekers find themselves in vulnerable positions in the asylum-seeking process, since they are placed into joint asylum-seeking accommodations with men. Due to the high proportion of men, informants experienced a fear of sexual harassment and violence.³⁹ Women may experience special conditions in the process of asylum determination, as well as through provisions for reception and while processing their applications.⁴⁰ Lastly, gender differences prevail in the process of the establishment in countries of final destination.

In Sweden, asylum seekers may be granted refugee status if they 'feels a well-founded fear of persecution on grounds of race, nationality, religious or political beliefs, or on the grounds of gender, sexual orientation or other membership of a particular social group'.⁴¹ The gender notion was first included after the reform of the Aliens Act in 2005. In the EU, Sweden and UK are the only two EU member states that have adopted such guidelines.⁴² Permits are also granted on the so-called subsidiary protection⁴³ and on humanitarian grounds.

Sweden is renowned for its gender equality policies. Despite the special status Swedish asylum law offers to gender-based vulnerabilities, in praxis, however, women who had been objected to GBV experience difficulties in realizing these claims.⁴⁴ Therefore, it is of interest to explore in what ways does the Swedish system of reception of asylum-seeking adolescent girls take account of the gender-specific vulnerabilities of girls.

37 M. Nagai, U. Karunakara, E. Rowley, & G. Burnham, "Violence against refugees, non-refugees and host populations in Southern Sudan and Northern Uganda", *Global Public Health*, Vol. 3, No. 3, 2008, 249-270.

38 Freedman, *supra* note 2; J. Bhabha, "Demography and rights: Women, children and access to asylum", *International Journal of Refugee Law*, Vol. 16, No. 2, 2004, pp. 227-243; S. Pickering, *Women, violence and borders*, London, Springer, 2011; Gerard & Pickering, *supra* note 6.

39 Luthman, *supra* note 10.

40 J. Freedman, "Engendering security at the borders of Europe: Women migrants and the Mediterranean 'Crisis'", *Journal of Refugee Studies*, 2016, pp. 1-15; Gerard, *supra* note 8; L. Hunt, "Women asylum seekers and refugees: Opportunities, constraints and the role of agency", *Social Policy & Society*, 2008, Vol. 7, No. 3, pp. 281-292.

41 SFS (Svensk författningssamling). *Utlänningslag*, 2005:716, Ch. 4, 1§, 2005.

42 Freedman, *supra* note 40.

43 EU, 2011 A person under 18 years who comes to Sweden and seeks asylum without their parents, or another grown-up who could take the parents' place, are termed UASC.

44 WRC (Women's Refugee Commission), *Falling through the cracks: Refugee women and girls in Germany and Sweden*, New York, Women's Refugee Commission, 2016.

15.4 NEED FOR A GENDER PERSPECTIVE ON THE REASONS OF UASC FLIGHT FROM THEIR HOME COUNTRIES

In a historical and international perspective, children are a part of the global migration. Children may flee together with their parents or alone. A person under 18 years who comes to Sweden and seeks asylum without their parents, or another grown-up who could take the parents' place, are termed UASC.⁴⁵ The reasons for UASC flight, whether legally or illegally, with a passport or paperless, can be different from children arriving with their parents. A Swedish mapping of the situation for 138 UASC who came to the Gothenburg area in 2008 shows that the majority of the children faced many hard experiences.⁴⁶ The children may have been living alone or in an orphanage (13%), and one-fourth had periodically grown up with a relative other than a parent. The children themselves may have been exposed to violence or witnessed another person exposed to violence or being killed, and are more often exposed to post-traumatic stress disorder than others.⁴⁷

There is a limited research about migrating children, and especially about UASC, that also has a gender perspective. Many of the reasons presented about boys for their flight may also have affected girls. Both boys and girls flee from violence inflicted by adults, as well as honouring oppression as a reason for the flight.⁴⁸ Meanwhile, there seems to be strong gender-related reasons due to children being sent away to another country for protection. The differences can be that boys in particular are sent away to be rescued for fear of kidnapping, while girls have reported forced marriage as the reason (11%), which boys have not. More girls (6%) than boys (1%) reported having been sexually assaulted. This data reflects upon women's vulnerable social position and lack of gender equality in Afghanistan, characterized by high infant mortality, a high incidence of women dying in childbirth,⁴⁹ the birth of a child and an arranged marriage and a lower level of personal autonomy of girls than boys.⁵⁰

Other intersectional aspects of challenges for asylum-seeking children from Afghanistan are that many asylum seekers belong to different minority groups, such as Tadjjik, Hazarian, Uzbekian, Aimakian and Turkmenian, forming 45% of the population,⁵¹ and that there is a low degree of literacy (10% in most areas in Afghanistan).⁵²

45 MIG, 2008; Migrationsverket, *supra* note 4. Migrationsverket. *Aktuellt om ensamkommande barn och ungdomar*, 2018. Retrieved on 26 January 2018 from <https://www.migrationsverket.se/download/18.4a5a58d51602d141cf41d7f/1516955556493/Aktuellt%20om%20jan%202018.pdf>.

46 Stretemo & Melander, *supra* note 9.

47 K. Eide, & A. Hjern, "Unaccompanied refugee children: Vulnerability and agency", *Acta paediatrica*, Vol. 12, 2013, pp. 666-668.

48 Stretemo & Melander, *supra* note 9.

49 J. Hildebrandt, *Kriget dödar flest – på BB*, Telegram & Journalistik, Stockholm, 2009.

50 J. Nordberg, *De förklädda flickorna i Kabul*, Bonniers, Stockholm, 2015.

51 Globalis, Afghanistan. Retrieved from 1 July 2016 from www.globalis.se/Laender/Afghanistan.

52 Nordberg, *supra* note 50.

15.5 NEED FOR A GENDER PERSPECTIVE FOR THE ANALYSIS OF ESTABLISHMENT IN SWEDEN

Migration is seen as a special challenge for many young, migrating boys when it comes to integration and equality questions. Young girls and women of the same age with the same socioeconomic background can win more on integration.⁵³ The immigrated boys and men can confront a more negative view in society than immigrated girls and women do.⁵⁴ Immigrated boys and men can themselves express a more negative attitude towards equality than girls. Also, honour culture may be stronger among immigrated men than among immigrated women, which has been interpreted as an impact of these men's loss of power in an unfamiliar environment.⁵⁵ Afghan boys associated with girls in school consider that they needed to change their behaviour and view about gender roles, even if they found it strange. For many girls, the situation is different. When they meet people from their own ethnic origin, these girls have to treat them in a traditional way, which is something else than when they meet people outside their ethnic origin.⁵⁶

Wadensjö and Celikaksoy,⁵⁷ who have followed UASC in Sweden between 2003 and 2012, show that most of the UASC come for education and that some continue to pursue university studies. The UASC have the same pattern as youngsters with a Swedish background, which means girls study slightly more than boys. Very few teenagers are employed, as most of them are studying. Conspicuously, UASC were more successful in establishing themselves in the labour market than those who came with their parents. UASC can receive more support to be able to be accepted in the Swedish society. Another explanation could be that those who do not have their parents in Sweden are under greater economic pressure, and are forced to work to support themselves and possibly also be able to contribute to support their family in their native country. Significantly, the difference is most distinct for girls. Beyond the general explanations, the gender difference might be related to higher expectations from girls coming with their families to take care of their younger siblings at home.

What is unknown is whether UASC encounter other attitudes than children who have come with their parents, or whether newly arrived children from different countries are treated in different ways. If UASC and children who have come with their parents are

53 Darvishpour & Westin, *supra* note 11.

54 Ahmadi *et al.*, *supra* note 19.

55 M. Darvishpour, & P. Lahdenperä, *Honour-related problems in school contexts in Sweden – theoretical perspective and prevention*, Mälardalen University Studies, Västerås, 2014.

56 J. H. Larsson, & M. McNell, "Identitet och invandring: En kvalitativ studie med ensamkommande flyktingbarn" in F. Ahmadi, & M. Lilja (eds.), *Ensamkommande flyktingbarn: utifrån perspektivet socialt arbete*, Gävle University press, Gävle, 2013.

57 A. Celikaksoy, & E. Wadensjö *De ensamkommande flyktingbarnen och den svenska arbetsmarknaden*, SULCIS Rapport 2015, 2, Stockholm, 2015.

offered resilience in making efforts from valuable persons with knowledge about the Swedish society, this may have a big impact.⁵⁸

15.6 RESEARCH APPROACH AND DATA

The interviews upon which this chapter are based originate from our research project 'Refugee Children's Inclusion and Gender Equality Development within Society', which involves interviews conducted with 50 asylum-seeking children between the ages of 15 and 18 living in Sörmland and Västmanland in small and medium-sized towns in two provinces in Sweden. The research has been part of a collaborative project between Mälardalen University and the surrounding provinces and municipalities financed by Samhällskontraktet. We also conducted 12 focus group interviews and research circles with mixed professional groups, as well as individual interviews with welfare professionals in six different settings. The paper highlights the experiences of two girls interviewed by Mehrdad Darvishpour and Mohammadrafi Mahmoodian. The research team also included Ildikó Asztalos Morell, Niclas Månsson and Magnus Hoppe.

We used an in-depth biographical interview while focusing on personal narratives. As S. Kvale and S. Brinkmann⁵⁹ note, the narratives that appear during the interviews are 'one of the natural cognitive and linguistic forms through which individuals attempt to organize and express meaning and knowledge'. Using the life story method focusing on certain life paths allows us to reflect on which values, attitudes, expectations and ambitions formed their life trajectories, and what type of understandings they formed over these processes. According to Bertaux,⁶⁰ the method's specific advantage is that it sets the focus on individual agency through the life course. Additionally, it enhances the possibilities to problematize the limitations and freedoms of the actions of individuals in mobilizing their capabilities, which are conditioned by the opportunity structures characterizing their positions within society.⁶¹ Life story interviews provide the opportunity to give voice to the disempowered, who otherwise lack channels to let their voices be heard.⁶²

58 E. Brunberg, "En magisk box för resiliensskapande insatser", *Socialmedicinsk tidskrift*, Vol. 2016, No. 1, 2016, pp. 82-96.

59 S. Kvale, & S. Brinkmann, *InterViews: learning the craft of qualitative research interviewing*, Los Angeles, Sage, 2009, p. 155.

60 D. Bertaux, *Biography and society: The life history approach to the social sciences*, Beverly Hill, Sage, 1981.

61 A. Krishna, *One illness away: Why people become poor and how they escape poverty?* Oxford, Oxford University Press, 2011.

62 I. Asztalos Morell, "Self-sacrificing motherhood: Rhetoric and agency in the era of collectivization in two parallel life-histories", in M. Ilic, D. & Leinard (eds.), *The soviet past in the post-soviet present*, London, Palgrave, 2015.

15.7 SECURITIZATION VERSUS EMPOWERMENT: CONFLICT BETWEEN THE INSTITUTIONAL GOALS OF THE MIGRATION BOARD AND MUNICIPAL SOCIAL WELFARE INSTITUTIONS

While asylum-seeking children are a vulnerable group, they have rights regulated in the UN Convention on the Rights of the Child (1989). This charter of rights includes protection for health care and social security, as well as education and leisure (Art. 24, 25, 26, 28, 29). The accommodation of asylum-seeking children differs depending on whether they arrive with their families or as UASC. Those arriving with their parents are accommodated in the housing units of the Migration Board. In contrast, municipalities are in charge of the reception, accommodation, school and social needs of UASC. The number of UASC increased 10 times from 2011 to 2015; with the rapid expansion during the vogue, the capacities of the accommodating system have been pushed beyond their limits.

Our research explored municipal strategies of coordinating resources for the establishment of asylum-seeking youth. Our interviews with staff members in six different settings, and focus groups interviews with social workers, give the impression of an engaged professional core who sympathize with the youth. Social workers' professional ethics encourage them to work in the children's best interests and to provide safety and improve their resilience. During 2015, many places were filled with staff without former training. For some, working with the youth required finding a balance between disciplinary and caring attitudes. Similar to social workers, teachers place great efforts in engaging the youth with studies and stimulating their resilience in diverse ways. Such resilience-strengthening interventions are crucial for the youth's recovery from the traumatic experiences they have.⁶³

In contrast, children who arrive with their parents and are accommodated in the institutions of the Migration Board, where, according to the accounts of municipal welfare workers, they do not receive concentrated support for establishment similar to UASC. Social workers legitimate greater resources to UASC as they lack the support from parents or safety from primary caretakers. This renders them vulnerable to eventual insufficient placements, which can then lead to traumatizing experiences.⁶⁴

The results of our research indicate the presence of a conflict between the professional engagement of welfare workers and the uncertainties caused by the Migration Board's surveillance of permits given to the youth. Most severe concerns were expressed with regard to bad coordination and communication with the Migration Board, which are critical for youth having to live in anxiety before decisions. Those denied permits were

63 E. Brunnberg, R.-M., Borg, & C. Fridström, *Ensamkommande barn: en forskningsgenomgång*, Studentlitteratur, Lund, 2011.

64 Brunnberg & Darvishpour, 2016, *supra* note 1.

moved out of their habitual environment on a short notice. Thus, while one set of social services lays down large resources on the establishment of youth, the other, that is the Migration Board, acts in negation of their efforts. Therefore, the two social systems find themselves in an implicit conflict that manifests itself from time to time in confrontations between municipal and state institutions as the municipal authorities in our interviews indicated. This conflict has even led to the organization of professional welfare provider groups against the 'securitization' of, and surveillance over, the asylum process of UASC manifested in Facebook groups ('Stop the expulsion of UASC from Afghanistan'), petition writing and demonstrations.

Seen from the perspective of the youth, our research found that most youth advance with their learning of Swedish and their engagement with school. However, we also observed a great anxiety among those still waiting for their trial. In opposition to the media image of young refugee men, many of the young men give an account of being passivized in school environments, which is also a consequence of segregated school environments for refugee children. Most of the youth showed satisfaction with social services, especially in homes for care or residence HVB homes. One of the few critiques came from a UASC girl who felt boys were challenging the staff who could not handle it.

15.8 EXPERIENCES FROM HOME COUNTRIES IN THE LIGHT OF LIFE STORIES

The families of the two girls who are the focus of this analysis are of Hazar origin of Afghanistan, had left Afghanistan due to persecution by the Taliban and became refugees in Iran. They have no personal recollections about Afghanistan: 'No I would never return to Afghanistan. Never. We have not been there'. Both of their families experienced hardships due to difficulties in accessing residence permits in Iran. One of the girl's parents lacked such permits, and as a result she could only go to a school for refugees. The other girl's parents could afford the cost of the permit for only shorter periods of time. She could attend Iranian schools during these periods. Anahita lost both of her parents in Afghanistan, and arrived to Iran together with her siblings and her uncle. Yasmin lived with her parents, yet the father could get only very low-paid construction work. Both of the girls witnessed discrimination by the authorities for belonging to the Hazar minority in Iran. They felt they were the object of a racist gaze in their everyday life: 'When we go out, they see us, they look at our appearance, that we are Afghan, it can be seen. And then only: *You are Afghan. What are you doing here? Why do you not go home?*' (Yasmin). They also experienced restrictions as girls. This concerned limitations by their families on their free movement: 'We were controlled more than boys, who had more rights to go out and do as they will'. These restrictions had their roots not only in patriarchal views on the restricted movement of girls. Yasmin's father feared what could happen to her being outdoors on

her own, which made her give up learning violin. While in Iran, 'My father was very anxious for me, how I should make my way to the violin lessons and come back. He was very much afraid for me'. Life had been especially harsh for Anahita, who had no parents in life and lived with her uncle while in Iran, and who had highly traumatizing experiences that she 'does not want to remember' and did not want to discuss in terms of how she made a living while in Iran. She does not have a permanent residency in Sweden and fears being sent back to Afghanistan as a lonely girl, which would put her life in serious danger.

15.9 MEETING THE REFUGEE EXPERIENCE IN SWEDEN

The two girls' experiences of being a newly arrived refugee in Sweden differ. Yasmin arrived with her family through affiliation immigration. Her brother arrived to Sweden at the age of 13 as an unaccompanied minor, and received permanent residency (PUT) prior to the securitization of the asylum policy after the vogue of 2015. Four years after his departure, he could reunite with his family (parents and two siblings). Hence, Yasmin did not have to go through the dangerous migrant passage, nor was she deprived of the support of her family. In contrast Anahita, who lacked parental support in Iran, was pushed to start the dangerous passage on her own, thanks to her desperate situation in Iran, a situation that is corroborated by interviews with several other unaccompanied girls in our study.

In contrast to Yasmin, Anahita came without the safety of a residence permit. She had waited for two years at the time of the interview for a decision, and had no family to rely on for support. While Yasmin could settle with her family in an independent flat, Anahita was accommodated in an HVB home.

Anahita was experiencing multiple stressors. First of all, the long wait for the decision on her asylum application accentuated her feelings of vulnerability. 'One feels isolated since one does not have a permanent residence permit. One feels isolated, lonely, depressed, and even aggressive'. She has applied for help from a psychologist, because of her ongoing 'fears for the rejection of others'. She feared that 'something was wrong with her'. In her fears and anxiety, she has no confidential, trustful relationship with adults. She felt she could not trust social workers at home: 'I have no one to trust, they are against me'. She experienced negative attitudes from both ethnic and non-ethnic Swedish employees. On one occasion, she asked for financial support to buy a bus pass. She felt that the monthly allowance was not enough to be able to buy it. The employee she asked shamed her by saying, 'You had no money in Afghanistan, why do you complain here then?' She also feels that they received more attention when she arrived, such as cultural programmes arranged by social care workers. In contrast, recently they had to find activities on their own. Anahita's feelings of degradation were enhanced by her experiences with the Migration Board, where she felt 'having been interrogated as if she was a murderer'. She finds that

the authorities are 'not listening to our voices'. She finds that authorities are discriminative against refugees from an Afghan background compared to those coming from Syria or Eritrea, since unaccompanied youth from these countries receive a much higher percentage of PUT. She feels mistrust, for being unjustly discriminated against: 'We have not done anything wrong'.

Anahita has a vulnerable emotional and existential situation, and a lack of trusting and supportive relationships with adults. Her vulnerability is aggravated by the institutional 'criminalization' of the asylum-seeking process. The asylum policies that were introduced after Anahita's arrival are restrictive and imply surveillance.

In contrast, Yasmin has the supportive nest of her family, the advice and rules of which she follows even if she thinks differently on some matters. Her father's views are the ones she follows:

This thing with the veil. ... I do not believe in it. This is for my family and this is for my father. I respect him and his wish. ... Otherwise, if it was for me, there would be no veil. I should not have a veil on me.

Her father's views also count in regard to her social contacts. She can meet up with friends, even boys, but only as friends. She is not expected to have a boyfriend, a rule that she has internalized:

It is OK with friends, but not so close.
No sexual relationship?
No, absolutely no such, none.

Especially when they were new in Sweden, her father had been very anxious about the interface with Swedish society: 'We should not be as them. ... We should always have some kind of distance between us and Swedes'. However, over time this strong fear has softened. Yasmin can fraternize with girls, and even with boys and Swedish girls. Although they have had conflicts occasionally, Yasmin is not revolting against her father's control. She also sees how her father is making her wishes come true, such as allowing her to take violin lessons. She accepts that her father is being protective due to divergent cultural codes compared to the Swedish ones. Nevertheless, she also sees that such a protective attitude has originated from her father's fears for her safety.

Yasmin's parents have not been successful yet with establishing themselves. They are unemployed, working on a practice job for the municipality. This situation seemingly contributes to shifting gender roles for the parents; her mother's practice job is cleaning, while her father takes care of children. At home, her father does much of the cleaning and washing of the dishes. In the meantime, Yasmin had a summer job as well as a babysitting

job after school. Through these jobs, Yasmin experienced an increased freedom of movement. Consequently, she has become a financial provider for the family. The normalization of life in Sweden has led to an adjustment to the norms in Sweden. Even if her father's fears became milder, and Yasmin experienced greater freedom, her father's control of her movement and association with friends would not fully disappear.

Hence, Yasmin's situation is balanced between two concerns: She has her parents, who provide her emotional support, and a caring context of trust. Her space of action is restricted by the controlling practices of her father, which has dual roots. On the one hand, they originate from the religious and cultural beliefs rooted in patriarchal traditions, in which a girl's body and movements are more controlled than boys. On the other hand, they originate from the fears of being a minority within a majority society, whose rules threaten the rules of their own culture.

15.10 SOCIAL CONTACTS WITH FELLOW COUNTRYMEN

Being an UASC, Anahita is accommodated in a mixed-gender HVB home. As a girl, Anahita finds herself being monitored by the gaze of boys in similar situation. She accounts for having been commented on about her clothing. The boys criticize her for wearing tight trousers and an improper veil, arguing that, 'If you are not wearing a proper hijab, you could just as well not wear anything'. These comments have led to many disputes, yet no 'physical fight' and no direct assault against her. Conflicts like these lead to falling-outs, when they close the doors, and not letting in others. She feels more comfortable with the company of girls than boys, due to cursing. She thinks that 'each individual should decide herself if she wants to wear a veil or not, one should respect each other'. Yet, she considers herself a believer, and wearing the 'half-veil' is her own choice. Ongoing comments on which kind of veil and clothes she wears makes her uncomfortable in the company of her Afghan countrymen: 'I feel myself much more comfortable in expressing myself outside of the Afghan group'. Unfortunately, in the HVB home where Anahita lives, there are only 2 girls and 10 boys: 'I may have a friend'. This contributes further to her feeling of isolation.

Wearing a proper veil is also a concern for Yasmin. She is sceptical about the veil, but puts up with it due to respect for her father. Nonetheless, she, just like Anahita, is wearing a so-called 'half-veil'. Her parents accept it, even if they never considered it to be a proper one, such as the one her mother wears. She also receives critical comments from Afghan youth at school, yet not all boys do so.

Thus, religious/ethnic symbols of chastity and virtuousness as a girl, such as the veil, are experienced as controversial for both girls. For Anahita, being an UASC girl, the veil posits insecurities concerning her own ethnic identity, even if she wears it out of her own religious

conviction. Yet, concerns by fellow Afghans on her appearance make her feel detached from and question the association with her own ethnic group. In contrast, in the case of Yasmin, she accepts wearing the veil as a kind of proof of alliance and identification with her father, and in extension with her own ethnic group, even if she does this against her own judgement. So for Anahita, the veil strengthens her individual choice and conviction, while for Yasmin it reinforces her group identification.

15.11 CONTACT WITH SWEDISH SOCIETY

The two girls share the experience of not having contact with ethnic Swedish youth in or outside of school: 'We do not know each other. They do not come and talk to us and we do not do it either' (Anahita).

Yasmin goes to high school. At first, before having passed the classes for immigrants, Yasmin had only a couple of Afghan friends. It was difficult with a lack of language skills. But over time she qualified to start in the mainstream Swedish educational system, where she made more friends. She describes it as an 'immigrant high school', due to the high proportion of youth with an immigrant background. There is only one class with ethnically Swedish pupils, but there is no interaction among pupils. Those in her class are youth with an immigrant background. For this reason, Yasmin's friends are teenagers with immigrant backgrounds. She describes a segregated educational system, where the 'Swedes are afraid of us and we are afraid of them. That is why we never come close to each other'. As discussed earlier, Yasmin experienced racial discrimination in Iran. She embodied racial difference in the eye of Iranians. In Sweden, she finds herself associated with youth who embody a non-Swedish status in her eyes. Therefore, she is careful in putting forth that her interest in making friends with ethnic Swedes has nothing to do with having concerns about her non-ethnic Swedish friends' deviant bodies. Hence, Yasmin is critical about this system, not that she would never like friends who were not ethnic Swedes:

They [her friends] are not born in Sweden. I have no problem with that they are not Swedes, or that they should look like Swedes. No. Not so. But it is good to mix a little.

Sharing and mastering the Swedish language is the key to identification and the acknowledgement of belonging to the community of Swedes:

I have friends from other countries who are born in Sweden, and they can perfect Swedish. Therefore, for my part there is no difference between those

who are born in Sweden [but have immigrant parents] and those who are [ethnic] Swedes. It is the same language.

Even so, Yasmin also has Afghan friends with whom she communicates in Persian: 'I feel very good among Afghan girls'.

15.12 ENCOUNTERING THE EQUALITY IDEAL IN SWEDEN

Intriguingly, both girls wish to become health professionals, Anahita a doctor or nurse and Yasmin a midwife, which implies ambitions and further studies.

Yasmin is very decisive on prioritizing education and a career before establishing a family: 'first a career and then building a family!' This is a priority that her parents do not challenge. She feels her parents would not like her to leave the family as a consequence of marriage: 'No, my father is not such a one. Not my mother either. They want me to stay home'. Thus, after initial fears from encounters with Swedish society, her parents seem to have become supportive of the opportunities that have opened for their daughter due to immigration to Sweden.

Both girls are very positive about Swedish policy for gender equality. They see it first of all as a policy which allows individual freedoms and a right to decide:

I believe it is very good that there is gender equality and that one respects women, and that they can decide on their own. (Anahita)

Meanwhile, in different ways, they express a critique of being received as immigrants: Anahita due to the long process of securitized asylum process, and Yasmin due to the segregated school system. In their everyday life, they feel safe and do not experience direct racism. However, both girls have experiences of elderly women being unfriendly with them on public transport and questioning why they are in Sweden at all.

15.13 DISCUSSION AND CONCLUSIONS

These two life stories reflect the very different experiences of two girls, Yasmin and Anahita, of Afghan origin. The girls share some joint experiences of intersectional discrimination from Iran, where their families resided prior to their departure for Sweden. This included stigmatization as refugees from a racially identified minority of poor social status, where gendered aspects of fear for being subjected to GBV were apparent. Anahita's situation was particularly vulnerable because she did not have parents.

Yasmin entered Sweden prior to the securitization of the asylum process after the 2015 refugee vogue through a family reunion. Having the support and emotional safety of her family has been decisive for her establishment. However, even if the readiness of her parents to accept the freedoms of Swedish society increased over time, they still put pressure on her to accommodate cultural and religious expectations that were not her own choice. Having acquired permanent residency opened the path for Yasmin for her integration into a segment of multicultural Swedish society with youth from an immigrant background.

By contrast, Anahita arrived with the vogue in 2015, with an increased surveillance and securitization of the asylum process. While prior to the restrictive regulations, those under 18 could count on favourable decisions on PUT, and one had the right for a family reunion; following 2016 restrictions, the percentage of denials increased and the asylum process became longer, especially in the case of youth from Afghanistan. As Anahita's case illustrates, the extended asylum process increases the vulnerability of youth, and psychological and social adjustment problems arise, as the establishment process is halted. The situation of girls is particularly vulnerable, since they find themselves not only without emotional support, experiences of questioning the truth of their asylum claims and the righteousness of being in Sweden, but are also challenged by fellow countrymen at their residence and at school about their clothing and behaviour, exercising gendered surveillance over them. Anahita, and many other UASC girls, face conditions of accommodation, in which they are in a clear minority compared to boys, and through this having fewer opportunities to establish viable social bonding with girls in a similar situation to them.

The account of the two girls does not corroborate the results of previous research by Celikaksoy and Wadensjö,⁶⁵ which indicated that UASC do better in terms of establishment compared to those who arrived with their families when they were children. In this study, Anahita, who arrived as an UASC, is the one who gives the largest indication of distress and difficulties in engagement with her studies. Since Celikaksoy and Wadensjö's research was conducted with youth who arrived prior to the securitization, we can consider that the difference can reflect the consequences of the increased insecurity for UASC after the 2016 laws. Anahita's case indicates that these UASC encounter difficult psychological challenges, especially due to the uncertain result of the asylum application, while at the same time they lack the emotional support of their families.

This has consequences for Anahita in terms of poor psychological health. If she obtains the permit, she would have a strong motivation to move on and accomplish her studies. She is highly motivated to strive for independence, and has shown a strong will to act according to her own values. However, the securitization has disempowered her and challenged her ability to move on with her life.

65 A. Celikaksoy & E. Wadensjö, *De ensamkommande flyktingbarnen och den svenska arbetsmarknaden*. SULCIS Rapport 2015:2, Stockholm. 2015.

Previous research has indicated that girls with their families are often hindered from engaging with Swedish society, since they have to participate in family scores, taking care of younger siblings and being more restricted in their movements by their fathers and brothers.⁶⁶ Yasmin's case partially corroborates with these results. She is accommodating her behaviour to her father's traditional views on clothing, as well as his monitoring of her social contacts. In the meantime, she also deviates in several aspects. She has been freed from doing family chores, since she has been successful in obtaining an extra job after school as a babysitter, while her parents are employed only through activities for the unemployed. Also, her parents seem to be very supportive towards her study. It appears that her father did not have the opportunity to provide this for her in Iran, and is now ready to open the opportunity for her studies. Moreover, she is succeeding better than her parents at finding work.

The cultural meeting with Swedish culture can be a particular challenge for children who come from a 'collectivist'-oriented society to an individualistic society like Sweden.⁶⁷ Cultural differences, not the least gender related, can cause conflicts and misunderstandings in daily social interactions.

In many cases, the cultural baggage of asylum-seeking children indicates hard patriarchal views on women and young girls, which may collide with basic thinking from an equality perspective. They may have been exposed to discriminating acts in their family home. The UASC may have had traumatizing experience from their native country or their travel to Sweden, but also become exposed in Sweden to intimidation or offensive treatment.⁶⁸ Both Yasmin and Anahita's case indicate they have to put up a double standard: one towards those of a similar origin displacing traditional behaviour and one among Sweden-born friends accommodating liberalized gender patterns.

Anahita's life chances, similar to the lives of those young girls and boys who arrived in and after 2015 to Sweden, became insecure due to the securitization of her asylum status. Their opportunities for establishment is hindered, and for many of them closed. As Anahita expressed, her life situation is fully unreliable:

Without the residence permit, one feels a very large insecurity, anxiety. One is between heaven and earth. One does not belong anywhere; one does not know what one should do.

66 Celikaksoy & Vadensjö, 2015.

67 E. Brunberg, & M. Darvishpour, "Etnicitet, kultur och genus: Om ensamkommande barn och mötet med den svenska skolan" in P. Lahdenperä & E.Sundgren (eds.), *Skolans möte med nyanlända*, Liber, 2016, pp. 111-132.

68 Brunberg *et al.*, *supra* note 63.

Studies conducted prior to 2014 indicate the difficulties UASC experienced in gaining access to the community with contemporary friends born in Sweden and in establishing long-term relationships with grown-up support persons.⁶⁹ They may face discriminatory attitudes from teachers who can negatively affect the development of the children.⁷⁰ Anahita's case corroborates both of these aspects, as she has difficulty with access to Swedish friends and also experienced negative attitudes from social workers.

As the report of the WRC⁷¹ indicates, GBV victims lack awareness of their rights for protection and experience difficulties in reporting and making their claims recognized by officers. The report is critical on the group placement of girls among men and the lack of access to adequate medical support. Yasmin's account gives clear indications of all these issues, indicating that her gender-specific vulnerabilities were not recognized within the extended (2 years) asylum trial, leaving her insecure and increasing her vulnerability. They must balance the insecurities of the application with pressures related to gendered hierarchies from their home cultures, with experiences of occasional homophobic accidents without any trusting supportive relationships. This leads to feelings of alienation and a disembedding of identities, a state of not belonging. They experience being criminalized in the asylum process and not listened to. Thus, as the life story of Anahita indicates, the increased securitization of the asylum-seeking process has contributed to increased pressures for UASC adolescent girls. These special sensibilities would need to be taken on board, both in the process of asylum trials and in forming reception.

REFERENCES

Ahmadi, F., Mella, O., Palm, I., & Darvishpour, M., *Mångfaldsbarometern Tio år av attitydmätningar i Sverige*, Gävle, Gävle University press, 2015.

Asztalos Morell, I., "Self-sacrificing motherhood: Rhetoric and agency in the era of collectivization in two parallel life-histories", in M. Ilic & D. Leinard (eds.), *The Soviet past in the post-Soviet present*, London, Palgrave, 2015.

Bhabha, J., "Demography and rights: Women, children and access to asylum", *International Journal of Refugee Law*, Vol 16, No. 2, 2004, pp. 227-243.

Bigo, D., & Julien, J., "Border security, technology and the Stockholm programme", *Centre for European policy studies: INEX policy brief*, No. 3, November 2009.

⁶⁹ Wernesjö, *supra* note 16.

⁷⁰ Stretemo & Melander, *supra* note 9.

⁷¹ WRC, *supra* note 44.

Borevi, K., "Sweden: The flagship of multiculturalism", in G. Brochmann & A. Hagelund (ed.), *Immigration policy and the Scandinavian Welfare State 1945–2010*, London, Palgrave Macmillan, 2012, pp. 25–96.

Bertaux, D., *Biography and society: The life history approach to the social sciences*, Sage, Beverly Hill, 1981.

Brunnberg, E., & Darvishpour, M., "Etnicitet, kultur och genus: Om ensamkommande barn och mötet med den svenska skolan", in P. Lahdenperä & E. Sundgren (ed.), *Skolans möte med nyanlända*, Den Hague: Liber, 2016, pp. 111-132.

Brunnberg E., & Aytar, O., *På väg in i det svenska samhället: slututvärdering av Solitario: dagverksamhet för ensamkommande barn i Eskilstuna*, Mälardalens högskola, Eskilstuna, 2012.

Brunnberg, E., "En magisk box för resiliensskapande insatser", *Socialmedicinsk tidskrift*, Vol. 2016, No. 1, 2016, pp. 82-96.

Brunnberg, E., Borg R-M., & Fridström, C., *Ensamkommande barn: en forskningsgenomgång*, Studentlitteratur, Lund, 2011.

Eurostat, Asylum statistics, 2017, Retrieved on 20 December 2017 http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

Cantat, C., *Contesting Europeanism: Discourses and practices of pro-migrant organisations in the European Union*, PhD Thesis, School of Law & Social Sciences, University of East London, London, 2015.

Castles, S., Miller, M. J., & Ammendola, G., in P. Marfleet (ed.), *The age of migration: International population. Refugees in a global era*, Basingstoke, Palgrave Macmillan, 2005, pp. 57-140.

Celikaksoy, A., & Wadensjö, E., *De ensamkommande flyktingbarnen och den svenska arbetsmarknaden*, SULCIS Rapport 2015, Vol. 2, Stockholm, 2015.

Darvishpour, M., "Welfare state 'stepchild': An intersectional and structural perspective on ethnic relations and discrimination Sweden", in E. Brunnberg & E. Cederström (ed.), *New tools in welfare research*, NSU Press, Århus, 2013.

Darvishpour, M., & Westin, C., "Maktperspektiv på etniska relationer", in M. Darvishpour & C. Westin (ed.), *Migration och etnicitet: perspektiv på ett mångkulturell Sverige*, Studentlitteratur, Lund, 2015.

Darvishpour, M., & Lahdenperä, P., *Honour-related problems in school contexts in Sweden: Theoretical perspective and prevention*, Västerås, Mälardalen University Studies, 2014.

Eide, K., & Hjern, A., "Unaccompanied refugee children: Vulnerability and agency", *Acta Paediatrica*, Vol. 12, 2013, pp. 666-668.

EU (Directive 2011/95/EU), 2011, Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

Freedman, J., *Gendering the international asylum and refugee debate*, London, Palgrave Macmillan, 2007.

Freedman, J., "Engendering security at the borders of Europe: Women migrants and the Mediterranean 'Crisis'", *Journal of Refugee Studies*, 2016, pp. 1-15.

Gerard, A., *The securitisation of migration and refugee women*, Abingdon, Routledge, 2014.

Gerard, A., & Pickering, S., "The crime and punishment of Somali women's extra-legal arrival in Malta", *The British Journal of Criminology*, Vol. 52, No. 3, 2012, pp. 514-533.

Globalis, Afghanistan, Retrieved on 07 January 2016 www.globalis.se/Laender/Afghanistan.

Hedin, L., Höjer, I., & Brunnberg, E., "Why one goes to school: What school means to young people entering foster care", *Child and family social work*, Vol. 16 No. 1, 2010, pp. 43-51.

Hessle, M., *Ensamkommande flyktingbarn men inte ensamma. Tio årsuppföljning av ensamkommande flyktingbarns livsvillkor och erfarenheter som unga vuxna i Sverige*, Stockholm, Stockholms universitet, 2009.

Hildebrandt, J., *Kriget dödar flest—på BB*. Stockholm, Telegram & Journalistik, 2009.

Hjern, A., Brendler-Lindqvist, M., & Norredan, M., "Age assessment of young asylum seekers", *Foundation Acta Paediatrica*, No. 101, 2012, pp. 4-7.

Hunt, L. "Women asylum seekers and refugees: Opportunities, constraints and the role of agency", *Social Policy & Society*, 2008, Vol. 7, No. 3, pp. 281-292.

Huysmans, J., "The European Union and the securitization of migration", *Journal of Common Market Studies*, Vol. 38, No. 5, 2000, pp. 751-777.

Justitie departementet, *Mottagande av ensamkommande barn*, (Regeringens proposition 2005/06:46), Stockholm, Regeringskansliet, 2005.

Krishna, A., *One illness away: Why people become poor and how they escape poverty?*, Oxford, Oxford University Press, 2011.

Kvale, S., & Brinkmann, S., *InterViews: Learning the craft of qualitative research interviewing*, Los Angeles, Sage, 2009.

Larsson, J. H., McNell, M., "Identitet och invandring: En kvalitativ studie med ensamkommande flyktingbarn" in F. Ahmadi & M. Lilja (eds.) *Ensamkommande flyktingbarn: utifrån perspektivet socialt arbete*. Gävle, Gävle University press, 2013.

Löfven, S., & Romson, Å, *Regeringen föreslår åtgärder för att skapa andrum för svenskt flyktingmottagande*, Stockholm, Regeringskansliet, 24 November 2015.

Luthman, I., *The gendered implications of securitized migration: A qualitative look at how the securitization of migration affects women's experiences of seeking asylum in one of the world's most gender equal countries*, Uppsala University, Department of Government, Master thesis in Political Science, Uppsala, 2017.

Masten, A. S., *Ordinary magic: Resilience processes in development*, *American Psychologist*, Vol. 56, No. 3, 2001, pp. 227-238.

MIG 2008:42, Retrieved on 11 April 2013 <https://lagen.nu/dom/mig/2008:42>.

Migrationsverket, *Aktuellt om... ensamkommande barn & ungdomar*, Retrieved on 01 July 2016 www.migrationsverket.se/download/18.2d998ffc151ac387159e6c/1452178480208/Aktuellt+om+ensamkommande+barn+januari+2016.pdf.

Migrationsverket, *Antal asylsökande—aktuell statistik*, 2017, Retrieved from <https://www.migrationsverket.se/Om-Migrationsverket/Statistik.html>.

Nagai, M., Karunakara, U., Rowley, E., & Burnham, G., “Violence against refugees, non-refugees and host populations in Southern Sudan and Northern Uganda”, *Global Public Health*, Vol. 3, No. 3, 2008, pp. 249-270.

Nordberg, J., *De förklädda flickorna i Kabul*, Stockholm, Bonniers, 2015.

Nyers, P., “Abject cosmopolitanism: The politics of protection in the anti-deportation movement”, in N. De Genova & N. Peutz (eds.), *The deportation regime: Sovereignty, space, and the freedom of movement*, Duke, Duke University Press, 2010.

Pickering, S., *Women, violence and borders*, London, Springer, 2011.

Rai, B., Kaur, J., Jafarzadeh, H., “Dental age estimation from the developmental stage of the third molars in Iranian population”, *Journal Forensic Leg Med*, Vol. 17, No. 6, 2010, pp. 309-311.

Roe, P., “Gender and ‘positive’ security”, *International Relations*, Vol. 26, 2014, pp. 116-138.

Schierup, C-U., & Ålund, A., “From paradoxes of multiculturalism to paradoxes of liberalism. Sweden and the European Neo-Liberal Hegemony”, *Journal for Critical Education Policy Studies*, Vol. 9, No. 2, 2011, pp. 125–142.

Skolverket, *Nyanlända—aktuell statistik november, 2015*, Stockholm, Skolverket, 2016.

Stretemo, L., & Melander, C., *Får jag vara med? erfarenheter från ensamkommande barn och ungdomar i Göteborgsregionen och arbetet med denna grupp*, Göteborg, FoU i Väst, 2013.

Strömbäck, J. F., Andersson & E. Nedlund, *Invandring i medierna—Hur rapporterade svenska tidningar åren 2010-2015*, Delmi Rapport, Stockholm, Vol. 6, 2017.

SFS (Svensk författningssamling), *Utlänningslag (2005:716)*, Ch. 4, 1§, 2005.

Tickner, A., “You just don’t understand: Troubled engagements between feminists stokes and IR theorists”, *International Studies Quarterly*, Vol. 41, No. 4, 1997, pp. 611-632.

UN, *Convention on the Rights of the Child*, 1989, Retrieved from https://www.unicef.org/crc/files/Rights_overview.pdf.

Wade, J., Sirriyeh, A., Kohli, R., & Simmonds, J., *Fostering unaccompanied asylum-seeking young people. Creating a family life across a "world of difference"*, London, BAAF Adoption & Fostering, 2012.

Wadensjö, E., & Çelikaksoy, A., *Ensamkommande barn i Sverige*. Stockholm, SULCIS Rapport 2015, Vol. 1, 2015.

Wernesjö, U., *Conditional belonging listening to unaccompanied young refugees' voices*, Uppsala, Uppsala Dissertations from the Faculty of Social Sciences, Vol. 93, 2014.

WRC (Women's Refugee Commission), *Falling through the cracks: Refugee women and girls in Germany and Sweden*. New York, Women's Refugee Commission, 2016.

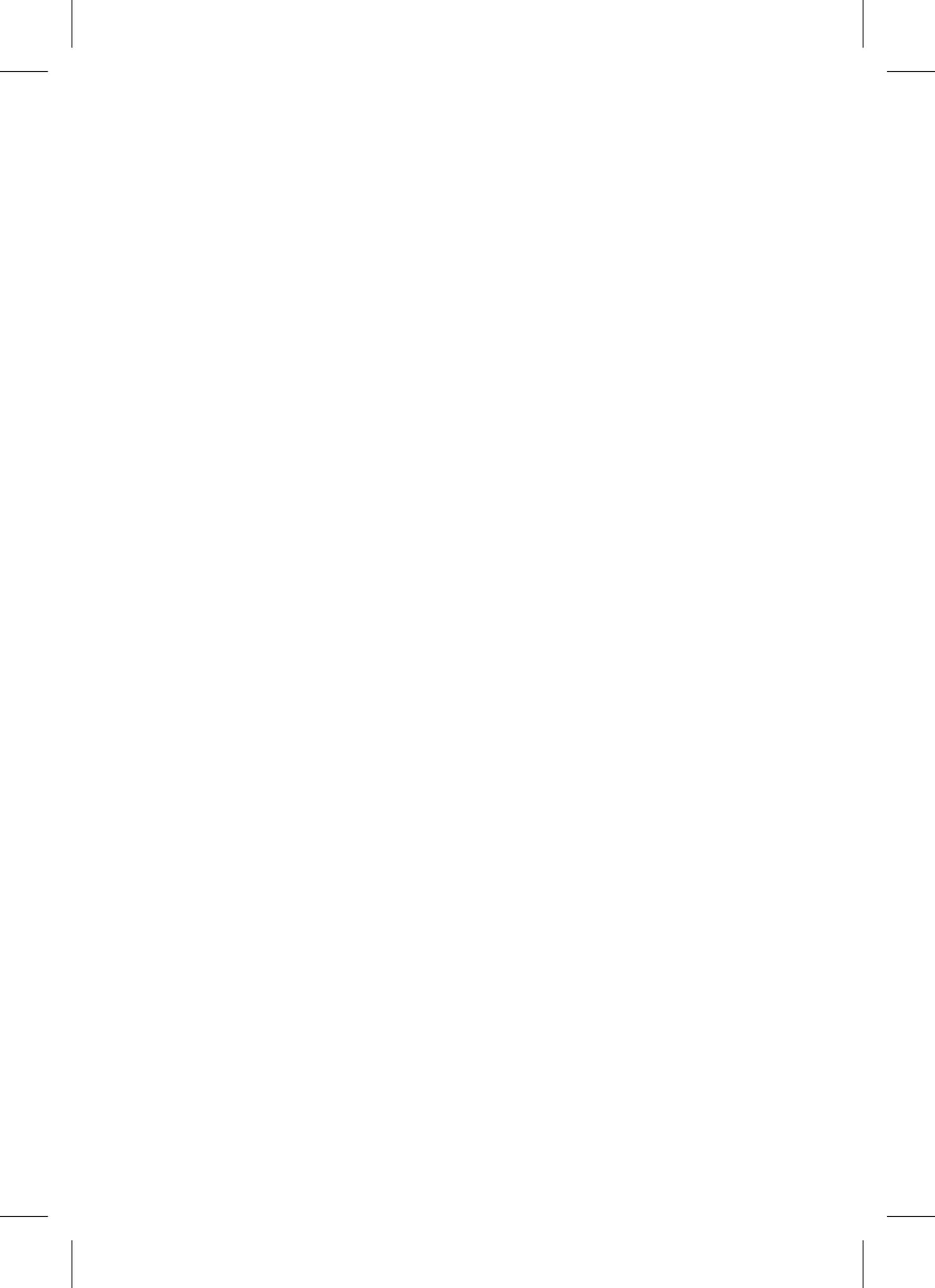
Zetterqvist Nelson, K., & Hagström, M., *Nyanlända barn och den svenska mottagningsstrukturen*, Stockholm, Forte, 2016.



ABOUT THE EDITORS

Dina Siegel is a professor of criminology at the Willem Pompe Institute for Criminal Law and Criminology at Utrecht University, the Netherlands. She received her PhD in cultural anthropology at the VU University, Amsterdam (*The Great Immigration: Russian Jews in Israel*, Oxford: Berhahn Books, 1998). She has published on the Russian mafia, human trafficking, human smuggling, crimes of mobility, legalized prostitution, underground banking, XTC trafficking, terrorism, crimes in the diamond industry, green criminology and the role of women in organized crime. Her most recent books are *Mobile Banditry: East and Central European Itinerant Criminal Groups in the Netherlands* (Eleven International Publishers, 2014), *Ethical Concerns in Research on Human Trafficking* (with Roos de Wildt; Springer, 2016), *Traditional Organised Crime in the Modern World* (with Henk van de Bunt; Springer, 2012) and *Contemporary Organized Crime. Developments, Challenges and Responses* (with Hans Nelen, Springer, 2017).

Veronika Nagy is an assistant professor of criminology at the Willem Pompe Institute of Criminal Law, Utrecht University. As part of the PhD program Doctorate in Cultural and Global Criminology (DCGC), she completed her research on welfare surveillance of Roma migrants and their interaction with social service providers in the European Union. Based on a multi-sited ethnography, she completed her research on crime politics and migration control in the European Union, in particular on privatized surveillance methods implemented through social welfare provisions in the United Kingdom. In her work, empirical methods, security theories and ethnic studies are integrated with her multidisciplinary background. After her master's degree in criminology, she was employed by the Probation Service of the Salvation Army and is recently working on digitization and policing in post-transitional societies. In cooperation with the National University of Public Service in Hungary, she is also involved in the research projects of the Doctorate School of Policing and Security studies.



ABOUT THE AUTHORS

Hanneke van Eijken is an assistant professor of EU law. Her fields of expertise are migration, EU citizenship, European asylum law, fundamental rights in the European Union and free movement rights. During the Dutch presidency of the European Union (January–July 2016), Hanneke worked as a legal advisor of EU law at the Dutch Ministry of Foreign Affairs. From 2013 to 2017, Hanneke was involved in a multidisciplinary research project *BEUCitizen*, in which she conducted research on civil rights and EU citizenship. Moreover, from September 2008 to September 2013, Hanneke was the assistant coordinator for the European Commission's Network of Legal Experts in the field of gender equality.

Barbara Safradin is a junior researcher and lecturer of European and international law at Utrecht University. She is currently conducting research within the EU Horizon 20-20 project 'ETHOS', in which she examines new integrative legal and empirical perspectives on justice and fairness for vulnerable groups in Europe. She graduated at Utrecht University and obtained the LLM European Law (cum laude) and the two-year LLM legal research (cum laude). During her studies, Barbara was a trainee at the Dutch Embassy in Croatia, where she worked on migration and minority issues in the context of the Netherlands' EU presidency (2016). She has also conducted research within the multidisciplinary *bEUCitizen* project on barriers to European citizenship. Her research interests include the interaction between member states and the EU in matters related to free movement, EU asylum law and fundamental rights of same-sex couples and third-country migrants residing in the Union, combining both legal and empirical (qualitative) research methods.

Linda Senden is a professor of EU law at Utrecht University. She is the co-director of the Law Department research programme and centre on 'Shared Regulation and Enforcement in Europe' (RENFORCE) and director of the LLM programme on European law. In her research she focuses on the institutional and constitutional dimension of EU law, with a specific interest in regulatory and enforcement aspects of the European integration process, in its interaction with the national legal orders. The overall question that triggers her interest is: How does shared authority between the European and national levels get shape and what does this mean for the position and development of different institutions and in terms of the legitimacy and effectiveness of the European integration process? She is a member of the Advisory Council on International Affairs, which advises the Dutch government and parliament; a member of the executive committee of the European Commission's Network on Non-discrimination; and a member of the editorial board of the *Utrecht*

ABOUT THE AUTHORS

Law Review, NTER (the *Nederlands Tijdschrift voor Europees recht*/Dutch Journal for European Law) and the *European Gender Equality Law Review*.

Narin Idriz/ Tezcan is a researcher at the T.M.C. Asser Institute within the strand 'Human Dignity and Human Security in International and European Law'. Narin has a master's degree in international human rights law (Essex University) and European business law (Leiden University). She worked as a PhD fellow at the Europa Institute of Leiden University, where she defended her thesis in May 2015. Her PhD thesis is titled 'Legal Constraints in EU Member States as Primary Law Makers: A Case Study of the Proposed Permanent Safeguard Clause on Free Movement of Persons in the EU Negotiating Framework for Turkey's Accession'. The thesis identifies constraints on member states in the context of drafting an accession agreement flowing from three legal sources: the EU-Turkey association law, the EU enlargement law and practice, and the EU constitutional law. Narin worked as an assistant professor, teaching European law, at Utrecht University for two years, after which she joined T.M.C. Asser Institute on 1 September 2017.

Ayşem Biriz Karaçay is an assistant professor at the Department of Political Science and International Relations, Istanbul Commerce University, Istanbul. As a (senior) research associate and administrator at the Migration Research Center at Koç University (MiReKoc), Istanbul, from 2003 to 2015, she took part in diverse EU-funded research projects on the topic of irregular migration, human smuggling and urbanization, while organizing several international conferences, workshops and trainings. She received her PhD degree in political science and international relations from the Social Science Institute of Marmara University (Istanbul). Her PhD research focused on labour mobility from Turkey to post-Soviet countries, entailing the structural evolution of the migration system between Turkey and Russia. After her PhD she conducted research at the University of Oxford, with a postdoctoral grant from TÜBİTAK, focusing on the emerging Eurasian migration (sub)systems and the case of Turkey in Russia. She has also co-authored (together with A. Icduygu, A. Ustübeci, and D. Sert and G. Göker) three volumes on migration and asylum in Turkey. Her interest areas include project-tied migration, irregular migration, human smuggling/trafficking, migration policy and border management.

Annelies (E. B.) Zoomers is a professor of international development studies at Utrecht University, chair of the board of the Dutch Land Academy and founding chair of Shared Value Foundation. After finishing her PhD in 1988, she worked for the Netherlands Economic Institute (Rotterdam) and the Royal Tropical Institute (Amsterdam) on long- and short-term consulting assignments for various organizations (e.g. the World Bank, IFAD, ILO, EU, DGIS) in various countries in Latin America, Africa and Asia. Between 1995 and 2007 she was an associate professor at the Centre for Latin American Research and Docu-

mentation (Amsterdam) and, between 2005 and 2009, a professor of international migration at the Radboud University (Nijmegen). She has published extensively on sustainable livelihoods and poverty alleviation in relation to climate change, the global land rush and international migration.

Femke van Noorloos is an assistant professor of international development studies and social urban transitions (Department of Human Geography & Planning, Utrecht University). She is a social science researcher with a broad interest in international development. Her current research focuses on urban development in Africa and Latin America, particularly on land issues in urban settings, urban land governance and private sector investment in urban development, also in relation to transnational mobilities. Femke did her PhD at Utrecht University on the topic of residential tourism and transnational property investment in Costa Rica (graduating in December 2012). She also contributed to research at Radboud University Nijmegen on bilateral migration agreements in 2008–2009.

Ilse van Liempt is an assistant professor in the Human Geography Department, Utrecht University. She joined the University of Utrecht in 2010, having previously worked as a Marie Curie research fellow at the Sussex Centre for Migration Research and a PhD student at the Institute for Ethnic and Migration Studies at the University of Amsterdam. Her research is centred around irregular migration, refugees and human smuggling. Her PhD was published in 2007 as a book with Amsterdam University Press: *Navigating Borders: Inside Perspectives on Human Smuggling into the Netherlands*.

Irina Kotenko is a lawyer and a graduate of Utrecht University LLM programme Human Rights and Criminal Justice. Her professional interests mainly lie in the area of human rights law. Currently, Irina lives in Albania and works as a lawyer at Tashko&Pustina, an Albanian law firm with a wide international orientation. Additionally, she is engaged in projects in the area of human rights defence and economic migration in the context of non-profit organizations. She is also associated as a long-standing expert at the Agenda Institute.

Idlir Peçi is an international freelance consultant in the area of rule of law and human rights. He has served as a deputy minister of justice of Albania and has worked as an assistant professor at Utrecht University in the Netherlands. Currently, Ildir lives in Albania, where he is active in judicial trainings in the field of criminal law and human rights. He is often involved as a key expert in numerous civil society projects in human rights. Ildir is also associated as a long-standing expert at the Agenda Institute.

ABOUT THE AUTHORS

Nilay Kavur is a postdoctoral researcher at the Willem Pompe Institute for Criminal Law and Criminology, Utrecht University. She obtained her PhD in cultural and global criminology at the University of Kent and Eötvös Loránd University in 2016 (*Revisiting Remand Imprisonment within Biopolitics: A Study on Turkey's Juvenile Justice System through Legislative, Judiciary and Executive Powers*). Her research interests lie on the sociology of law, social policy on migration and mobility, criminal justice and imprisonment studies. Holding a critical view to the liberal, individualist language of human rights, she is particularly interested in studying the applicability of children's rights discourse for children in the margins, such as the migrant children and children in the criminal justice system.

Mairi Zoi is a lawyer in Athens, Greece, and a former master's student of European law at Utrecht University. She received a bachelor's degree in law from the National and Kapodistrian University of Athens. Her research interests lie with EU asylum law, migration policies, security and border controls.

Salvatore (Salvo) Nicolosi works as an assistant professor (*Docent*) of European and international law at Utrecht University Law School, where he is also a researcher within the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE). Salvo is an associate postdoctoral research fellow at the Human Rights Centre of Ghent University, where he previously conducted a research project on the Common European Asylum System and its degree of compliance with International Human Rights Standards. In the ambit of his research, Salvo was awarded the prestigious EU Fulbright-Schuman Fellowship spent as a Michigan Grotius Research Scholar at the Center for International and Comparative Law and the Program on Refugee and Asylum Law at Michigan University Law School. Salvo defended his PhD at *La Sapienza* University of Rome, and his research combines expertise in the domains of European law, international human rights law and international refugee law, with particular attention on developing the Common European Asylum System.

Dina Siegel is a professor of criminology at the Willem Pompe Institute for Criminal Law and Criminology at Utrecht University, the Netherlands. She received her PhD in cultural anthropology at the VU University, Amsterdam (*The Great Immigration: Russian Jews in Israel*, Oxford: Berhahn Books, 1998). She has published on the Russian mafia, human trafficking, human smuggling, crimes of mobility, legalized prostitution, underground banking, XTC trafficking, terrorism, crimes in the diamond industry, green criminology and the role of women in organized crime. Her most recent books are *Mobile Banditry: East and Central European Itinerant Criminal Groups in the Netherlands* (Eleven International Publishers, 2014), *Ethical Concerns in Research on Human Trafficking* (with Roos de Wildt; Springer, 2016); *Traditional Organised Crime in the Modern World* (with Henk

van de Bunt; Springer, 2012) and *Contemporary Organized Crime. Developments, Challenges and Responses* (with Hans Nelen, Springer, 2017).

Vassilis Gerasopoulos is a PhD candidate at the Willem Pompe Institute of Criminal Law and Criminology in the University of Utrecht, under the umbrella of RENFORCE (Utrecht Centre for Regulation and Enforcement in Europe). He is, currently, in the second year of his doctorate research. He holds a bachelor's degree in law from the University of Athens and an MA in global criminology (cum laude) from Utrecht University. His area of interest centres around the concepts of fear, exclusion and identity – in racial, sexual or cultural terms. His PhD research focuses on the connection between migratory flows and the concomitant phobic, exclusionary tendencies of the receiving population in Greece. He has conducted research on labelling, homophobia and identity construction of young gay Greek men.

Aleš Bučar Ručman, PhD, is an assistant professor of sociology and vice-dean for international cooperation at the Faculty of Criminal Justice and Security, University of Maribor. His research interest includes sociology of deviance, with a focus on a broad connection between migration and crime, securitization of international migration, criminalization of immigrants, etc. He has conducted research on specific forms of human trafficking in Slovenia (exploitation of workers, forced criminal activities and forced begging, trafficking of children). He is the author/co-author of several monographs, research reports and many journal articles. His latest book, *Migration and Crime: A Perspective Beyond Stereotypes and Prejudices* (in Slovenian), was published by the Publishing House of Slovenian Academy of Sciences and Arts.

José A. Brandariz-García is an associate professor of criminal law and criminology at the University of A Coruña, Spain, and a member of the Executive Board of the European Society of Criminology. He has published widely on penalty and criminal justice issues, especially on penal policies, migration control and penal managerialism. In addition, he is currently researching on political economy of punishment and the influence of the Great Recession on penalty.

Cristina Fernández-Bessa is a researcher of the Antígona Research Group at the Autonomous University of Barcelona, course instructor in the Degree of Criminology at Universitat Oberta de Catalunya and a member of the research group Observatory of the Penal System and Human Rights of the University of Barcelona. She holds a PhD in law and political science, as well as a diploma in international critical criminology. She is also a human rights consultant. She has taken part in a number of European and national research projects on liberty and security, migration and borders, public space management,

ABOUT THE AUTHORS

imprisonment, violence against women, surveillance and refugee women, and has published on these topics in different languages.

Karin Geuijen is an assistant professor of public management. Her main research interest is the creation of public value in global wicked issues. Recently, she has co-edited a special issue of *Public Management Review* (2016) on 'Ventures in Public Value Management'. She focuses on the role of (international, national and local) networks in experimental innovative governance arrangements. Domains that interest her the most are justice and security, refugees and migrants, as well as the police. She also does monitoring and evaluation research. She has developed a framework for the evaluation of international police cooperation. Currently, she is involved in an evaluation study on international police cooperation in which this framework is leading, as well as in a monitoring and evaluation study on innovative financial arrangements for social enterprises (social impact bonds).

Ildikó Asztalos Morell is an associate professor of sociology at Mälardalen University. Her major interests include comparative gender research, the study of transition societies with a special focus on rural transformation during state socialism and in the emergence of capitalism, intersectional aspects of rural marginalization and poverty, Romani and migration studies. Morell has published close to 40 articles and book chapters and has been the co-editor of several volumes, most importantly *Gender Regimes, Citizen Participation and Rural Restructuring* (Elsevier, 2008 – with Bettina Bock), *Attitudes, Poverty and Agency in Russia and Ukraine* (Routledge 2016 – with Ann-Mari Sätre) and *Gendering Post-socialism: Old Legacies and New Hierarchies* (Routledge 2018 – with Yulia Gradszkova).

Mehrdad Darvishpour is an associate professor and senior lecturer of social work at Mälardalen University. He has a PhD in Sociology from Stockholm University about immigrant women breaking the traditional family patterns. He also has published several articles and books about gender, equality and ethnicity, masculinity and honour-related problems, integration and discrimination. He leads the research project 'Refugee Children's Inclusion and Gender Equality Development within Society' at Mälardalen University.