Human Rights Issues in Migration and Border Management

Challenges and Perspectives

Ivan Sammut
Ivan Mifsud
(Eds.)

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This book aims to bring together researchers and experts from different legal and anthropological backgrounds to examine the interaction between borders and migration and the challenge they pose to our societies. The work results from an academic sub-project on Migration Law and Policy at the Faculty of Laws of the University of Malta. It formed part of a much larger project involving a Jean Monnet Network MAPS project led by the University of Naples, L'Orientale. It represents the work undertaken by the University of Malta during this project.

This book is relevant to lawyers, anthropologists and students with an interest in migration law and policy.

This book has been financed by the Jean Monnet Network 's migration and asylum policies systems (MAPS) project led by the University of Naples, L'Orientale.

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Foreword

This book results from an academic sub-project on Migration Law and Policy at the Faculty of Laws (Department of European & Comparative Law & Department of Civil Law) of the University of Malta. It formed part of a much larger project involving a Jean Monnet Network migration and asylum policies systems (MAPS) project led by the lead partner, the University of Naples, L'Orientale. The proposal of the University of Naples 'L'Orientale' for a Network Jean Monnet on MAPS was born based on the past experiences of Jean Monnet activities carried out (Jean Monnet Modules, Jean Monnet Chair, Centre of Excellence Jean Monnet on Migrants' Rights in the Mediterranean) of the academic courses on the International Protection of Migrants Rights, on the Protection of Human Rights in EU and, finally, on Islamic and Sinology studies focused on the phenomenon of migration. Starting from the EU proposal of 4 May 2016 to amend the asylum system, Dublin IV, MAPS aims at highlighting key changes relating to the general principles and safeguards of the asylum system and the corrective allocation mechanism as regards differentiating between deficiencies in the legal design of the system and its implementation, analysing weaknesses and the compliance with international law obligations to protect asylum claimants, refugees and migrants in general.

This edited book represents the work undertaken by the University of Malta during this project. Some of its contributions also reflect conference proceedings organised in Malta on 25 March 2022 within the auspices of the said project. Most chapters are about migration from a legal perspective, although the edited book's first part contains chapters from an anthropological perspective. As a result, the different writing styles between the anthropological and legal chapters are maintained. The opinions of the chapters in the book reflect solely those of the respective author and not of the editors.

List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
AIDA	Asylum Information Database
CAM	Corrective Allocative Mechanism
CEAS	European Commission, Common European Asylum System
CEMIRIM	Centre of Excellence Jean Monnet on Migrants' Rights in the Mediterranean
CETI	Centro de Estancia Temporal de Inmigrantes
CJEU	Court of Justice of the European Union
CNDA	National Court for Asylum
COSI	Intergovernmental Standing Committee on Internal Security
EASO	Europen Asylum Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUAA	European Union Agency for Asylum
EURA	Readmission Agreement
HIRC	Hal Far Initial Reception Centre
ICJ	International Court of Justice
ICT	Information Communication Technology
ILPA	Immigration Law Practitioners' Association
JHA	Justice & Home Affairs
MAPS	Migration and Asylum Policy Systems
NRA	National Readmission Agreement
OFFI	French Immigration and Integration Office
OFPRA	Office Française de Protection de Refugies Apatrides
OUP	Oxford University Press
REFCOM	Office of the Refugee Commissioner
SAR	Search and rescue
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UNITAR	United Nations Institute for Training and Research

Contributors

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Campbell Brian lectures in social anthropology at the University of Plymouth. Funded by the Royal Anthropological Institute and the Max Planck Institute for Social Anthropology, Brian is an ethnographer of the Spanish enclave of Ceuta. Focusing on the dynamics, contradictions and resilience of ethno-religious coexistence (*convivencia*), he wrote papers on ritual, patronage, carnival and satire. Of late, he has refocused his attention on the relationship between coexistence and migration, examining the rise of the far-right in Ceuta and the continued militarisation of the enclave as the gate of fortress Europe. He is the author of numerous journal articles and book chapters, including "Ceuta (Un)chained: Anxiety, Nostalgia, and Irony on the Spanish border with Morocco", in Canessa, Andrew (ed.). *Barrier and Bridge: Spanish and Gibraltarian Perspectives on Their Border.*

Mifsud Ivan graduated with an LLD in 1999 and a PhD in administrative law in 2008. After thirteen years working for the Maltese Parliamentary Ombudsman (mainly investigating complaints related to planning, police and local councils) and three years chairing the Prison Board of Vistors, he joined the University of Malta as a resident academic in September 2013. He is currently Head of the Department of Public Law

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violence and victims of trafficking. Ayesha is a contributor to the Immigration Law Practitioners' Association's *ILPA Handbook for Legal Practitioners: Using the UN Global Compact for Safe, Orderly and Regular Migration as an Interpretative Tool* (2021) and has also written a number of peer-reviewed articles in prestigious journals.

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Sammut Ivan is a Lawyer, Resident Academic and holder of a Jean Monnet Chair in EU law within the Department of European and Comparative Law at the Faculty of Laws of the University of Malta, where he has taught and researched since 2005. Before joining the University of Malta, he practised law and acted as a Consultant in EU law. He was also employed with the European Commission for two years. He was promoted to Associate Professor in 2019 and was awarded a Jean Monnet Chair in 2022. He holds an LL.D. from the University of Malta, an MA from the University of Birmingham (UK), an LLM from the College of Europe (Bruges) and a PhD from the University of London. Professor Sammut has published various articles in Malta and in international peer-reviewed journals, including the *European Review of Private Law*. He is also the author of a monograph entitled *Constructing Modern European Private Law – A Hybrid System* and an editor of several edited academic books.

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Introduction

Ivan Sammut

Migration as a social, cultural, political and legal phenomenon has been at the forefront of global debate in the last two decades. 'Migration as crisis' is a powerful legal and political narrative that dominates the discussion on the movement of people and ultimately shapes policies and regulations at the EU, national and international levels. In its broadest sense, the concept of migration is strictly intertwined with that of borders. Borders are one of the oldest ways to separate and draw distinctions between different societies. From Roman times to the Congress of Vienna, the idea of drawing and protecting borders between people and societies has been a powerful tool used by law and policymakers. The implications of bordering practices and the very concept of a border are worth exploring: what is a border, how is it produced and how does it regulate the lives of people on one side and the other and movement across it are questions that should be answered through an interdisciplinary approach that borrows, among other things, from anthropological and legal research. Border management is an equally fundamental concept, even more so within supranational organisations like the EU, where twenty-seven Member States share the same external border. Within this border, EU citizens live largely borderless lives, where the movement of people, goods, services and capital is free from traditional limitations, and are caught unaware by the reintroduction of borders, as recent events like Brexit have clearly shown.

The central Mediterranean area, together with what is now the Eastern land border with Ukraine and Belarus, is a key paradigm of the meaning and significance of the concept of the border from a legal, political and even anthropological perspective. The interaction between different states (Italy, Malta, Libya and Greece), supranational (EU) and non-governmental organisations and institutions, as well as EU agencies (such as Frontex and the EUAA), demonstrated the limits of the legal framework applicable to search and rescue operations as well as to asylum and immigration procedures and the requirement for its profound restructuring to meet the challenges of the next decade. It is, in this sense, extremely problematic to note up to which extent the national and supranational institutions are unable (or only limitedly able) to coordinate their respective efforts in ensuring an orderly and fundamental rights-compliant movement of migrants along the sea and land border of the EU. Moreover, since empires and states rise and fall over the management of borders, as history teaches, the questions posed by this book are timelier than ever.

This book aims to bring together researchers and experts from different backgrounds to reflect in an interdisciplinary perspective on the questions that the interaction

between borders (and their management) and migration pose to our societies. The book is divided into three parts. Part I collects contributions on the concept of border from a legal-anthropological perspective. Chapters on questions like the rule of law and migration, inter-religious marriages, migration in the Spanish enclave of Ceuta and the 'hermeneutics of suspicion' will reflect on the meaning and significance of the concept of border, border practices and the operations of EU and national agencies and NGOs in the Mediterranean Sea. In Part II, contributors reflect on challenges posed to land borders and their management with regard to the situation in the Balkans and the case law of the Court of Justice of the European Union. Part III concludes the book by reflecting on the challenges and perspective of reform for migration in the Mediterranean Sea from a predominantly legal perspective.

Prelude – European Migration Law

1 Migration and Border Management: Challenges and Perspectives for Reform

Ivan Mifsud

This contribution reflects the opening speech of the MAPS Jean Monnet Conference held at the University of Malta on 25 March 2022. It is meant to give an overview of the issues discussed at the conference and in the chapters that follow.

Life as the underdog is tough. Let me clarify: I do not pity migrants, but I feel for migrants' causes, for their plight. Before proceeding further, I must emphasise that what I am about to say is purely my opinion. I have always remembered that whole nations have been built based on European migration: North America and Australia, to name but two. So, I consider resisting migration today ironic, given Europe's past performance in other continents.

Secondly, I have always remembered that birds, all kinds of animals and marine species migrate and cross whole continents and oceans as part of their natural reproductive cycle or merely to survive, to escape hunger and thirst. It is no wonder, it should come as no surprise, that human beings seek to do the same. Look at Ukraine, for example. I heard on BBC radio yesterday that it is the largest people displacement since World War II. It happens. Migration from Africa happens, too.

A small remark on territoriality: having territory is a trait we share with at least some other species. I recently watched a documentary about male lions – how a male lion will fight another male to the death if he dares enter his territory. So, territoriality may be a natural phenomenon for some species, including humankind. However, it is also a fact that countries, boundaries, nations and national identities are recent artificial creations to serve a purpose: preserve the status quo within the state. Years ago, I read a book called *States, Nations and Nationalism from the Middle Ages to the Present* by Hagen Schulze (English translation). Schulze accuses poets and writers of shaping literature to evoke a spirit of nationalism in their respective countries. At the same time, wars were largely responsible for the transition of the national mentality from the intellectuals' minds to the masses. According to Schulze, with the Great War (World War I), the whole society was at war, and the hour of the state had come. It has been so ever since.

So, we have raised artificial borders, we have made life very difficult for foreigners unless they are wealthy and willing to spend money in our 'territory' and we exploit migrants, leaving them to do the menial jobs that the locals do not wish to do. I have personally visited detention centres, including outside Malta, and have been amazed at what I perceive as a complete and utter failure of governments, for there is no other way to describe healthy people being confined to zoo-like conditions. I shook my head in initial disbelief a few years ago, when an earlier Prime Minister of Malta went on record saying that Malta profits from foreign workers because they pay national insurance but do not remain here long enough to claim a pension. In time, I realised that this was indeed the case. I was once assisting a foreigner and accompanied her to a government entity. The official asked me, 'Why does this person not simply return to her country? Who told her to come to Malta anyway?'

So, here I am talking about foreign workers, not migrants, but you get the picture. Look at the general approach to foreigners: they either serve a purpose or are not welcome. I sincerely hope that things will change and that the younger generation will do better as they grow up accustomed to living in a multiracial and multicultural society and will be more ready to embrace foreigners, including migrants, and not consider them to be some 'invasive species'. I trust that initiatives like today's will help to make this happen, this change, this move towards an easier transition for migrants to a better life.

Of course, there is the other side of the coin: migrants must do their part, namely, do their utmost to be law-abiding persons. I am in no way suggesting that migrants are any more criminal than the local population of any country, Malta included. You find less well-meaning people everywhere. Migrants must try to integrate and contribute to the nation's growth, thus advancing their cause.

2 EU Migration Law: From Schengen to the Externalisation of Border Control – Quo Vadis?

Ivan Sammut

This chapter aims to highlight the main features of EU migration law. It starts with Schengen and the context of removing border control at EU's internal borders to facilitate the flow of people internally and then moves on to how the EU has strengthened, and sometimes struggles to strengthen, its external border with third countries. Hence, while the EU encourages internal migration, it seeks to tighten regulations at the external border. Finally, the chapter discusses where this may lead the EU in the future by examining current European case law.

2.1 Introduction

EU migration law has long been a controversial and debatable field of law. Why the EU initially lacked competence and still does not have exclusive competence plays an important role in evaluating EU migration law. The EU went from eliminating internal border controls to strengthening the external border through the Schengen acquis. However, the externalisation of border control brings up several potential human rights violations and raises the question of the positive obligation of states to protect human rights and strike a balance between the rights of migrants and the control of the external border. In the first part, this chapter provides a microcosm of the main EU migration law and policy. This is followed by how the EU went from removing control at its internal borders to strengthening and fortifying its external borders. However, this did not prove sufficient to stem a legal migration. So, the Member States sought to externalise border control, which brought about potential human rights violations. In the final part of this chapter, the discussion focuses on some examples of the case law of European courts in Strasbourg and Luxembourg and how they see the externalisation of border control.

2.2 EU Migration Law

Free movement of persons is one of the very foundations of the Treaty on the Functioning of the European Union (TFEU), which establishes the Internal Market through Article 45 TFEU. Free movement rights have been consolidated in the Citizens' Rights Directive.[1] Although the directive applies to EU nationals, it can be argued that the principles in the directive are gradually being widened to include third-country nationals. The relationship in EU migration law between Union citizens and third-country nationals is one of both convergence and divergence.[2] Convergence because the category of third-country nationals enjoying the same or similar rights as Union citizens is widening – a prime example being that of third-country national family members of Union citizens – although their treatment remains problematic. Divergence because in developing EU law on borders and admission, residence and status of third-country nationals, Member States have subjected the right of free movement of third-country nationals to barriers that the Court of Justice of the European Union (CJEU) has severely limited, and in many cases excluded, with regard to Union citizens. Guild identifies such barriers, for instance, in the lower threshold for their expulsion and in the additional requirements to access social security benefits.[3] The result is that the developing concept of EU citizenship is presumed to be based on discrimination between classes of citizens. For third-country nationals enjoying free movement rights, the dividing line between citizenship rights and discrimination against aliens remains rather blurred. This brings up the following questions: How to distinguish between free movement and immigration? Who are the citizens and the immigrants?

Third-country nationals are those who do not hold the nationality of a Member State. As clarified by the CJEU, the rights of workers, self-employed and service providers to have free movement are limited to the nationals of the Member States. The jurisprudence of the Court is more ambiguous about the rights of service recipients, such as tourists. In 1986, the Single European Act enlarged the scope of the right of free movement of service providers to include the ability to adopt measures for the free movement of third-country national service providers. This opportunity has not been taken up. Although the Commission proposed a directive to provide for this in 1999, it was withdrawn. The extension was reintroduced in the draft services directive in 2005

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States [2004] OJ L 158/77.

2 See Guild, E., 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons', in Baldacchi, A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 57.

3 Ibid., p. 59.

but was withdrawn in the face of heavy criticism by some Member States and social partners.[4]

EU nationals, however, have a right to exercise free movement rights, which entails a movement right for third-country nationals. In particular, EU businesses that provide services across EU borders are entitled to deploy personnel of any nationality for this purpose.[5] While it appears that Member States can require that the third-country national personnel have been admitted to a Member State, other obstacles, such as obligatory periods of previous employment with the enterprise before the deployment, are not permissible.[6]

Third-country nationals are entitled to rely on all EU free movement rights except those of persons. Thus, for example, they are not excluded from the personal scope of the free movement of goods or capital under agreements between their country of origin and the EU. Some third-country nationals enjoy rights attached to the free movement of persons, such as security of employment and residence, equal treatment in social security and education.[7] The most extensive of such rights accrue to the Turkish workers under the EC-Turkey Association Agreement and the Decisions of the Association Council, in particular Decision 1/80, which has been the subject of substantial jurisprudence from the CJEU.[8]

Following the *communautarisation* (introduction to the then Community pillar) of the immigration and asylum issues into Title IV of the EC Treaty by the Amsterdam Treaty in 1999, now Title V of the TFEU, several new legislative instruments were created dealing with legal migration. A five-year period ending 1 May 2004 required adopting measures under the new powers. Regarding legal migration, the following measures have been adopted:

a) Regulation 1030/2002 on residence permit[9]
b) Regulation 859/2003 on third-country national's social security[10]
c) Directive 2003/86 on family reunion[11]
d) Directive 2003/109 on long-term residents[12]

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4 See Baldacchi, A. et al., *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 39.
5 Case C-43/93 *Vander Elst* [1994] I-3803.
6 Case C-445/003 *Commission v. Luxembourg* [2004] ECR I-10191.
7 Romero-Ortuno, R., 'Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?', *Journal of European Policy*, 11, pp. 245-272, 2004.
8 See Groenendijk, *ILPA European Update*, June 2005. p. 7-10.
9 [2002] OJ L 157/1.
10 [2003] OJ L 124/1.
11 [2003] OJ L 251/12.
12 [2004] OJ L 16/44.

The second five-year period is the subject of the Hague Programme adopted by the Council and the Commission, setting out the agenda of measures to be adopted. According to this agenda, there is significantly fewer new legislation than in the first five years of the Community, now Union, competence.[13]

Most significant for third-country nationals lawfully living in the EU are the two directives on long-term residency and third-country nationals and family reunification for third-country nationals. Firstly, Directive 2003/109/EC on long-term resident country nationals provides that third-country nationals who have resided lawfully in a Member State for five years (except for certain excluded classes such as refugees, and an exception for students who must complete ten years' residence in a Member State) have a right to move and engage in economic activities as workers, self-employed, service providers or recipients or students in any of the Member States.[14] They may also move for other purposes subject to an economic self-sufficiency requirement. This right derives from EU law, not national law, and must be transposed by January 2006. Thus, so long as the individual has completed the qualifying five years of lawful residence per the conditions, he or she has the right, notwithstanding what the national may state.

Further, the directive does not recognise any delay in the right. All third-country nationals who fulfil the requirements as of the transposition date are entitled to the right to free movement.[15] This directive will likely result in substantial new friction between the authorities of the Member States and third-country nationals who seek to rely on their rights.

The second important directive is that on family reunification. Directive 2003/86 creates a right of family reunification for third-country nationals in EU law. The next step is to look into the main elements to see how EU migration law works.

2.2.1 The Long-Term Residents & the Family Reunion Directives

The drafter of the directives had three aims in mind: (i) to create a new status for long-term resident third-country nationals, (ii) to determine the rights attached to that status in the first Member States (i.e. secure residence rights and equal treatment with nationals of the country of residence), and (iii) to grant freedom of movement within the EU

13 For a commentary on the new multi-annual programme see ILPA, *Response to the Hague Programme: EU Immigration and Asylum Law and Policy*, available at www.ilpa.org.uk.

14 See Carrera, S. & Migration, B. T., *Borders and Asylum: Trends and Vulnerabilities in EU Policy*. Brussels CEPS, 2005.

15 Ibid.

under certain conditions.[16] Third-country nationals holding the new status are no longer restricted to only residence in one host Member State. The Commission, in its proposal, conscientiously followed the guidance of the European Council in Tampere:

> The EU must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting these individual rights and obligations comparable to those of EU citizens.[17]

The Council asked the Commission to draft a set of uniform rights that are as close as possible to those enjoyed by citizens of the EU. This request is explicitly referred to in the second Preamble Recital to the directive. The Tampere Conclusions and the directive proposed by the Commission extend the old principle of EU free movement law (secure legal status and equal treatment to stimulate the integration of immigrants) to settled third-country nationals. While a full, comprehensive description of this directive is beyond the scope of this chapter, it makes sense to short survey some of the most underlying issues, including the acquisition and loss of status, the rights attached to the status in the first Member State and the right to move to other Member States.[18]

Articles 4 to 6 of the directive mention three mandatory conditions for the acquisition of status: five years of lawful residence in the Member State where the application is filed, stable and regular income for the family without recourse to social security and that the public policy and public security exception does not apply.[19] The other Member States are bound to recognise a decision by a first Member State unless that decision was manifestly wrong. Third-country nationals admitted for study or temporary purposes, such as seasonal workers, are excluded. A third-country national meets the status of a long-term resident if he or she satisfies the aforementioned conditions and has lodged an application that has been accepted.[20] Without application, they are not entitled to anything. The Member State has six months to evaluate the application and cannot add any additional requirements. The status is permanent. Expiry or loss of the document does not entitle loss of status.[21] It can only be lost on three grounds: fraudulent acquisition of the status, an expulsion decision on serious public order grounds or absence from the

16 Art. 1 of the directive.
17 Presidency Conclusions, Tampere European Council, 16-16 October 1999, para 18.
18 Lahav, G., 'Immigration and the State: The Devolution and Privatization of Immigration Control in the EU', *Journal of Ethnic and Migration Studies*, Vol. 24, No. 4, pp. 675-694, October 1998.
19 Art. 6 of the directive.
20 Art. 7 of the directive.
21 Arts. 8(1) and 9(6) of the directive.

territory of the EU for more than twelve consecutive months. However, Member States may decide that longer absences shall not entail withdrawal of the status.

The directive grants two rights in the country of residence: a secure residence right and equal treatment. Expulsion is possible only if the person "constitutes an actual and sufficiently serious threat to public policy or public security."[22] The article also stipulates substantial guarantees (judicial remedies and legal aid) in the event of an expulsion decision. In Article 11, the directive grants long-term residents equal treatment with nationals in various fields: employment, education and access to social services, among others.

Chapter III of the directive (Arts. 14-23) introduces an important innovation in EU law: the right of a long-term resident to move to and reside in another Member State for employment, study and other purposes.[23] Previously, this right had been granted only to third-country family members accompanying a Union citizen who had exercised his or her right to freedom of movement. The directive extends this right to all third-country nationals holding long-term residence status. The right to reside in a second Member State depends on conditions similar to those for acquiring the new status in the first Member State: an application, sufficient income, health insurance and the absence of public order grounds. There is a special refusal where the person constitutes a threat to public health.[24] The second Member State may (not must) introduce two barriers: a labour market test in case of migration for employment and, in certain cases, a further condition related to integration. Once admitted into the second Member State, the third-country national is immediately entitled to equal treatment as guaranteed by the directive in the first Member State. During the first six years in the second Member State, the long-term residence status in the first Member State remains valid. After five years, the long-term resident may apply for a long-term residence status in the second Member State, and once this is acquired, the status obtained in the first Member State is lost. Under the Family Reunion Directive, which will be discussed next, family members have the right to follow the person who has acquired the new long-term resident status.

What can be concluded from the aforementioned Directive 2003/109/EC has been compared with the consolidated Directive 2004/38/EC dealing with Union citizens. Since the European Council in Tampere instructed the institutions to establish

22 Art. 12(1) of the directive.

23 See Groenendijk, K. 'The Long-Term Residents Directive', in Baldacchi A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 438.

24 See Art. 18 of the directive. Diseases contracted during 5 years of lawful residence in the first Member State are no ground for refusal of the long-term residence status. This provision is absent from Chapter 2 of the directive.

a new status 'comparable' or 'as near as possible' to that of Union citizens, this approach is understandable, as Groenendijk argues.[25] However, it also tends to result in understanding the significance of changes produced by Directive 2003/109/EC in comparison with the situation before the directive was supposed to be implemented, that is, in January 2006, when the national law of the Member States fully determined the rights of long-term resident third-country nationals. Most provisions in the Long-Term Residents Directive can have a direct effect. They provide a clear definition of the limited number of conditions that Member States will have to check when dealing with applications for the status of a residence permit in the second Member State. The directive also ensures equal treatment between residents with such a status and Union citizens. However, although third-country nationals with such status have many more rights than before, the difference between them and Union citizens remains.

There are clear differences between the rights granted to long-term residents in this directive and the rights of Union citizens and their family members under Directive 2004/38/EC., For example there are differences such as family reunification, first access to employment and integration conditions. Integration conditions, for instance, are completely absent in the Union citizens directive. In addition, one should not disregard the differences in the wording of some of the provisions on similar issues in both directives. Concerning the public order provisions, it is not yet clear whether the Court will disregard (minor) differences in wording or, on the contrary, attach great weight to the differences. The CJEU in *Gattoussi* indicated that it continues bringing unity and coherence to union law.[26] What Member States had in mind during the negotiations in the Council, when they decided to use slightly different wording, is often far less clear. Those provisions have to be interpreted by the national courts and by the CJEU in the light of the aims and instructions of the Tampere Council, referred to in the second Preamble Recital to the directive. That Recital reiterates that the aim was to adopt a 'set of uniform rights which are as near as possible to those enjoyed by citizens of the EU'. Thus, giving a different meaning to similar provisions has to be justified so that it cannot be taken for granted.

This directive has to be accompanied by Council Directive 2003/86/EC on the right of family reunification.[27] The purpose of the Family Reunion Directive is to determine the conditions for third-country nationals who are lawful residents of a Member State to exercise the right to family reunification. Family reunification is defined as 'the entry into and residing lawfully in that Member State to preserve the family unit, whether the

25 See Groenendijk, 'The Long-Term Residents Directive', p. 439.
26 Case C-97/05 *Gattoussi*.
27 [2003] OJ L251/12.

family relationship arose before or after the resident's entry'.[28] To this end, the directive defines who can apply for family reunification (Art. 3); which family members benefit from the right to a family on the grounds for refusing an application, including the right to mount a legal challenge (Arts. 16-18); the procedure for applying for family reunification (Art. 5) and the rights enjoyed by family members admitted under the directive (Arts. 14-15). The provisions in the directive set out the minimum standard. This follows from paragraphs (4) and (5) of Article 3, establishing that the directive is without prejudice to more favourable provisions of international law and does not affect more favourable provisions in national law. Member States are, thus, free to provide higher protection in their national legislation if they so desire.[29]

To establish the personal scope of the Family Reunification Directive, it is necessary to know who can apply for family reunification, who (in terms of the directive) is described as the sponsor and on behalf of whom family members can apply. Although the Commission's initial proposal used the terminology 'applicant for family reunification', in the directive the term 'the sponsor' has been chosen to refer to the person seeking permission to be reunited with or be accompanied by his or her family members. A sponsor is defined in Article 2(c) of the directive as a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him or her.[30] To be eligible for family reunification, a sponsor has to have a residence permit issued for a period of validity of one year or more and have reasonable prospects of obtaining a permanent right of residence.[31]

Even though the concepts 'reasonable prospect' and 'permanent residence' are the keys to the right to family reunification, the directive remains silent regarding their meaning. Neither is found in the initial nor the revised 2000 proposal. From the Commentary in the amended 2002 proposal, it follows that these requirements reflect 'the idea that the right to family reunification would not be open to persons staying only temporarily without the possibility of renewal'. The exclusion applies to au pairs and exchange and placement students. As there was no discussion on these conditions in either the Council or the European Parliament, there are no further clauses regarding how 'permanent' and 'reasonable' are to be interpreted.[32] A preliminary reference may be needed to clarify this issue.[33]

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28 Art. 2(d) of Directive 2003/86/EC.

29 See Case C-540/03 *European Parliament v. Council*.

30 See Oosterom-Staples, H., 'The Family Reunification Directive', in Baldacchi A. et al. (eds.), *Whose Freedom, Security & Justice?*, Hart Publishing, Oxford, 2007, p. 456.

31 See Council document 6912/03, 28 February 2003, at 5.

32 See Oosterom-Staples, 'The Family Reunification Directive', p. 457.

33 Groendijk, K., 'Legal Conceps of Integration in EU Migration Law', *European Jounral of Migration*, Vol. 6, 2004, pp. 111-126, at 118.

Union citizens' family members are excluded from this directive, as the Citizens' Free Movement Directive, Directive 2004/38/EC, would be applicable in their case. Also, some other third-country nationals are excluded from the scope of this directive. Accordingly, the directive does not apply to a person:

- applying for recognition of refugee status whose application has not yet given rise to a final decision,
- authorised to reside in a Member State based on temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status[34] or
- authorised to reside in a Member State based on a subsidiary form of protection under international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

The first two groups listed were excluded from the personal scope of the directive from the outset. However, third-country nationals residing in a Member State based on subsidiary protection were initially not included in the list of persons not benefiting from the Family Reunification Directive. One may question whether it was really necessary to exclude applicants for refugee status, temporary protection and subsidiary protection from the personal scope of the directive. It can be argued that they are already excluded because they cannot provide evidence that they have 'reasonable prospects of a permanent residence status', as Article 3(1) requires for qualification as a sponsor. The explicit exclusion, admittedly, leaves no room for doubt.[35] Family members who can apply for family reunification under the terms of the Family Reunification Directive are those listed in Article 4 of the directive. This provision distinguishes between family members whom Member States must admit if the conditions in the directive are satisfied, such as the case for a nuclear family, and family members a Member State may include in the personal scope of the directive.

One thing that the directive on family reunification does not do is make national law on family reunification superfluous. First, there are EU citizens who have not experienced the right to free movement and, therefore, do not benefit from EU law when seeking permission to be united with third-country family members. Oosterom-Staples argues that it is a missed opportunity that Member States objected to the Commission's proposal to give EU citizens who have not exercised free movement rights the same

34 Council Directive 2001/55/EC of 20 July 2001 on the 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 [2001] OJ 212/12.

35 See Oosterom-Staples, 'The Family Reunification Directive', p. 461.

right to family reunification as their fellow citizens who do not benefit from EU law.[36] To extend the terms of Directive 2004/38/EC to all EU citizens would have put an end to reverse discrimination in this field, which has resulted in what is now referred to as 'abuse of EU law' by nationals of Member States seeking permission for their third-country national family members to enter and reside with them in their home country.[37] Besides EU citizens who have not exercised free movement rights, national law still determines the right to family reunification of children over 15 in those Member States where derogation found in Article 4(6) of the directive applies and where the Member States choose to provide for more favourable provisions, as permitted by Article 3(5) of the directive.

Having analysed the two main directives involving EU immigration law, one can conclude that Directive 2003/108/EC may give fewer rights to long-term residents than many observers interested in encouraging the integration of immigrants settled in the EU had hoped for after Tampere. The directive may even have a counterproductive effect in some Member States, as seen by the introduction of integration tests as a new barrier to the secure status in Austria, France and the Netherlands.[38] Different, competing, contradictory perspectives on the relationship between the law and integration are visible in the political debate between Member States and EU migration law. The two perspectives can be summarised as follows. The first perspective maintains that secure legal status will enhance the immigrant's integration into the host society. A long-term residence status will enhance the immigrant's integration into the host society. A strong residence status and equal treatment are instruments for integration. According to the second perspective, a permanent residence status should be remunerated for complete integration. Naturalisation is considered to be the crown of a completed integration. In the first perspective, the concept of integration is used inclusively or instrumentally, while the second perspective exemplifies the exclusive or selective use of the concept of integration.[39]

The first perspective has a long tradition in EU law. Regulation 15 of 1961, Regulation 1612/68/EEC, the Council Decisions of the Tampere European Council, Directive 2004/38/EC on the free movement of Union citizens and the Common Basic Principles of integration policy adopted by the JHA Council in November 2004 are all clear expressions of the first perspective. Directive 2003/109/EC now extends comparable rights to all third-country nationals with long residence in a Member State, irrespective

36 Ibid., p. 487.
37 See on this issue Cases C-459/99 *MRAX* [2002] ECR I-6591; C-109/01 *Akrich* [2003] ECR I-9607; & C-135/03 *Commission v. Spain* [2005] ECR I-2911.
38 See Groenendijk, 'The Long-Term Residents Directive', p. 448.
39 Ibid., p. 449.

of nationality. The directive sends an important symbolic message to immigrants and most of the population, namely, that all would be entitled to stay and have equal treatment with co-citizens. This makes the directive a central element of any EU policy on integrating immigrants. How the Member States implement the Long-term Residents Directive and the Family Reunion Directive in their national law will indicate how serious the Member States are in pursuing the integration of immigrants into their societies. It makes clear whether integration is a serious policy aim or whether it is primarily a code word for the selection and exclusion of immigrants from their societies.[40]

As regards the Family Reunion Directive, it can be argued that it is meant to be geared towards preserving family unity. When drawing up the initial proposal, the Commission envisaged equal treatment with EU citizens and, therefore, chose to extend the generous provisions of existing EU law regarding family reunification for family members of EU citizens to third-country nationals.[41] The Commission also took great pains to ensure compliance with international obligations regarding family life. Harmonisation was seen as a means to ensure that the right to family reunification would not depend on the Member State of residence and have the additional bonus that forum shopping by third-country nationals seeking the Member State with the most lenient rules on family reunification would cease. However, the inclusion of discretionary powers, the watering down of the public policy exception and the open-ended provisions on judicial protection, which have found their way into the final text, indicate that the directive now primarily serves to preserve Member States' interests.

Although the watered-down text does prevent further deterioration of the right to family reunification in the national law of the Member States, it does cry out for serious reconsideration, which is, fortunately, provided by Article 19 of the directive. Member States can take seriously the commitment to ensure equal treatment to third-country nationals and, as a consequence, revise the text accordingly by taking Directive 2004/38/EC as a starting point as well as ensuring that the national transposing legislation is to be centred around the same concepts in line with the CJEU trend explained earlier on.

2.3 The Borders of Schengen and Its Function

Border control is a state's best way to manifest its sovereignty. A state's de facto control over a territory is one of the essential ingredients for functioning. It would be able to

40 Ibid., p. 450.
41 See Oosterom-Staples, 'The Family Reunification Directive', p. 487.

control the flow of people from and into the territory it controls. Migration sees people crossing a border, so the control of migration is one of the most important aspects of state sovereignty. Before providing for EU nationals, the Internal Market and later the Common Market described EU citizens' right to leave their home state and settle in a host Member State if they satisfy several conditions. The free movement of people or labour is one of the pillars of the Internal Market; therefore, it cannot be described legally as migration. The Member States are establishing a club, the EU, whose objective is the Internal Market, which necessitates the free movement of labour, which contributes towards economic growth within the club. The members of the club are even described as EU citizens, EU citizenship being a subservient right to national citizenship but it shows that persons who are members of the club are not considered as outsiders. So, they are not migrants. Barring the exceptions by law, EU citizens have an automatic right to cross the border.

The Member States of the club decided to go beyond the bare minimum of freedom of movement for EU citizens. In 1985, purely outside the EU framework, the then West Germany, France and the Benelux decided to go further. It signed an agreement in Schengen that abolished control between its internal borders and fortified its external ones. Hence, physical controls were no longer required at the internal border. The area of the agreement resembles one unified country for travel. The removal of internal border control is compensated for by strengthening external border control. The Schengen area necessitates mutual recognition and harmonisation of certain legislation, including a common visa policy. Persons crossing from third countries into the common travel area are regulated by the migration legislation discussed in the previous section of this chapter. The Schengen Agreement became the Schengen Convention in 1990, and it was transformed from an instrument of international law outside the treaty framework into the treaty framework, that is, EC law through the Amsterdam amendments and, eventually, EU law through the Lisbon amendments.

The Amsterdam Treaty amendments explicitly recognised the link between the goal of building an area of freedom, security and justice (AFSJ) and adopting measures relating to external border control, asylum and migration. Migration policy shifted to the then first pillar until it was abolished by the Lisbon amendments of December 2009. The treaty, as amended, mentions appropriate measures with respect to border control, asylum and immigration as a correlate of the establishment of an AFSJ, conferring upon the EC the exclusive right of initiative on border checks, asylum and immigration. In addition, it recognised the full legislative powers of the European Parliament and the jurisdiction of the CJEU. The ordinary legislative procedure (formerly co-decision) is established through Article 77(2) TFEU for measures within this area. Furthermore, in Article 78(3) TFEU, the treaty provides for 'solidarity measures' with Member States when they are confronted with an exceptional flow of migrants upon a decision of

the Council and consultation of the European Parliament, and proclaims solidarity and 'burden sharing' between Member States as a general principle in issues of border checks, asylum and immigration.

Despite this, the communitaristion of the AFSJ policies with the Lisbon amendments did not produce a true supranational governance of border management. The role of intergovernmental institutions remains important. The role of the European Council in setting the agenda is still very much there, while the Council of the European Union (formerly the Council of Ministers) works on consensus. The informal meetings of JHA counsellors play a paramount role in consensus building. Suppose supranationalism does not occur at the decision-making or operational levels. In that case, Member States remain the actors in charge of border management regarding individual cases and the actual border management. Bodies at the European level, such as the Intergovernmental Standing Committee on Internal Security (Art. 71 TFEU), have a coordinating role rather than the mandate to direct the work of national security agencies. The role of the EU has rather been one of capacity building, whereby it creates new European actors and assigns power to them, either in parallel or sometimes in competition with the national authorities. This is the case with FRONTEX, EASO (the European Asylum Office), the European Border and Coast Guard and the development of border management technologies such as the Schengen Information System. To sum up, despite the development of supranational elements, the EU border regime remains differentiated and fragmented, combining intergovermentalism and suprnationalism, and has not evolved in a federal-like form.

Schengen expanded not only in becoming EU law but also in the territory. At the time of writing, in January 2024, even Bulgaria and Romania will become members as far as non-land borders are concerned and full membership will materialise very soon. However, within this context, from a supposedly secured external border, one can observe that the EU seeks cooperation and association with third countries to help it manage the external border, mainly for migration purposes. This brings about the notion of the externalisation of border controls.

Confalonieri[42] argues that there is fuzziness in the EU biopolitical border, which does not coincide with the EU territorial border. Secondly, the distinction between the EU's domestic and foreign policies is blurring. Thirdly, the externalisation of border controls has exasperated the tension between effectiveness in border management and compliance with the EU human rights regime. The EU has faced criticism for

42 Confalonieri, M.A., 'The Borders of Schengen and Their Functions', in Calabro A.R (ed.), *Borders, Migration and Globalisation*, Routledge, London, 2022. P. 114

keeping undesired migrants at its periphery over respect for human rights by third countries have been formulated by NGOs and international organisations. Finally, the externalisation of migration control raises problems of democratic accountability since EU citizens are insulated from border-related violence used in their name by non-EU countries' authorities. The predominance of the security paradigm is a persistent feature of the EU's migration policy. Since the EU's migration policy's inception, migration has been approached as a 'security threat'. This framing of migration has marginalised competitive frames focusing on human rights or the economic function of migrant labour. The association of migration with other security threats implies the redefinition of Europe's external threat. After communism, immigration is perceived to be a destabilising factor of potentially destructive proportions.

The security paradigm dominates migration policy, and the common metaphor of 'Fortress Europe' does not capture its complexity. It contrasts with policies of openness to achieve economic desirability. Sometimes, the concept of a 'gated community' is used to accept only the wanted migrants. This is illustrated by the blue card (Directive 2009/50/EC) and the scientific Visa Directive (2005/71/EC). The relationship between humanitarian and securitised borders is complex. It relates to the fundamental control of humanitarian migrants' lives, which are put at risk because of the closing of channels for legal and migration. The next section shows that courts monitor, sanction and influence policies. Far from being taken for granted, the security approach starts as an object of institutional, political and moral disputes.

From the aforementioned, one can observe that some EU policies have shifted towards the externalisation of the border. The matter has become even more politicised. Intergovernmentalism proved dramatically ineffective during the refugee crisis with the de facto collapse of the Dublin system and the failure of burden-sharing capital due to the lack of humanitarian channels for refugees and the absence of a common migration policy. This led to evermore risky roots, producing permanent humanitarian emergencies at the borders. The externalisation of border control in third countries implies an acceptable shortcoming in compliance with international humanitarian norms; furthermore, it risks undermining the role of the EU as a normative power within the international context and in its relationship with neighbouring countries.

2.4 Externalisation of the EU Migration Policy

To control the ever increasing number of migrants at the borders, many Member States, including Italy, have put into practice methods of repression and deterrence to stem arrivals. This practice may consist of criminalisation of irregular migrants, separation of family members, poor reception conditions, reduction of procedural safeguards to

prolong the process to determine the status and expurgated returns where possible. This also includes fences, walls and, above all, the externalisation of border control.[43] One can argue that the externalisation of migration border controls is no longer a novelty but a widespread practice at the European level. This happens even though the EU has implemented various strategies to strengthen and control the external border.

One of the core concerns of externalisation is that they risk creating legal black holes, as one could learn from Australian and US border control practices.[44] Externalisation can lead to infringements of migrants' rights, in particular the prohibition of torture and inhuman treatment, the principle of non-refoulment, the right to leave the country, the rights to the Betty right to seek asylum, the rights of vulnerable people such as children and the rights of effective remedies.[45] These risks are particularly likely due to the most recent evolution of this practice in Europe, caused by the proliferation of arrangements with unsafe countries such as Libya. These arrangements could potentially breach the human rights legislation shared in the next subsection. The European courts in Strasbourg and Luxembourg play an important role in balancing the externalisation of EU borders and human rights principles.

2.4.1 The European Convention on Human Rights and the European Court's Views on Externalisation

The European Court of Human Rights (ECtHR) has been trying to apply the theory of positive obligations to hold Member States responsible for human rights violations connected to acts committed by the state. According to the doctrine of positive obligations, Member States are under a due diligence obligation to do all they can to prevent human rights violations by other parties, both private and state actors. A positive obligation of prevention may also be a viable function alternative, sometimes making it easier to establish the accomplice's and state's responsibility. For example, one can refer to the International Court of Justice (ICJ)[46] Bosnian genocide case as a strong precedent regarding the possibility of overlapping functions of the two categories. In this case, the ICJ found that the Federal Republic of Yugoslavia failed to comply with its obligation to prevent genocide. The Court stated the following:

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43 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of 26 February 2018, doc. A/HRC/37/50, available at https://www.ohchr.org/Documents/Issues/tortureA_HRC_37_50_EN.pdf (accessed 30 December 2023).

44 Kneebone, S., 'The Pacific Plan: The Provision of Effective Protection', *International Journal of Refugee Law*, Vol. 18, No. 3-4, 2006, p. 696.

45 Frelick et al., 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal on the Migration and Human Security*, Vol. 4, No. 4, 2016, p. 190.

46 Para. 40.

> The first, which varies greatly from one state to another, is clearly the capacity to influence effectively the action of persons likely to commit or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of political links, as well as links of other kinds, between the authorities of that state and the main actors in the events.

The ECtHR also examines the possible overlap between the two notions, especially in case law on extraordinary renditions. In *El Marsi v. North Macedonia*,[47] the Court states that it must assess whether the treatment suffered by the applicant at Skopje airport at the hands of the special CIA rendition is computable to the respondent state seeming to assume complicity in the act of torture by agents of a foreign state sufficient to attribute the conduct of those agents to the competent state. Paragraph 211 of the judgement of the Court explicitly references active facilitation and the theory of positive obligations. It states that the respondent state must be considered directly responsible for violating the applicant's rights under this head since its agents actively facilitated the treatment and then faced taking any measures that might have been necessary in the circumstances of the case to prevent it from a caring. In another case, in 2016, *Nasr & Ghali v. Italy* (App 44883/09), in examining the allegation of violation of Article 3 of the European Convention on Human Rights (ECHR), the Court appears to be less ambiguous in identifying a possibility of the breach of a positive obligation of protection under the Convention.

Traditionally, state jurisdiction for human rights obligations was assumed to be limited to austerity. As international human rights law evolved, it is now accepted that the state jurisdiction for human rights purposes can act on two persons outside its territorial limits whenever the state exercises effective control over them, over the territory and where they are located. In *Issa v. Turkey* (App no. 31821/96), the Court said that Article 1 of the ECHR cannot be interpreted to allow a state party to perpetrate violations of the Convention on the territory of another state that it cannot perpetrate on its territory. A consistent implementation of this principle needs a functional approach to extraterritorial jurisdiction, although there may be some inconsistent interpretation in some cases, for example, in *Bankoviv v. Belgium* (App no. 52207/99). Still, each case should be examined on its own merits.

Because the concept of jurisdiction is effective control sets a high threshold, there is the risk that it may feign in some cases of externalised contours where the state does not enjoy the control but only some influence. However, in some judgements, the Court

47 Application no. 39630/09.

adopts an ocean of jurisdiction concerning two positive obligations. One may refer to the case of *Ilasco and Others v. Moldova and Russia* (App no. 48787/99) concerning Moldova's and Russia's jurisdiction. With respect to Moldova, the Court stated as follows:

> However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicant's right guaranteed by the Convention.[48]

From these snapshots of ECtHR case law, one can conclude that states' positive obligations are not exempt from the externalisation of border control.

2.4.2 The CJEU's Views on Externalisation

Regarding the externalisation of EU borders, the Luxembourg court has taken a somewhat cautious position. One can refer to the case of *X and X* as an example.[49] The case concerned a Syrian family who had come to Beirut to apply for a territorial limited Schengen visa at the Belgian Embassy because of humanitarian considerations to reach Belgium and request international protection. The CJEU ruling on a preliminary reference decided that, in substance under the Visa Code, Member States have to issue a territorial limited Schengen visa where there are substantial grounds to believe that the refusal to issue the document will have the direct consequences of exposing persons to torture or inhuman or degrading treatment. In its judgement, the Court, although it acknowledged that the applicants in the main proceedings were facing the risk of being subjected to inhuman and degrading treatment, did not pronounce itself on the merits. It stated that the application was outside the scope of the Visa Code. This is because, in the Court's view, even if formally grounded in Article 25 of the Visa Code, the application, in reality, was submitted to apply for a final evaluation in Belgium immediately upon arrival in that Member State and, therefore, to be granted a residence permit with the creator validity not limited to 90 days. Consequently, the Court inferred that the provisions of the Charter, in particular Articles 4 and 18, refer to the Belgian Court's question and do not apply. An application for international protection, which means staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of the Court and that EU law currently stands solely within the scope of national law.

48 Para. 331.
49 Case C-638/16 PPU.

One may argue that this interpretation protects Dublin Regulation 604/2013. Advocate General Mengozzy, at the beginning of his opinion in this case, argued that the Member States must not escape the responsibilities that follow from EU law when borders are closing and walls are being built. In the first case, the Belgian Courts are concerned about the consequences of a different interpretation of Article 25 of the Visa Code because this would entertain legal access irrespective of the rules established under the Dublin system. Thus, from the aforementioned, while the legal position is not very clear, one can see that the CJEU somewhat has a distance in striking down the externalisation of border control completely. One might argue that it could be regretful that a more courageous approach of Luxembourg might have offered a concrete possibility to a friend the supremacy of Human Rights with regard to the externalisation of border control, giving the extraterritorial applicability of the European Charter of fundamental rights of the European Union.

2.5 Conclusion

Migration has long been a very controversial subject in Europe, especially after the fall of the Iron Curtain. While the EU does not have full competence to deal with the matter, it is often seen as facilitating illegal migration. As discussed in the first part of this chapter, the EU has a considerable volume of legislation dealing with migration. While facilitating the flow of people within itself, the EU strengthens its external border, but this is not enough to control illegal migration. Several Member States have resorted to policies that involve the externalisation of border control in those countries. This has inadvertently brought up human rights issues, which will continue to be tackled by the European courts of Strasbourg and Luxembourg. It is of paramount importance to find a possible remedy to situations in which the jurisdictional threshold of effective control is difficult to reach and to find a way to hold outsourcing states responsible when they operate under the motto 'out of sight, out of mind'. The latter tends to make refugees and migrants, as well as the violation of their rights, invisible. The positive obligation of states to protect human rights remains, and one awaits how, in the long term, the European courts will continue to balance Member States' international human rights obligations and the need to externalise border control. The issue of the externalisation of border control is far from closed, and one looks for words for both judicial and legislative development in this regard.

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Part I

Legal-Anthropological Perspectives on Border Management in the European Mediterranean

3 Of *Iliad* and *Odyssey*: Competing Spectacles of Migration in a Spanish Enclave in Northern Africa

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Why do the inhabitants of the Spanish enclave of Ceuta advocate the rescue of migrants at sea but lobby for their repulsion when they attempt to enter by land? Why do Ceutans support border policies that have adverse political, economic and social effects on their town? Scholars must understand borders as vivid phenomenological and affective experiences to answer these questions. This chapter argues that while the encounter at sea is conducive to hospitality, land entry induces both migrants and Ceutans to think of themselves as warriors locked in a fatal struggle, where victory can be achieved only by escalating violence. This chapter concludes by suggesting that shifting geopolitical conditions have left Ceuta with only one way to stress belonging to the Spanish nation state: to act as the defender of Spain. It is ironic that to do so, it must create the 'savage migrant' it so seeks to destroy.

3.1 *Odyssey*

On 7 June 2018, the search-and-rescue vessel MV Aquarius Dignitus saved 629 migrants stranded off the coast of Libya and turned north to Italy. The migrants on board were suffering from shock and exhaustion. Some had been exposed to gasoline-infused seawater and carried ugly chemical burns. Seven were pregnant, and over a hundred were unaccompanied minors (Borges 2018). Despite the emergency, Italy turned the Aquarius away. Matteo Salvini, Italy's Deputy Prime Minister, said he would not let his country become "Europe's refugee camp" and urged the vessel to go to Malta (Kirchgeassner et al. 2018). The Island's Prime Minister lamented Italy's behaviour, "which manifestly went against international rules and risked creating a dangerous situation for all involved".

Nevertheless, he added that Malta was neither the "co-ordinating nor competent authority in this rescue operation" (Costa 2018). Accordingly, he also closed Malta's ports to the Aquarius. The standoff between the two countries continued for three days. Meanwhile, out at sea, the Aquarius' supplies were rapidly running out (Giuffrida 2018).

I happened to be in the Spanish enclave of Ceuta – where I had been doing anthropological fieldwork intermittently since 2011 – when Spain's new socialist Prime Minister, Pedro Sanchez, unexpectedly intervened to offer the Aquarius safe haven. Several days later, the battered vessel disembarked in Valencia, where an army of bureaucrats was ready to help the migrants sign asylum papers. Mainstream Spanish media covered the event with glee, hailing Sanchez as a beacon of hope in the Mediterranean disoriented by austerity and populism (e.g. Cue 2018). However, many of my interlocutors – most connected to Spain's security forces and ardent supporters of the conservative Partido Popular – approached the odyssey of the Aquarius with mixed feelings. On the one hand, the boat people were not welcome. Sanchez was often described as a '*vendepatria*' (traitor), unable to protect the country's borders. On the other hand, my interlocutors (very) reluctantly agreed that Spain should never turn its back on the rickety boats appearing on its horizons. These '*negritos*' (poor/little black people) had to be saved from the treacherous sea, human traffickers and egotistical politicians like Salvini, Muscat and Sanchez.

3.2 *Iliad*

My Ceutan interlocutors advocated the rescue of migrants at sea as a moral, human obligation. However, in Ceuta, migrants rarely arrived by sea. More commonly, they entered Spanish territory by breaching the enclave's border fences. One does not find touching tales of shipwrecks and hospitality on the land border. Rather, migration emerged as an *Iliad* of rage, fate, pathos (for one has fallen), glory, vengeance and heroic perseverance.

Let us take, as an example, the 'avalanche' of 22 August 2018. It was Eid el-Adha. A fateful fog allowed the 300 sub-Saharans to slip past the Moroccan guards during prayer and sneak undetected to the fences. A Civil Guard later recounted the event with a mix of frustration, disgust and admiration:

> They came prepared. They weakened the fence with wire cutters in minutes and pulled it down. We formed up at the breach, but the 'negros' pelted us with sticks, rocks, bloodied rags and bottles of urine. Some had Molotov cocktails and acid bombs. I also saw a flamethrower made from deodorant cans.

Vastly outnumbered, the defenders wavered and fled.

The guard continues, shaking with anger: "The 'negros' were more aggressive than ever. They chased us, attacking from behind. This is when one burned my colleague's face with acid". Videos uploaded on social media depicted groups of strong men dancing,

shouting and laughing as they surged through the enclave. Many had lost their clothes, hopelessly ripped on barbed wire. Some approached terrified bystanders with horrible cuts on their arms and legs. Those too hurt to wear their wounds with pride were being carried by friends or lay waiting for assistance. By mid-morning, the 116 migrants who had managed to penetrate the border fence had either reached the Centro de Estancia Temporal de Inmigrantes (CETI) – where they could apply for asylum – or had been arrested by the police. A score of migrants were hospitalised, and seven Guardia Civil were injured, two with ugly chemical burns. The Moroccan police also suffered casualties, for those migrants who were too slow to push through the breach had to beat a fighting retreat into the forests around the city (Coronado 2019).

This episode, locally known as '22-A', was not exceptional for its violence. Ceuta's walls are regularly breached, leaving casualties on all sides (e.g. Ondacero 2016, TRT Español 2017, EFE 2017, Canas 2018, Guzmán 2018, Campo 2019, Caro 2021, EFE 2021, Amado 2022). Rather, 22-A was unique in its aftermath. Despite real logistical difficulties, migrants entering Ceutan territory are given shelter in the CETI until their cases are processed (Caravaca 2018). However, the migrants involved in this assault were – the very following day – taken to court. Each hearing lasted two minutes, and the defendants could not access a translator or appeal their sentences (Sánchez 2018). Then, they were driven to the border and were unceremoniously handed over to the Moroccan guard, who beat whoever tried to escape (Echarri 2018b). Local NGOs reported the incident to the European Court of Justice (El Faro 2019). Ceutan authorities, by contrast, argued the legality of the devolutions. They invoked a 1992 bilateral agreement with Morocco that permitted devolution in 'exceptional' situations (Moreno 2018). Most of my informants celebrated their government's '*cojones*' (balls) in standing up to the savage 'negro'.

3.3 Puzzles

These narratives show behaviour patterns that any ethnographer of Ceuta would find puzzling. Firstly, why did my informants advocate the rescue of migrants at sea but their violent expulsion on land? Secondly, why did Ceutans champion border policies with severe economic and political effects on the city? Once a prosperous trading hub with cosmopolitan aspirations, Ceuta is now an impoverished and inhospitable prison fort, famous only for the bloody tragedies occurring at its gates. Since addressing these questions will require us to rethink how we approach borders, I believe the Ceutan case would be helpful to scholars working on managing migration in the region.

It is best to start with the first puzzle. Most Ceutans firmly believethat sea and land migrants were completely different kinds of people. Scholars of migration would know that this claim is, of course, untrue as individual travellers may try various

routes into European territory (Mainwaring & Bridgen 2016; Schapendonk, Bolay & Dahinden 2020; Snel, Bilgili & Staring 2020; Martin 2021). While factually incorrect, my informants' accounts pointed to a deeper truth: the physical layout of the border – its materiality – could induce migrants and locals to behave in fundamentally different ways.

Let us start with the sea border. As Naor Ben-Yehoyada (2016, 2018), Maurizio Albahari (2016a, 2016b), Ruben Andersson (2014) and other ethnographers have argued (Achtnich 2017; Lauth Bacas 2013; Mannik 2016; Mainwaring 2019), migrants at sea appear on European horizons as vulnerable creatures at the mercy of an ill-tempered ocean. The radical inequality of the encounter at sea promotes what Gregory Bateson (1936: 176-177) would call 'asymmetrical schizmogenesis', the formation of groups tied through a hierarchical yet complementary relationship. On the one hand, migrants are reduced to a 'bare life', (Agamben 2005) and conversely, we have a saviour whose claim to humanity depends on successful rescue. This inequality – saviour/saved, dominant/subservient – continues on land. Locals are likely to come to think of themselves as life-giving 'hosts' (Carney 2021; Grotti & Brightman 2020; Zammit 2016), with Spanish sea guards openly describing themselves as 'guardian angels' (Andersson 2014: 140). Migrants adopt the mantle of 'guests'.

Hospitality, of course, is not unambiguously positive. As far back as Pitt-Rivers (2012), anthropology has noted that hospitality is designed to keep outsiders from becoming community members with the power to move freely, form relationships and access resources. As a temporary institution, hospitality can become very strained if neither the host nor the guest can escape or transcend it. Bateson (1936: 177-178) suggests that complementary relations driven by 'asymmetrical schizmogenesis' amplify each other until they become unsustainable and collapse with deadly effects. Indeed, across the Mediterranean, we have seen sea migrants becoming increasingly frustrated with their status as guests, which locks them as ever-indebted bearers of trauma and targets of charity. We have also witnessed states imprisoning, abandoning, expelling and exploiting guests who they feel are parasitically overstaying their welcome and forcing the host's generosity (Carney 2021; Debono 2013, 2019).

On Ceuta's land border, migrants do not hang on to the 'bare life'. On the contrary! They are bursting with the vitality needed to overcome the enclave's formidable defences. Accordingly, the terrestrial border is conducive to 'symmetrical schizmogenesis', groups that are functionally mirror-images of each other (regardless of whether they see it) and interact through positive or negative reciprocity/mimesis (Bateson 1936: 177). Indeed, Ceuta's guards and citizens feel that if they want to defend their border against this dangerous stranger, they must match his ferocity with their strength. Since I started fieldwork in 2011, I have noticed how migrants, border guards and Ceutan citizens have

all turned to military metaphors to make sense of the world around them. Put simply, they see themselves as 'soldiers' locked in a fatal struggle. Working in migrant camps around Ceuta, Ruben Andersson (2014: 158-162) has described how sub-Saharan migrants talk of themselves as 'soldiers' or 'commandos', fighting 'battles' against the 'bad guys'. Their 'assaults' and 'raids' are initiated from 'striking points' and 'bunkers' and follow 'intel' gathered from 'recon'. Those who have led attempts against the walls are revered as 'veterans', while some described their wounds as 'medals' of valour. Ceutans have embraced similar discourses. Facebook and Twitter feeds were saturated with images of crusaders and conquistadors and retold legends from Ceuta's historical sieges. Gyms or language schools seeking to attract military clients used posters that depicted Ceutan troops as the Spartan warriors from the film *300*. Carnival performers dressed up as medieval or highland warriors when singing dirges about how their 'abandoned' town was under siege and overrun by migrants (Chellaram 2017). Since 2015, moreover, the enclave has become the site of recurrent demonstrations by far-right groups (e.g. Ceuta Insegura and Vox) begging the government to deploy the army or allow border guards to use lethal force against migrants (VoxPopuli 2016, Ortiz 2017). Such movements also mobilise to counter protests by humanitarian groups and have defended several instances of street violence against sub-Saharans.

More importantly, 'symmetrical schizmogenesis' induced both Ceutans and migrants to feel that victory in this 'war' could only be achieved through superior numbers, weapons, tactics and ruthlessness. Indeed, migrants seemed particularly adept at finding new and creative strategies to fight, sneak or bribe their way through, under or over the fences. They knew how to use the forests for concealment and as a source of wood for ladders and rams. Likewise, they possessed enough streetwise to scavenge north Moroccan towns and villages for metal scraps and chemical materials to build wire cutters, grappling hooks and basic weaponry. Sub-Saharans learnt how to use the physical (e.g. hills, valleys, fogs) and cultural (e.g. religious feasts, holidays) environment to maximise the impact of their attacks. They knew which Moroccan guards could be bribed and with what. Most crucially, sub-Saharan travellers successfully activated ethnic, national and religious connections to enable the large-scale assaults needed to breach Ceuta's defences. Ceutan media reported that the most elaborate operations tended to be masterminded by ex-guerilla fighters or military deserters who understood the importance of speed, surprise, cunning and aggression when taking a defending force off balance (Zuloaga 2018).

On the Spanish side, the most obvious evidence of the escalatory logic of 'symmetrical schizmogenesis' is the border itself. In 1993 – when the EU ordered its construction – it was but a small fence. These defences proved no obstacle. Consequently, they have been periodically reinforced to make them as deadly and as dangerous to migrants as possible. Today, the border consists of two parallel fences 6 meters high, adorned with

barbed wire, guard towers, spotlights, night-vision cameras, noise and smoke detectors and infrared sensors. These developments have not deterred migrants, nor have they given the defenders the initiative they seek: as the introductory vignette indicates, guards always seem to be caught on the back foot. Therefore, the Spanish government constantly expanded the training and equipment available to the personnel operating its borders. Regardless of how good Ceuta's technological capabilities got, the enclave's capacity to scan its hinterland for signs of attack was restricted by the high hills and thick forests outside its gates. This led Spain to rely on bilateral treaties with Morocco. As Andersson (2014) has described, Spain pays Morocco to harass northbound travellers and stop them from reaching the border (Echarri 2015). The Spanish government has agreements allowing the deportation of migrants, sometimes even after they reach the safety of the land. (Echarri 2011, 2012).

3.4 From Fortress to Bazaar, and Back Again

Why did Ceutans support the militarisation of the border? 'Symmetrical schizmogenesis' injured their family and friends. It also harmed the enclave's reputation. Death and tragedy had a habit of drawing international scrutiny towards Ceuta's anomalous geopolitical position. They ignited uncomfortable debates about Ceuta's sovereignty and stunted its economic growth. In order to address this question, we will need to look at the enclave's historical trajectory briefly.

Captured by Christian forces in 1415, Ceuta spent the following five centuries as a poor prison fort, constantly under attack from Muslim forces. The colonisation of Morocco in 1912 transformed sleepy Ceuta into Spain's busiest port, drawing Christian, Muslim, Jewish and Hindu labourers, soldiers and traders from all over the Mediterranean (Rezette 1976). Morocco's independence deprived Ceuta of its hinterland. To save its economy, Madrid granted the enclave Freeport privileges. Hindu and Jewish traders mobilised their global connections to import goods – electronics, clothes, cars, appliances, foodstuffs, alcohol – that were simply unobtainable on the mainland. Every day, thousands of visitors crowded Ceuta's streets and shops. The enclave was a main destination for youths doing their levy duty. These young recruits had to be fed and entertained. They also bought gifts for their families on the mainland or had military surplus to sell. Ceuta prospered, and my interlocutors suggested that, by the mid-1980s, the 'bazaar economy' would have employed 80% of the enclave's population.

These 'marvellous days' – as my informants called them – did not last long. Obligatory military service was abolished in 1992. Moreover, to join the EU, Spain had to relax its customs, and goods unique to Ceuta were now widely available on the mainland. As Ceuta's prosperity and strategic importance dwindled, some mainland politicians

seriously considered selling the enclave to Morocco. Ceutan leaders felt the only way out was quickly binding the enclave closer to Madrid. After an arduous campaign in 1995, Ceuta became an 'Autonomous City'. Symbolically, this consolidated Ceuta as an inextricable part of the Spanish nation state, on par with the country's other regional governments. In practice, Ceuta's municipal government only gained control over strictly local issues, and many aspects of government – such as tourism, border management and education – remained in the hands of a Delegate appointed by Madrid. Nevertheless, in order to exercise its newfound powers, Ceuta had to expand its bureaucracy and infrastructure. By 2016, the civil and military sectors employed half the enclave's population (Observatorio de las Ocupaciones 2016).

This 'functionary economy' had two problems. True enough, state employees received good wages and were highly regarded. However, Ceuta's wealth was not evenly distributed. For historical reasons, local Muslims found it difficult to obtain civil service positions and compete in the private or informal sectors, which favoured cheap Moroccan labour. Many Muslims subsisted on welfare. The overlapping of economic inequality with ethno-religious identity created much tension in the enclave and constantly scuttled Ceuta's attempts to project itself as a paragon of '*convivencia*' (multiculturalism).

Secondly, Ceuta became financially dependent on Madrid. The Ceutan autonomous government spent considerable funds to diversify the economy and promote tourism, industry and small businesses. These plans, however, never took off. Failure was attributed to 'structural problems' relating to Ceuta's size and location (Chandiramani Ramesh & Bustillo Galvez 2020). However, as local tourist mottos indicate – 'Ceuta? Yes!' 'Ceuta? It will surprise you!' 'Ceuta? A city of trade!' – the enclave's main problem lay in its inability to shake off its worsening reputation. Indeed, since the first fatal tragedy of 2005, when confused Moroccan and Spanish guards opened fire on migrants assaulting the fences, Ceuta has become synonymous with the murder of the most marginalised, those on whom deterrence does not work because they have no option but to dare the border's lethality (Abad 2005).

3.5 'Maritime-ing' the Border

Some inhabitants of Ceuta were very worried about the ongoing militarisation of the enclave. They feared that antagonising and pursuing sub-Saharan migrants would not bring about tranquillity or regeneration but only insecurity and ghettoisation on an unprecedented scale. These voices came from the usual suspects: a few humanitarian NGOs, a handful of left-wing politicians and a few liberal-minded journalists. Though largely uncoordinated, they all explicitly sought to break the escalation of violence by

challenging the beating heart of 'symmetrical schizmogenesis': the spectacle of land entry.

In order to achieve this, they had several tricks up their sleeve. Any mention of Ceuta by prominent international figures quickly made it to social media or local headlines. A key example is a 2019 Reuters interview with the Pope, where they reportedly said that "Ceuta's fences make him weep" (El Faro 2019). These actors also published stories about migrants waiting to be processed. These accounts highlighted migrants' vulnerability to exploitation, xenophobia, depression and crime – they were incarcerated victims of structural violence, not angry aggressors (Echarri 2017; A.Q. 2016; El Faro 2021; Sakona 2017a, 2017b). These actors tressed that sub-Saharans were either harmless or good for Ceuta – they spent their time fishing in the castle moats, tending to parking lots and helping ladies with shopping and organising fashion, culinary and music workshops that enriched Ceuta's '*convivencia*' (Chergui 2022; El Faro 2021). These narratives, some journalists admitted, often reduced migrants to objects of trauma and pity. However, this, they insisted, was better than outright hostility. Journalists were also very keen on showing that migrants could become successful members of Spanish society and key to some of its prized institutions. The best example is that of Didier, a Cameroonian man who got to the final stages of *Spain's Got Talent!* His final performance saw him weaving through barbed wire and leaping across fences. Moved by the performance, the programme's presenter – Paz Padilla – embarked on a lengthy monologue begging Ceutans to see that "people like Didier are not animals to be locked in cages" and to "please remove the fences: they kill!" (Telecinco 2019).

Their most fascinating strategy, however, involved the coverage of the spectacle of land entry in a way that avoided tropes conducive to 'symmetrical schizmogenesis'. Inevitably, this meant shifting the camera away from powerful bodies crashing through defences and parading triumphantly in the streets. Rather, their gaze lingered on those who failed in their assault and lost their momentum. They spared no detail describing migrants collapsing from exhaustion or blood loss (Sakona 2018, Ceutaldia 2021, Coleto 2020). They produced stories of sub-Saharans hiding in ditches and bushes, too slow, weak or scared to push through the fences. Moroccan guards flush them out and beat them mercilessly. The sound of boot and baton on flesh and bone echoes loudly (Echarri 2017, 2018d). Above all, they carefully filmed sub-Saharans stuck in barbed wire: scared, meek and silent, they know that struggle can only drive the barbs deeper into their flesh. Spanish guards clamber up the fences to cut them free. This is a delicate task, for one mistake can send the razor-wire whiplashing like a rapier or send a migrant tumbling down to his death (Furnier 2021, Echarri 2018d, 2018e, 2018f, Sakona & Testa 2021).

As one journalist adroitly noted during an interview, the main objective of this coverage was to 'maritime the border' and to infuse the spectacle of land entry with tropes more associated with the encounter at sea. Images of migrants stuck in barbed wire, collapsing by the wayside or hiding from the police were qualitatively similar to those of migrants desperately drowning or quietly huddled together, waiting for help. They cast the migrant on land in a 'bare life' state that invited pity, obliged rescue and induced hospitality. Furthermore, these accounts brought into stark relief the absurdity of the land border: guards were fighting with migrants one second and offering them medical assistance the next; they were dismantling the fences that they were defending just moments earlier.

Efforts to 'maritime' the border were well intentioned and creative, but they had little impact on my Ceutan interlocutors. There were many reasons for this. Although nationally influential, people like Paz Padillia never spent significant time in Ceuta and seemed oblivious to the enclave's myriad problems. Similar accusations could be levelled at the journalists, activists and politicians writing against Ceuta's border policies. Since most were not Ceutan born or had spent many years training on the mainland, they were dismissed as 'outsiders' (*de fuera*) out of touch with 'the Ceutan reality' (regardless of how many decades they had lived in the enclave; Ceutan-ness was a very elastic concept). Many critics were also suspected of '*protagonismo*', that is, attempting to selfishly enhance their personal prestige by exploiting the suffering of others. People like Padilla, I was told, 'does not care about migrants. She cares about TV ratings. She used Didier!' Politicians like Sanchez wanted votes, while NGOs had to appease their funders. Journalists similarly sought renown for their investigative prowess, and selling stories to the national press about the horror of the border was one easy way to reach that goal. Whether these acts were born out of ignorance or undertaken in the pursuit of self-aggrandisement, my informants believed that if Madrid started seeing Ceuta as a source of recurring embarrassment, it might start reconsidering plans to surrender the enclave to Morocco.

Nevertheless, the quest to 'maritime' the border primarily failed because the 'bare life' migrant it tried to construct could not be easily reconciled with the 'triumphant' one that Ceutans experienced first hand. Many of the enclave's inhabitants personally knew border agents injured on duty. For them, mourning African wounds and ignoring Spanish ones was upsetting and insulting. Even those Ceutans not directly implicated in the violence of the border had witnessed the wild hunt of journalists, migrants and police crashing through their neighbourhoods, beaches, parks and religious rituals (Echarri 2018a). To my interlocutors, the disruption of Ceuta's tranquil urban rhythms (also called '*convivencia*') clearly meant that this uninvited sub-Saharan visitor was 'not dying of hunger' (i.e. not worthy of hospitality) but was a chaotic, dramatic persona that

menaced Ceutan life. Anyone who tried to convince them otherwise was misinformed or dishonest.

3.6 Land Reclamation

Local attempts to recast the migrant at land as an object of pity failed. In fact, the opposite was happening. In Ceuta, sea entry was being increasingly read using terrestrial tropes. This represented a concentrated effort to transform the 'bare life' migrant at sea into a rational, deliberate and dangerous actor that could be violently repelled away from Spanish shores.

A notable example occurred on the night of 6 February 2014. Several hundred sub-Saharans waded into the frigid sea on the Moroccan side of the border. They swam along the coast, past the fences and then onto Spanish shores. What happened next is unclear. Allegedly, the Spanish Civil Guard opened fire with rubber bullets and killed fifteen swimmers (El Faro 2014). The incident quickly made international news, and a coalition of NGOs opened a judicial case against the 16 Guardia Civil on duty, accusing them of 'negligent homicide', that is, of failing to assist drowning people in distress. To everyone's surprise, the Ceutan government threw its weight fully behind the Guardia Civil. In an impassioned interview, the Ceutan Delegate – one of the enclave's highest civil servants – argued that "the agents were being preposterously tried for doing their sacred duty of protecting the border" (El Faro 2015).

After a tense year, the Ceutan courts decided to pass the case to Madrid's higher courts. Madrid refused to be implicated, and the Ceutan judges dismissed the case, adding that the migrants "knew the risks associated with trespassing into Spanish territory. They swam at night in a crowd. They were armed and ignored the warnings of Spanish law enforcement". There was no "protocol regulating the use of riot equipment in a water-based environment", and when confronted with "belligerent migrants", the use of force was "legitimate" (Testa 2014).

The NGOs did not give up. In 2017, they located new witnesses – those sub-Saharan survivors whose refugee claims had been processed and were now living on the mainland – and reopened the case (Peral 2017). However, the precedent had now been set, and the battle for how Ceutans were to think of this 'water-based' border had been lost. Some of my informants strongly believed that some African migrants were simply trying to take revenge on the Guardia Civil by initiating judicial processes that 'could lead to their dishonourable dismissal and put their families under mental stress', as one Guardia Civil told me. Accusations of '*protagonismo*' were common. NGOs were accused of trying to regain the political limelight by shamelessly tricking migrants

into the courts, where they would have to relive terrifying traumas and open horrific wounds. 'Who is the real racist here?' one policeman asked.

3.7 Conclusion

We are now in a position to address our second puzzle. Why are most Ceutans lobbying for the continued militarisation of their hometown? In 2010, when I embarked on my doctoral project, I chose to work in Ceuta because I thought it had the right conditions for the emergence of a widespread, grassroots, citizen-led critique of the EU border regime. Unlike many other places around the Mediterranean, Africans in Ceuta did not compete with locals for jobs. The 'functionary economy' – Ceuta's main industry – was entirely closed off to sub-Saharans, and the enclave was so small that their inconspicuous insertion into the informal economy, which relied on networks of personal trust (Campbell 2018), was particularly difficult. Secondly, this was a place where the spectacles of migration were affecting its international reputation, weakening its sovereignty and hindering its economic potential. Lastly, and most crucially perhaps, Ceuta's traditional enemy was not the 'negro' but the Moroccan 'moro'. Traditionally, the sub-Saharan was held as backward, yes; uncivilised, perhaps; a victim and a pawn, surely. However, it was not inherently an enemy to be fought and vanquished.

Eagle-eyed readers will note that the above has not happened. But why? This chapter suggests that such puzzles require us to revise how we – as scholars – conceptualise and study borders. Academia still approaches borders from a legal-political perspective and is primarily interested in issues of sovereignty and state power (Follis 2015; Albahari 2021; Johnson 2014), the construction and enactment of legal (and extra-legal) categories and personhoods (Skleparis & Crawley 2017; Cabot 2012, 2018; Frank-Vitale 2022) and the issues that emerge when different bodies of law overlap, contradict or reinforce each other (Klepp 2011; Greene, Leidwanger & Repola 2022; Esperti 2019). To my informants, however, the Ceutan border was a vivid phenomenological experience. Europe's borders are not made equal, and their materiality in different places induces 'locals' and 'strangers' to think and act in particular ways. Specifically, I described how the land border works in a way that casts migrants as savage and dangerous attackers and urges all actors involved to see themselves as soldiers locked in a deadly struggle.

Although the materiality of the border is very important, it is not the only thing governing behaviour. As seen in this chapter, many in Ceuta are critically aware of the forces acting upon them. They do their best to contest 'symmetrical schizmogenesis' by challenging the spectacle of land entry. This means that the second part of my answer lies with the functions and uses of xenophobia. It is easy to dismiss most Ceutans as inherently conservative, deeply immoral and hostile to all 'others'. The antagonisation

of the 'negro', however, is the result of several wide-ranging political-economic processes. It is no secret that Ceuta – whose sovereignty is ardently contested – has long struggled to define its position within the Spanish nation state. As we have seen, postcolonial Ceuta dreamt of shedding its role as a fortress and becoming a wealthy cosmopolitan trading hub known for its exclusive and wondrous luxuries. Spain's entry into the EU scuttled that project. Soon after the first migrants started dying at Ceuta's gates, local governments sought to counter-represent Ceuta as a paragon of peaceful multiculturalism, as 'The City of Four Cultures'. This dream of '*convivencia*' lingers, but local ethno-religious politics has become hopelessly entangled with petty patronage networks, has failed to address Ceuta's inequalities and now attracts open critique from both Christians and Muslims (Campbell 2021).

This means that Ceuta in the 21st century has only one card left to play – its oldest one, that of 'defender of Spain'. As the death toll mounts, Ceuta turns into the physical manifestation of the EU's repression. As its economy crumbles, powerful forces scrutinise its future. Facing uncertain futures, the inhabitants of the Spanish enclave of Ceuta find that they have no option but to deepen their dependence on the border regime, on political movements that appreciate their struggles and – of course – on the 'negro', without whom one would have no danger and, therefore, no need for salvation. Ceuta desperately needs the savage African it desperately tries to destroy.

My parting remark is for ethnography to be fully embedded in policy. With its close attention to people's symbolic, material and affective worlds, anthropology can capture the *Iliads* and *Odysseys* of the Mediterranean. The discipline is, thus, perfectly placed to contribute to the governance of an increasingly traumatic and agonistic region.

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4 The Gatekeeper of 'Fortress Europe': Constructing the 'Self' and the 'Other' at the Moroccan-Spanish Border

Ibtisam Sadegh

A few weeks before the 2016 Spanish general elections, I was among an enthusiastic crowd that gathered in Ceuta's beautiful La Muralla hotel overlooking the straits of Gibraltar, all for a chance to see Mariano Rajoy at his political rally. At the time, the Prime Minister of Spain, Mariano Rajoy, was also the leader of the Partido Popular. This conservative political party had governed the enclave's local assembly for decades.[1] Luckily, an interlocutor, who was an enthusiastic amateur journalist, obtained an additional pass for me to join him. Surrounded by security and his whole electoral campaign entourage, Rajoy entered the grand hall through the cheering crowd with Juan Vives, Ceuta's Mayor-President. Firstly, Vives gave Rajoy a flattering welcome. He thanked him for coming to Ceuta, demonstrating to other Spaniards living in mainland Spain that merely catching a short ferry, one could travel from the peninsula across the Mediterranean to the African coast and remain on Spanish land. 'Thank you, dear leader', he said into the microphone to a hyped-up, mixed audience composed of Muslim, Christian, Hindu and Jewish Ceutans and Peninsular residents who had moved to Ceuta from mainland Spain.

> Thank you for defending Spain's unity, defending the integrity of our national territory and ensuring that all Spaniards are treated equally regardless of where they reside. This for Ceuta is particularly important!

he continued. The audience cheered, whistled, nodded and clapped in utmost agreement.

Rajoy's speech expressed patriotic sentiments similar to those of Vives. He promised Ceutans that should they vote for his party and should he be re-elected, he would invest even more money in the further securing of the Ceutan border with its neighbouring

1 In 2016, Rajoy was successfully re-elected, and he continued to serve as Spanish Prime Minister until a no confidence vote ousted his government in 2018.

country, Morocco: more infrared video cameras, more high walls, more microphone cables, more land surveillance and more sea patrolling. 'More!' he promised.

> We commit to presenting a comprehensive remodelling project of the Tarajal border with the most advanced technology and following the requirements derived from its status as the southern European border.[2]

Upon acknowledging and congratulating the enclave's Muslim residents for the month of Ramadan that had started just a few days earlier, Rajoy concluded,

> As I said at the beginning of my speech, thank you, everyone, for all your efforts in our country. Vote for the unity of Spain, national sovereignty and, as the Mayor-President said, equality of all Spaniards and those who live here and elsewhere!

He received a lengthy ovation.

Amidst political debates surrounding Catalonia's request for independence from Spain, Rajoy's message that the future of Spain lies in its unity was a strong warning against Catalonia's appeals for sovereignty. For Ceutans, however, the political endorsement of Spain's territorial integrity had an additional normative meaning: it reassured Ceutans that Christian, Muslim, Hindu and Jewish Ceutans alike are just as Spanish as those from the peninsula and that Ceuta would forever remain protected under Spanish sovereignty. It averted fears that a future national government would eventually trade or surrender the Ceutan enclave to its Moroccan neighbours, following Morocco's repeated irredentist claims.

The Spanish-Moroccan border makes Ceuta a unique border space that forms Europe's border with Africa. Extending well into the Mediterranean Sea, the border in its current permanent form had only recently been added to the enclave's landscape, following Spain's entry into the EU in the mid-1980s. As part of its EU accession deal, Spain received annual payouts from the EU to further secureits southern borders (Alscher, 2017). Although some Muslims have a long history in Ceuta, dating back to the 1930s, the decision to grant Spanish citizenship to Muslims residing for over a decade in the enclave was not supported by all Spaniards because it challenged their idea that only Christians could be truly 'Spanish'. Moreover, the Moroccan Kingdom has repeatedly

2 Referred to as *la frontera* (the frontier) in Spanish and *dwana* (customs) in the North Moroccan Arabic dialect, Dariya, Spain formally named the Spanish-Moroccan border in Ceuta as La Frontera del Tarajal, which is named after the small Tarajal beach located on the Southernmost tip of Ceuta, right next to the border.

requested over the decades that Spain transfer jurisdiction over Ceuta and its sister city, Melilla, to Morocco, claiming that Spain currently colonises these enclaves (Gold, 1999) and asserts its national integrity because there is no territorial continuity between these enclaves and the rest of Spain (Pinos, 2012). Rajoy's political speech aimed to appease these Ceutan insecurities and their need to feel that they belonged to the Spanish nation.

Today, the moniker 'Ceuta' denotes an autonomous Spanish city bordering Morocco. Due to its location, fenced off by Spanish government policies developed under EU instructions on one side and by the Mediterranean Sea on the other, coupled with its geopolitical context and ongoing border struggles, Ceuta has been reimagined and reconstructed as the ultimate gatekeeper for Continental Europe. The process of re-bordering, which includes the construction of a physical border and increased security measures, has further solidified Ceuta's role in regulating the movement of people and goods between Africa and Europe. However, the process has also led to Ceuta being marginalised from Morocco, the rest of Spain and Europe. Moreover, the evolution of the Moroccan-Spanish border occurred in tandem with Ceutans' struggles to gain equal rights as Ceutan-Spanish and, subsequently, as European persons, notwithstanding their various religious identities as Christians, Muslims, Hindus or Jews.

Drawing on 14 months of fieldwork in Ceuta between 2015 and 2016, this chapter explores the complicated history and identity politics of Ceuta as a culturally diverse, densely populated autonomous border city on the remote periphery of the EU. The chapter highlights how the 're-bordering process' (Suárez-Navaz, 2004) in Ceuta gave new meaning to the border. It argues that the enclave's geopolitical context and significance, its border struggles with Morocco and its re-bordering process shape the contemporary geography and function of Ceuta as a land between Morocco on the one hand and Europe and Spain on the other, contributing to Ceuta's (re)imagination and (re)construction as the ultimate gatekeeper for 'Fortress Europe'. Although borders create exclusion and are intended to stop the crossing over of people, goods and services, I argue that the Moroccan-Spanish border simultaneously allows a measure of exclusive inclusion through selective permeability of 'excepted' migrants (Khosravi, 2010), who are allowed to enter the enclave as consumers and providers of cheap labour but remain precarious outsiders to Ceutan society.

4.1 From Historic Abyla to Contemporary Ceuta

On the way to the city centre, it is difficult to avoid the large bronze statue of Hercules separating two pillars that overlook Ceuta's port. While I did not pay much attention to the statue of Hercules, my Ceutan interlocutors were eager to point to it and explain

the historical origin of the enclave using Greek mythology. According to the most popular myth, Hercules, eager to impress a goddess he wished to marry, pushed apart two large mountains and pumped water in between, creating today's Europe and Africa. The Northern pillar of Hercules, 'Calpe', is today known as the rock of Gibraltar, which on most days is clearly visible from Ceuta, while the Southern pillar of the ancient Mediterranean world, 'Abyla', translating to the mountain of god, is either the rugged Mount Hacho in Ceuta or 'Jebel Musa', the mountain located across the Ceutan border in Morocco (Gómez Barceló, 2008). The myth continues that, Zeus, angry that the goddess had deceived Hercules into thinking that she would marry him should he pass her tests, put the goddess into an eternal sleep (or killed her, some say) by turning her into stone. Ceutans recount that this explains why the mountain of Jebel Musa – known among Ceutans as '*la mujer dormida*' (the sleeping woman) or '*la mujer muerta*' (the dead woman), depending on the extent of Zeus' mythical punishment – appears when viewed across the border from the Ceutan neighbourhood of Benzu, as a woman lying down on her back with her hands resting across her chest.

There are two gigantic statues of Hercules in Ceuta, one symbolising the separation and the other the union between Europe and Africa. Both were originally meant to be located at the port's entrance. However, despite their enormous size, they could barely be seen from the Ceutan shore. Seemingly unaware of the ironic connotations, Ceutans moved the 'Division of Europe and Africa' close to the city centre, relegating the 'Union of Europe and Africa' to a remote, barely visible presence. Accordingly, Ceuta's politically neutral myth about the enclave's origin does not link Ceuta to a specific religious or cultural origin. On the contrary, Ceuta is represented as a place that is neither in Europe nor in Africa, but is rather a central and an in-between place, distinct from everything around it. Following Malinowski's idea that myths are charters for social action that rationalise the structure and norms of social life in an attempt to make sense of the world (1929, 1935), Ceuta's origin myth portrays the enclave as an exceptional place in line with Ceutans' desire to justify its uniqueness and differentiate themselves from their neighbours.

Occupying a strategic chokepoint on the southern straits of Gibraltar, where the Atlantic Ocean meets the Mediterranean Sea, Ceuta is historically epitomised by movement and trade. The written history of the enclave dates back to the Phoenicians, who established it as a trading colony in the early 1st millennium BC. Greek geographers recorded it as 'Abyla' and other variations of the same name. Following the Phoenician rule, the Carthaginians successively colonised Abyla and then the Romans in 42 AD, who named the enclave 'Septem Fratres' (seven brothers), referring to the seven hills of Rome (Rezette, 1976). The Spanish name Ceuta is a corruption of 'Sebta', the name conferred on the enclave by Arabic speakers, deriving from the enclave's original Roman name. The Romans structured the enclave as a rich fishing outpost and port, pumping goods

from Western Africa towards its imperial centre. By the late 4th century, the Christian population in Ceuta had grown considerably. In the 6th century, Ceuta fell to Vandal tribes, who ousted the failing Roman Empire. The Byzantines subsequently conquered the enclave, and shortly after, as the Byzantine Empire weakened and probably left Septem isolated, the enclave was stormed by the Visigoths, who subsequently ruled for a century before the enclave, together with the rest of the Iberian Peninsula, was conquered by Muslims around 710 (Grieve, 2009). While there are no reliable accounts of the rapid Islamic conquest of the Iberian Peninsula, many historical romances were subsequently produced about this period, in which Ceuta plays a central role.

Ceutans recount that while Umayyad Muslims easily conquered northern Morocco, they could not conquer the enclave because of the fine military skills of Count Julian, the Visigoth Governor (Campbell, 2012). On the peninsula, when the Visigothic King of Hispania, Wittiza, died, the nobleman Rodrigo, depicted as a monstrous man hungry for power, seized the crown. The King's young sons fled to Ceuta, begging Count Julian for shelter and protection. Rodrigo, testing the Count's loyalty, asked that the boys be returned to him. Count Julian protected the boys from certain death and promised the new King that no trouble would come from them. He instead sent his daughter, referred to in chronicles by the name La Cava, as a seal of this promise. King Rodrigo took the Count's daughter under his care, but the royal court proved to be a less than safe refuge for her. She became the object of King Rodrigo's lascivious desire (Grieve, 2009). According to Ceutans' legend, when Julian, Count of Ceuta, learnt that his daughter had been violated, his vengeful rage led him to change sides and offer his allegiance to the Muslim armies. Under the leadership of General Tariq ibn Ziyad, the Muslims were exhorted to invade and conquer the land forming southern Portugal and Spain, resulting in the Count of Ceuta slaying King Rodrigo and the Muslims conquering the Iberian Peninsula in 711. Subsequently, General Tariq named the mountain 'Calpe', after him as 'Gebel Tariq', from which it later contracted to its present name, 'Gibraltar'.

The new Moorish Kingdom of Al-Andalus is often described as a space of conviviality between the Christian population descending from the Hispano-Romans and Visigoths, the Muslim population of Arabs and Berbers and the smaller population of Sephardic Jews (Ruggles, 2004).[3] Ceuta was part of the Moorish Iberian Kingdom, where the fusion of cultures greatly encouraged the development of agriculture, architecture, law, art, medicine and scholarship. Over the following centuries, successive North African dynasties conquered Muslim Iberia, and they were particularly interested

3 Ceuta has many historical artefacts and archaeological remains from this era. The most noteworthy are the bathhouse and the beautiful fortification walls around the medieval military fort at the peripherals of today's city centre.

in Ceuta because of its commercial and military importance. In August 1415, after a few decades of political instability, King John I of Portugal captained a fleet to Ceuta for a surprise assault, capturing the prosperous enclave the same day. Thus, that year became significant in Ceutan and Portuguese history. In Spanish history books, this struggle for territorial control between Christian and Islamic rulers is referred to as the *Reconquista* (re-conquest), suggesting that the Christians reoccupied the Moors' territory that had always been theirs.

The Portuguese seizure of African territories and the preliminary delineation of today's Euro-African border occurred within a historical struggle for political, cultural and territorial delimitation. The Portuguese Empire hoped that Ceuta would serve as a base for further African conquests. However, Muslim merchants boycotted its markets, and without Tangier trade routes, Ceuta became a drain on the Portuguese treasury. Consequently, the cosmopolitan population of Ceuta quickly diminished to a few thousand members of the Portuguese garrison, convicts who were exiled to the enclave as a punishment for their crimes and a small Jewish bilingual community that acted as an intermediary between soldiers and traders (Rezette, 1976). The General Edict on the Expulsion of the Jews from Spain in the late 1400s meant that more Jews, fleeing from Spain, crossed the straits of Gibraltar to Ceuta. Despite the Inquisition on the Iberian Peninsula, the Jewish inhabitants in North Africa were largely left undisturbed. After the Battle of Alcácer Quibir in 1578, the young King Sebastian I of Portugal was never seen again, and a succession crisis arose as he had no descendants. In the end, King Philip II of Spain gained control of Portugal, uniting the Portuguese and Spanish thrones for the following 60 years as the Iberian Union, allowing the two Kingdoms to flourish without being merged and resulting in Ceuta having an influx of new Spanish residents (Mutlu & Leite, 2012).

In 1640, a war broke out between Spain and Portugal. The latter regained its independence, and according to Ceutans' historical narrative and romanticisation of its imagined past, Ceuta was the only city of the Portuguese Empire that explicitly sided with Spain. In 1668, Portugal formally recognised Ceuta's allegiance to Spain, and with the Treaty of Lisbon, Portugal finally ceded the enclave to its Spanish neighbours. Many Ceutans emphasise Ceuta's unequivocal loyalty during this period to demonstrate the long fidelity of Ceutans to Spanish sovereignty and the authentic Spanish character of the city. After that, Ceuta remained mostly a Spanish fortification. Between 1694 and 1727, Ceuta was besieged by Moroccan forces under Moulay Ismail. During this 33-year siege that does not generally feature in Ceutan narratives of the enclave's history, Ceuta lost most of its Portuguese character (Campbell, 2012). The Ceutan black and white

flag is among the few surviving Portuguese influences.[4] In 1704, Ceuta resisted British forces that had taken over Gibraltar, resulting in greater Spanish military fortification of its African territories against a new antagonist.

During the 18th century, Ceuta's population grew to just above 7,000, consisting of military troops andexiled prisoners who could freely move within its city walls as the enclave served as a Spanish prison city (Torres Colón, 2008). Some Christian Ceutans claim that by tracing their ancestry to these exiled prisoners, they are the oldest founding people of Ceuta. In 1792, Muslim soldiers moved to Ceuta from the city port of Oran, Algeria, under Spanish control (Doncel, 1991). Once in Ceuta, the loyal indigenous force integrated them into the Spanish military, and to date, some Muslim Ceutans who wish to distinguish themselves from their Moroccan neighbours emphasise that these were the true ancestors of the Muslims of Ceuta. Between 1859 and 1860, disagreements over Ceuta's borders resulted in the Spanish-Moroccan war, commonly known in Spain as the 'War of Africa'. Despite the high rate of fatality, Ceutans to date describe this 6-month war as a victorious battle, for it concluded with the Treaty of Wad-Ras (otherwise known as the Peace of Tetuán) by which Ceuta's borders were extended to its present size, consolidating perpetual Spanish presence in Ceuta and its sister city, Melilla.[5] The 19th century was disastrous for the Spanish Empire, which lost all its colonial possessions in Latin America.

In 1863, Ceuta acquired its freeport status, leading to intense trading, complementing its garrison function and generating new interest in the enclave. By 1900, the population of Ceuta had gradually grown to 13,000, and after that, the enclave's population continued to explode; yet, it mostly comprised military personnel and their families. In November 1912, the French and Spanish heads of state signed a treaty regarding Morocco. France, which had earlier that year through the Treaty of Fez gained control over Morocco and its foreign affairs, gave Spain influence over Morocco's southern territory (to rule from Laayoune, the largest city of Western Sahara) and northern strip (with the city of Tetuán as its capital). The prison city of Ceuta was abolished, a railway was built between Tetuán and Ceuta and new houses and whole neighbourhoods were built (Gómez Barceló, 2008). By the 1930s, Ceuta was no longer a marginalised fort. The enclave became Spain's busiest port and an important transit city connecting the peninsula with its colonial hinterlands. The Spanish colonisation of northern Morocco during this period greatly contributed to the revival of the Muslim community in Ceuta.

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4 Ceuta's flag features the configuration of the Portuguese shield and has the same black and white background as the flag of Lisbon.

5 In a conference organized in 2016 by the *Regulares* stationed in Ceuta, this war over the borders of the Ceutan enclave was described as *a big war with a small, yet worthy, victory*.

In July 1936, General Francisco Franco dispatched a military expedition against the Spanish republican government from Ceuta, leading to the outbreak of the Spanish Civil War (1936-1939). The Regulares[6] – an indigenous army largely recruited from Ceuta, Melilla and the Spanish-controlled Moroccan lands – and the Spanish regiment of Africa, La Legion,[7] which likewise recruited and garrisoned the Spanish protectorate, played major roles in Franco's military uprising.[8] Although Ceuta served as a launching pad for the Franco-led fascist rebels, the enclave was spared most of the brutality of the Spanish Civil War. When the war ended, many from the regiments settled in the outlying barrios of Ceuta (Campbell, 2012). To date, many Muslim Ceutans proudly retrace their ancestors to these regiments to demonstrate their outstanding loyalty to Spain and long-standing affiliation with the enclave.

The population of the new economic hub grew rapidly, reaching 59,000 by 1940 (Rezette, 1976). By then, a "new middle class appeared, composed mainly of Spaniards and Moroccans, with a small but remarkable presence of Sephardic Jews" (González Enríquez, 2007, p. 224). Migration from mainland Spain to Ceuta continued, comprising mainly state functionaries from all over Spain and unskilled workers from Andalucía, Southern Spain. The Jewish community in the enclave expanded as many migrated to Ceuta from the neighbouring cities of Tangiers and Tetuán. In the 1950s, the small Sindhi Hindu community in Ceuta was also amplified. The British imperial partition of India and Pakistan led to an unprecedented number of Hindu migrants moving to Gibraltar and other British lands. Shortly after, seeking business opportunities, they moved across the straits of Gibraltar, settling in Ceuta and opening various successful businesses (Campbell, 2012), some of which powered their way through several economic recessions and continue to function until the present day.

In 1956, the colonial protectorate over Morocco was dismantled, and Morocco gained independence after 44 years under French and Spanish rule. The transition lasted another 10 years. The end of colonialism in Morocco gave a new meaning to the North African Spanish enclaves and the border of Spain with its postcolonial Moroccan lands. Despite Moroccan complaints, the Spanish national government, with UN support, claimed the Ceutan and Melillan enclaves and other *plazas de soberanía* (places of sovereignty) as parts of the Spanish state. As Spanish territories, Ceuta and Melilla were

6 Formally 'Fuerzas Regulares Indígenas', the Regulares were originally infantry and cavalry forces of the Spanish Army primarily formed in Melilla in 1911. They retain their presence in both Ceuta and Melilla.

7 The Spanish Legion was originally formed in 1920 to fight rebelling tribes during the Spanish protectorate. It continues to maintain its headquarters in Ceuta.

8 In February 2010, an imprint of Franco's footprints was filled with concrete. However, there remain many Ceutan streets named after the Franco period and an abandoned 15-metre obelisk monument, moved from Morocco to Ceuta in 1962, remains one of the very few extant monuments commemorating Francoism in Spain.

to follow the political standards and rules set by the central government in Madrid. In the eyes of Spain, the African enclaves were never colonial territories; however, Morocco considers them integral parts of Moroccan territory that are still to be decolonised. Ceutans strongly reject Morocco's irredentist claims. Many Ceutans further assert that Spaniards inhabited the enclaves well before the Moroccan Kingdom was established, a claim conceptualised to emphasise that Ceuta is Spanish territory.

Following Morocco's independence, Ceuta enjoyed three decades of economic prosperity, predominantly derived from its freeport status and "bazaar economy" (Caballero, 2009), largely trading in electronic goods and cheap luxury items unavailable on the Spanish peninsula. Ceuta's population continued to grow, and its residents enjoyed tax-free goods, high wages and trading opportunities with Morocco and the peninsula. Moroccans from the hinterland migrated to Ceuta, working in retail markets, services, domestic labour and the small agricultural and construction sector (Gold, 1999). The growing presence of Muslims in Ceuta and Melilla remained largely ignored by mainland Spain. Muslims residing in Ceuta had no access to Spanish nationality or documentation as they were not locally registered. While most Muslims of the enclave have or had relatives of Moroccan origin, a few others still claim to the present day that their origins had no links whatsoever with Morocco and that they were born in Ceuta and are Muslims of the enclave.

After Franco died in 1975, Spain moved towards a democratic monarchy under the leadership of King Juan Carlos I. Spain's subsequent bid in the 1980s to enter the European Economic Community, later the EU, involved another important shift concerning the Spanish-Moroccan border, for it required a range of legal modifications. EU authorities demanded that Spain's border policy be revised and its residents regularised, particularly in its North African territories. To satisfy the EU membership requirements, Spain replaced the previous temporary markers identifying its border with Morocco with more permanent fixtures. As part of the EU re-bordering process (Suárez-Navaz, 2004), the previously undocumented Muslim residents were for the first time granted Spanish documents that regularised them as migrants (Mutlu & Leite, 2012) with an ambiguous promise that they might qualify to obtain Spanish citizenship after the passing of 10 years.

In 1985, the first Spanish Law on Aliens was approved. It provided special and favourable provisions for immigrants from countries with long historical and cultural ties with Spain, allowing them to be dual citizens. These included Latin America, Portugal, the Philippines, Andorra and Equatorial Guinea, but not Morocco, even though part of Moroccan territory had been a Spanish colony (González Enríquez, 2007, pp. 224-225). Unlike those coming from Latin colonies, Moroccans and, more generally, Muslim residents who identified as being the Muslims of Ceuta could not gain Spanish

citizenship regardless of their long-term, trans-generational residency in the enclaves and despite some having faithfully served in the Spanish militaries. Many Muslims born in the enclave refused to apply for the Spanish documents that classified them as foreigners (Gold, 1999) and that would have allowed them to live in Ceuta as second-class citizens (Mutlu & Leite, 2012); however, without undergoing the registration process, they risked deportation (González Enríquez, 2007). As Soddu (2002) argues, the Muslims of Ceuta, who had been settled in the enclave for more than 100 years, were suddenly facing laws that reclassified them as illegal. In late 1985 and early 1986, there were numerous gatherings and demonstrations by the Muslim residents of Ceuta against the application of the new law limiting Spanish citizenship, describing the law as "fascist and racist" (González Enríquez, 2007, p. 221).

Perhaps as a reaction to the protests and claims of the Muslim community, or possibly to expedite the process and satisfy the EU entry requirements of regularising the population of Spain's North African territories, an extraordinary process of regularisation was undertaken. While Spain replaced the metre-high movable fences surrounding its North African enclaves with a more permanent and higher fence, it also drafted a more flexible law granting all immigrants already residing in the Spanish enclaves a residence permit and the possibility of immediately applying for Spanish citizenship upon proving 10 years of residency (Moffette, 2010). By the late 1980s, 3,667 Muslims residing in the Ceutan enclave for more than 10 years had finally obtained Spanish nationality through this newly adopted process (Gold, 1999). This decision was, however, not supported by all Spaniards, as it challenged their idea of what it means to be Spanish and that only a person with a Christian background could be Spanish (Campbell, 2012).

4.2 The Making of a Borderland

Spain's bid to enter the EU was accepted in 1986. This was unquestionably a major event in the history of Ceuta as the Spanish-Moroccan border acquired a dual geopolitical significance, making it the EU's external border with Morocco. After EU accession, Ceuta lost its freeport status, and the nostalgic Ceutan golden years were over. Ceutans to date reminisce about the times before Spain joined the EU, when the Ceutan port fuelled the enclave's economy.[9] The new structural asymmetries stimulated illegal flows of goods and people, and the new conditions set on Spain as an EU Member State responsible for policing the EU's external border required the implementation of

9 In 2007, Morocco's Tangier-Med Port started operating. For Ceutans, this move was a political strategy to relinquish Ceuta with competition and to take over the work that once belonged to Ceuta's freeport.

tight border controls and stricter immigration and asylum policies (Ferrer-Gallardo, 2008). Adopting visa requirements for Moroccan citizens remarkably impacted the Spanish-Moroccan border dynamics (Ferrer-Gallardo, 2007). In 1991, Spain joined the Schengen area, abolishing checks at the common borders between signing EU Member States. Further to the agreement, Ceuta and Melilla were semi-excluded under a special arrangement tailored to the North African enclaves' unique circumstances, with a view to introduce and enable 'desirable' people and goods (ibid.) to move more freely between the neighbouring Moroccan hinterlands and Spain.

The exclusive arrangement between Morocco and Spain, recognised by the EU, allows special provisions regarding the North African Spanish enclaves, which allow Moroccans from the province of Tetuán[10] to cross the border in either direction by presenting their residency cards.[11] Thousands of '*transfronterizo*' (cross-frontier) Moroccan workers cross from neighbouring Moroccan towns to Ceuta daily to work in the enclave's informal economy. Many men work in Ceuta's busy construction industry, and many women work as domestic help in Ceutan households (Campbell, 2018). This entry to Ceuta is only valid during the day; sleeping or staying in Ceuta overnight is a breach of the law. Unlike migrants who cross the border with a visa, the enclave's Moroccan neighbours are not recognised as having entered a Schengen area. Thus, they are limited to the enclave and prohibited from taking the ferry connecting Ceuta to mainland Spain.

Following the 1991 systematisation of Ceuta's position within the EU Schengen area, came the first deaths of migrants trying to cross the straits of Gibraltar. The new management of the land border meant that Ceuta became a dangerous transit city to Europe, as migrants continued to die attempting to rush its fortified southern borders. Hundreds of migrants regularly congregate on the Moroccan side of the border, some in makeshift camps in the Moroccan hillsides, awaiting an opportunity to enter Ceuta and claim asylum. The political relations between Spain and Morocco further deteriorated throughout the 1990s, initially over fishing rights. While many of Spain's regions had obtained autonomy, granting them increasing power to manage their own affairs, Ceuta, to the horror of Ceutans, was often used by the national government in Madrid as leverage in discussions with Morocco. To the equal fury of Morocco, in 1995 the national government granted Ceuta and its sister city, Melilla, the status of autonomous

10 The Tetuán province has a population of around half a million. Tetuán, the biggest city within the province, is approximately 35 km from Ceuta. The closest Moroccan town to Ceuta is Fnideq, known as Castillejos among Spanish speakers.

11 Agreement on the Accession of the Kingdom of Spain to the Convention, implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders between signing EU Member States.

city (*ciudad autónoma*), sanctioning the enclaves' locally elected parliament and Mayor-President (Presidente-Alcalde),[12] replacing the previous city council. Ceuta's municipal government gained significant control over the local economy, taxation, land use and public security. However, matters of national interest (such as cross-border trading, education and foreign affairs) remained in the hands of a Delegate appointed by Madrid. On a symbolic level, however, the new autonomous status confirmed Ceuta as an integral part of the Spanish nation state, on par with other territories on the mainland, and reinforced its difference from its Moroccan neighbours.

Following the granting of autonomous status, the Ceutan public sector significantly expanded to allow the municipal government to exercise its new-found powers and redress the decline in trade-related jobs. Today, the public sector employs roughly half of the enclave's working population. These functionaries' positions are greatly sought after as they are lifetime-appointed civil servants with significant wages. In Ceuta, functionaries (or *funcionarios* in Spanish) additionally receive exceptional wage bonuses, generous tax breaks and attractive pension plans, making Ceuta the crème de la crème platform for these state functionaries. This fact has resulted in many Peninsulars in recent decades migrating from mainland Spain to Ceuta after succeeding in obtaining various functionary positions in institutions ranging from Ceuta's town hall to its prison, including teachers, police officers, prison guards and Guardia Civil, among many others. Nevertheless, Ceuta continues to depend on the (formal and informal) trade with Morocco, and the labour force from Morocco remains of foremost importance to the livelihood of the enclave, meaning that despite the significant economic dependence on the public sector, the permanent closure of the border could have a devastating impact on Ceuta's economy.

The effects of border closure became more visible amid Morocco's tightening border restrictions and its radical decision to close the Ceutan border in October 2019, when Morocco claimed that it had to clamp down on the informal trade and smuggling because it was causing a haemorrhage of tax and customs duties. In January 2020, Ceutan Mayor-President Juan Vives followed other Spanish officials in accusing Morocco of putting serious pressure on Ceuta in an attempt to isolate and suffocate the enclave's economy. Ceutans were calling for a new economic model that did not depend heavily on Morocco. The situation, however, only worsened in March 2020, when the global pandemic led to a 2-year closure of the Moroccan-Spanish borders based on what was framed as public health security. In May 2021, Ceuta made international headlines during this period when more than 6,000 people crossed the Moroccan-Spanish border irregularly into Ceuta. The sudden influx of migrants, many of whom were

12 Before becoming an autonomous city, Ceuta was under the province of Cadiz.

unaccompanied minors, was a record-breaking number of undocumented migrants crossing the border in one day. Some rushed the fortified double fences, while others treacherously swam or paddled into Ceuta on inflatable boats. In the following days, thousands of more migrants succeeded in crossing the closed border through land or by sea.

The mass crossing occurred during increased tension between Morocco and Spain. According to Spain, it is no coincidence that this incident happened shortly after Brahim Ghali – the Sahrawi leader fighting for the independence of Western Sahara from Moroccan rule and a terrorist, according to Morocco – was allowed to enter Spain to receive medical treatment after having contracted COVID-19. Although Spanish officials said that the independence leader was only allowed to access health assistance on humanitarian grounds, his arrival sparked vociferous protests from Morocco, especially because it was seen as a sign of sympathy from Spain, which had enjoyed a 'protectorate' over the Sahara and, thus, had a lingering affinity with the Sahrawis. Moroccan officials insisted that Spain's move was inconsistent with a spirit of partnership and good neighbourliness between the two countries. After the surge of crossings, however, Morocco claimed that the incident was not related and merely an unintentional result of low tides and opportunistic advantage taken over the poor Moroccan officials at the border. Footage that went viral internationally showed another picture: Moroccan guards opening the border and looking the other way.

The incident was followed by mass deportation. Spain proudly reported having immediately pushed back many of the migrants to Morocco based on the 1992 bilateral extradition agreements between Spain and Morocco, which allow the return of migrants even after they have reached Ceuta safely. The immediate deportation of migrants – especially unaccompanied minors – without allowing the application for international protection by those seeking asylum was heavily criticised by human rights activists. Spanish authorities were not transparent concerning these expulsions. When the Spanish government changed its welcoming policy about Sahrawis in March 2022, Morocco developed a renewed attitude of collaboration with Spain. A few months later, the Moroccan-Spanish border was finally reopened, reuniting some residents of Ceuta with their families who lived on the Moroccan side of the border and had been separated since the border closure.

Following the unprecedented 'migrant crisis', the local football stadium was for some time converted into a processing centre for migrants; armoured vehicles lined the beach, and Spain deployed more troops to Ceuta as well as to Morocco to patrol the Spanish-Moroccan border. The EU made large payouts to Morocco to support its protection of the southern EU borders. "Ceuta is Europe, this border is a European border, and what is happening there is not Madrid's problem, it is the problem of all", said the

Spanish EU Commissioner (Hedgecoe, 2021), echoing the sentiment of most Ceutans, who were terribly upset by these incidents. "The mood among Ceuta's population is now one of anguish, uncertainty, unease and fear", said Ceuta's Mayor-President on national Spanish radio.

4.3 Conclusion

The Ceutan border is constructed around a complex amalgamation of clashes and alliances between Spain and Morocco. The sterile, securitised environment of the border coexists with an economically vibrant cosmopolitan Mediterranean life. From a geopolitical perspective, Ceuta, while indisputably part of the world's poorest continent of Africa, also forms part of the EU, the world's richest trading block. Officially, there is almost no commercial interaction between Ceuta and the Moroccan hinterlands (Soddu, 2002). However, the irregular flow of goods across the borders significantly exceeds any legal exports between the two countries. The extraordinary commercial activity – organised through what Planet (2002) describes as a binary scheme of legality and illegality – is facilitated by the economic inequality between the two sides of the border, the enclave's special tax regime and the Schengen Agreement, which makes special exceptions allowing the flow of certain Moroccan citizens from the neighbouring hinterlands (Ferrer-Gallardo, 2008).

In the last decade, there has been a growing interest among social scientists in the structure and function of borders, as well as the movements across them (Cunningham, 2001; O'Dowd et al., 2004; Wilson & Donnan, 2012), analysing how across diverse global spaces, borders are changing labour markets and the composition of citizenship. A lot has been written about the transformation and reconfiguration of European frontiers (Bigo, 2002; Koslowski, 2011; Walters, 2002); however, scholars tend to focus more on the removal of EU internal borders rather than the enforcement of external boundaries (Planet, 1998; Wilson & Donnan, 1998), with a few exceptions (Albahari, 2008; Suárez-Navaz, 2004). Spain's accession to the EU implies that the Spanish-Moroccan border also became the border between Morocco and the EU. By superimposing the EU external border on Ceuta, two different perimeters overlapped, and two territorial lines aligned (Ferrer-Gallardo, 2008). Nevertheless, this re-bordering process does not erase the postcolonial role of the border in separating the former Spanish colonisers from the Moroccan colonised others. By reinforcing the border with Morocco, Spain also reinforces the founding narratives of the national Spanish identity itself. The narrated history of the Reconquista, the War of Africa and the Sahrawi and North Morocco 'protectorate' add negative connotations to Spanish conceptualisations of Morocco.

As this chapter demonstrated, Ceuta finds itself at the interface between two states and two continents locked irrevocably in a paradoxical selective border management logic. The intensively securitised Moroccan-Spanish border, combining Ceuta's medieval fortress landscape with high-tech control mechanisms, together with the easy access to Ceuta enjoyed by those who can glide through the various checkpoints without the necessity of a visa, complicates the clear-cut boundaries between the inside and the outside. The exceptions made for Ceuta and Melilla, as acknowledged by the EU and standing to date, allow the daily cross-border flow of Moroccans from the neighbouring border regions (workers, consumers, merchants, smugglers and so on) to enter the enclave without a visa, but without acknowledging Ceuta's Schengen status. Ceuta's location has, therefore, acquired increased significance as it is now located on what is both a gateway to Europe for a privileged few and an increasingly securitised border dedicated to preventing thousands of sub-Saharan African immigrants from entering Europe. These anomalies and contradictions must be analysed in light of Anderson's (2001) notion of "selective permeability of state borders, their differential 'filtering' effects, and the changing nature of state territoriality" (p. 220). The special regulations for the sustainability of the enclave allow selective border permeability concerning 'excepted' migrants (Khosravi, 2010) – daily border crossers who are neither thrown out nor considered participants in Ceutan society.

O'Dowd (2002) argues that borders function as barriers, bridges, resources and symbols of identity. It is the last of these functions that is interesting for this research. O'Dowd (ibid) further opines that borders are integral for humans because they reflect the desire for sameness and difference and are a marker between Us and Them. The Spanish-Moroccan re-bordering fits this traditional us/them binary logic, and the physical demarcation of the border entails a symbolic representation of this delimitation. Beyond the border, however, the territory of Ceuta is a border space torn between a simultaneous divide and embrace of Ceutanness, Moroccanness, Spanishness, Europeanness, Africanness, Muslimness, Christianness and other identities.

Migration and border policies have profoundly changed Ceuta's labour market and the composition of its population, as well as Ceutans' perceptions of themselves and others. The significance of events like Rajoy's rally among Ceutans brings to light Ceutans' ongoing sovereignty and identity struggles. On the one hand, they aim to persuade suspicious Peninsulars to recognise that Ceuta belongs to Spain and that Ceutans are to be treated as equally Spanish as those from mainland Spain, while on the other, they aim to avert fears and concerns about a potential surrender of the Ceutan enclave to its Moroccan neighbours. The border demarcation and crossing struggles must also be understood as the generative matrix for a 'Ceutan-Spanish-European' collective identity and its counterpart, the 'Moroccan-non-European' Other.

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5 The Encampment of the World

Elise Billiard-Pisani

First created as temporary structures, camps have become settlements and a decisive means of control for the forcibly displaced. Although only 20% of the 108 million displaced people live in camps. Today we are also a witness to an increase in the variety of campsites. We are witnessing a diversification of the segregated areas, which are growing larger and multiplying. In all its forms, whether legal or illegal, controlled by the UNHCR or self-settled, today's temporary detention centres of the global north – not forgetting the heirs of the old ghettos of Warsaw, Chicago or Bantustan, such as the municipal camps on cities' outskirts for Gypsies, are increasing.

If segregation is the first (but not sole) condition defining a camp, we cannot turn a blind eye to the other aspects of camps: the campuses and camping sites and, most visibly, the positive discrimination that exclusive spaces offer. Moreover, the increase of forced encampment is accompanied by an equally exponential number of exclusive spaces: luxury bunkers as the latest solution in the event of climate tragedy; cosy, gated communities as the private suburbs for the wealthy only or private jets and helicopters as the means of transportation for those fleeing public spaces.

Voluntarily or forcibly, individuals seem to be increasingly living in closed spaces. Even big cities do not deliver the cosmopolitan ideal at the core of their appeal, as citizens navigate increasingly segregated spaces.[1] Although one can argue that space fragmentation following social boundaries is nothing new, I would contest that its rise triggers unavoidable problems for democracies. If, during colonisation, indigenous cities were distinguished from colonial towns, today the same practice applies everywhere: dormitory towns, condominiums and industrial estates are built far from gentrified town centres, and these mono-functional zones form (along with commercial zones, theme parks, high-tech university campuses and invisibilised shanty towns) the structure of modern urban planning.

Defining camp as a loosely enclosed and homogeneous segregated space in which laws are different, we ask ourselves, is the camp form spreading to the entire population? Furthermore, if we take the refugee camp as the epitome of the general

1 Nilforoshan, H., Looi, W., Pierson, E., et al. Human Mobility Networks Reveal Increased Segregation in Large Cities. *Nature* 624, 586-592 (2023). https://doi.org/10.1038/s41586-023-06757-3.

form of encampment, is the refugee camp a laboratory for future urban forms? What implications does this have for democracy?

The spread of migrant and refugee camps confirms the inability of democratic societies to apply human rights universally. Arguably, in such places, displaced people are kept alive but deprived of their inalienable rights (the right to work, to education or the right to be politically represented). Giorgio Agamben[2] states that such camps are the materialisation of 'the state of exception' of modern states, following the same legal bias that enabled concentration camps.

One question remains: Are camps unfortunate but necessary exceptions in an imperfect world, or are they, on the contrary, essential tools for liberal societies? In other words, do camps follow an upward trend? Are they part of a paradigm that governs modern societies? Can the refugee camp be seen as the absolute form of a wider phenomenon – the typical modern management of populations? Has the camp replaced the Greek city as the nation state model, as Lieven De Cauter and Giorgio Agamben proposed?

To answer these questions, we first need to recognise that the camp belongs to two concomitant categories of space: 'heterotopia' (Michel Foucault[3]) and 'capsule' (Lieven de Cauter[4]). It will then become clear that the tendency to enclose or at least circumscribe certain types of individuals and certain specific activities in delimited places, the habit of fragmenting space into defined zones, is a phenomenon that is progressively extending to all areas of life. Even if, in the majority of countries, the presence of public spaces still preserves the conditions for democratic life, the propensity to divide time, space and people into increasingly homogenous categories fragments social life and inevitably contributes to establishing the modern disciplinary society, whose ideology Michel Foucault described in *Discipline and Punish: The Birth of Prison*. Thus, the camp can be considered the archetype, the absolute form of today's enclaves marked by the expansion of private law and the reduction of democratic life. From this perspective, the camp is no longer just an instrument of migration policy but a model of practice that extends to society as a whole.

After analysing the encampment of the world, we should ask ourselves whether capsules have always existed and whether they are expanding worldwide. Is there an alternative

2 Agamben, A. *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University, 1998); Agamben, G. 'Qu'est-ce qu'un camp?' In Agamben G. *Notes Moyens sans fin, notes sur la politique* (Paris, 1995); and in Agamben, A. *State of Exception* (Chicago: University of Chicago Press, 2005).

3 Foucault, M. 'Des espaces autres.' Conférence au Cercle d'études architecturales du 14 mars 1967, in Architecture, Mouvement, Continuité, N 5, 1984, pp. 46-49.

4 De Cauter, L. *The Capsule and the Network. Preliminary Notes for a General Theory* (OASE 54, 2001).

to the capsular world? The observations of Tim Ingold[5] and Edouard Glissant show the specificity of post-industrial societies, whose high-performance infrastructures allow for speed, deterritorialisation and fragmentation of space, a lifestyle that stands in stark contrast to those of nomadic societies open to diversity, to the 'Tout-Monde' to use Glissant's term.[6]

By taking the refugee camp out of the realm of exception in which it is generally studied and showing its similarities with other types of enclave, the aim is to warn against an 'encampment of the world' that would lead to authoritarian societies.

5.1 Capsular Life: The Encampment of the World

5.1.1 A Modern Life

Paula lives on the outskirts of a big city, on a chic dormitory estate with neatly mowed lawns. Every morning, she drives her car out of the garage and takes the ring road to the high-tech district where she works. There, she spends several hours at her desk, eyes glued to a computer screen, connected with foreign clients with whom she communicates in international English. On this late winter afternoon, when the night is falling fast, she sets off again for the hypermarket, where she will shop in a brightly lit, dry and clean space that offers all the beautifully packaged consumer goods she dreams of. Paula is also thinking about the trip she will be taking this weekend. She will be going to that exotic city she discovered on Instagram, and thanks to the newly built airport near her home, the flight will only take an hour. She booked her flight and the hotel on her phone, which sounded perfect. There is a basement pool and a sauna, and excursions into the picturesque historic city centre where she hopes to see a small quantity of the community life of yesteryear. In anticipation of Friday evening, she will be spending her evening watching a film on streaming while enjoying an authentic Thai meal delivered in 10 minutes by an anonymous immigrant.

Paula has not set foot on land since she woke up. She went from one enclave to another, sitting comfortably in her car-capsule. Protected from the cold and the noise, she did not smell the spring scents and drove by too quickly to see a small poster put up by a member of the community in the neighbourhood through which she drives every day, morning and evening. The small poster invited people to come along to a vegetarian

5 Ingold, I. *Une brève histoire des lignes* (Éd. Zones Sensibles, 2013), Bruxelles.
6 Glissant, E. *Philosophie de la relation* (Paris: Gallimard, 2009).

BBQ evening where she could have met someone who did not meet the IQ criteria she imposed on her Tinder profile.

Paula's story is not taken from a science fiction novel. It is similar to the lives of the many who navigate from city to city, ignorant of the countryside around them, other than the stereotyped images on the billboards along motorways and airports. While some continue to take public transport and, thus, have the opportunity to meet people from different social groups, they are nevertheless protected from any chance encounters by their phone screen and headphones, two transmitters that envelop them in a bubble of information selected for them by efficient algorithms.

Interestingly, encapsulated living was not born in the 21st century. As early as the late 1960s, architects understood the tendency of the modern man to live in cells reduced to a minimum. For example, the Japanese Metabolist Kurokawa movement built the famous Nakagin tower in 1972 to house the Tokyo salary man, who spent his working week alone, returning to his family home only on weekends. This capsular architecture was based on standardised and pre-formatted construction, already imagined in the interwar period. The 'plug-in architecture' developed by the Achigram agency is also part of this long history of capsules.

5.1.2 Definition of the Capsule

Our world is fragmented, composed of delimited and impermeable zones that communicate with each other but only through controlled transit zones. Paula's daily life, like that of the citizens of the liberal world, is increasingly experienced inside security bubbles called capsules. Architect and philosopher Lieven De Cauter defined this reality as the 'capsular world'.

De Cauter defines the capsule by returning to its etymology, which addresses all its ambiguity at once: "he word capsule comes from the Latin 'capsa' which in turn comes from 'capere' meaning: grasping, holding, keeping, in 'captivity', one might say. A capsule is a holder".[7] The capsule protects as much as it encloses. Capsules protect an environment considered to be dangerous or uncomfortable. Capsules are built against their environment. Their opacity varies depending on whether they protect from the vagaries of the climate or from armed violence. They are multiform: between anti-nuclear bunkers and phone screens lit on social networks' wire, capsules are more or less permeable with the external world. From this perspective, refugee camps are one

7 De Cauter, p. 122.

of the many shades capsules can take – an extreme form distinct only in degree and not different by nature. What defines capsules is the control applied inside. Capsules are characterised by very specific governance, which needs to be described and further confirms the links between the actual management of national populations and impoverished foreigners.

5.1.3 The Fear-Fuelled Prisons

As mentioned, a capsule protects as much as it encloses: it is private. This is contrary to public spaces, so the capsule is an instrument of authoritarian order. In her quest to identify the causes of fascism, Hannah Arendt constantly warned against reducing public space, or what she called 'the world'. For Arendt,[8] 'the world' represents the totality of social relations that enable a dialogue between interest groups and guarantee political progress. Without meeting places necessary for conversations and simple anonymous interactions to spring, which were so dear to Jane Jacobs, individuals lose all capacity for informed judgment, and no exchange of points of view is possible. All possibility of maintaining a democratic regime is lost.

Wendy Brown warns us that such walls give us the illusion of a safe inside that is protected from a dangerous outside. Both sides exist in opposition. Taking the example of the apartheid walls of South Africa to elaborate on the growing border fences along modern nation states, she writes,

> Like the old Bantustans separating white South Africans physically and ontologically from the African labour on which their existence depended, the new walls contribute to organising this dependency, even as they resurrect myths of national autonomy and purity in a globalised world. Danger, disorder, and violence are projected outside, and sovereign power is figured as securing a homogenous, orderly, and safe national interior. (p.103)

Thus, enclosure increases the danger outside of it by projecting it (or externalising it) and removing itself from the need to confront and address it.

Jane Jacobs was pleading for a diverse Brooklyn where the variety of professions meant that there were 'eyes on the street' at all times, day and night. Prostitutes could call for help if witnessing a problem on the street. She also advocated for the need for semi-private spaces like bars or little shops where one could ask for help (at a time when

8 Arendt, H. *The Human Condition* (Chicago: University of Chicago, second edition, 1998).

mobile phones did not exist) without having to enter the privacy of one's home. For this reason, she disliked suburbs, where it became difficult to entertain the neutral relation only cities could provide, a space for casual encounters with strangers. Suburbs are the awkward offspring of the village and the city, the sterile child of the *Gemeinschaft* of the rural community in which everyone knows their neighbours and of the cosmopolitan *Gesellschaft* of the citizens that can chat with strangers at the bus stop without asking for each other's names; both anonymous and proper, suburbanites are, more importantly, deprived of public spaces. In the suburbs, one is directly confronted with private homes; seeking someone in the street meant starting a friendly relationship with its array of gift exchanges and polite counterparts, thus making random encounters difficult to negotiate. As we have seen with Paula's daily routine, life in the suburbs is part and parcel of the popularisation of the world, a world in which individualisation is the cause and effect of withdrawal from public life – the new desire for 'cocooning' at home in pyjamas and with comfort foods.

Sadly, and contrary to a long-standing expectation, large cosmopolitan cities do not guarantee an escape from such capsularisation. As a team of researchers (Nilforoshan, Looi, Pierson, Villanueva, Fishmen, Chen, Sholar, Redbird, Grusky and Leskovec) observed recently, citizens of large American cities tend to take segregated paths in their daily moves and, thus, have less exposure to a socioeconomically diverse range of individuals.[9] The multi-sited study also confirms that such behaviour is made possible thanks to the increase in segregated places and leads to the polarisation of political opinions and social endogamy.

5.2 The Capsules and the Network: Enclosure and Mobility

Capsules cannot exist on their own. They can function only when plugged into a network. These infrastructures and capsules are isolated without these networks, like doorless houses. They become silent and dark dungeons. However, such connections must be controlled. To maintain the homogeneity within capsules, relations between them must be regulated. They are making sure that no cold air enters the warmed-up house. Checkpoints are, thus, essential to the capsular system. Internet passwords and firewalls, security checks at the entrance of supermarkets, guards in front of schools and luxury hotels, keyholes and heavy doors in private houses, each of them control the access to capsules.

9 Nilforoshan et al., pp. 586-592.

In the capsular society, the experience of liminality, amplified by the constant crossing of borders, with its long queues and security checks, has become part of the everyday. Although pressed for time, citizens spend most of their time sitting and waiting. The vicious circle inherent in such a system is that the more we move, the more we withdraw into bubbles.[10] This resonates with the first law of capsularisation stated by De Cauter: "The more mobile we become, the more immobile and capsular our behaviour: we are sedentary nomads (in the literal sense of sitting travellers)".[11] To travel far, we no longer use our body's energy but let ourselves be driven by fast cars, trains or planes. How could humanity evolve if we continue on this path?

In the animated motion picture *Wall-E*, set in a nearby future, plump men and women move at will on levitating individual chairs, chatting with their friends via the small screens in front of their round faces. These hypermodern humans are unable to stand or walk due to a lack of physical activity. There is no need to project our imagination very far into the future to foresee the dramatic consequences of the replacement of walking with driving and the opposition between the new liberal elite of the 'global nomads' and the 'wayfarers', a term used by Tim Ingold[12] to define traditional nomads like the Inuit he studied. The next section will discuss this distinction dedicated to life beyond the camp. For now, we must continue to address De Cauter's laws of mobility.

The second law of capsular society addresses our love for speed and the consequent need for capsules: "The greater the increase in physical and informational speed, the greater the human need for capsules".[13] If our work is far from home, we need capsules to communicate or move quickly between these two spaces. The time spent commuting feels like wasted. Cities and states build bigger and faster roads and ideally invest in efficient public transport. Marc Augé defines these places of flow as non-places, 'non lieux', which we crossed as fast as we could, doing our best to avoid interactions with fellow passengers or with the surrounding natural environment. The third law follows: "The more the non-place and the space of flows become the dominant spatial dynamic, the more heterotopia urbanism and capsular architecture will bloom".[14] Here, De Cauter defines heterotopia urbanism as the tendency to build 'heterotopia' or spaces ontologically in opposition to their environment. Michel Foucault invented the

10 Michel Lussault points out that, conversely, the recent need for separation between individuals means that they will have to travel more than ever before. 'Separation requires mobility and hyperspatiality if it is to function to the full and offer humans who aspire to reside in a spatial bubble or to stop there for a while, the full potential of entre-soi and the enjoyment of exclusive goods', in Lussault M. *L'avènement du Monde. Essai sur l'habitation humaine de la Terre* (Paris: Le Seuil, 2013).

11 Ibid., p. 122.

12 Ingold. Routledge Oxford

13 Ibid., p. 123.

14 Ibid., p. 127.

well-known concept of heterotopia[15] to address marginal spaces that propose another reality, for example, spaces that materialise another temporality, such as museums or cemeteries. A heterotopia urbanism breaks a city's continuity and flow by creating isolated bubbles of reversed realities, like a little utopia made real, a capsular urbanism.

Thus, a suburban geography of enclaves and non-spaces is expanding, taking up more space every year – a capsular infrastructure that could only be 'decapsularised' by bringing all activities of the every day together in the same place, a programme that is generally approached by conservative reactionaries wishing to go back to the good old days of pre-industrialisation. However, are there more progressive spaces to turn to in the hope of imagining a better world?

As we have seen, capsules are the atoms of the infrastructural body, the units and the plug-in entities, and their sum makes the network. As all networks function with capsules, the degree of capsularisation is directly proportional to the growth of the network. To challenge this theory, we could see if there are capsules, or enclaves, in a society like the Democratic Republic of the Congo, a country characterised by its "failed infrastructure".[16] A country where the national bank does not protect the value of the currency, where neither water nor electricity networks provide regular service, where the lack of oil can immobilise the giant metropolis of Kinshasa for days. With such an unreliable infrastructure, is it possible to have capsules? Certainly, there, like in all places stricken by extremely difficult conditions, the wealthy have created gated communities, like the 'cité du fleuve' situated on reclaimed land of the giant Congo River, separated from the turbulent city life by water and checkpoints. However, in Kinshasa, the vast majority of people share equal access to the street, public transport, large open-air markets and pop-up bars and restaurants. Most importantly, deprived of efficient infrastructure, Kinois invest in building strong social networks instead of investing in physical goods like expensive computers, cars and houses that can quickly be robbed or rendered useless. Their survival does not depend on reclusion but on social expansion, and by being out there, they can seize each opportunity on the street.

The golden prisons and luxury bunkers built by the affluent few in contexts of violence and insecurity illustrate another law of capsulization: 'Fear leads to capsulization, and capsulization enhances fear'. At great cost, the inhabitants of these condominiums manage to ensure comfortable capsules, a deterrent cost too high for the middle classes, who are constrained to negotiate their daily lives in insecure public spaces.

15 Foucault, pp. 46-49.

16 De Boeck, F. & Plissart, M.-F. *Kinshasa. Récits de la ville Invisible* (Tervuren: Musée royal de l'Afrique centrale, 2005).

However, as Setha Low (2004) demonstrated, life in quiet gated communities does not lower insecurity. Without regular encounters with 'others', inhabitants feel threatened when meeting strangers on the street.[17] Detached from their direct environment, the privileged live sheltered from economic difficulties but also from neighbours of the poorest district, who are slowly considered 'strange' people for the sole reason that they live in different socio-economic conditions. Encounters are increasingly controlled; serendipity becomes scary or rebellious. The sad truth is that capsules generate fear as much as they are the product of fear. The ecology of fear, which Mike Davis showed in his seminal study of Los Angeles, 'City of Quartz', can be summed up in a few words: exclusion leads to crime, and crime leads to exclusion.

5.3 Spectacle, Hyperreality and Simulation

De Cauter concluded his definition of the capsule with a paradox: if the capsule is at first a refuge built against a hostile environment, with time it itself becomes the environment, replacing the deemed reality outside with pleasing landscapes. The philosophers put it more bluntly:

> A capsule is a tool or an extension of the body, turning into an artificial environment that shuts out the hostile external environment.[18]

As they become the constant environment in which we experience the world, capsules increasingly provide a new environment to the point of completely hiding access to the world outside. In such cases, the inhabitants believe their reality is the simulated spectacle projected inside capsules. De Cauter warns us: "Capsules are simulation machines".[19] They simulate an ideal environment while excluding us from hostile nature or society. The film *Matrix* by Lana Wachowski and Lilly Wachowski is an extreme example of the capsule as a simulation. The characters live in the illusionary world imagined in their brains. Immobile, naked bodies are kept alive in incubators, and they are oblivious of the dark reality as they dwell in what resembles a giant video game, living there the exciting life of superheroes.

If the age of post-humanism is yet to come, and even if we still live within the constraints of our limited bodies, this does not prevent us from believing in the spectacles that

17 Low, S. M. *Behind the Gates: Life, Security and the Pursuit of Happiness in Fortress America* (2004). Routledge Oxford.
18 De Cauter, p. 122.
19 Ibid., p. 127.

capsules offer. In this new 'Society of Spectacle' (Guy Debord[20]), we believe that the carefully fabricated decor of gentrified, romantic, mystified city centres (Pierre Henri Jeudy[21]) is real. The beautiful sea view from a tourist resort (framing out the pollution and poverty of the nearby industrial area), as much as the TV news showing a simplistic world of religious hatred and conflicts in 'underdeveloped countries', shapes our vision of the world and our political decisions. The 'cloud effect' in social media filters information and largely induces our reactions, as in the case of the recent American elections. Understandably, the tendency to live in hyperreality increases as the outside violence increases; the vicious circle seems unavoidable. Thus, De Cauter describes a future dystopia where "the grimmer and uglier is the outside reality, the more hyperreality will dominate the inside, the capsular society".[22] Hence, De Cauter's pre-vision is not optimistic:

> The future might be a world turned into an archipelago of insular entities, fortresses, gated communities, enclosed complexes (hotels, shopping malls), enclaves, envelopes, cocoons, in short: capsules in a galaxy of chaos.[23]

5.4 Life Beyond the Camp

Fortunately, capsular life has not yet engulfed the whole planet. We have seen that its implementation depends on the level of infrastructure in place. Some areas, like Kinshasa, are relatively devoid of them, at least compared with rich countries. What would a society be like that was not so fragmented and in which the world's diversity was open to all? The Creole philosopher and poet Edouard Glissant offers a possible representation of it with his concept of the "Tout-Monde".[24] The 'all-world' refers to the new co-presence of beings and things. Multiple, diffracted and unpredictable, the Tout-monde is a shifting space where identities, languages and cultures creolise and disappear, only to be reborn ad infinitum. In this lively chaos of the world, a new humanity is formed, capable of dealing with the unforeseen. In contrast to the division, control and fragmentation of the world, Glissant's programme articulates a moving world open to others, deeply rooted in 'the common'. A world of exploration and 'métissage' (miscegenation).

However, it would be a great mistake to conflate the Tout-monde with the cartography of travels drawn by the so-called digital nomads. Millions of young Western teleworkers

20 Debord, G. *La Société du spectacle* (Paris: Gallimard, 1967).
21 Jeudy, P.-H. *Mémoire du Social* (Paris: Presses Universitaires de France, 1986).
22 De Cauter, p. 127.
23 Ibid., p. 125.
24 Glissant, E. *Philosophie de la relation* (Paris: Gallimard, 2009).

are free from their fathers' limited and sedentary lives thanks to cheap flights and virtual meetings. Liberals concerned about climate change undertake a minimalist lifestyle, but their carbon footprint and environmental impact are negative. In Thailand and Mexico, coworking spaces and hotels are being built for them at the expense of mangroves and nature reserves that digital nomads seek out for their exoticism but which they are helping to destroy. Additionally, their extensive nomadism (they move from one continent to another) and the fact that they stay in one place only for a few weeks, means that they are unaware of what is happening around their privileged cocoon of 'expatriates'. Sociologist Maxime Brousse calls them 'neo-colonisers'.[25] This lifestyle on the move, which increased after the confinements caused by the COVID-19 pandemic, was already in its infancy at the end of the 20th century. In 1995, in his provocative book, *The Generic City*, which quickly became an urban planning classic, Rem Koolhaas wrote, 'The in-transit condition is becoming universal'.

Nomadism is not new, and the post-industrial society (originally sedentary) is not the only one offering a nomadic lifestyle today. Nomadism was universal before the Neolithic period, and it remains how hundreds of societies relate to the world today. Breeders and hunter-gatherers have a very different relationship with their environment compared with that of senior executives, who, despite the great distances they travel, always sleep in the same standardised hotels. Anthropologist Timothy Ingold describes the different modes of nomadism by visualising them in the form of lines. On one side, nomads draw curved lines that adapt to the landscape daily; on the other, individuals of post-industrial societies draw straight segments, pressed to get to their destination. In short, the aim of those whom Ingold calls 'wayfarers' is the journey itself. The destination is merely a stopover, a time to rest. They feed off the environment they travel through, experiencing its hazards just as much as they revel in its beauty. Post-industrial workers like Paula, on the other hand, seek to reduce the time spent travelling, which they see as a waste of time. They trace out motorways and aerial lines that cross space without coming into contact with it. Ingold describes them as immobile in their rapid movements, sitting in their capsules, transported from point A to point B, much like the futuristic characters in *Wall E*.

5.5 Refugee Camps and Biopolitics

Refugee camps are shelters protecting their inhabitants from the harshness of war and hunger. They are the inversion of the dire reality outside, although not only because they are safer. Camps are heterotopia also because inside the camp certain fundamental laws

25 Brousse, M. *Les nouveaux nomades* (Paris: Arkhé, 2020).

do not apply: the right to work, the right to protest and freedom of movement; even visits are forbidden or restricted. Michel Agier describes refugee camps as spaces outside any national law, cities without political representation, where security is imposed by a police force dependent on the UNHCR and where refugees sometimes live for years, kept alive but without the right to work, without political recourse.[26] According to De Cauter, the exponential growth of the refugee problem will inevitably lead to the rise of biopolitics, a type of governance focused on keeping individuals alive rather than securing everyone's freedom and equality. Indeed, stateless refugees do not benefit from the protection of a state. They depend entirely on the UNHCR, which is only entitled to secure their basic biological needs. Left without civil status, the refugees or asylum seekers are quickly treated as 'bare life' or what the ancient Greeks called *zoé*.

The division between biological life (*zoé*) and political existence (*bio*) is explained by Aristotle, for whom life in the city was only concerned with *bio*. In the Greek *polis*, *bio* refers to community life, the only meaningful life in the *cité*. On the contrary, *zoé* refers to bare life, the surviving conditions and the simple fact of being alive. Michel Foucault used this ancient distinction to refer to today's governance. According to him, biological life became the object of a new, direct political interference in the late 18th century. Before the French Revolution, the actions within the family circle were rarely the subject of laws. If the King's subjects were free to choose the type of diet or the sexuality they liked, these choices now entered the realm of the state power's control. Using the Greek dichotomy between *bio* and *zoé*, Foucault named this type of government 'biopolitics'.

Looking at the present with Foucault's theoretical apparatus, Giorgio Agamben reasoned that the threshold of what can be governed by the state has moved further in the 20th century, that the realm of the state's control continues to spread until it completely takes into its realm the *zoé*. The bare aspect of our lives – our biological needs, our health, our diet and sexuality, for instance – was brought into discussion in the *agora*, in parliaments, when human bodies became the subject of new regulations. This analysis led Agamben to write a controversial text at the beginning of the lockdowns imposed around the world during the COVID-19 pandemic. In this text, Agamben argued that democratic states view citizens as living things that must be controlled and normalised. Consequently, any citizen deemed dangerous for the social body can be excluded from society and, therefore, be reduced to bare life (*zoé*). Drawing from Hannah Arendt, who had already suggested the refugee was the paradigm figure of contemporary political ontology, Agamben is introducing here comparisons to

26 Agier, M. *Managing the Undesirables: Refugee Camps and Humanitarian Government* (Cambridge: Polity, 2011).

dramatic historic segregations of Jews, Gypsies and homosexuals during the Third Reich in Germany. This expulsion from the *polis* and the city is, for Agamben, terrible, considering that once expelled, any human being is refuted his human rights. He becomes the *homo sacer*, the one that can be sacrificed.

By stressing that such state control is not restricted to authoritarian regimes or to dangerous situations, like in the case of the refugee camps, Agamben warns us that with the increased resources of the 'state of emergency', the risk to be reduced to bare life (*zoé*) is very real, even in rich democracies. The example of the prison of Guantanamo is often brought to the fore. He argues that certain detention camps could also be considered places governed by biopolitics in European countries. With force, Agamben criticises Western democracies, arguing that their governance model could be the refugee camp, which is far from being the Greek *cité*, as they claim.

5.6 Conclusion

I propose to look at the fragmentation of today's urban spaces through the looking glass of refugee camps. Could the camp be the prototype of the heterotopia enclaves that structure the contemporary world?

Far from being marginal structures, camps belong to the vast array of capsules or heterotopia enclaves that increasingly define contemporary urbanism. From this perspective, gated communities, such as shopping centres, gentrified historical centres or university campuses, are non-democratic spaces because they do not allow for various encounters between individuals of different socio-economic backgrounds. The heterotopia of the so-called liberal world is characterised by social homogeneity (ethnic, economic, professional, etc.). These spaces are the antithesis of what defines public spaces: conflict and heterogeneity. It follows that the analysis of the particular 'state of exception' defining the refugee camp organisation can help address the risk of authoritarian tendencies in modern nation states. With the help of Lieven De Cauter's description of the capsular society, I aimed to demonstrate how positive or negative segregation structures nation states and enables an increasingly extended control of people's views. Living and moving in capsules built against the surrounding dire realities, the citizen moved out from what Hannah called 'the world' and, therefore, becomes unable to make the informed judgements necessary for rational political choices. Enclosed in his conformable capsule, the citizen is easily controlled and less inclined to participate in the *agora*, unless social media comments are considered of any political weight.

Capsular urbanism participates in the general segregation of individuals and the invisibilisation of human tragedies. Because of this fragmentation of society into different groups living in their own distinct realities, states can easily resort to camps to 'manage the undesirables', as Michel Agier would say. However, more generally, the encampment of the world structures all spaces from prisons to luxury hotels. The possibility of externalising tensions is problematic. The fact that the EU externalises its 'migration crisis' through detention centres at its borders makes it a fortress, a secured conservative heterotopia in a world of growing migration flows.

I want to conclude by repeating, after Agamben and Arendt, that human rights are not guaranteed to every human and that the eventuality of being deprived of one's rights is not as far as citizens of wealthy nation states might assume. It is enough to become stateless to see one's life reduced to biology. In the 1960s, Hannah Arendt was already criticising the superficiality of the UN's humanism for this very reason. Because no one is obliged to ensure that the universal rights of stateless people are respected, the *apatrides* lose their status as political subjects. More recently, Giorgio Agamben even argued that, once in camps, people were no longer recognised as subjects but as 'bare lives', excommunicated from the *polis*, the *cité* where politics occur. The paradox is striking. The UN, which derives its legitimacy from the fact that it guarantees human rights to all, is also the organisation that, through the UNHCR, is implementing the most flagrant biopolitics towards those who, as refugees and stateless people, are condemned to be nothing more than bodies.

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Part II

Land Border: Challenges and Perspectives for Reform

6 The Great Migration and Asylum Games: From the Serengeti to the Mediterranean – Which Law Prevails?

Ivan Sammut

Migration is a natural phenomenon that affects both humans and animals. It has happened since animals started roaming the Earth and continues to this day, even after the dawn of civilisation, involving animals and humans. This chapter discusses how migration in the case of humans cannot be stopped but can be controlled or regulated.

6.1 The Rule of Law Versus the Rule of the Jungle

If one were to search under the title 'the Great Migration' in an Internet search engine, a possible first hit would be the US Great Migration. The Great Migration was one of the largest movements of people in US history. Approximately six million black people moved from the American South to Northern, Midwestern and Western states roughly from the 1910s until the 1970s. The driving force behind the mass movement was to escape racial violence, pursue economic and educational opportunities and obtain freedom.[1] However, a further search may yield many more contrasting results. Throughout human prehistory and history, humans always migrated. Firstly, there were hunters, always on the move. Then, we settled down and became farmers.

Nevertheless, for various reasons, both natural and artificial, such as politics, humans moved from one place to another. One can mention how people from the North slowly and gradually invaded the Western Roman Empire and eventually ended one of the world's greatest empires, formally ushering in the Middle Ages. However, migration is not limited to humans. The Great Migration also refers to the migration of the millions of wild beasts that rule central Africa over the Serengeti plains between Tanzania and Kenya. Then, one can mention the migration of birds or salmon. The list goes on.

1 https://www.archives.gov/research/african-americans/migrations/great-migration (accessed 1 February 2024).

From this, one can easily conclude that animal and human migration is part of nature and has existed since nature started inhabiting this planet. Migration will continue to exist as long as nature exists, and human migration will continue to exist as long as humans are around. It may be controlled or regulated, but it cannot be stopped. At the end of the day, it is also the individual's choice. There were times when Europeans settled in the New World for new opportunities. They crossed mountains, deserts, forests, oceans and so on. Migration can happen anywhere and for various reasons. People living in New York may want to try their luck and settle in Florida or Europe. Some migration is encouraged. Other migration is tolerated and understood. Millions of Ukrainians were welcomed in Europe when their country was invaded by Russia. However, the same European nationals struggle to welcome migrants from Africa, while, at the same time, some European nationals choose to import cheap labour from certain Asian countries. Migration, in some cases, appears to be à la carte.

The movement of animals migrating over the African plains or salmon while migrating up the rivers to spawn is regulated by the law of the jungle. Humans are supposed to be civilised, and civilised countries are expected to uphold the Rule of Law. The contrast between animal and human migration is supposed to be that the Rule of Law governs human migration, and countries show other countries compassion and support. While this may be the case, often, this is not. This chapter seeks to describe and discuss issues involving human migration across human-depicted borders. Then, it examines the consequences on the country of departure and the effects on the host country. So, who wins in this never-ending Great Migration game?

6.2 Asylum in a Nutshell

Asylum is a form of protection that a state gives on its territory based on the principle of non-refoulement and internationally or nationally recognised refugee rights. It is granted to a person who cannot seek protection and/or residence in his or her country of citizenship for fear of being persecuted for race, religion, nationality, membership of a particular social group or political opinion. In the Tampere Conclusions, the EU pledged to develop "common standards for a fair and efficient asylum procedure".[2]

Asylum decision-making poses unique challenges. At its core, it assesses fear of persecution and future risk of certain harms, which requires both sensitive communication approaches and objective risk assessment. These methods may not sit easily together, in that the former privileges the asylum seekers' account and the latter

2 Presidency Conclusions, Tampere European Council, 15-16 October 1999, SN 200/99, 3.

objective country of origin information. Both elements are, however, crucial. Moreover, the context necessitates a particular non-adversarial approach to fact finding because while the asylum seeker has the relevant personal knowledge, governmental authorities may be better placed to deal with general country conditions.[3] These may, in turn, be volatile and variable. In claims that warrant recognition, asylum seekers' testimony may nonetheless be inconsistent, incredible or even untruthful in respects, and the process marred by intercultural and linguistic understanding. On the other hand, sometimes, findings of incredibility that are too hasty are inevitably unfair, and the applicant must be given the benefit of the doubt.[4] Deciding on refugee status has accordingly been described as "the single most complex adjudication function in contemporary Western societies".[5] There is no analogous process, although useful lessons may be drawn from other areas of decision-making.[6]

In 1999, the EU heads of state and government called for establishing a Common European Asylum System (CEAS). Since then, asylum has been considered a European issue that needs to be tackled at the EU level. Indeed, it makes sense to harmonise conditions for asylum seekers in a Europe with no borders and sharing the same fundamental values. During the first phase (1999-2005) of the establishment of the CEAS, an important number of legislative measures harmonising common minimum standards in the area of asylum were adopted, the four more important being, without doubt, the Directives on Reception Conditions for asylum seekers, on Qualification for becoming a refugee or a beneficiary of subsidiary protection status and on Asylum Procedures, and the so-called Dublin regulation, which determines which Member State is responsible for examining an asylum application. In addition, financial solidarity was promoted by establishing the European Refugee Fund.

After completing the first phase, it was necessary to reflect on the direction in which the CEAS would develop further. A Green Paper was issued in 2007, the basis for a wide-ranging consultation of the public, NGOs and national governments. Based on the contributions received during the consultation and the evaluation of the implementation of the existing instruments, in June 2008 the Commission adopted

3 See Thomas, R., 'Asylum Appeals: The Challenge of Asylum to the British Legal System', in Shah P. (ed.), *The Challenge of Asylum to Legal Systems*. Cavendish Publishing, London, 2005, p. 201 at pp. 204-205.

4 See Kalin, W., 'Troubled Communication: Cross Cultural Misunderstanding in Asylum Hearing', [1986] Vol 20, No. 2, *International Migration Review* 230.

5 Rousseau, C., et al., 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian immigration and Refugee Board', [2002] 15 *Journal of Refugee Studies* 43.

6 Costello, C., 'The Asylum Procedure Directive in Context', in Baldacchi A. et al. (eds.), *Whose Freedom, security & Justice?*. Hart Publishing, Oxford, 2007, p. 153.

a Policy Plan on Asylum that set the direction the Commission wished to give to the asylum policy of the EU.

The current development of the CEAS is, therefore, based on three pillars:

I. Reaching higher common standards of protection by further alignment of Member State asylum legislation: This requires amendments to the three most important EU asylum directives – dealing with Reception Conditions for asylum seekers, Asylum Procedures and Standards for Qualification as refugees or persons needing international protection.
II. Effective and well-supported practical cooperation: This will be ensured by establishing a European Support Office that will consolidate all activities related to practical cooperation in asylum: country of origin information, training, common curriculum and asylum expert teams.
III. Higher degree of solidarity and responsibility among the Member States, as well as between the EU and third countries: This focuses, on the one hand, on improving the Dublin system (including Eurodac) and on the establishment of solidarity mechanisms between the Member States, in order to offer adequate support to the Member States whose system is overburdened. On the other hand, three ways will be explored to alleviate asylum pressure in third countries: Regional Protection Programmes, Protected Entry Procedures and Resettlement.

6.3 Crossing the Borders

Traditional doctrine defines freedom of movement and residence as transferring a person to a state where the admissions' aim is to reside there. Such a notion seems to address migrants mainly because it seems to exclude temporary circulation from one state to another if there is no aim of residing. Hence, tourists who travel intending to return cannot be described as migrants even if they stay for some time. International law may introduce limitations that reduce the exercise of the reason of entry by migrants. The state's fear of preferring indiscriminate reception of foreigners leaves migrants' regulations and residences with a directive and offers the status because of its uncertain outcome. However, one also has to consider international humanitarian law, which is concerned with determining the status of foreigners who have legally entered the host country and for whom a wide range of civil and social rights are recognised. UN Resolution 0/144[7] safeguards the rights of individuals who are not nationals of their countries. It is stated in Article 5, paragraph 3 that "early years lawfully in the territory of a state shall enjoy the right to liberty of movement and freedom to choose the residence

7 Resolution adopted by the general of the UN on 13 December 1985.

within the borders of the state". The resolution, because it is specifically dedicated to migrants, considers freedom of movement and residence as the central point around which all rights revolve. The letter constitutes specific needs that must be satisfied to ensure that all life choices of migrants are safeguarded in a dignified and safe manner.

International humanitarian law also specifically protects migrants from situations that may distinguish them from migrants staying in their countries, i.e. internal migrants. In order to give the most inclusive definition, the article broadly designates migrant workers as those who are to be engaged or are engaged or have been engaged in a remunerated activity in a state of which he or she is not a national; however, here, one can observe that despite the definition of migrants, who are explicitly defined by the need to move and look for the possibilities of life, the prediction is concentrated on inclusive working conditions and the receiving countries. This definition neglected the dynamic aspect of circulation, which determines the whole existential part of the migrant as to whether modern sustainable landing or settlement is achieved. Only migrants not belonging to the state make the migration flow a pattern, which is observed here at its centre stage. This way, the convention concentrates on the social rights essential for litigation, such as the right to work, to adequate remuneration, to take part in meetings and activities of trade unions, to enjoy the same treatment granted to nationals concerning security, to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health based on equality of treatment with the nationals of the state concerned.

From the aforementioned, one can observe that international humanitarian law attempts to bring some form of civility or the Rule of Law to how human migration takes place to preserve the dignity of migrants as humans. Nevertheless, international migration law does not necessarily attempt to regulate migration flow. Many countries may be more than willing to be open to ideas on international humanitarian law. However, once the migration flows into their territory and starts increasing to alarming numbers, which the country's internal resources may be unable to afford, the politicians will find it difficult to cash in the political capital to enforce international humanitarian law. It may become politically expedient to attack migrants, deny asylum and fortify the external border. Migrants are no longer treated as humans. In this way, human migration may end up worse than the Great Migration of the African plains, which is completely regulated by natural causes. Artificial causes can make natural causes worse.

While the law of the jungle purely regulates animal migration, one would expect human migration to be regulated by the Rule of Law. Instead, sometimes, the Rule of Law may become worse than the law of the jungle, and the migrants may face more challenging tasks than those animals trying to cross a crocodile-infested river. A human casualty

is worse than an any other casualty, so international humanitarian law is necessary. On its own, though, it does not protect migrants. While human migration will never stop, it can still be arrested, as normally humans prefer to stay within their culture and the state attached to the land of their forefathers. Migration may be welcomed by some states; the Great Migration may not, as it may result from war and poor economic decisions. From the present and the past, international law can attempt to do more to tackle the problem at its source and prevent a mass exodus rather than control the flow of people.

Migration always has its pros and cons. States may benefit from a smaller population, while other states in a different demographic or economic situation may benefit from a larger population; however, even states in such a position may need to control the flow of people. While accepting people over international boundaries is a sovereign decision of the state concerned, international guidelines and funding may be necessary to soften the movement of people and enable regions to prosper. In the next sections of this chapter, we will briefly examine the consequence of the departure of migrants from their state of origin and then the effects these migrants have on the host countries. Who wins, who loses and how does one look at the problem?

6.4 Consequences of Departure

Labour is one of the four factors of economic production. Labour involves people, and establishing the Common Market in the then EEC and now the Internal Market in the EU involves the free movement of persons as one of the core freedoms. Today, within the EU, the free movement of persons is a right to the extent that the course of the EU as one market movement, say from Italy to France, is no longer considered migration but covered by a different legal regime under the different movement of persons provisions of the Treaty on the Functioning of the European Union. Migration legally refers to third-country nationals' movements into the EU or EU citizens leaving the EU.

Naturally, the consequences of migration considerably impact the country or region of origin. Human capital is essential for economic growth; therefore, inhabitants are an essential factor for economic growth and social development. Consequently, it is automatic to argue that constant emigration causes impoverishment of the country of origin in terms of potential for development. However, as always, one has to consider both sides of the coin. Firstly, one may observe that migratory plans might not be permanent, and one could acknowledge the possibility of returning in time. This occurs on a case-by-case basis and the region of emigration. At least in terms of the principle, one might accept the possibility that some migrants acquire resources during a part of their life that they then transfer to the country of origin on their return. Furthermore,

it is not unusual that migrants, particularly economic migrants who settle in the host country, share a part of their income with people in their country of origin, giving rise to so-called remittances. This could be potentially quite useful for the country of origin. Migrants form a network of potential contacts that can be utilised in the host country that could resume the benefits of economic entities in the host country. This refers to illegal migration, because it may still have these elements but is more complicated. In short, on the one hand, the country of departure would loose human capital, and on the other, it would gain direct income and useful contacts in countries with developed economies. The overall result could even be positive.

While the aforementioned may be the case, this is by no means to be taken for granted. The depletion of human resources for countries of origin always affects the direct advantages connected to migratory fluxes. One could mention various reasons for this. For example, the individuals with the most talents and abilities normally migrate. Hence, the brain drain of human resource depletion is normally more severe because it is the individuals who have a greater strategic value for economic development who leave their country of origin, and this, in turn, can only result in a reduction in the capacity for internal production of value and wealth.

Another effect is connected more generally with the relational aspects this impoverishment produces. Each migrant may represent a missing network node in the society of origin. Finally, another aspect that may be considered is whether migrants bring their own cultures to the host society, creating possible integration problems. Assimilation is never straightforward. In countries of settlement such as Australia or the US, the societies may be more willing to accept migration. However, if migration flows towards areas populated by specific ethnic groups, this may be difficult. Nation states may then be less welcoming of migrants. Migratory processes can give rise to crossbred and different identities, including all oppositional, radicalised identities. Hence, there is a positive and negative side to migration. There are certainly lots of other opportunity costs. The same can be said regarding the effects on host countries.

6.5 Effects on Host Countries

The previous section maintained that the loss of human capital for the countries of origin constitutes impoverishment. It is logical to maintain that the arrival of new human resources must be considered an enrichment for the host countries. Countries at the economic development stage work with migrants as they can reap the benefits from this process. It can be gathered from various case studies that immigrants significantly and systematically contribute to the growth of the gross domestic product of the host country. Immigrants are useful because they are ready to offer themselves to cover regardless of

the static qualifications. A job is always a job, even though it would be secular migrants are considerably more exposed to the phenomenon of over-education, often giving up finding an occupation consistent with their educational qualifications. It may well be that such educational credentials often are not even recognised in those countries, so the legal system is fuelling situations of starters' inconsistency. Consequently, it may be difficult or impossible to act as an occupation in line with the actual education and human capital they possess.

Immigrants could be useful but also dangerous competitors for the locals. Certainly, they are not dangerous for those entrepreneurs who require an available workforce at a lower cost. They are not even dangerous competitors for those in liberal professions because the recognition mechanism counters access to these provisions. They could be potentially dangerous competitors for those who populate the most exposed sectors in the employment market. For example, one can mention self-employed workers and employed men who would have to compete with potential migrants. Immigrants are dangerous competitors in these professional spheres. They contribute to declining wages, making it more difficult to obtain an acceptable income. In times of economic crisis, like those experienced in recent years, this dynamic becomes even more critical, and in due course, a cycle of tension leads to an escalation of social tension. Social tension could be further fuelled by the states of exclusion that characterise the immigrants' situation. They are always suspended between precarious substantive citizenship rights and barely recognised legal rights. Social tension may cause natives to feel generalised fear, stigmatisation, labelling and xenophobia and, ultimately, affect all terrain for fundamentalism and populism.

The eruption of the jittery dynamics may constitute a logical supposition for a genuine political revolution that has evolved in most Western countries today. One can witness the continual erosion of the traditional progressive electoral days and the support of the least privileged classes shifting to populist and conservative political groups. The mainstay of a significant portion of these groups' point policies is the generalised social fear linked to migration. Fuelling detention, even with a loudness mechanism based on fake news, has become an effective model of political communication for simulating widespread agreement. One can refer, for example, to former US President Donald Trump's rhetoric on the US-Mexico border wall and his statement that he will make Mexico pay for such a wall.

Lined up on the opposite side of this political role, one may put big entrepreneurs requesting greater rationality in the regulation of migration fluxes in order to secure a workforce that is worse than new talent pools. In fact, in the 2016, 2020, and 2024 US presidential elections, the high-tech businesses that are among the most bitter opponents of the anti-immigration movement created by the GOP nominee, had a

bigger pool to choose from. These businesses traditionally absorb the best international talent in the most advanced technological sectors, causing a significant brain drain in developing countries.

6.6 Conclusion – Who Wins and Who Loses?

The aforementioned discussion has demonstrated that while there are advantages and disadvantages to migration, migration happens nonetheless. With proper regulation and legislation, migration flows can be more beneficial to both sides. Governments and legislators should dedicate some of their attention to policies that guarantee internal security. At the same time, they need to start working on an entire and international level to construct a framework of systematic governance of the migration phenomenon, planning policies that will help intervene in the migration issue, in possible chaotic or chronic conditions and encourage the pollution of the conditions of people's national movement worldwide. Like the Great Migration of the Serengeti in Africa, those of humans will continue. People move from Western or Eastern Africa to the Sahara to reach the Mediterranean shores and Europe. People move from Latin America across the Darian Gap and Central America to reach the US and Canada. While this migration flow will surely continue, what is needed is better political will and better legislation. One cannot stop it, but one can control it.

Choosing this process of activating systematic migration governance policies complemented by proper legislation may appear to be the first choice regarding equity. This is not the only motive that should move institutions of national and international management tools decisively to turn this road. The walls and barbed wire fence policy requires constant surveillance; in the long term. Some ethical principles are important not so much because they are fair but because there are inevitable consequences if they are ignored. Even children's characters teach them that with great power comes great responsibility. One should hope that those with great political and economic power will remember this. Whether the great human migration resembles the Great Migration from the Serengeti to the Mediterranean ultimately depends on the political will to legislate and control the flow in the general interests of humanity. It would be a win-win situation if rich countries invested and ensured that developing economies had decent living standards. Whenever this is not possible for various reasons, there is adequate legislation in place both nationally and internationally to ensure that migrants are not exploited. Human dignity must be preserved, and hence, migration will always remain a hot topic for policymakers and legislators.

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7 The New EU-UK Land Border: Legal Issues over Asylum and Migration in the Light of the Nationality and Borders Bill 2022

Ayesha Riaz

Following the end of the Brexit transition period on 31 December 2020, the EU's Common European Asylum System, the Dublin III Regulation and the EURODAC database ceased to apply to the UK. There is uncertainty about the UK's handling of asylum seekers arriving in the country. This chapter assesses the implications of the new land border between the UK and the EU on immigration and asylum matters in the light of the Nationality and Borders Bill 2022.

The 1951 UN Refugee Convention and its 1967 Protocol Relating to the Status of Refugees, which the UK has endorsed, consolidate the international obligations relating to the protection of refugees (UNHCR, 1951). In particular, the Convention embodies the principal framework relating to international refugee protection (UNHCR, 2016). It defines a 'refugee' and establishes the duty of non-refoulment, which prohibits states from returning individuals to countries where they may be at risk of persecution, torture or other forms of serious or irreparable harm (UNHCR, 2016). The EU has developed the Common European Asylum System (CEAS) within the aforementioned framework (EU Committee House of Lords, 2017). The CEAS establishes mutual standards concerning the reception and treatment of asylum seekers (EU Committee House of Lords, 2017). Before the end of the Brexit transition period on 30 December 2020, the UK enjoyed a selective relationship with the CEAS (EU Committee House of Lords, 2017).

This chapter was written in February-March 2022. It assesses how the UK's departure from the CEAS has impacted the UK's asylum/migration policy in the light of Brexit (Home Office, 2020). This chapter will also examine the UK's relationship with the EU on asylum/migration-related matters before the end of the Brexit transition period. It will then consider the implications of Brexit on the UK's asylum/migration policy. No agreements have been reached regarding future partnerships between the UK and the EU. Instead, the UK drafted the Nationality and Borders Bill 2021, which outlines

a dangerous future relationship with the EU on asylum/migration issues, which this chapter examines in detail.

7.1 The UK's Partnership on Asylum/Immigration Matters with the EU before Brexit

Matters relating to asylum and immigration were first brought into the EU's sphere of competence by the 1992 Maastricht Treaty, which established a structure for intergovernmental cooperation in some areas relating to the asylum and migration of non-EU nationals (HM Government, 2017). Further, the 1997 Treaty of Amsterdam established a new Title IV on "visas, asylum, immigration and other policies related to the free movement of persons" (HM Government, 2017, 18). Asylum seekers are supposed to receive equal treatment within the EU according to the mutual common standards listed as part of the CEAS (European Commission, Common European Asylum System).

Between 1999 and 2016, the EU adopted six legislative measures (in phases of the CEAS) concerning asylum-related matters (European Commission, Common European Asylum System). The first phase of EU asylum law was adopted between 2003 and 2005, while the second phase was adopted between 2010 and 2013 (European Commission, Common European Asylum System). Gaps were identified in the EU's asylum policy in 2015 following an unprecedented number of arrivals of asylum seekers/irregular migrants within the EU (European Commission, Common European Asylum System). Thus, the European Commission released a third phase between May and July 2016 to achieve a fully efficient and fair asylum policy that could function effectively under high migratory pressures (European Commission, Common European Asylum System).

As mentioned, when the UK was a part of the EU, it retained some autonomy over its asylum policy (EU, FAQ EU Competences and Commission Powers). Thus, before the end of the Brexit transition period, the UK enjoyed a selective membership of the CEAS. However, it signed up firstly to the Dublin III system, which establishes which Member State is responsible for examining asylum applications lodged within the EU's territory, and secondly, to the EURODAC database, which is used for storing the fingerprints of asylum seekers (EU Committee House of Lords, 2017). The UK decided not to partake in the EU standards on reception conditions, asylum procedures and qualification for international protection (EU Committee House of Lords, 2017).

The initial treaty that allocated responsibility for asylum seekers between EU Member States was the Dublin Convention, which was signed in 1990 and replaced by the Dublin

II Regulation in 2003 and Dublin III in 2013.[1] As discussed, under these rules Member States are allocated responsibility for processing asylum claims (European Parliament, 2019). The criteria for establishing responsibility is in order of importance as set out in the Regulations, in which family considerations is the most important factor for the authorities is; then, they consider whether the asylum seeker had a visa or residence permit in a Member State, followed by whether the asylum seeker had entered the EU legally or illegally.[2] Prior to the end of the Brexit transition period, the UK authorities could ascertain whether an asylum seeker/irregular migrant had been fingerprinted in an EU Member State as it had access to the EURODAC database; however, as it has lost access to the database, this is no longer the case.[3]

Apart from the CEAS, before the end of the Brexit transition period the UK participated selectively in other aspects of EU asylum cooperation, such as the European Asylum Support Office (which facilitates and strengthens practical cooperation between Member States on asylum-related policies) (European Parliament, 2018). The UK could also collaborate with Frontex (an agency that coordinates cooperation between Member States vis-à-vis issues about the management of borders) operationally on a case-by-case basis (European Parliament, 2018). It was also part of Eunavfor Med (Operation Sophia, a military crisis management operation that disrupted human smuggling and trafficking networks in the Southern Central Mediterranean). (European Parliament, 2018) and contributed to the Asylum Migration and Integration Fund (to promote the efficient management of migration flows and to implement, strengthen and develop a common EU approach to asylum and immigration). Furthermore, the UK was a part of the EU Readmission Agreements (agreements between the EU and 17 third countries

1 Eur-Lex, 'Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention', 19 August 1997, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41997A0819(01) (accessed 12 February 2022); Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 25 February 2003, [2003] OJ L50; 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 [2013] OJ L 180/31.

2 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 [2013] OJ L 180/31.

3 Regulation (EU) No 603/2013 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 operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L180/1.

that deal with issues about the readmission of those countries' nationals in instances where they lack a lawful basis to be present in the EU) (European Parliament, 2018) and participated in the Immigration Liaison Officers Network (which allows Member States to send Immigration Liaison Officers to non-EU countries to establish and maintain contacts with the relevant authorities of that country to combat illegal migration). (European Parliament, 2018).

7.1.1 The Implications of Brexit on Immigration/Asylum Matters

Having discussed the UK's partnership with the EU on migration/asylum-related matters, examining how this relationship has changed because of Brexit would be appropriate. No agreement has been reached on how the UK and the EU will coordinate their asylum policy. However, a House of Lords Committee has given reassurance that the continued application of international law through the Refugee Convention of 1951 and the European Convention on Human Rights should ensure no diminution in the treatment of asylum seekers in the UK (EU Committee House of Lords, 2017).

At the end of the Brexit transition period on 31 December 2020, the Dublin III Regulation, EURODAC, all elements of the CEAS and the other European measures discussed earlier ceased to apply to the UK. During the negotiations, the UK government clarified that it did not wish to remain a part of Dublin III as a third party (Overton, 2021). Initially, the UK wanted to maintain access to EURODAC, but this interest did not crystallise further (EU Committee House of Lords, 2017).

However, the UK and the EU recognise the importance of good management of migratory flows (Eur-Lex, 2020). There is mutual interest in maintaining the UK-EU asylum cooperation following Brexit so that the effective management of European regional migration flows is not disrupted. Properly managed migration will also ensure that asylum seekers and refugees – some of the most vulnerable groups in society – can continue to exercise their right to claim asylum, receive adequate protection and integrate into society (Eur-Lex, 2020).

Rossella Pagliuchi-Lor, who is a senior representative from the UNHCR, stated that

> whether you are inside or outside the European Union, the reality is that [the UK] will remain part of the broader geographical area and, therefore, will be very much impacted by the regional flows that we see across the continent, I think you will need to continue to be part of some kind of co-operation agreement. (House of Lords, 2019b, Q3)

A collaborative relationship between the EU and the UK would reduce the need to spend vast sums of money on expensive border security mechanisms (House of Lords, 2019b). Ms. Pagliuchi-Lor had anticipated that the Dublin system would form the backbone of the future relationship between the EU and the UK (House of Lords, 2019b).

Examining the prospective EU-UK partnership in terms of migration and asylum-related policy would be appropriate. The July 2018 White Paper (a government's report giving information/proposals on an issue) clarified that the UK and the EU should work collaboratively to strategically address the global challenges of asylum and illegal migration (Yeo and HM Government, 2018). The framework included the need for both entities to cooperate through Frontex and Europol to have arrangements to return asylum seekers who had a connection with or had travelled through safe countries/EU Member States either through EURODAC or an equivalent system (Yeo and HM Government, 2018). The White Paper also listed new arrangements to allow unaccompanied asylum-seeking children in the EU to join close family members; it further stipulated the need to enjoy a continued strategic partnership to deal with illegal migration on an international level and to have in place an option to collaborate on future funding arrangements (Yeo and HM Government, 2018). Only a few of these objectives were published in subsequent publications. For example, the Political Declaration on the future EU-UK relationship was silent on prospective EU-UK cooperation methods vis-à-vis asylum-related areas, and it contained minimal information on illegal migration (HM Government, 2018).

Due to the UK's geographic location (which makes it very hard to reach it), very often asylum seekers get apprehended and fingerprinted in another Member State (House of Lords, 2019c). The Immigration Law Practitioners' Association (ILPA) has also voiced concerns about the consequences of losing access to the EURODAC database, as it would be difficult to identify whether someone had already made an asylum application in another Member State before reaching the UK (UK Parliament, 2019a). Even if the UK discovered that an asylum application had been lodged in another Member State, the ILPA was not clear on how the UK would be able to negotiate the removal of the asylum seeker to that Member State in the absence of the Dublin System (UK Parliament, 2019a). Eleanor Harrison, Chief Executive of Safe Passage (a charity), was concerned that refugee children, in particular, would be at a greater risk of being left in 'extremely vulnerable situations' without the procedural safeguards that were offered by the Dublin System (UK Parliament, 2019a).

Arguably, leaving the Dublin System would considerably impact refugee family reunion applications. The British Red Cross stated that around 2019, the UK went from being a net 'sender' to a net 'receiver' of asylum seekers under the Dublin System (EU Committee House of Lords, 2017). A family reunion was the "key driver" behind

this change, accounting for over 80% of incoming transfers (UK Parliament, 2019). According to the Refugee Council, the Dublin System was working more to prioritise the well-being and needs of people seeking asylum over policy demands to increase removals (UK Parliament, 2019).

Following Brexit, the UK Government proposed two draft agreements on certain elements of the Regulations dealing with the transfer of unaccompanied asylum-seeking children and irregular migrant returns (UK and EU, undated). However, the EU rejected these proposals as they did not fall within the remit of their mandate for negotiations (UK and EU, undated). Given that the Dublin routes are no longer available, unaccompanied children in the UK will be expected to integrate and succeed with no familial support, which will cause significant emotional trauma and challenges for their successful transition to adulthood (AIP0012, 2019). The most significant impact of leaving the CEAS concerns the lack of safe, legal routes for the reunification of separated refugee families in Europe, leading to a reduction in the reunion rights of vulnerable, unaccompanied children, who benefitted from being able to reunite with a broader range of family members under the Dublin System than under the UK's own immigration rules (EU Committee House of Lords, 2017).

There were also discussions on whether the UK could adopt measures similar to the ones adopted by Norway. Norway abolished border checks to facilitate cross-border travel between Sweden, Finland, Denmark and Iceland (Brekke and Staver, 2018). Sweden, Finland and Denmark joined the EU, whereas Iceland and Norway became associated members of the Schengen Area.[4] Thus, Norway was required to uphold the EU's external borders and selectively participate in some legislative measures (Brekke and Staver, 2018). Regarding the CEAS, Norway is not bound by the Dublin Convention and EURODAC regulatory measures but remains broadly compliant with EU asylum rules (Brekke and Staver, 2018). It seems unlikely that the UK will follow Norway's approach, as the UK is not a part of the Schengen Area/Agreement (EU Committee House of Lords, 2017).

It was envisaged that the future UK-EU asylum cooperation agreement would establish the EU's 'responsibility (or burden) sharing' mechanism in assisting Member States that received many asylum seekers, such as Germany, Sweden, Italy and Greece (EU Committee House of Lords, 2017). However, the UK remained in a weaker bargaining position than the EU in negotiating a returns agreement because, historically, the UK

4 The border free Schengen Area allows free movement to more than 400 million EU citizens. Free movement of persons enables every EU citizen to travel and live in the EU without special formalities. This agreement underpins this freedom by enabling citizens to move around the Schengen Area without being subject to border checks.

had requested Member States to take back asylum seekers more than the other way round (EU Committee House of Lords, 2017). The UK received a lower number of asylum seekers than its European counterparts (EU Committee House of Lords, 2017).

7.2 The New Plan for Immigration/Nationality and Borders Bill 2022

On 6 July 2021, the Nationality and Borders Bill was introduced in Parliament. It was based on the UK government's "New Plan for Immigration" published on 24 March 2021 (HM Government, 2021). In February-March 2022, the Nationality and Borders Bill was in its final stages before it received royal assent and was implemented (House of Lords, 2022). The objective of the New Plan was threefold: firstly, to ensure that the UK immigration system operated fairly so that there were adequate safeguards to protect and support those in genuine need of asylum; secondly, to deter illegal entry into the UK to discourage criminal trafficking networks from protecting the lives of those they endangered and thirdly, to remove irregular/illegal migrants from the UK (House of Lords, 2022).

The UK seems to be deviating from European standards following its departure from the EU and the CEAS. For example, Clause 27(4) of the Nationality and Borders Bill revokes the Refugee or Person in Need of International Protection (Qualifications) Regulations 2006, under which the UK attempted to comply with the commitments specified in the 2004 EU Qualification Directive.[5]

There has been intense criticism of the Bill from academics and relevant organisations such as the UNHCR, who have described it as "cruel" and "unfair" (UNHCR, 2021). Not only is this Bill inherently discriminatory, but it is also incompatible with international instruments and domestic case law. This Bill contravenes the UN Global Compact for Safe, Orderly and Regular Migration; the Global Compact for Refugees; the 1951 Convention relating to the Status of Refugees and the ECHR – all of which have been endorsed by the UK (Global Compact for Migration, 2018). It will now be appropriate to consider some of the provisions of the Nationality and Borders Bill 2021 that may impinge upon the future relationship between the UK and the EU concerning immigration/asylum matters.

5 The Refugee or Person in Need of International Protection (Qualifications) Regulations 2006, UK SI 2006 No 2525, https://www.legislation.gov.uk/uksi/2006/2525/contents/made; 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 [2004] OJ L 304/12.

Firstly, the Bill introduces a two-tier asylum system. According to Clause 11 of the Bill, asylum seekers will be treated differently based on whether they arrived in the UK legally or illegally (Nationality and Borders Bill HC Bill, 2021-2022). The New Plan punishes those who arrive in the UK irregularly/illegally as it stipulates that

> anyone who arrives into the UK illegally – where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system, consistent with the Refugee Convention. (HM Government, 2021, 19)

Asylum seekers who arrive legally may be granted Indefinite Leave to Remain upon arrival (HM Government, 2021). Differentiating asylum seekers based on their mode of arrival in the UK contravenes the Refugee Convention's prohibition of discrimination under Article 14, as well as Article 3 of the ECHR (prohibition against torture) (UNHCR, undated). Further, Clause 11 of the Bill undermines the UK's asylum protection principle. It further contradicts the basic tenets of the 1951 Refugee Convention listed in Article 31 – that someone's mode of arrival should not influence whether they have a right to make an asylum claim or are later recognised as a refugee (UNHCR, undated). Article 23 of the Refugee Convention also confirms that refugees should benefit from "the same treatment with respect to public relief and assistance as is accorded to their nationals" (UNHCR, undated).

Moreover, the Bill states that asylum claims made by EU nationals (Clause 14) or those connected to a "safe third country" (Clause 15) would be deemed inadmissible (Nationality and Borders Bill HC Bill, 2021-2022). This is not a new development (HM Government, 2021). Under the current UK Immigration Rules, an inadmissibility decision can be taken based on a person's earlier presence or passage through a "safe third country" (Home Office, 2020a). The UK government's intention, set out in their "New Plan for Immigration", is to secure return agreements to "return inadmissible asylum seekers to the safe country of most recent embarkation" or to "alternative safe third countries" (HM Government, 2021, 19).

However, does a refugee need to avail himself or herself of the protection of the first country he or she reaches? According to the Refugee Convention of 1951, asylum seekers are not obligated to seek protection in the first country they enter. Simon Brown LJ has held that some element of choice was open to refugees regarding where they may claim asylum.[6] Further, the UK government's plans for returning inadmissible asylum seekers will depend on securing return agreements with safe third countries. According to the

6 *R v. Uxbridge Magistrates Court* (ex parte Adimi [1999] EWHC Admin 765.

available data, a quarter of asylum seekers who had arrived in the UK from January to March 2021 were informed that their asylum claims would not be considered on "inadmissibility" grounds (Home Office, 2021a). Amnesty International UK has voiced concerns that this was reckless and impractical and added to the mountain of existing backlogs (Amnesty International, 2021). It appears unlikely that the UK will secure bilateral returns agreements with EU Member States. France, Germany, Belgium, Sweden and the Netherlands have stated they will not agree to bilateral returns deals with the UK (Bulman, 2021b). When writing (in April 2022), the UK had no bilateral removal agreements with other "safe third countries" (Refugee Council, undated).

On 20 July 2021, the UK and France released a joint statement detailing the next phase in their cooperation methods to manage small boat crossings on the English Channel. They agreed to contribute €62.7 million (£54.1 million) towards France's border enforcement and technological capabilities (Home Office, 2021c). The statement included the caveat that the UK and France should support the idea of a UK-EU readmission agreement, which carried a mutual advantage (Home Office, 2021c).

Nevertheless, as noted by Professor Steve Peers, a UK-EU readmission agreement would not be solely up to France, and the joint statement does not mention a bilateral UK-France readmission treaty (@Steve Peers, 2021). Several former civil servants have stated that an increased number of asylum seekers will be entering the UK, leading to an increase in delays within the British asylum system (which is already inundated with delayed asylum claims) (Bulman, 2021a).

Clauses 39 and 40 of the Bill introduce two reforms to the Immigration Act's provisions relating to those who assist asylum seekers in entering the UK (Nationality and Borders Bill, 2021-2022). Those assisting asylum seekers across the English Channel could face life imprisonment, which marks an increase from the current maximum sentence of 14 years (Clause 40(1)) (Nationality and Borders Bill, 2021-2022). The Bill penalises those who help asylum seekers, which means that charities like the Royal National Lifeboat Institution could be charged for assisting asylum seekers in the English Channel (Wright, 2021). The UK Border Force's powers would increase under Clause 42 of the Bill to "stop, board, divert and detain" vessels on UK territorial waters (Nationality and Borders Bill, 2021-2022). Under these provisions, Border Force agents would be permitted to redirect vessels from the English Channel towards France (Nationality and Borders Bill, 2021-2022). However, the French authorities would need to grant permission for that (Nationality and Borders Bill, 2021-2022).

Those arriving in the UK "without a valid entry clearance" (Clause 39) will face criminal sanctions (Nationality and Borders Bill, 2021-2022,). It is already a criminal offence to enter the UK illegally. However, asylum seekers are not considered entering

the UK until they disembark and pass through immigration control under the current rules (Nationality and Borders Bill, 2021-2022). This offence has been broadened from entry to include arrival, which means that asylum seekers could also be prosecuted for arriving on the UK's territorial waters before they may have technically entered the country (Nationality and Borders Bill, 2021-2022).

A family reunion is now possible only if a relative of the asylum seeker is living in the UK with refugee or subsidiary protection status, and unaccompanied minors can only reunite with their parents[7] (European Commission, undated). Previously, in addition to family reunion transfers undertaken under the Dublin System, the UK had its own refugee family reunion rules (Home Office, 2020c). Under such rules, partners and children of individuals who held "refugee status", "humanitarian protection" or settlement on protection grounds could apply to join them in the UK (Home Office, 2020c). Children were required to be under 18, unmarried and not in a civil partnership (Home Office, 2020c).

Further, child refugees in the UK were not allowed to sponsor their parents or other family members to join them in the UK (Home Office, 2020c). Under the 'Dubs' Scheme, the UK had committed itself to transferring 480 unaccompanied asylum-seeking children from Europe.[8] However, according to the available data, 220 children were transferred to the UK, which increased to 478 children by May 2020 (UK Visas and Immigration, undated). Accordingly, this scheme was introduced to relocate a specific number of unaccompanied children as it would be in their best interests to travel to the UK rather than to remain in their host country, be transferred to another EU Member State or be reunited with their family outside Europe (UK Visas and Immigration, undated). They received refugee status if their asylum application was successful (UK Visas and Immigration, undated).

During the passage of the EU (Withdrawal) Act 2018, an amendment was tabled to maintain arrangements that enabled unaccompanied child refugees to join relatives in another Member State.[9] The British Red Cross and Safe Passage welcomed this amendment. However, they argued that its scope should be expanded to maintain all family reunion routes under the Dublin III Regulations (HM Government, 2021). It was suggested that any attempts to level down the requirements of family unity under the

7 Subsidiary protection is the protection afforded to third country nationals/stateless persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person to their country of former habitual residence, would face a real risk of suffering serious harm as defined by law.

8 Immigration Act 2016, s.67.

9 EU (Withdrawal) Act 2018, s.17.

UK's immigration law should be strongly resisted (UK Parliament, 2019). Academics have argued that the UK should replicate the Dublin System within its family reunion provisions (House of Lords, 2019a). In 2019, the Liverpool Law Clinic noted that the UK's approach towards protecting unaccompanied minor asylum seekers following Brexit was half-hearted, as it failed to establish a 'guardianship scheme' and incorporate comprehensive protections within domestic legislation (House of Lords, 2019a).

Thus, to summarise, this Bill would have a devastating impact on the UK's asylum system. According to the UK government, this Bill would deter migrants from seeking asylum in the UK through irregular means due to its impacts on irregular Channel crossings in small boats (Home Office, 2021b). According to the British Foreign Affairs Select Committee, closing borders without offering any feasible alternative ways of travelling to the UK would result in asylum seekers/migrants taking even more perilous journeys to reach the UK (UK Parliament, 2019f). This will push people to take even more dangerous journeys in the hands of smuggling gangs. If the UK government was serious about protecting the lives of vulnerable individuals, it would have created safer routes. Instead, it is ignoring all evidence and repeating a tried-and-failed approach of clamping down on desperate/vulnerable migrants, a continuum of the hostile immigration environment that was formally instigated in 2012 (although the hostile practices to deter migrants from entering the UK have been in place before then). The UK government's own Equality Impact Assessment confirmed that the Bill would result in widespread discrimination on the grounds of race and nationality by disadvantaging asylum seekers from Syria, Afghanistan, Iran and Sudan (Home Office, 2021d). Likewise, the UNHCR has published a detailed analysis of how this Bill violates the 1951 Refugee Convention (UNHCR, 2021).

7.3 Conclusion

Without access to the EURODAC database, one can question how the UK will identify asylum applicants who have claimed asylum in an EU Member State. The UK urgently needs a new returns agreement to send asylum seekers back to their first point of entry within the EU. The UK's departure from the Dublin System has had a significant impact on separated refugee families. There has also been a loss of safe and legal routes for the reunification of separated refugee families in Europe. Vulnerable, unaccompanied minors have had their family reunion rights severely curtailed. There are major shortcomings in the Nationality and Borders Bill, given that it deviates from international standards/laws that the UK has endorsed. This Bill should be withdrawn, and independent international law experts should assess its compatibility with the UK's international obligations.

The UK government should continue participating in some European responsibility-sharing mechanisms for asylum seekers as it would demonstrate solidarity, goodwill and commitment towards managing migration flows across the continent. The UK government has a perfect opportunity to review its immigration policy, which should provide an opportunity to develop a more humane and effective asylum policy, which does not seem to be the case at the time of writing. Lastly, the UK has a history of offering sanctuary to those in need, and it should stick by its historical commitment.

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8 The Prospect of Temporary Protection Reform in the Light of the Ukrainian Refugee Crisis

Oleksandr Pastukhov

This chapter analyses the Temporary Protection Directive's application and its reform prospects. The process of the Directive's implementation is marked by significant legal innovations, most notably the principle of "free choice" for the temporary protection beneficiaries. The rules of the Regulation intended to replace the Directive are also analysed, and the provisions of the two instruments are compared. The chapter concludes that the reform initiated before the war needs to consider the experiences generated by the Ukrainian refugee crisis and the resulting pragmatic legal solutions should be included in an amended proposal for the Regulation.

8.1 The Temporary Protection Concept

The Temporary Protection Directive[1] was adopted following the Kosovo refugee crisis of 1998-1999 and entered into force in 2001. The Directive established an emergency mechanism to provide immediate and temporary admission into the EU to displaced persons from third countries who cannot return to their country of origin in mass influx situations.

The Directive (Art. 2(a)) defines temporary protection as follows:

> 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

1 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 [2001] OJ L212/12.

Whereas mass influx is defined as an "arrival in the Community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation programme" (Art. 2(d)).

To trigger the application of the Directive, the Council, upon the proposal of the Commission, must adopt by a qualified majority (Art. 5(1)) a Decision based on
(a) an examination of the situation and the scale of the movements of displaced persons;
(b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures; and
(c) information received from the Member States, the Commission, UNHCR and other relevant international organisations (Art. 5(4)).

The Decision, binding on all the Member States, must include at least
(a) a description of the specific groups of persons to whom the temporary protection applies;
(b) the date on which the temporary protection will take effect;
(c) information received from Member States on their reception capacity; and
(d) information from the Commission, UNHCR and other relevant international organisations (Art. 5(3)).

Unless terminated earlier by a Council Decision, the duration of temporary protection is one year, and it may be extended automatically by six months, two times maximum (Arts. 4(1), 6(1)(b)). If the reasons for temporary protection persist, the Council, by a qualified majority and on a proposal from the Commission, may extend it by one more year (Art. 4(2)).

8.2 Enters Russia

Amazingly, the Directive has been activated for the first time for the persons fleeing the Russian invasion of Ukraine. It had not been activated even during the Syrian war. However, the number of Syrian refugees in Europe exceeded the number of Ukrainian refugees at the time of activation of the Directive and is about the same at the time of writing.[2] On 3 March 2022, the Interior Ministers of the EU Member States took

2 See UN High Commissioner for Refugees, Operational Data Portal, 'Situations', https://data2.unhcr.org/en/situations (accessed 17 November 2023).

the "historic decision" to activate the Directive. The resulting Council Implementing Decision became valid upon the official publication the following day.[3]

Extraordinary times call for extraordinary measures. One more revolutionary decision the Ministers took was not to apply Article 11 of the Directive. Moreover, this was done not "based on a bilateral agreement", as envisaged in the Article, but by agreeing on a statement in Recital 15 of the Implementing Decision. Article 11 provides for the so-called take-back mechanism (similar to that of the Dublin III Regulation[4]), according to which every Member State must "take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision".

Legal innovation does not stop there. The Commission has also produced guidelines on derogations from the fulfilment of entry conditions for third country nationals under Article 6(5)(c) of the Schengen Border Code, where it invited the Member States "to ensure that the onward travel – and the future return – of these third country nationals remains possible".[5] The document even envisaged the possibility for the Member States to exempt carriers from paying fines for "carrying passengers who are not adequately documented due to the ongoing conflict in Ukraine", expressly acknowledging the plans of at least "some" displaced persons from Ukraine "to travel further to other EU destinations, to reunite with family or friends in most cases".[6]

This "unexpected renaissance of 'free choice'" was not charity, of course: "The sheer need for pragmatic solutions in the face of more than a million entries made possible what would have been a political taboo only two weeks ago".[7] Under the Directive, the territorial allocation of the beneficiaries of temporary protection depends on two factors: firstly, the capacity of a Member State to receive a certain number of persons indicated at the time a mass influx is found and subsequently updated during the

3 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

4 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast) [2013] OJ L180/31, Arts. 18(1b-d) and 20(5).

5 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders 2022/C 104 I/01, OJ C104I/1, 4.

6 Ibid.

7 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of "Free Choice"' (*EU Immigration and Asylum Law and Policy*, 7 March 2022), https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/ (accessed 17 November 2023).

temporary protection period (Art. 25(1)), and secondly, the consent of individuals who are not yet in a Member State to be received into its territory (Art. 25(2)), or in the case of those who already enjoy temporary protection in a Member State, their consent to be transferred from that Member State to another (Art. 26). In the absence of quantitative indicators to establish the reception capacity of the Member States and effective mechanisms to obtain, record and communicate consent of the beneficiaries, the pragmatic solutions included doing away with the "take-back" mechanism and relying on the displaced persons' free choice, often based on "meaningful links". Among the latter, Professor Di Filippo mentions

- presence of family members or relatives in a Member State;
- knowledge of the official language of a Member State;
- evidence of past experiences of work, training, study or other activities deployed in the country;
- verified local sponsor (individuals, companies or other entities);
- existing legal tools facilitating the recognition of professional qualifications; and
- other social ties include the regular presence of friends from the same country of origin or diaspora and associations of exiles or nationals of the same country.[8]

Besides Eastern Europe's geographic proximity, cultural and linguistic similarities and historical connections, the aforementioned links have already drawn many Ukrainian displaced persons to Italy, Germany, Spain and Portugal, that is, the countries where multitudinous Ukrainian diasporas exist. The Commission has demonstrated its awareness of the importance of and support for diaspora involvement and individual and community sponsorship in its proposal for a New Pact on Migration and Asylum.[9]

8.3 The Proposed Reform

The reasons for no prior activations of the Directive cited by commentators include the absence of clear and objective indicators of a mass influx in the text, a complex and lengthy activation mechanism and the difficulty of securing a qualified majority vote in the Council in case of a mass influx that seriously affects only some of the Member

8 See Marcello Di Filippo, 'From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures' (Policy Brief – January 2016) 11-12, http://immigrazione.jus.unipi.it/wp-content/uploads/2016/02/IIHL-A-plea-for-the-reform-of-the-Dublin-system-policy-brief-def.pdf (accessed 17 November 2023); Marcello Di Filippo, 'Dublin 'Reloaded' or Time for Ambitious Pragmatism?' (*EU Immigration and Asylum Law and Policy*, 12 October 2016, November 2016) 2-3, https://doi.org/10.13140/RG.2.2.30146.17608.

9 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, Para. 6.6.

States.[10] For those reasons, the Commission's Staff Working Document has concluded that "the Temporary Protection Directive no longer responds to Member States' current reality and needs to be repealed".[11] On 23 September 2020, as a part of the New Pact on Migration and Asylum, the European Commission put forward its Proposal for a Regulation[12] that would replace the Temporary Protection Directive. Compared with temporary protection, the activation mechanism of immediate protection has been significantly simplified, its scope narrowed down and its duration shortened.

What follows is a discussion of the key provisions of the proposed Regulation as compared with the corresponding rules of the Directive.

8.3.1 The Activation Mechanism

The proposed Regulation seeks to introduce a new concept of "immediate protection", essentially a legal status comparable to that of a refugee that would apply to groups of displaced persons in migration crises.

Just like the Directive, the proposed Regulation provides for an implementing act, but this time, it is the Commission that adopts it (Art. 10(4)):

> The Commission shall, by means of an implementing decision:
> (a) establish that there is a situation of the crisis on the basis of the elements referred to in Article 3;
> (b) establish that there is a need to suspend the examination of applications for international protection;
> (c) define the specific country of origin, or a part of a specific country of origin, in respect of the persons referred to in paragraph 1; [and]
> (d) establish the date from which this Article shall be applied and set out the time period during which applications for international protection of displaced persons as referred to in point (a) may be suspended, and immediate protection status shall be granted.

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10 See, e.g., Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' in Celine Bauloz, Meltem Ineli-Ciger, Sarah Singer, Vladislava Stoyanova (eds.), *Seeking Asylum in the European Union* (Brill 2015); Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, 'Study on the Temporary Protection Directive: Executive European Commission, Publications Office, January 2016), available at https://data.europa.eu/doi/10.2837/479329 (accessed 17 November 2023).

11 Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 10.

12 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, 2020/0277 (COD).

Unlike the temporary protection's activation mechanism, the Council is nowhere in the picture. The Commission is to adopt the implementing decision leading to the granting of the immediate protection status assisted only by a committee composed of representatives of the Member States (Art. 11(1) referring to Art. 5 of Regulation 182/2011[13]) by means of a process known as comitology.[14] However, where duly justified imperative grounds of urgency exist, the Commission can adopt an implementing act without submitting it to the committee (Art. 11(2) referring to Art. 8 of Regulation 182/2011).

Another difference between immediate and temporary protection subsists in their respective triggers: a "situation of crisis" and a "mass influx". While under the proposed Regulation, the former includes the latter, the trigger that would set the whole temporary protection procedure in motion is a situation of crisis. It is defined in the proposed Regulation (Art. 2) as

> an exceptional situation [or an imminent threat of such a situation] of a mass influx of third country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in [the simultaneously proposed Regulation on Asylum and Migration Management].

From this definition one can deduce four conditions that must be met for a situation to be formally recognised as a crisis:

1. An imminent or actual mass influx of displaced persons must exist (notably, the vague definition of "mass influx" has not migrated from the Temporary Protection Directive to the proposed Regulation).
2. The displaced persons must be third country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following a search and rescue operation.
3. The number of such persons thus arriving must be disproportionate to the population and GDP of the Member State concerned.

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13 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L55/13.

14 See European Commission, 'Comitology', https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en (accessed 17 November 2023).

4. The nature and scale of the arrivals must make the Member State's asylum, reception or return system non-functional and be capable of adversely affecting the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Asylum and Migration Management Regulation[15] that forms part of the New Pact on Asylum and Migration.

It is obvious that the definition of a situation of crisis, with its references to the persons "arriving irregularly" and disembarkations "following search and rescue operations", was formulated with the illegal migration from Syria and Northern and Trans-Saharan Africa kept in mind. It is only natural that the refugees from those regions are arriving irregularly: it is impossible to obtain an entry visa there because the embassies of the EU Member States either do not exist there or the applicants are being denied visas for the lack of certainty that they will return to their country. At the same time, since Ukrainian citizens enjoy a visa-free regime when travelling to the Schengen countries or the Republic of Ireland, they are arriving irregularly only if they do not have a valid biometric passport or if they have reached the limit of the number of days that they can stay in the Schengen Area or Ireland without a visa.

While the implementation of the Temporary Protection Directive is tied to the existence of a mass influx and the inability of the asylum system to process this influx without adverse effects on its efficient operation, the implementation of the immediate protection procedure is linked to the existence of a crisis situation and a Member State's asylum, reception or return system becoming non-functional. It must be admitted that compared with the Directive's vague definition of a mass influx, the proposed definition of a situation of crisis including a set of quantitative indicators, such as the number of arrivals being disproportionate to the population and GDP of the affected Member State, can, to a certain extent, make it easier to determine the existence of a crisis. The qualitative indicators, however, remain blurred: it is not clear when exactly a Member State's asylum, reception or return system becomes non-functional and when exactly the "consequences for the functioning the Common European Asylum System or the Common Framework as set out in [the Asylum and Migration Management Regulation]" become "serious". While adding the reception system to the definition seems logical, the inclusion of the return system on the list of the systems that are becoming non-functional and, hence, a factor in establishing the situation of a crisis seems dubious and contradicts the very spirit of the proposed Regulation.

15 Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final.

The duration of immediate protection is one year, after which time Member States must "resume the examination of the applications for international protection that have been suspended" (Art. 10(3)). No extensions to this one year are envisaged. Given the experience of the Russo-Ukrainian war and the fact that the temporary protection under the Directive has been extended to the fullest,[16] the proposed Regulation's maximum of one year might prove to be short-sighted.

8.3.2 The Eligibility Criteria

Compared with the Temporary Protection Directive, groups that can be granted immediate protection status have been defined quite narrowly in the proposed Regulation.

The proposed Regulation provides for the granting of immediate protection status to

> displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin (Art. 10(1)).

"Indiscriminate violence" is a term used in EU law only in the context of an armed conflict. Thus, according to the Qualification Directive,[17] indiscriminate violence is one of the factors relevant for establishing the risk of serious harm for the purposes of qualification as a "person eligible for subsidiary protection" (Art. 15(c)), that is, the protection additional to that of refugees. The CJEU has used the same term in a case involving the ongoing internal armed conflict in Iraq.[18]

The use of the term indiscriminate violence is a sign of a radical departure from the Directive's approach, according to which (Art. 2(c)) temporary protection is granted to "displaced persons", in particular

(i) persons who have fled areas of armed conflict or endemic violence and
(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

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16 See Council of the EU, 'Ukrainian Refugees: EU Member States Agree to Extend Temporary Protection' (Press release, 28 September 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/ (accessed 17 November 2023).

17 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9.

18 See Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921.

The proposed wording significantly narrows down the circle of persons eligible for immediate protection. Refugees (as opposed to persons eligible for subsidiary protection) from the relatively peaceful parts of Syria or from Belarus, for example, would be ineligible. This limits the potential use of immediate protection since the status can only be granted to those fleeing the indiscriminate effects of an armed conflict, not persons fleeing oppressive regimes, political persecution, systematic violations of their human rights, among others.

According to Article 10(1) of the proposed Regulation, persons representing a danger to the Member State's national security or public order where immediate protection is sought can be denied such protection. The draft does not provide a procedure to follow in such a case. This is in stark contrast with the Temporary Protection Directive, which, on the one hand, contains an exhaustive list of grounds for exclusion and, on the other, clearly provides that an exclusion decision must follow an individual assessment based on the principle of proportionality (Art. 28).

8.3.3 The Rights of the Protected Persons

Unlike the Directive, the draft Immediate Protection Regulation contains no provisions on the rights of the persons granted immediate protection. Instead, by reference provided in Article 10(2) of the proposed Regulation, they would enjoy the same social and economic rights as the subsidiary protection beneficiaries under the so-called Qualification Regulation[19] that the Commission also proposes as part of the New Pact on Migration and Asylum. According to the provisions of that latter Regulation, the persons holding the immediate protection status would enjoy

- protection from *refoulement* (Art. 23);
- the right to obtain information on the rights and obligations relating to their status (Art. 24);
- the right to maintain family unity (Art. 25);
- the right to be issued a residence permit (Art. 26) and travel documents (Art. 27);
- freedom of movement within the Member State (Art. 28) and the Union (Art. 29);
- access to employment (Art. 30), education (Art. 31) and procedures for recognition of qualifications and validation of skills (Art. 32);
- social security (Art. 33), social assistance (Art. 34) and healthcare (Art. 35);

19 Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, COM(2016) 466 final.

– rights related to unaccompanied minors (Art. 36);
– access to accommodation (Art. 37), integration measures (Art.38); and
– the right to assistance with repatriation (Art. 39).

Compared with temporary protection, immediate protection would have more to offer to the status holders in terms of rights and freedoms: under the Directive (Arts. 8-16), temporary protection beneficiaries do not have a right to enjoy equal treatment with nationals of the host Member State when it comes to access to employment, social security and social assistance and healthcare. Thus,

> [f]or reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefit. (Art. 12)

Surprisingly, the Directive does not provide even for the freedom of movement within the receiving Member State. As a result, while the proposed Regulation does not fully equate the status of an immediate protection beneficiary with that of an EU citizen, it obviously envisages more rights and entitlements than the Directive does.

Both immediate protection (Art. 17 of the Directive) and temporary protection (Art. 22 of the proposed Regulation) do not prejudice the right of their beneficiaries to apply for international protection. However, both statuses allow Member States to suspend the processing of international protection applications for a certain period. In the case of temporary protection, that period is the duration of temporary protection, which lasts for one year and can be further extended for a maximum of two years (Art. 4 of the Directive), while immediate protection can be granted for a maximum of one year, with the Commission having the authority to decide for exactly how long applications for international protection may be suspended. Immediate protection will be granted (Art. 10(3) and (4)(d) of the proposed Regulation).

8.4 Conclusions and Recommendations

The receiving capacities of the EU Member States are put to the test. Under these circumstances, temporary protection offers a pragmatic compromise between what is needed and what is possible. The Directive provides temporary relief to the Member States' overwhelmed migration and asylum systems in times of crisis and to the displaced persons who get a legal status comparable to that of a refugee. However, the reform of the temporary protection mechanism, with its complicated activation mechanism, the

"take-back" principle and other shortcomings discussed in this chapter, has been long overdue.

The proposed immediate protection would considerably improve the system. Thus, the activation mechanism in the proposed Regulation is simpler and makes the Commission rather than the Council the decision-maker. The indicators for triggering immediate protection are clearer and more precise than those for temporary protection. The rights of immediate protection status holders are more generous than those of temporary protection beneficiaries. On the other hand, the persons who can be granted immediate protection are defined narrower than those who can be granted temporary protection. This limits the potential use of immediate protection by those who flee not from an armed conflict but from systematic human rights violations, political persecution or oppressive regimes.

Being a pre-war proposal, the Regulation would become a major facelift to the temporary protection system, but not a radical reform that is needed, as the Ukrainian refugee crisis has vividly demonstrated. The pragmatic ad hoc solutions described – now seen as an exception – should, we submit, become standard procedures. Most importantly, the placement decisions should, at least partially, depend on the free will of the beneficiaries of temporary protection and their "meaningful links" with the country of their choice.

From the very beginning of the war, private actors have demonstrated motivation, determination to provide relief and the ability to mobilise resources, create synergies and generate ideas instrumental for central and local authorities. This is an indispensable resource that should be tapped. The EU's efforts to provide relief to Ukrainians can provide a testing ground for "catalysing a whole of society response"[20] based on sharing responsibility among governments, civil society, NGOs and diasporas, the approach that should be written into an amended proposal for the Regulation.

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20 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, European solidarity with refugees and those fleeing war in Ukraine, COM/2022/107 final 8.

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9 Readmission Agreements: Function & Fundamental Rights Implications

Steffi Vella Laurenti

This chapter highlights the function and fundamental rights implications of readmission agreements. In doing so, it explores where and how these readmission agreements feature in the migration control efforts of the EU and its Member States and whether these instruments can be implicated in the fundamental rights violations that can, at times, be occasioned by such efforts. It also considers whether fundamental rights concerns linked directly to cooperation on readmission exist. The chapter concludes by suggesting that, if drafted and applied properly, readmission agreements can sometimes act as a fundamental rights safety net when all prior safeguards in the return process fail, and it calls on the EU to take the lead in this regard.[1]

9.1 Introduction

A readmission agreement is "establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence"[2] in the territory of a contracting party. Besides standard readmission agreements, cooperation on readmission has taken other forms over the years. For various reasons, such as greater flexibility and rendering these otherwise unpopular arrangements less visible,[3] more informal methods have emerged, making cooperation on readmission a "highly diversified"[4] exercise.

At the national level, examples of such nonstandard means of readmission include exchanges of letters, memoranda of understanding, friendship treaties and police cooperation agreements.[5] Similarly, one finds so-called readmission arrangements

1 This is an edited and updated version of the author's dissertation "Readmission Agreements and the Rights of Asylum Seekers: A European Context", which was submitted in partial fulfilment of the LLD. degree from the University of Malta in 2012.
2 European Migration Network. (2023). 'Asylum and Migration Glossary.' https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en.
3 Ibid., 28.
4 Ibid., 26.
5 Ibid., 27.

alongside standard readmission agreements at the EU level.[6] All of these alternative instruments, while not readmission agreements "in the technical sense",[7] nonetheless establish cooperation on or result in the readmission of unauthorised migrants between the contracting parties.

Readmission agreements and these other more informal forms of cooperation on readmission are essential to the efforts of the EU and its Member States to control migration;[8] yet, they seldom evoke the same attention as the return decisions, border control practices and asylum policies they seek to implement. Thus, this chapter aims to shed more light on these seemingly elusive instruments, particularly their function and fundamental rights implications within the EU and Member State context.

To this end, section two explores where and how standard and nonstandard readmission agreements feature in the migration control efforts of the EU and its Member States. It does this through the lens of certain key pieces of legislation adopted under the EU policy framework known as the Area of Freedom, Security and Justice (AFSJ). On the other hand, section three considers whether formal or informal forms of cooperation on readmission are neutral or otherwise from a fundamental rights perspective.

The EU laws that will feature in section two are those in force as of February 2024. As a result, the chapter will not discuss how these laws or the issues they regulate will change with the New Pact on Migration and Asylum.[9] Suffice it to say that the need for readmission agreements (whether formal or informal) at the EU or Member State level will probably increase.[10] For this reason, it is assumed that the human rights implications of these agreements (if any) would, if left unaddressed, be exacerbated under the new Pact.

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6 European Court of Auditors. (2021). *EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results* (Special Report 17), 11. https://op.europa.eu/webpub/eca/special-reports/readmission-cooperation-17-2021/en/.

7 European Migration Network. (2023). 'Asylum and Migration Glossary.' https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en., 28.

8 Council of the European Union. (2010). *Conclusions on the Follow Up of the European Pact on Immigration and Asylum* (3018th Justice and Home Affairs Council meeting) 4. www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114881.pdf; European Migration Network. (2022). Bilateral Readmission Agreements – EMN Inform. European Migration Network, 1. https://home-affairs.ec.europa.eu/news/new-emn-inform-examines-and-updates-how-bilateral-readmission-agreements-influence-return-irregular-2022-09-16_en.

9 European Commission. (2020). *Communication from the Commission on a New Pact on Migration and Asylum* (COM(2020) 609 final). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609.

10 Ibid.

Before proceeding any further, it is also important to clarify at this stage that the readmission agreements covered by this chapter are those between the EU or a Member State and a non-EU country (also known as a 'third country'). Moreover, this chapter will refer to a readmission agreement between the EU and a third country as an EU Readmission Agreement or EURA. In contrast, a readmission agreement between a Member State and a third country will be referred to as a National Readmission Agreement or NRA. In addition, unless stated otherwise, reference to a readmission agreement, generally, or a EURA or NRA, specifically, includes both standard readmission agreements and nonstandard ones as described earlier.

9.2 Function

The principle of readmission can be found both in customary international law[11] and the *jus inter gentes*. Concerning the latter, the principle finds expression in the Universal Declaration of Human Rights,[12] which protects, among other things, everyone's right "to return to his country".[13] The inverse of this right is the obligation of the state to allow its nationals to return and, thus, to readmit.[14] This right can also be found in the International Covenant on Civil and Political Rights[15] and the International Convention on Eliminating all Forms of Racial Discrimination.[16]

Thus, readmission agreements do not obligate the contracting parties to readmit their citizens as such is already imposed by international law. Rather, these agreements facilitate the implementation of this obligation[17] and ensure that states live up to it in practice. Even though a state may identify and apprehend an undocumented migrant as well as issue a return decision in his or her regard, the actual return is uncertain if a readmission agreement with the country of origin has not been concluded. The country of origin "may be reluctant to readmit him on economic, demographic or

11 Jean-Pierre Cassarino. 'Readmission Policy in the EU' (Study prepared for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2010), 13. www.europarl.europa.eu/studies.
12 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
13 Ibid., Art. 13(2).
14 Roig, A., & Huddleston, T. (2007). EC Readmission Agreements: A Re-evaluation of the Political Impasse. *European Journal of Migration and Law*, 9(3), 363-387, 364. https://doi.org/10.1163/138836407X190433.
15 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art. 12 (4).
16 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 Art. 5 (d) (ii).
17 Roig & Huddleston, 363-387.

social grounds",[18] even though the person's nationality may be uncontested.[19] For this reason, a readmission agreement is crucial to ensure that the removal process can be completed.

A readmission agreement becomes even more indispensable in the case of removal of persons who are not nationals of the readmitting country but who have simply transited through the latter while travelling to the country of destination. The reason is that states are not required under international law to readmit non-nationals.[20] Thus, rather than simply facilitating or ensuring that readmission occurs in practice, readmission agreements that cover non-nationals establish an obligation between the contracting parties to readmit.

Concluding readmission agreements with transit countries has become a priority for both the EU and its Member States because they are seen as "an alternative to repatriation to countries of origin"[21] when such proves to be difficult due to, for instance, problems in determining the nationality of the returnee due to a lack of documentation.[22] Under these agreements, transit countries would accept responsibility for irregular non-nationals and stateless persons because they transited through its territory on their way to the EU. Thus, in such situations, the itinerary replaces nationality as a criterion for return and readmission.

To better understand the role of readmission agreements in the migration control efforts of the EU and its Member States, this section will turn to and consider the core idea/s behind certain key pieces of legislation adopted under the AFSJ. However, before undertaking such an exercise, the AFSJ will be briefly discussed as a more general EU policy area.

9.3 The Area of Freedom, Security & Justice

The AFSJ, the legal provisions of which are contained in Title V of the Treaty on the Functioning of the European Union (TFEU),[23] features prominently as part of the EU's

18 Billet, C. (2010). EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Migration. An Assessment after Ten Years of Practice. *European Journal of Migration and Law*, 12(1), 45-79, 46. https://doi.org/10.1163/138836410X13476363652596.
19 Ibid.
20 Roig & Huddleston, 363-387.
21 Ibid., 365.
22 Ibid.
23 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

objectives.[24] It was officially developed in response to one of the fundamental freedoms underpinning the internal market – the right of free movement of persons.

To safeguard this right, Member States considered it necessary to develop common policies on immigration, asylum and border control and measures for cooperation among their national competent authorities in civil and criminal matters.[25] However, it is argued that the AFSJ is more than just a set of policies and measures.[26] Rather, it contributes to and defends a "wider European way of life".[27] Migration and asylum are seen as "affecting this way of life"[28] and, therefore, a joint effort in their management and regulation is considered necessary.[29]

The AFSJ is an area of shared competence.[30] In the context of this chapter, shared competence generally means that a Member State can negotiate and conclude an NRA unless the EU is in the process of or has concluded a EURA with the same third country. Nevertheless, a previous NRA is still valid, notwithstanding the entry into force of a subsequent EURA with the same third country. However, in case of incompatibility, the EURA takes precedence.[31]

9.4 The Role of Readmission Agreements in EU Immigration, Asylum and Border Control Policies

9.4.1 Common Policy on Immigration

Article 79 of the TFEU empowers the European Parliament and the Council of the EU to take certain measures in the field of immigration in pursuance of a common EU policy in this regard. The areas covered by such measures include "illegal immigration"[32] and the "removal and repatriation of persons residing without authorization"[33] in the EU territory.

In this regard, the central piece of EU secondary legislation is the Directive on common standards and procedures in Member States for illegally returning third country

24 Consolidated version of the Treaty on European Union [2012] OJ C326/01, Art. 3(2).
25 Craig, P., & De Búrca, G. (2020). *EU Law: Text, Cases, and Materials*. Oxford University Press, 998-1000.
26 Chalmers, D., Davies, G., & Monti, G. (2010). *European Union Law*. Cambridge University Press, 493.
27 Ibid.
28 Ibid.
29 Ibid.
30 TFEU, Art. 4(2).
31 European Migration Network (2022), 4.
32 TFEU, Art. 79(2)(c).
33 Ibid.

nationals (hereinafter the "Returns Directive").[34] Under this Directive, Member States are, with some exceptions, under an obligation[35] to issue a return decision concerning non-EU nationals who do not or no longer fulfil the "conditions for entry, stay or residence in that Member State".[36]

In the absence of a voluntary return, Member States are required to "take all necessary measures to enforce the return decision",[37] resulting in the physical removal from their territory of persons to whom a return decision is addressed. Such necessary measures generally require a readmission agreement with the country of return, including the returnee's country of origin or a transit country. In fact, the need for such agreements, whether at an EU or a national level, is explicitly mentioned in the Returns Directive when the return is to take place to a transit country.[38]

9.4.2 Common Policy on Asylum

A significant volume of EU secondary legislation has been adopted in pursuance of a Common Policy on Asylum as required by Article 78 TFEU. The most relevant for this article is the Directive on common procedures for granting and withdrawing international protection (hereinafter the "Asylum Procedures Directive").[39]

The reason is that in case of a negative decision on an asylum application pursuant to the common procedures established by the Directive, the failed asylum seeker is no longer considered to have cause to remain in the EU. Therefore, he or she should subsequently be subjected to the procedure established by the Returns Directive,[40] including readmission to a third country in terms of a readmission agreement, as discussed in Section 9.2.

Moreover, a provision in the Asylum Procedures Directive allows Member States not to examine an asylum application in certain circumstances, such as when a third country is deemed responsible for the asylum seeker.[41] Known as the Safe Third Country or First

34 Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals [2008] OJ L348/98.
35 Ibid., Art. 6(1).
36 Ibid., Art. 3(2).
37 Ibid., Art. 8.
38 Ibid., recital 7 & Art. 3(3).
39 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 (recast) [2013] OJ L180/60.
40 Returns Directive, recital 9.
41 Asylum Procedures Directive, Art. 33.

Country of Asylum policies,[42] these policies are based on the premise that the asylum seeker has no justification for seeking asylum in the EU because his or her international protection needs can be catered for in that other third country.

However, this transfer of responsibility is conditional on the third country readmitting the asylum seeker in question[43] While it is conceivable for a third country to readmit an applicant for asylum on a case-by-case basis without a readmission agreement in place, a readmission agreement would, no doubt, offer Member States a guarantee that this will, in fact, take place.

9.4.3 Common Policy on Border Checks

The development of a common policy on border checks required by Article 77 TFEU rests on two main interrelated objectives: removing checks on persons at internal border crossing points and strengthening the EU's external borders. The latter consists of performing checks on persons at external border crossing points and effectively monitoring those borders.[44]

The main EU instrument in this regard is the Regulation on a Union Code on the rules governing the movement of persons across borders (hereinafter the "Schengen Borders Code"),[45] according to which persons who do not fulfil the entry conditions stipulated therein are, with some exceptions, to be refused entry in the territory of the relevant Member State.[46] In such situations, Member States may choose to rely on applicable national legislation rather than the Returns Directive (Section 9.2) to regulate the return of such persons.[47] The same applies to persons who are apprehended after having irregularly crossed into that territory and "who have not subsequently obtained an authorization or a right to stay".[48] In any case, a readmission agreement with the country of origin or with a transit country should facilitate the orderly removal of such persons.[49]

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42 Ibid., Art. 33(2)(b) & (c).
43 Ibid., Art. 35 & 39(6).
44 Ibid., Art. 77(1)(b).
45 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 [2016] OJ L77/1.
46 Schengen Borders Code, Art. 14.
47 Returns Directive, Art. 2(2)(a).
48 Ibid.
49 By way of clarification, when a person who is refused entry at a border crossing point used a carrier to arrive at that crossing point, it is generally the responsibility of that carrier, pursuant to Part A of Annex V of the Schengen Borders Code, to effect the return of that person.

Furthermore, readmission agreements have proven to be indispensable in the context of border surveillance at or beyond the EU's external sea borders,[50] whereby vessels carrying undocumented migrants are intercepted and forcefully pushed or pulled back to the point of embarkation within a third country.[51] In fact, the EU's Sea Borders Regulation[52] – which regulates sea border surveillance operations when these involve the assistance of FRONTEX – provides, among other things, for the interception on the high seas of vessels suspected of being "engaged in the smuggling of migrants by sea"[53] where they would be ordered to head towards a third country[54] or be handed over, together with the persons travelling thereupon, "to the authorities of a third country".[55]

9.5 Fundamental Rights Implications

The relationship between readmission agreements and the fundamental rights of the persons readmitted thereunder is a contested one. Advocates of readmission agreements argue that these agreements "are neutral in terms of human rights".[56] This argument is based on the idea that readmission agreements are simply the instruments through which decisions made under immigration, asylum and border control legislation may be implemented or completed successfully.

For this reason, if there are any fundamental rights concerns, they are related to the stage at which the actual decisions are taken because it is at this stage that fundamental rights have to be taken into account.[57] Readmission agreements simply "provide a legal framework and are merely an instrument facilitating return".[58] Moreover, it can be argued that, with or without a readmission agreement in place, such decisions will be adopted nonetheless.

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50 Gammeltoft-Hansen, T. (2011). The Externalization of European Migration Control and the Reach of International Refugee Law, in E. Guild & P. Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (pp. 273-298, 273-277). Brill | Nijhoff.

51 As evidenced by the facts in the case of *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012 and *S.S. and Others v. Italy*, no. 21660/18, ECHR [pending].

52 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93.

53 Ibid., Art. 7(1).

54 Ibid., Art. 7(2)(c).

55 Ibid.

56 Council of Europe Parliamentary Assembly. (2010). *Readmission Agreements: A Mechanism for Returning Irregular Migrants* (Resolution 1741), paras. 2, 1. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17874&lang=en.

57 Ibid., para. 2.

58 Council of Europe Parliamentary Assembly. (2010). *Readmission Agreements: A Mechanism for Returning Irregular Migrants* (Report 12168), paras. 29, 11. https://pace.coe.int/en/files/12439/html.

However, even though readmission agreements represent only a part of the return process, critics argue that they are an important part that cannot be disconnected and considered independently.[59] For this reason, any fundamental rights violations arising at the pre-readmission stage will still bring about the responsibility of readmission agreements as they are an inseparable part of the whole process of return.[60] According to these critics, this occurs when a readmission agreement is utilised to implement "a flawed decision".[61] Alternatively, the existence of a readmission agreement could encourage states to make flawed decisions.[62] It is also possible that cooperation on readmission itself is a threat to fundamental rights.

This section will, therefore, seek to uncover whether readmission agreements are neutral from a fundamental rights perspective. For this to occur, however, some of the risks to fundamental rights posed by the pre-readmission stage must first be discussed.

9.6 Some Fundamental Rights Concerns Linked to the Pre-Readmission Stage

The pre-readmission stage in an EU context is largely dominated and dictated by the legal instruments that are featured in section two of this chapter. Additionally, many of them contain minimum harmonisation measures and/or grant Member States a wide margin of discretion as well as several opportunities to opt out or derogate from their provisions. Thus, most fundamental rights concerns linked to this stage can be traced back to these laws.

However, exceptions exist. Member States might fail to adhere to their minimal obligations under the said laws and interfere with fundamental rights in the process. Moreover, as held previously, the AFSJ is an area of shared competence. This means that Member States can act to the extent that the EU has not or has ceased to act. In doing so, they may undermine fundamental rights outside of the EU legislative framework.

9.6.1 The Returns Directive

Certain provisions in the Returns Directive can be criticised for their ability to expose the person concerned to forced removal in violation of his or her fundamental rights.

59 Ibid., paras. 30, 12.
60 Ibid.
61 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 3, 2.
62 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 30, 12.

This is particularly evident regarding certain provisions aimed at preventing "abuse"[63] by the returnee of the legal remedies provided by the Directive.

For instance, Member States are obliged to provide the person concerned with "an effective remedy to appeal against or seek review"[64] of a return decision. However, they are allowed to make free legal assistance subject to certain conditions and limitations.[65] Also, they are not obliged to grant automatic suspensive effect to the appeal or review, which means that the return decision can be enforced pending the outcome of the process.[66] Further, in leaving the time limits within which to file an appeal or review up to the Member States, the Commission openly suggests that "Member States provide for the shortest deadline",[67] even if this could somewhat compromise the right to an effective remedy.[68]

Fortunately, with regard to the lack of automatic suspensive effect of the appeal or review, both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU have required Member States to give suspensive effect to appeals whenever the principle of non-refoulement risks being compromised[69] or whenever the health of the potential returnee is at "a serious risk of grave and irreversible deterioration".[70] Although it is not excluded that suspensive effect would be granted if other rights are at risk,[71] the Commission has recommended against this in order "to strike the right balance between the right to an effective remedy and the need to ensure the effectiveness of return procedures".[72]

To conclude, the fact that a third country national can be returned to a transit country under the Returns Directive is also a cause for worry from a fundamental rights perspective. The reason is that persons who are returned to a transit country, with which

63 European Commission. (2017). *Commission recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks* (C/2017/6505) 135. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338.

64 Returns Directive, Art. 13(1).

65 Ibid., Art. 13(4).

66 Ibid., Art. 13(2).

67 European Commission (2017, Return Handbook).

68 The Commission draws the line at "disproportionate interference with the right to an effective remedy", implying that an interference is acceptable (in the face of a hypothetical scenario that the returnee will abuse the system) as long as it is proportionate. See European Commission (2017, Return Handbook).

69 *Gebremedhin v. France* [Sect.2], no. 25389/05, ECHR 2007.

70 Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* [2014] EU:C:2014:2453.

71 When one considers Arts. 5 (Non-Refoulement, best interests of the child, family life and state of health) and 9 (Postponement of removal) of the Returns Directive.

72 European Commission (2017, Return Handbook).

they have few ties save for the fact that they had transited through its territory, are more likely to end up in an "unsustainable situation"[73] in that country as the governments in question may not have the capacity to sustain them and/or return them to their country of origin.[74] Moreover, third country nationals who are returned to a transit country also risk being locked up for an excessive amount of time while they await repatriation.[75]

9.6.2 The Asylum Procedures Directive

Like the Returns Directive, the Asylum Procedures Directive has shortcomings that can lead to questionable decisions on asylum applications, which can, in turn, trigger unlawful returns under the former Directive. For instance, Member States have the right to accelerate the procedure for examining an asylum application at first instance in no less than ten defined circumstances,[76] which includes that the "applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information"[77] and that the applicant hails from a country which is considered to be a safe country of origin.[78]

The case of *S.H. v. Malta*[79] highlights the risks associated with using the accelerated procedure. In this case, the ECtHR held that "the asylum procedure undertaken by the applicant"[80] – a journalist from Bangladesh, which was designated as a safe country of origin by the Maltese authorities – "and examined under the accelerated procedure, *ab initio*, did not offer effective guarantees protecting him from arbitrary removal".[81] Consequently, the court found, inter alia, that Malta had violated the applicant's rights under Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[82] (ECHR) in conjunction with Article 3 thereof.[83]

Admittedly, the infringement of the applicant's fundamental rights in this case was not the result of the Maltese authorities' blind acceptance of the measures introduced by

73 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 28, 11.
74 Roig & Huddleston, 380-381.
75 European Commission (2011). *Evaluation of EU Readmission Agreements* (COM (2011) 76 final) 13.
76 Asylum Procedures Directive, Art. 31(8).
77 Ibid., Art. 31(8)I.
78 Ibid., Art. 31(8)(b).
79 *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022.
80 Ibid., para. 93.
81 Ibid.
82 Convention for the Protection of Human Rights and Fundamental Freedoms (signed on 4 November 1950, entered into force 3 September 1953) ETS No. 5.
83 *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022, para. 99.

the Directive. However, it is hard to ignore the fact that the Maltese government relied on the rights granted to Member States under the Directive "to introduce accelerated procedures"[84] as part of its defence strategy. Also, it appears that the European Commission did not take Malta to task for the systemic failures[85] identified by the ECtHR in the case, to both abide by the minimum obligations imposed by the Directive and guarantee the rights in the Charter of Fundamental Rights of the EU[86] "when they are implementing Union law".[87] Hence, the EU's complete lack of culpability in this regard is questionable at best.

Interestingly, a EURA with Bangladesh was and is currently in force,[88] meaning that if the Maltese authorities were allowed to have their way with the applicant in this case, the latter could have been readmitted to Bangladesh in violation of his fundamental rights on the strength of this form of EU-level cooperation.[89]

Aside from the asylum procedure itself, the application of the First Country of Asylum and Safe Third Country policies can be problematic in their own right. Although the Asylum Procedures Directive provides a list of requirements[90] that must be fulfilled in order for these concepts to be applied to an asylum application – such as that the applicant will not be subject to "refoulement"[91] in that country – "in reality, nominal adherence to these criteria has often been deemed sufficient even when there are evident gaps between formal acceptance of principles and their realization in practice".[92]

9.6.3 Border Control Practices

Suppose Member States decide to apply the Returns Directive to persons who have been refused entry at the external border or have crossed the EU irregularly. In that case, some fundamental rights concerns related to this particular pre-readmission stage.

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84 Ibid., para. 72.
85 Ibid., para. 91.
86 Charter of Fundamental Rights of the EU [2012] OJ C326/02.
87 Ibid., Art. 51(1).
88 European Commission. 'A Humane and Effective Return and Readmission Policy.' *Migration and Home Affairs*. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en.
89 The author is not aware of the current personal circumstances of the applicant in question and, hence, is not in a position to provide information as to what happened to him once the judgement was delivered and became final.
90 Asylum Procedures Directive, Arts. 35 and 38.
91 Ibid., Arts. 35(b) and 38(1)(c).
92 Frelick, B., Kysel, I.M., & Podkul, J. (2016). 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants.' *Human Rights Watch*. https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants.

However, regardless of whether Member States apply the Returns Directive in such circumstances, the fact that border regions tend to be located far from any form of public scrutiny means that persons apprehended risk being subject to treatment in violation of their most basic rights, including the principle of non-refoulement. Indeed, the Border Violence Monitoring Network[93] noted how, between 2020 and 2022, migrants "along the EU's external border"[94] suffered "beatings at the hands of police",[95] "forced undressing",[96] "shaving of heads",[97] "sexual assault"[98] and were subject to "illegal expulsions".[99]

All this, notwithstanding that the Returns Directive obliges the Member States to adhere to the principle of non-refoulement even in respect of border cases that have been excluded from its scope[100] as well as a similar obligation under the Schengen Borders Code,[101] not to mention their obligation under the said Code to ensure that border guards "in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons".[102]

Moreover, border control practices performed at sea increase the risk of refoulement, as confirmed by the ECtHR in *Hirsi Jamaa and Others v. Italy*.[103] The origins of the case date back to 2009, when, based on a number of bilateral instruments[104] between Italy and Libya, including a newly signed treaty between the two nations (hereinafter the "Friendship Treaty"),[105] Italian authorities conducted a series of maritime interception and push-back operations involving vessels carrying migrants in the Central Mediterranean region. A group of migrants that had been intercepted and turned back to Libya during one such operation challenged Italy's actions before the ECtHR.

The applicants claimed that their return to Libya violated their right to be free from torture or inhuman or degrading treatment or punishment under Article 3 of the

93 Rankin, J. (2022). 'Migrants Face "Unprecedented Rise in Violence" in EU Borders, Report Finds.' *The Guardian*. https://www.theguardian.com/law/2022/dec/08/migrants-face-unprecedented-rise-in-violence-in-eu-borders-report-finds.
94 Ibid. In countries such as Poland, Greece, Croatia, Serbia, North Macedonia and Albania.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 Returns Directive, Art.4(4)(b).
101 Schengen Borders Code, Art.4.
102 Ibid., Art.7.
103 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
104 Ibid., paras. 19-20.
105 Trattato di Amicizia, Parternariato e Cooperazione tra La Repubblica Italiana e La Grande Giamahiria Araba Libica Popolare Socialista (Italy-Libya) (signed 30 August 2008, entered into force 2 March 2009).

ECHR, their right not to be collectively expelled under Article 4 of Protocol No. 4 to the ECHR[106] and their right to an effective remedy under Article 13 of the ECHR.[107] Firstly, the ECtHR held that the return of the intercepted migrants to Libya brought about Italy's responsibility under the ECHR because, notwithstanding that these events occurred on the high seas, Italy had exercised "continuous and exclusive *de jure* and *de facto* control"[108] over the applicants.[109] Secondly, the ECtHR ruled in favour of the applicants on all three counts, finding that there had indeed been a violation of the rights complained of.[110]

Regrettably, it appears that this landmark ruling did not deter Italy from subsequently relaunching cooperation with post-Arab Spring Libya on irregular migration along similar lines. It did this primarily through a Memorandum of Understanding (hereinafter the "Memorandum") signed in 2017[111] to, inter alia, "implement the relevant agreements undersigned by the Parties".[112] Among these agreements, the Friendship Treaty[113] – the instrument on which the interception and push-back of the applicants in the aforementioned case largely rested – is specifically mentioned.

The apparent consequence of this is that Italy is once again being challenged before the ECtHR in the case of *S.S. and Others v. Italy*.[114] The applicants in this case, whose vessel was intercepted and pulled back to Libya by the Libyan Coast Guard (hereinafter "LCG") in November 2017, seem to be relying on the fact that, under the Memorandum, "the Italian government committed to providing technical and technologic support to the Libyan institutions in charge of the fight against illegal immigration."[115] Thus, Italy is allegedly responsible for the fundamental rights violations suffered by the applicants "insofar as it effectively made it possible for the LCG to conduct interception measures".[116]

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106 Protocol 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. CETS, No. 046.

107 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, para. 3.

108 Ibid., para. 81.

109 Ibid., paras. 81 & 82.

110 Ibid., paras. 137, 158, 186 & 207.

111 Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (Italy-Libya) (signed and entered into force on 2 February 2017).

112 Ibid., preamble.

113 Ibid.

114 *S.S. and Others v. Italy*, no. 21660/18, ECHR [pending].

115 De Leo, A. (2020). '*S.S and Others v. Italy*: Sharing Responsibility For Migrants Abuses in Libya.' *Public International Law and Policy Group (PILPG)*. https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya.

116 Ibid.

While the judgement appears to be pending at the time of writing, the ECtHR might, notwithstanding the lack of effective control by Italy over the applicants' situation at the time the LCG intercepted them, rely on its judgment in *Ilascu and Others v. Moldova and Russia*[117] to establish Italy's connection with and, hence, responsibility for the alleged violations in this case.[118] The reason being that, in the latter case, the ECtHR found the Russian Federation responsible for the "unlawful acts committed by the Transdniestrian separatists, regarding the military and political support it gave them to help them set up the separatist regime"[119] as well as its subsequent continued "support for the regime and collaboration with it".[120]

9.6.4 The Neutrality or Otherwise of Readmission Agreements

The previous subsection attempted to illustrate how certain procedures at the pre-readmission stage can result in flawed return decisions. Nevertheless, a flawed return decision is nearly irrelevant if it cannot be implemented in practice. For this reason, the argument put forward by critics of readmission agreements – that any fundamental rights concerns arising at the pre-readmission stage will still bring about the responsibility of readmission agreements as they are an inseparable part of the whole return process – seems well-founded.

Advocates of readmission agreements, on the other hand, might counter this argument by stating that returnees have, prior to their return under these agreements, recourse to national constitutional courts (which might, in turn, make a preliminary reference to the CJEU) and/or the ECtHR for violations or potential violations of their fundamental rights as a result of a flawed decision. However, how satisfied should we be with this position considering that

1. potential returnees are known to experience logistical difficulties in accessing legal assistance to be able to file cases of this nature or to be able to file them in due course;[121]
2. the independence and impartiality of national constitutional courts are under threat in some Member States;[122] and/or
3. not all proceedings before such bodies have an automatic suspensive effect.[123]

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117 *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004.
118 De Leo.
119 *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004, para. 382.
120 Ibid., para. 393.
121 The ECtHR in *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022 confirmed this in para 82 at least in respect of Malta.
122 Examples: Poland and Hungary due to well-documented rule of law backsliding in recent years.
123 As was also acknowledged by the EctHR in *S.H. v. Malta* [Sect.2], no. 37241/21, ECHR 2022 in para. 98.

Furthermore, in the context of the sea border controls, maritime interception and push-back/pull-back operations depend upon a readmission agreement with the country of return, as evidenced by the Italo-Libyan case studies examined in the previous subsection. Moreover, the pressures on transit countries resulting from readmission agreements with the EU or its Member States may also induce such countries to adopt questionable methods of migration control even before the migrants reach EU territory. Often referred to as the externalisation of immigration and asylum policies, this is an aspect of readmission agreements that sees the intensification of immigration and border controls in transit countries as a consequence of these countries' obligations under these agreements.

Such intensification can also have negative repercussions on the rights of asylum seekers and irregular migrants trying to reach the EU.[124] It is perhaps not a coincidence that the non-EU states implicated in the report compiled by the Border Violence Monitoring Network all have a EURA in place.[125] From all this, it is possible to concur with the other view shared by the critics of readmission agreements, which is that the existence of such agreements leads states to adopt, rather than a flawed decision, a course of action which is flawed from a fundamental rights perspective.

In the author's view, however, there are also instances where readmission agreements may be held responsible on both counts simultaneously. This double responsibility is observable concerning persons caught crossing irregularly into the EU. The remote locations of border regions increase the likelihood that undocumented migrants are subject to treatment in violation of their most basic rights, including the principle of non-refoulement. Therefore, a readmission agreement in a border setting would go a long way to ensure removal in breach of this principle.

However, the existence of a readmission agreement in such a setting, especially an agreement with the country from which the person concerned attempted to cross into the EU irregularly, can also encourage Member States to conduct unlawful returns. The reason is that the mixture of geographical proximity and an established form of cooperation on readmission offers the Member State in question the opportunity to swiftly deal with such persons while potentially preventing them from accessing effective legal remedies[126] to challenge their return.

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124 Council of Europe Parliamentary Assembly (2010, Report 12168)), paras. 67, 17.

125 European Commission. 'Return and Readmission.' *Migration and Home Affairs*. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

126 Council of Europe Parliamentary Assembly (2010, Report 12168), paras. 31, 12.

In fact, ten out of eighteen EURAs are with countries that share a land border with EU Member States.[127] Moreover, seven of these ten EURAs provide for an accelerated procedure that is contracted specifically to deal with persons apprehended while trying to cross the borders of the contracting parties irregularly. The accelerated procedure allows the contracting parties to accelerate the readmission process in such situations, usually by requiring them to request readmission and reply to a request for readmission within two days from the apprehension of the person and the receipt of the request, respectively.[128]

This double responsibility of readmission agreements is also evident in the case of a decision to return irregular migrants and failed asylum seekers to a transit country under the Returns Directive. Aside from implementing a potentially flawed decision the existence of a readmission agreement with a transit country rather than the country of origin could also be a factor that determines removal to the former rather than the latter. If a readmission agreement already exists with a transit country, Member States do not have to negotiate directly with the country of origin to secure a return. In addition, the costs and complexities of the actual return are less as transit countries are usually located closer to the EU.

In addition to the pre-readmission stage, the culpability of readmission agreements from a fundamental rights perspective may arise from how the EU and its Member States shape their cooperation on readmission. Aside from how the actual transfer of persons under a readmission agreement occurs, this aspect includes the choice of third countries with whom to cooperate on readmission, as well as the lack of sufficient guarantees in the text of the agreements to ensure that such countries will adhere to certain fundamental rights standards in relation to those who are readmitted.

There are several factors which the EU and its Member States take into account when determining the third country with which to cooperate on readmission. One of these factors is the migratory pressure coming from or through a third country.[129] In fact, it is possible to state that the greater the migratory pressure, the greater the urgency to establish some form of cooperation on readmission with that country. Unfortunately,

127 European Commission ("Return and Readmission.").
128 Ibid. EURAs with Russia, Ukraine, North Macedonia, Serbia, Moldova, Turkey and Belarus.
129 Billet, 52.

this urgency often seems to overlook the fact that many of these third world countries have a shady human rights record.[130]

Perhaps even more worrying is the fact that certain third countries that the EU has sanctioned for serious human rights violations are among the list of countries with which the EU has also concluded a readmission agreement. The EURA with Belarus is a case in point, having been concluded while EU restrictive measures had been in place since 2004.[131] In addition, following its entry into force in June 2020, the EU imposed further restrictive measures on Belarus as a result of "the fraudulent presidential elections that took place in August 2020 and the brutal crackdown by Belarusian security forces on the peaceful protesters, democratic opposition and journalists".[132] Sadly, it appears that Belarus (in response to the sanctions) and not the EU subsequently suspended the said agreement.[133] Furthermore, at the time of writing, the EURA with Russia, which entered into force on 1 June 2007, appears to be unaffected despite the ongoing war in Ukraine and resulting EU sanctions.

Suppose the EU and its Member States do not refrain from reaching or do not suspend agreements of this nature with certain third countries. In that case, the least they could do is infuse them with all sorts of fundamental rights safeguards, including monitoring mechanisms and corresponding sanctions as a compensatory measure. Since NRAs tend to be inaccessible to the general public,[134] it is hard to determine whether sufficient provision is made to respect and protect the fundamental rights of the persons to be readmitted. However, if the NRAs mentioned earlier in this section between Italy and Libya are anything to go by, it would seem that fundamental rights issues are not high on the agenda of the contracting parties.

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130 For instance, Italy currently has the Memorandum with Libya, while Belgium has/had an NRA with Somalia. Moreover, EURAs have been concluded with Pakistan, Afghanistan and Guinea. For an inventory of NRAs signed or in force between 2014 and 2021. https://home-affairs.ec.europa.eu/news/new-emn-inform-examines-and-updates-how-bilateral-readmission-agreements-influence-return-irregular-2022-09-16_en, while most EURAs currently in force are accessible at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

131 European Council/Council of the European Union. 'EU restrictive measures against Belarus.' https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/.

132 European Union. (2023). 'Restrictive Measures in View of the Situation in Belarus and the Involvement of Belarus in the Russian Aggression against Ukraine.' *EU Sanctions Map*. https://www.sanctionsmap.eu/#/main/details/2/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D.

133 European Commission. (2021). 'Commission Proposes Partial Suspension of EU–Belarus Visa Facilitation Agreement for Officials of the Belarus Regime.' *Press Release*. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4906.

134 Council of Europe Parliamentary Assembly 2010, (Report 12168), paras. 77, 19.

Indeed, Article 6 of the Friendship Treaty simply states that Italy and Libya shall act according to their respective laws, objectives and principles of the UN Charter[135] and the Universal Declaration of Human Rights. In addition, Article 5 of the Memorandum states that the "Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two countries are parties".

The insufficiency of the provision was confirmed by the ECtHR in *Hirsi Jamaa and Others vs Italy*, when it stated that relying on that provision to argue that Libya was a safe place to return the applicants was not enough to absolve Italy of responsibility under the ECHR, given the well-documented and consistent failure on the part of Libya to abide by its international obligations in practice.[136] This also confirms that the insertion of a rudimentary fundamental rights provision in the text of an NRA is not enough to bring it in line with the contracting parties' international obligations in this respect.

Unfortunately, the same criticism can be levelled at the corresponding provision in all the EURAs currently in force. For instance, the relevant provision in certain EURAs is generic in its wording as it essentially states that the agreement in question will not affect the obligations of the contracting parties under international law. On the other hand, the relevant provision in other EURAs is only slightly more elaborate as it specifies the instruments to be adhered to by the contracting parties in their implementation of the agreement,[137] which, generally, include the Refugee Convention,[138] the ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[139] Moreover, it would appear that under most of the more informal EURAs (or readmission arrangements), the contents of which are not publicly accessible, "no references to international protection of refugees and human rights" are made.[140]

135 United Nations, Charter of the United Nations, 1945, 1 UNTS XVI.

136 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, paras. 127 & 128.

137 European Commission ("Return and Readmission").

138 UN Convention Relating to the Status of Refugees (opened for accession 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (opened for accession 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

139 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

140 European Court of Auditors (2021), paras. 36, 23 and paras. 37, 25.

9.7 Conclusion

This chapter aimed to shine a light on readmission agreements, particularly their function and fundamental rights implications. It first clarified how vital these agreements are in the migration control efforts of the EU and its Member States. Their importance is underscored by the fact that they do not simply complement some of the most prominent pieces of legislation adopted under the immigration, asylum and border control policies of the AFSJ. Instead, readmission agreements complete them.

The chapter then exposed how readmission agreements are far from neutral from a fundamental rights perspective. In implementing certain decisions under the policies mentioned, readmission agreements can potentially unleash the toxicity of those decisions. Moreover, they can, in certain circumstances, encourage states to flout their international law obligations, and they do very little to restrain the conduct of the contracting parties, particularly the country that is doing the readmitting. In fact, it can be argued that the perception that these instruments are, somehow, impartial when it comes to fundamental rights has served to mask and avoid a proper discussion by the powers that be of their actual accountability in this respect.

Nevertheless, it would be unrealistic to call for completely eradicating these instruments. Moreover, there may be some benefits associated with readmission agreements. They can, if drafted and applied properly, "contribute to reducing the migrant's period of uncertainty or detention by facilitating and speeding up the enforcement of return decisions".[141] However, among the improvements that should be considered is increased attention to fundamental rights by adopting a provision in the agreements that goes beyond a simple reaffirmation of the contracting parties' obligations under certain international instruments. In fact, such provisions should be more specific about the obligations expected from the contracting parties.[142]

For instance, if a third country is considered a safe third country under the Asylum Procedures Directive, the provision in question should specify that the state will provide readmitted asylum seekers access to an asylum procedure that contains effective guarantees against refoulement. Moreover, suppose the third country national is in transit under the Returns Directive. In that case, the relevant clause should specifically bind that state to guarantee that such returnees will live with dignity in that country, that it will provide them with the possibility of returning home and that it will not

141 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 2, 1.
142 Council of Europe Parliamentary Assembly 2010, (Report 12168), paras. 37, 12.

arbitrarily detain them for an indefinite period pending such return. In addition, these clauses should be beefed up by an appropriate monitoring and sanctioning mechanism to ensure that these obligations are observed in practice post-readmission.[143]

For the EU to truly become an area of freedom, security and justice, the right of the EU and its Member States to control migration must be reconciled with their obligations under fundamental rights law. Readmission agreements constitute just a part of the migration control process and, therefore, addressing their fundamental rights implications will not necessarily be enough to achieve this. They were turning readmission agreements into a fundamental rights safety net when all pre-readmission safeguards can constitute an important first step in this reconciliation process.

Given its prominent position in shaping the migration, asylum and border control policies of the Member States and the fact that respect for fundamental rights is one of its founding values,[144] the EU should lead the way in this regard and start setting the right example in the context of its readmission agreements, which, after all, have primacy over national ones.

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143 Council of Europe Parliamentary Assembly (2010, Resolution 1741), paras. 6, 2-3.
144 Consolidated version of the Treaty on European Union [2012] OJ C326/01, Art. 2.

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10 The Legal Framework for the Management of the Influx of Displaced Persons from Ukraine: The Example of France

Kiara Neri

The war in Ukraine has led to unprecedented use of the 2001 Temporary Protection Directive. The Council of the European Union adopted an Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine, activating its temporary protection mechanism for the first time. This chapter focuses on the content of the protection granted by the EU and on its implementation by France. It concludes that the French authorities have, for the most part, properly implemented EU law. However, some grey areas remain, especially concerning articulating the temporary protection status and other forms of protection, such as asylum or subsidiary protection.

10.1 Introduction

According to the UNHCR, nearly 8 million[1] people have fled Ukraine since the beginning of the Russian military intervention on 24 February 2022. Most have reached neighbouring countries: Poland, Romania, Moldova, Russia or Slovakia. France is, of course, not on the first line because of its geographical location. However, because of a small Ukrainian diaspora,[2] 119,000 persons fleeing Ukraine took refuge in its territory. Moreover, during this crisis, France was merely a transit country for people trying to reach their relatives in the UK, Spain or Portugal.

Thus, the challenge is very modest. However, it is an opportunity to review the legal framework deployed to manage the flux of displaced persons from Ukraine and share the French practice. The solutions put in place by the French authorities are similar to those deployed by the other European countries because the applicable rules come from

1 https://data.unhcr.org/en/situations/ukraine.

2 In 2021, 18,000 Ukrainian nationals had a residence permit in France, https://www.lemonde.fr/societe/article/2022/03/08/refugies-ukrainiens-en-france-pour-le-moment-la-mobilisation-est-superieure-aux-besoins_6116598_3224.html#:~:text=4%20000%20Ukrainiens%20arriv%C3%A9s&text=Le%20nombre%20relativement%20faible%20s,le%20d%C3%A9clenchement%20de%20la%20guerre.

(1) EU law regarding visas and (2) temporary protection. However, the implementation of EU law by French authorities sometimes shows some particularities.

10.2 Visa Exemption

The holders of a Ukrainian biometric passport[3] are exempt from the requirement to have a visa when entering the Schengen Area. Indeed, Ukraine is listed in Annex II[4] of the 2018 Regulation (EU) 2018/1806 of the European Parliament and the Council of 14 November 2018,[5] listing the third countries whose nationals are exempt from that requirement. The exemption applies for stays of no more than 90 days in any 180 days.

As a result, Ukrainian nationals with biometric passports can enter French territory without a visa for 90 days. Without a biometric passport, the French authorities required Ukrainian nationals to go to a French consular post in a country bordering Ukraine (e.g., Poland, Romania, Hungary, among others) so that their situation could be studied. However, this formality is not applied in practice.

Besides, the French Minister of Interior, Gerald Darmanin, indicated having extended all residence permits held by Ukrainian nationals for 90 days.[6] Beyond 90 days, a lawful stay on French territory requires the request of further authorisation. The legal way French authorities apply EU law is mainly temporary protection.

3 Limited to the holders of biometric passports issued by Ukraine in line with the standards of the International Civil Aviation Organisation.

4 Annex II: List of third countries whose nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period.

5 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, PE/50/2018/REV/1. OJ L 303, 28 November 2018, pp. 39-58.

6 Declaration of the Ministry of Interior, 1 March 2022, https://www.bfmtv.com/international/asie/russie/guerre-en-ukraine-les-titres-de-sejour-des-ukrainiens-en-france-prolonges-d-au-moins-90-jours_AV-202203010393.html.

10.3 The Application of the Temporary Protection Directive

10.3.1 The adoption of the Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine

Temporary protection is an EU procedure of exceptional character to provide immediate and temporary protection to those who cannot return to their country of origin in the event of a mass influx or imminent mass influx of displaced persons from third countries.[7] Article 5 of 2001 Council Directive 2001/55/EC of 20 July 2001[8] gives the Council the competence to identify a "mass influx of displaced persons" based on information received from Member States, the Commission or other relevant organisations such as the UNHCR. The Council has to consider the scale of displaced persons' movements and the potential for emergency aid and action on the ground.[9]

The qualification enables the Council to trigger the mechanism of temporary protection by adopting a Council Decision. According to Article 5§3 of the 2001 Directive, this Decision shall include

- a description of the specific groups of persons to whom the temporary protection applies;
- the date on which the temporary protection will take effect;
- the information received from Member States on their reception capacity; and
- information from the Commission, UNHCR and other relevant international organisations.

When such a temporary protection is adopted by the Council by a qualified majority, the Member States must provide persons enjoying temporary protection with residence permits for the entire duration of the protection.[10]

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7 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, Art. 2.

8 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.

9 Art. 5§4 of Council Directive 2001/55/EC of 20 July 2001.

10 Art. 8 of Council Directive 2001/55/EC of 20 July 2001.

In the Ukrainian crisis, the Council of the European Union adopted a Decision on 4 March 2022[11] establishing the existence of a mass influx of displaced persons from Ukraine and granting temporary protection for an initial period of one year.

The protection is granted by the Council's Decision to four categories of persons present on Ukrainian territory before 24 February 2022[12]: (i) Ukrainian nationals residing in Ukraine before 24 February 2022, but also (ii) third country nationals and stateless persons benefiting from protection (international or equivalent national) in Ukraine; (iii) family members of a person referred to in one of the two previous situations, situation 1 or 2. According to the Council's Decision, a family member is the spouse or the unmarried partner in a stable relationship (where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its national law relating to aliens), the minor unmarried children of the temporary protected person or his or her spouse and other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced persons, and who were wholly or mainly dependent on a temporary protected person. Lastly, temporary protection is granted to (iv) third country nationals holding a valid permanent residence permit issued per Ukrainian law if they cannot return to their country of origin in safe and durable conditions.

10.3.2 Articulation with Asylum and Subsidiary Protection

During his 25 February speech, French President Macron said that France would welcome "Ukrainian refugees". Using the term "refugee", the French President made a – possibly involuntary – reference to the right to asylum. As a result, in the first days of the Russian military operation, the French authorities (OFPRA) received an important number of asylum claims (around 1000). Adopting the Council Decision granting temporary protection to Ukrainians leads those fleeing Ukraine to opt for this protection instead. Besides, the Minister of Interior, Gérald Darmanin, declared that asylum will not be granted to Ukrainians because they have a vocation to go back to Ukraine when the armed conflict is over.[13]

11 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INIT. OJ L 71, 4 March 2022, pp. 1-6.

12 Ibid., Art. 2.

13 https://www.europe1.fr/politique/accueil-des-ukrainiens-comme-pour-la-crise-en-2015-la-france-naccueillera-pas-tout-le-monde-mais-prendra-sa-part-4097697.

However, temporary protection status does not prevent beneficiaries from seeking asylum.[14] The 2001 Directive expressively states that "[t]emporary protection shall not prejudge recognition of refugee status under the Geneva Convention".[15] The right to seek asylum thus remains, as it is a fundamental right recognised by Article 18 of the Charter of Fundamental Rights of the EU.[16] On the contrary, the articulation with subsidiary protection is unclear in EU law: the Directive does not mention the possibility of a beneficiary of temporary protection seeking subsidiary protection instead. French law is more precise on that particular matter and recognises the right of the beneficiaries of temporary protection to seek both asylum and subsidiary protection.[17] As a result, many beneficiaries of the temporary protection also filed claims for asylum or subsidiary protection in France. At the time of writing, none of these claims had reached the National Court for Asylum (CNDA), which seems to have postponed the assessment of the claims made by Ukrainian nationals, filed before or after 24th February. It is, thus, too early to know how the French judges will articulate these different protection categories; however, a quick look into the CNDA case law provides some input.

According to the Geneva Convention, a refugee is a person with a
(i) well-founded fear of being persecuted
(ii) for reasons of race, religion, nationality, membership of a particular social group or political opinion,
(iii) 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[18]

The status of a refugee requires persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion. It does not refer to an armed conflict or a situation of indiscriminate violence on the territory of the country of origin or habitual residence. Therefore, the conflict alone can hardly be sufficient

14 Art. 3 of the 2001 Directive.
15 Ibid.
16 "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')." Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391-407.
17 Art. L581-4 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code of entry and stay of foreigners and the right to asylum) (inserted into the Code by Ordonnance n°2020-1733, 16 December 2020).
18 Art. 1A.2, Convention relating to the Status of Refugees, 28 July 1951 as amended by the 1967 Protocol.

to qualify a person fleeing Ukraine as a refugee. As a result, when applying EU law, especially Article 15 of the 2011 qualification Directive,[19] French practice is to grant not a refugee status but subsidiary protection[20] to persons fleeing an armed conflict. The same subsidiary protection was granted to persons fleeing Syria or Afghanistan. More recently, the CNDA recognised the existence of a situation of indiscriminate violence in the Tillabéri Province (Niger).[21] However, the CNDA has already recognised Ukrainian nationals as refugees because of their membership in particular social or political groups in Ukraine. For instance, in 2021, the Court recognised the refugee status of a policewoman persecuted because of separatist political opinions imputed by the authorities.[22]

10.4 Implementation of EU Law by French Authorities

In France, temporary protection is mostly done by the Préfets and the French Immigration and Integration Office (OFII). The Préfet is in charge of granting the status and the documents. In contrast, the OFII assists the beneficiaries with their administrative procedures to access the rights attached to their status. As a result, the procedure differs from the regular claim for protection. The regular procedure to ask for international protection in France (asylum or subsidiary protection) goes through the French Office for the Protection of Refugees and Stateless Persons (OFRPA), whose decisions to deny protection can be challenged before the CNDA.

Suppose the Member States must provide persons enjoying temporary protection with residence permits for the entire duration of the protection. In that case,[23] the Directive enables Member States to provide more favourable conditions.[24] The French Ministry of Interior has instructed the Préfets in each department or region on how to apply EU

19 Art. 15c) "Serious harm consists of … serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict." Art. 15 is codified in L.512-1 3) of the French Code for the stay of aliens and the right of asylum (CESEDA).

20 According to the 2011 qualification Directive, "'[P]erson eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15, and to whom Art. 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country" Art. 2f.

21 CNDA, 19 July 2021, *M. M. et Mme A.*, n° 21008772 et n°21008773 C+.

22 CNDA, 1 July 2021, *Mme D.*, n° 19043893 C.

23 Art. 8 of Council Directive 2001/55/EC of 20 July 2001.

24 Council Directive 2001/55/EC of 20 July 2001 (12): "[I]t is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons", cons. 12. See also Art. 3§5.

law.[25] For the most part, the instructions require the Préfet to apply EU law strictly without granting any additional guarantee (3.1). However, the instructions seem more favourable than EU law in interpreting the list of persons to whom temporary protection applies (3.2).

10.4.1 Strict Application of EU Law

Regarding the regime of exclusions and the rights attached to the status, the instructions of the Ministry of Interior are in line with EU Law.

Exclusions
According to the 2001 Directive, the following are excluded from the benefit of temporary protection:
(i) Ukrainian nationals with a French residence permit before 24th February
(ii) Third country nationals who can return to their country of origin in safe and durable conditions
(iii) Third country nationals from Ukraine whose asylum claim was under review in Ukraine on 24th February.

These persons fall within the general regime and must apply for a residence permit or asylum following the regular procedure. EU law also enables Member States to exclude a person from temporary protection if there are serious reasons for considering that this person has committed a crime against peace, a war crime, a crime against humanity or acts against the purposes and principles of the UN or a serious non-political crime.[26]

The instructions recall these exclusions and specify that the presence of such an individual on French soil is a serious threat to public order. As a result, the Préfet can, in those circumstances, issue an order for the individual to leave French territory (OQTF) and for appropriate administrative measures.

Rights derived from temporary protection in France:
The instructions list seven rights granted to the temporary protected persons:
– Housing
– Residence permit
– Payment of an allowance (included in the asylum seekers' allowance programme)

25 Instruction relative à la mise en œuvre de la decision du Conseil de l'Union européenne du 4 mars 2022, prise en application de l'article 5 de la directive 2001/55/CE du Conseil du, 20 juillet 2001.
26 Art. 28 of Council Directive 2001/55/EC of 20 July 2001.

- Access to healthcare
- Access to school for children
- Social support
- Work permit

The French regime is, in general, consistent with EU law, which requires Member States to grant beneficiaries a number of social rights, among them the right to work, the right to suitable accommodation and housing, the right to assistance in terms of social welfare and means of subsistence, the right to healthcare, the right to education for children and the right to family reunion (Art. 15).[27]

However, the duration of the provisional residence permit on French territory seems to be in breach of Article 8 of the 2001 Directive. Indeed, Article 8 requires Member States to grant a residence permit "for the entire duration of the protection," which, in this case, is one year.[28] Nevertheless, the instructions of the Ministry of Interior asked the Préfet to issue a provisional residence permit for six months in French territory.

10.4.2 More Flexible Application of EU Law, More Favourable Conditions

The Directive leaves some "margin of manoeuvre"[29] for Member States willing to broaden the scope of coverage for migrants in each crisis. Article 7 states that Member States may extend temporary protection "to additional categories of displaced persons over and above those to whom the Council Decision … applies". In line with this provision, the French instructions add two categories of beneficiaries who are not covered by the Council Decision of 4 March 2022:

- Based on the visa exemption and the establishment of their permanent residence in Ukraine, Ukrainian nationals resided before 24 February 2022 in another Member State or Associated State
- Family members of third country nationals holding a valid permanent residence permit issued in accordance with Ukrainian law if unable to return in safe and durable conditions to their country of origin

27 Right to work (Art. 12); right to suitable accommodation and housing (Art. 13); right to assistance in terms of social welfare and means of subsistence (Art. 13); right to healthcare (Art. 13); right to education for children (Art. 14); special rights for unaccompanied minors (Art. 16); right to family reunion (Art. 15) of Council Directive 2001/55/EC of 20 July 2001.

28 See supra, Council Implementing Decision (EU) 2022/382 of 4 March 2022.

29 See J. Julia Motte-Baumvol, T.C. Frota Mont'Alverne, and G. Braga Guimarães (2022), 'Extending Social Protection for Migrants under the European Union's Temporary Protection Directive: Lessons from the War in Ukraine'. *Oxford University Comparative Law Forum* 2 at ouclf.law.ox.ac.uk.

To conclude, the French authorities have, most importantly, properly implemented EU law during the Ukrainian crisis. The instructions given to the Préfet align with EU requirements regarding the identification of beneficiaries, residence permits and rights attached to the status or exemptions. However, some grey areas remain, especially concerning articulating the temporary protection status and other forms of protection, such as asylum or subsidiary protection. The case law of the CNDA has yet to come up on this particular matter due to the freeze on claims emanating from Ukrainian nationals. One can only hope for a change of policy from the CNDA and a resumption of the review of Ukrainian claims.

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11 All in the Name of Quality: Making Life Harder for the Third Country Migrant Worker

Ivan Mifsud

This chapter presents a scenario where the economy of a particular EU Member State not only depends on migration but risks over-dependence on making migration as difficult as possible for third country nationals.

11.1 A Pro-Migrant Outlook

The author of this chapter makes no secret of his pro-migrant perspective, arguing that migration is a natural phenomenon, whereas statehood is not. So many species in the natural world traverse long distances seasonally for food and water without being required to apply for passports or permits. Similarly, human beings do not always manage to find a job or build a career in the vicinity of where they were born and educated, or are displaced, whether by natural phenomena or by tragic events such as war. Therefore, they need to move, sometimes considerable distances, in order to be able to sustain themselves and their families. Moving for humans involves crossing borders and requires passports, visasand other permits to be done legitimately.

In recent years, Malta has attracted so many foreign workers that its demography has changed. One in five persons in Malta is non-Maltese, and 63% of foreign workers are third country nationals.[1] These people earn their living and feed their dependants, whether they bring them to Malta or send money back home. However, it is by far not a one-way relationship: the Maltese benefit in many ways from the services these people provide, be it in the form of carers for the elderly and the sick, labourers in the construction industry or cab drivers, to name but a few. The relationship between third country migrant workers[2] and Maltese individuals is undoubtedly mutually beneficial. However, third country migrant workers face countless hurdles in obtaining and retaining valid work permits and getting on with their lives just like any other

1 https://jobsplus.gov.mt/resources/publication-statistics-mt-mt-en-gb/labour-market-information/foreigners-data (accessed 29 February 2024).

2 For the purposes of this chapter, the author will concentrate on legitimate migrant workers, that is, those persons who are in Malta legally and have their documentation in order.

human being aspires to. This phenomenon does not seem to be anywhere near improving, simply because the Maltese state has little interest in facilitating matters for third country migrant workers.

11.2 A Legal System Which Favours the Maltese Citizen

Although sixty years old, the Maltese Constitution truly reflects the current situation where migrant workers are concerned. We are a democratic republic founded on work and the individual's fundamental rights;[3] the state recognises the right of all citizens to work,[4] protects work[5] and provides subsistence to citizens incapable of working.[6] One immediately notes the word "citizen". One may argue that it is to be expected that the Constitution of a country will lean towards its citizens; the only issue with this is that the world we live in is not naturally divided into states with their citizens. Nobody other than humankind created this division, and they did so to suit their own needs.[7]

The same Maltese Constitution also provides "workers" with reasonable insurance on a contributory basis,[8] favouring the Maltese citizens because the pension system works in such a way that current workers' contributions sustain the old-age pensions of the retired. Former Prime Minister Muscat was always very open about this; for example, when he said that if we do not want foreigners, we must say goodbye to pensions,[9] a statement which one would be very unwise to doubt. The same Muscat is also on record for having observed that foreign workers create wealth for Malta because most of them leave within six to seven years and, therefore, never claim a pension.[10] Muscat is indeed correct: while the author of this chapter does not have the statistics to prove this, he has heard first-hand from Serbs, in particular, that their ultimate aim is to move to Australia or New Zealand. They come to Malta and stick it out for around six years despite the high cost of rent and the poor salaries because Malta is a very good stepping stone to other countries even beyond mainland Europe, such as Australia and New Zealand; hence, their participation in, and effectively the creation of, the 'revolving door' system which Malta profits from.

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3 Constitution of Malta Art. 1.
4 Ibid., Art. 7.
5 Ibid., Art. 12.
6 Ibid., Art. 17(1).
7 Ivan Mifsud, *The State's Duty to Care when Acting in an Administrative Capacity* (Ph.D thesis 2008).
8 Constitution of Malta, Art. 17(2).
9 https://timesofmalta.com/article/if-you-dont-want-more-foreigners-say-goodbye-to-pensions-warns-muscat.701023 (accessed 29 February 2024).
10 https://deeply.thenewhumanitarian.org/refugees/articles/2018/08/06/migrants-malta-does-not-want-are-powering-its-economy (accessed 1 March 2024).

As a full member of the EU, Malta's legislation on migrant workers, such as the Immigration Act[11] and subsidiary legislation drafted thereunder, is broadly in line with its EU membership obligations; however, it tends to be implemented in such a way that favours Malta and not the third country national. For example, when it comes to family reunification, the sponsor must prove that they earn the "equivalent to the median wage, as established by the National Statistics Office – the latest published amount is €18,155 in addition to a 20% of the said median wage for each family member".[12] A policy allows for the review of applications for people who do not meet the family reunification requirements. The author can confirm that this policy works because he has himself presented applications for such persons and is pleased, indeed relieved, that the authorities did allow the reunification, for example, of a third country national fourteen-year-old girl born out of wedlock from an officially unknown father and whose mother had been working in Malta for more than ten years, had a stable income which unfortunately did not reach the median, but who had no choice but to bring her daughter over after the grandmother with whom the daughter lived for so many years had grown too old and was in too poor health to look after her granddaughter any more. The author publicly acknowledges the reasonable, humane stance taken by the public officials who decided on this application, but cannot help but ask, why is there a requirement for a median wage in the first place? Do people who earn a minimum wage[13] not have a natural right to family life? Does anybody control a Maltese citizen's ability to procreate or base it on their income? Never mind unemployed persons, but why are these obstacles limited to foreign workers? The author cannot help but question why the benchmark for family reunification is not the minimum wage, with no additional 20% per family member. An unemployed migrant worker is not a worker and, therefore, cannot be expected to bring their family over and sustain it. Advocating below the minimum wage would be illegal because nobody is allowed to earn below the minimum wage, but in the author's opinion, to be truly migrant friendly the benchmark should be a stable, full-time employment with no reference to income.

Another interesting question the author has encountered occasionally is, what if two third country nationals, migrant workers legitimately in Malta but not earning the median wage (as is indeed the case for many third country nationals on single permits), have a baby or possibly more than one? Will these babies be deported? The answer presumably will be negative because the authorities will exercise their discretion and the earlier mentioned policy. However, there is always the risk of a refusal to issue a

11 Chapter 217 of the Laws of Malta.

12 https://identita.gov.mt/expatriates-unit-non-employment-permits-family-members-policy/ (accessed 2 March 2024).

13 Currently, €213.54 per week for workers aged over eighteen, https://legislation.mt/eli/ln/2023/287/eng (accessed 2 March 2024).

residence card for the child, which will affect that child's ability to go to school and use state-provided medical services. These situations should be eliminated in the first place for migrant workers by eliminating the 'median wage + 20% per family member' rule. However, the current scenario favours Malta at the expense of the migrant worker because raising the bar in such a way results in less likelihood that migrant workers will bring their families over, and this, in turn, results in less likelihood that the migrant will settle in Malta, and will also result in the Maltese state needing to cater to fewer people when it comes to, for example, the provision of healthcare and education. We are, thus, back to the economics of migrant workers moving on after spending a number of years in Malta, which very much favours the Maltese economy, more than third country nationals remaining in Malta.

The same applies to long-term residency rules. As the author has already explained elsewhere,[14] in a country in which English is an official language apart from Maltese, the legislator amended the relevant legislation[15] in such a way as to make it necessary for the person seeking long-term residence to not only be able to communicate in English but also to be able to speak, read and write in Maltese. Indeed, if they do not obtain a minimum of 65% in a written exam[16] in the Maltese language, they will not be granted long-term residence status. This leads to two observations: Why is there a requirement to be able to read and write in Maltese in a country where everybody speaks English? Why the 65% pass mark when the pass mark at the national university is 45%? It is no secret that learning to speak the Maltese language is not easy, let alone reading and writing in Maltese and passing an exam with such a high benchmark. These same applicants must also follow a course on the social, economic, cultural and democratic history and environment of Malta and obtain a minimum of 75% marks in the exam. This may be done to integrate foreign workers, but as was observed, it "creates as many obstacles as opportunities" for integration.[17] Another challenge to overcome is the financial requirement. The author notes that the long-term resident[18] applicant requires to earn the national minimum wage and not the national median wage required for family reunification, which is a positive requirement in itself, except that the same legislation on LTR requires proof of the individual earning an additional 20% for each additional family member. This last requirement does not favour the migrant worker, who might not earn an additional 20% over the minimum wage for each family

14 "Long-Term Residency Rules in Malta: Undefeatable Obstacle Course for Third-Country Nationals?", *The Implementation and Enforcement of European Union Law in Small Member States: A Case of Malta* (Springer, 2021, pp. 205-221).

15 S.L.217.05.

16 Ibid., reg. 5(2)(a).

17 https://migrant-integration.ec.europa.eu/country-governance/governance-migrant-integration-malta_en (accessed 2 March 2024).

18 LTR.

member, just like a Maltese citizen might be on the minimum wage[19] irrespective of the number of family members that person might happen to have.

The stark reality is that Malta benefits more from third country nationals extending their stay in Malta via single permits than these same workers obtaining long-term residence status: single permits must be renewed annually and come at a fee of €300 each,[20] while workers enjoying LTR status also enjoy a number of rights as a consequence, including the right to self-employed economic activity and the real prospect of remaining in Malta for much longer, if not indefinitely, and claiming a pension instead of the country profiting from the 'revolving door' system and from the fact that they will not stay in Malta long enough to be entitled to a pension despite paying their national insurance contributions.

The unfortunate truth is that the main considerations regarding migrant workers are economic. Migrant workers are allowed into Malta because it favours us, for the reasons already stated. They are allowed to serve us and for our convenience. They pay €300 per single permit application, which is not refunded if the application is refused; yet, where the state considers this to be convenient, this fee is reduced to a mere €27.50.[21] This reduced fee applies to live-in carers for the elderly. The reason for this reduced fee is that it is much cheaper for the state to encourage and assist the elderly to remain living at home than to provide beds and facilities in old peoples' homes, which, apart from being very expensive to build and run, will involve the employment of third country national nurses and carers anyhow. Indeed, economic considerations run so deep that the Maltese state encourages rich foreigners to come to Malta and settle there; hence, the Malta Residence and Visa Programme,[22] because it also benefits the Maltese economy.

11.3 The Creation of New Challenges

Although Malta needs migrant workers, the Maltese state is about to make life for the migrant worker even harder. The latest challenge has come in the form of the "skills

19 A total of 29,036 Maltese workers earned between €0 and €10,000 in 2021 (https://gwu.org.mt/en/majority-of-employees-earn-more-than-20000-euros/ [accessed 2 March 2024].).

20 Increased in early 2024 from €280.50. Considering that, according to the papers placed before the Parliament on 8 January 2024 (PQ 14242 available at https://pq.gov.mt/PQWeb.nsf/7561f7daddf0609ac1257d1800311f18/c1257d2e0046dfa1c1258a9e00309730!OpenDocument [accessed 2 March 2024]), in July 2023 there were 68,755 registered third country national workers in Malta, one appreciates that the Maltese state earns tens of millions of Euro per annum from these applications and, likewise, potentially stands to lose millions of Euro per annum if they obtain long-term residence.

21 This remained unchanged when the fee for single permit applications was increased from €280.50 to €300.

22 Regulated by S.L.217.18.

card" requirement, the rules for which still have to be publicised, which was announced in October 2023. According to articles in the Press,[23] third country nationals seeking tourism and catering jobs will require skill cards. New third country nationals applying to relocate to Malta for employment within the tourism and hospitality industry will be required to take several courses aimed at tackling English proficiency, customer care and knowledge of Maltese tourism products. The Institute for Tourism Studies will undertake these courses online. According to the same news reports, only once they pass these courses will these individuals be able to apply for their single permit. If the single permit is granted, that individual will have to make an appointment with the Institute for Tourism Studies three weeks before they arrive in Malta and will be assessed by the Institute within three business days from actual arrival in Malta; if they fail their assessment, they will be repatriated. This procedure comes at a not insignificant fee of €575,[24] over and above the €300 single permit application fee.

According to the same news reports, by October 2024 all third country nationals currently working in the tourism and hospitality industry must apply for and obtain this skills card or will not have their single permit renewed. A few months later, all European and Maltese people working in the tourism and hospitality industry must obtain the same skills card. At a later stage, this system of skills cards will be extended to other industries.

It is claimed that this is being done to raise standards in the tourism and hospitality industry,[25] and it is hard to argue with the prospect of improving skills and raising standards, the more so when the system is not going to be restricted to third country nationals. The system will be hard on employers as well because it will be even harder for them to recruit people and hold on to existing staff. The author of this chapter has assisted and advised people in obtaining work permits and the necessary visas which go with them. There was a time when the single permit was not a problem, and a letter of "Approval in Principle" could be obtained with relative ease; the true difficulty lay in obtaining the visa and finding oneself in a situation where one had an "Approval in Principle" and was then denied a visa. On one particular occasion, the Consul General of Malta in Istanbul refused a visa because "there are reasonable doubts as to your intention to leave the territory of the Member States before the expiry of the visa". Following this communication, an appeal to the Immigration Appeals Tribunal was

23 https://www.maltatoday.com.mt/news/national/125687/thirdcountry_nationals_seeking_tourism_and_catering_jobs_will_require_skills_card_from_2024#.ZeNc8nbMLGI (accessed 2 March 2024).

24 https://timesofmalta.com/article/skills-card-rules-rolled-hospitality-workers-january.1063551 (accessed 2 March 2024).

25 N.319.

lodged, and to date, this appeal, sent on 13 April 2022, is still pending. In the meantime, the individual gave up and found a job in another country.

This is but one example of a real scenario in which the author of this chapter was involved. The main point is that this difficult process will be made even more difficult by having to take and pass online courses. Apart from practical difficulties, for example, lack of easy access to the internet and difficulty in meeting the costs involved,[26] there is the impracticality of certain topics that have been announced, namely, knowledge about Maltese tourist products. With all due respect to the authorities, this is unrealistic. These third country nationals who are 'still abroad' are hired for their special skills. For example, a restaurant serving Thai food will hire and bring over a person who knows how to prepare authentic Thai cuisine. From the author's experience, this person will not know a word of English and, in all probability, will barely know where Malta is at the time they decide to take up a job here. However, they can cook very well and, therefore, will fulfil the employer's requirements. Getting these people through these courses and the ensuing assessments within three working days of arrival in Malta is not going to be easy. Even more difficult will be getting third country nationals already in Malta, such as Asians who can prepare their native dishes but hardly know a word of English, to pass the exams and obtain their skills card and with it the renewal of their work permit.

The author of this chapter knows an individual who owns a handful of Asian restaurants in Malta and is bracing himself for the worst – having to shut down his business because his chefs are very good at what they do but cannot speak English. He may try to send them for courses in English but very much doubts their success by the time they need to renew their work permits. The bleak reality is that, in the name of raising standards, several migrant workers are anticipated to lose their jobs by not passing the tests and getting their skills cards. Ironically, this will work in favour of the Maltese economy, which, as stated earlier, relies on the 'revolving door' concept, that is, on migrant workers not staying more than a few years in Malta, most certainly not enough to claim a pension. Amid all this, the government will line its pockets with the €575 multiplied by countless applicants and generate work for the trainers. At the same time, third country nationals will pay, study and suffer in silence, and restaurateurs will have to cope with an even more challenging business environment than at present. Despite the

26 €575 is a lot of money to these people and that is not considering the other fees they pay, for example to people and entities that assist them in the processes of finding jobs, obtaining visas, etc. See for example https://www.aljazeera.com/features/2023/12/4/malta-welcomes-foreign-workers-to-fill-labour-shortage-but-repels-refugees (accessed 3 March 2024) for accounts on paying agencies, and on only coming to Malta as a stepping stone to the European Union. Unfortunately, the more bureaucracy created, the more fertile the ambient for agencies and middlemen.

difficulties, this initiative looks very good politically to Maltese citizens, who tend to be wary of foreign workers and immigrants in general, especially dark-skinned ones,[27] and are likely to welcome government initiatives to raise standards.

While it is not being implied that this system of training and skills cards is specifically intended to act as a 'revolving door' for migrant workers or to raise money and create jobs for trainers and other assessors, if the government persists with these plans that it has indeed already announced, this could be an unanticipated benefit for the country and the factor of 'not staying too long in Malta', on which the economy seems to rely in order to maximise benefit from migrant workers. One hopes that the government will have a rethink, at least when it comes to the renewal of single permits. It may indeed be argued that a person who does not have contact with the patrons of the restaurant or other catering outlets does not even need to know English or be trained in customer care or know about the Maltese catering industry in general; all they need to know is how to do their job, that is, how to prepare Asian or otherfood to the likings and expectations of the diner. Another solution is to extend the time frames, giving such people a longer time window within which to acquire these skills,[28] or if they are unwilling, giving their employer sufficient time to find, train and recruit replacements, thus keeping their business going.[29] The government could also lower the anticipated fee of €575 to something more affordable; indeed, the lower this fee, the better.

11.4 Concluding Observations

The fact that the author considers migration a natural phenomenon does not imply that it should not be regulated. Only animals, birds and fish can cross territories free of passports, visas and other permits, humans cannot. The human world is what it is: governments exist, as do controls. Every government is concerned with its territory, economy, people and their welfare; whether we like it or not, it is ultimately about the survival and quality of life[30] of one's people. It is also about addressing the concerns and sentiments of one's people, for example, their perception of immigrants and crime. Truth be told, it is also about votes. Apart from the odd act of solidarity, such as opening up to victims of war, the government will not shower foreign workers with empathy, either where the planned skills card system is concerned or in other aspects.

27 https://www.maltatoday.com.mt/news/national/104097/numbers_tell_a_different_story_its_the_state_that_must_not_neglect_migrants_and_our_communities#.ZeSP3HbMLGI (accessed 3 March 2024).

28 It is submitted that a three-year time frame within which to go for tuition and acquire these skills should suffice.

29 Interestingly, this will also satisfy the 'revolving door' factor.

30 N.323.

Specifically concerning the planned skills card system, the government intends to extend this system in due course beyond the catering and hospitality industry. This means that, from a third country migrant worker's perspective, the challenges are set to increase yet further. That Maltese and Europeans will be subjected to the same system is of little consolation: one cannot anticipate them losing their jobs, and for certain, they will not have paid so much money and put in so much effort to come to Malta, and will not be deported either because one cannot deport a Maltese and deporting a European citizen seems rather unlikely, which means that the brunt will be on the third country immigrant workers, who leave their country in search of a better life, only to find yet more difficulties in the host country even though the relationship is a mutually advantageous one. The author is also particularly concerned that Malta may be approaching a stage of over-reliance on the current status quo to keep its generous system of pensions and welfare going,[31] and there is little to no room for being more accommodating towards third country migrant workers. Indeed, the government must continue to be harsh in the requirements it imposes on third country migrant workers, and doing so in the name of improving the quality of service offered by the particular industry may be but one facet of the stand which the government has to take, in order to sustain the current economic model.

31 N.323.

Part III

Sea Border: Challenges and Perspectives for Reform

12 Migration in the Mediterranean Sea: Management within and beyond Borders

Dimitra Papageorgiou & Eva Tzavala

The notion of borders has been revisited in recent years, given the trend of expanding migration control beyond borders and, at the same time, creating border zones of fictional non-entry regimes into the territory of a state. To this end, earth observation systems are used by Member States and EU agencies at the EU external sea borders to fight cross-border criminal activities and avert situations of distress at sea. Such digitalisation of border control is accompanied by a borderilisation of migration procedures for most third country nationals having irregularly entered the territory of a Member State. Against this backdrop, the EU, in its last proposals under the EU Pact on Migration and Asylum, envisions a unified, fast procedure at its borders to identify those entitled to international protection and those eligible for return, a scheme seemingly disregarding lessons learnt from the implementation of such policies at the Greek sea borders with Turkey.

12.1 Introduction

It is a truism that maritime migration has been the most significant challenge for border management in the Mediterranean Sea in the last twenty years. Indeed, concerns over managing the external borders of the EU have grown, especially after the 2015 refugee crisis. The EU states and the EU have tried to respond to this situation by finding the most efficient means to protect their maritime borders. These measures are far from territorially anchored, as they often transcend any physical sense of borders, spanning vast maritime areas from the south to the north coasts of the Mediterranean Sea.

In this regard, maritime domain awareness, including 'real-life' knowledge of migration flows, is instrumental to any efficient border management policy, with the use of new technologies, such as satellite technology and other earth observation systems, being of paramount importance. At the same time, any migration management mega-plan requires equally effective intra-border policies, including mandatory screening, harmonised asylum procedures and swift returns. The new package of the European Commission's proposals (EU Pact on Migration and Asylum) emphasises questions of border management and beyond.

In view of the aforementioned, the present chapter aims to highlight some key aspects of the present and the future of border management in the Mediterranean Sea, within and beyond borders. In the first part, we will lay out the architecture of EU and EU Member States' policy for monitoring and managing migration, including the increasing use of earth observation tools such as drones, satellite-tracking devices and remote-sensing technologies that are employed for surveillance and border management purposes. In the second part, we will evaluate the intra-border policies advanced by the EU states and organs based on lessons learnt from the Greek experience on the Eastern Aegean Islands.

12.2 The Evolution of EU Maritime Border Management: Natural Borders, De-territorialisation and Digitalisation

Traditionally, the protection system for refugees, asylum seekers and migrants was based on natural borders, where the process of receiving and managing mixed migratory flows began and, in several cases, ended. However, especially from 2015 onwards, there has been an attempt to remove this migration control from the natural borders. This change is manifested through a progressive shift from a framework that revolves around the concept of territory to a regime based on state functions without prior territorial restrictions.[1] In truth, we are facing a process of de-territorialisation of border control, which extends the sovereign powers of the state beyond its natural borders.[2]

This de-territorialisation is expressed through a series of measures that are essentially immigration prevention measures, which aim at preventing people from leaving their place of origin while trying to prevent them from leaving their country and entering a third country.[3] In fact, what has happened is that the EU approach has shifted from the coastguards of EU states pushing back boats on the high seas to the place of departure

1 See ECJ, C-638/16, *X & X v. Etat Belge*, Grand Chamber, 7 March 2017; ECtHR, *Nahhas & Hadri v. Belgium*, relinquished to the Grand Chamber, 26 November 2018. *Cf*, IACtHR, Advisory Opinion OC-25/18 on the right to asylum as human right, 30 March 2018.

2 Trevisanut S. (2014). The Principle of *Non-Refoulement* and the De-Territorialization of Border Control at Sea. *Leiden Journal of International Law*, 27(3), 661-675. More on extraterritorial border control, see Moreno-Lax V. (2017). *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*. Oxford Studies in European Union Law, Oxford University Press; Gammeltoft-Hansen T. (2011). *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. Cambridge University Press.

3 Heschl L. (2018). *Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities*. Intersentia.

to the coastguards of departure countries pulling back the flows before they manage to reach international waters.[4]

Especially in the aftermath of *Hirsi Jamaa* and the 2015 refugee crisis, the EU and its Member States could not continue with "push-back" practices,[5] so they have transformed them into "pull-backs", employed for managing, monitoring and controlling EU external borders. These measures focus on enhancing the cooperation among EU Member States in search and rescue (SAR) activities in the Central and Eastern Mediterranean and the sharing management of migratory movements through externalising border-crossing control. These policies, also known as "cooperative deterrence" or "cooperation-based *non-entrée*",[6] have marked an era of excessive border control in the southern borders of the EU, of outsourcing the burden of managing migration[7] and, ultimately, of shifting the points of border control henceforward transcending natural borders.[8]

In practice, EU Member States have delegated the coordination of the joint border management operations to the European Border and Coast Guard Agency (FRONTEX), while at the same time, the EU scaled back its SAR activities, favouring a deterrence policy, in the context of Article 79 para. 1 TFEU calls for efficient management of migration flows and prevention of enhanced measures to combat illegal immigration.

The EU and its Member States have also opted for an approach based on the "full externalization of border controls and, subsequently, the 'off-shoring' of their responsibility regarding the rescue, disembarkation and overall protection of migrants, with the view to developing a legal framework that would allow the management of migratory flows by the countries of origin, while the EU or its Member States would

4 Kühnemund J. (2018). *Topographies of "Borderland Schengen": Documental Images of Undocumented Migration in European Borderlands*. Columbia University Press, p. 92.

5 Tondini M. (2010). *Fishers of Men? The Interception of Migrants in the Mediterranean Sea and their Forced Return to Libya*. INEX PAPER.

6 Gammeltoft-Hansen T., and Hathaway J. (2015). Non-Refoulement in a World of Cooperative Deterrence. *Columbia Journal of Transnational Law*, 53(2), 235-284; Aalberts T. A., Gammeltoft-Hansen T. (2015). Sovereignty at Sea: The Law and Politics of Saving Lives in Mare Liberum. *Journal of International Relations and Development*, 17(4), 439-468.

7 Deftou M. L., Papageorgiou D., and Papastavridis E. (2022). Interdiction in the Mediterranean Sea: From Unilateral to Multilateral Cooperation, in Dastyari A., Nethery A., and Hirsch A. (eds.), *Refugee Externalization Policies: Responsibility, Legitimacy and Accountability*. Routledge.

8 Müller P., and Slominski P. (2021). Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean. *Journal of European Public Policy*, 28(6), 801-820.

avoid any contact with migrants crossing the Mediterranean, thereby establishing what has been described as 'contactless control'".[9]

Admittedly, pull-backs, with the assistance of new technologies, have succeeded to a great extent in their goal of preventing migrants from entering the EU. Drones, satellite-tracking devices and satellite images have been in the realm of EU migration policy, the use of which has further enhanced the shift of natural borders in monitoring migration at external and internal borders across Europe. Earth observation systems are being used progressively more in and around Europe to track migrant flows because they help monitor borders more efficiently and, in most cases, more safely.

The use of digital technology and monitoring equipment is not something novel. Satellites have been used for quite some time to trigger enforcement at sea, including in the context of the right of hot pursuit under Article 111 UNCLOS. Indeed, the Arbitral Tribunal in the *Arctic Sunrise* case acknowledged that the following:

> Given the large areas that now must be policed by coastal States and the availability of more reliable advanced technology (sea-bed sensors, satellite surveillance, over-the-horizon radar, unmanned aerial vehicles), it would not make sense to limit valid orders to stop to those given by an enforcement craft within the proximity required for an audio or visual signal that makes no use of radio communication.[10]

Satellite data can also be used when there are reasonable grounds to suspect certain illegal acts, such as to board "stateless vessels" in the exercise of the right to visit under Article 110 UNCLOS or vessels suspected of being engaged in the smuggling of migrants under Article 8 of the 2000 UN Smuggling Protocol.[11] As a means of evidence produced by states to support their case, satellite data has been used in several cases in international litigation, mainly in territorial or maritime delimitation disputes. For instance, in *Certain Activities Carried Out by Nicaragua in the Border Area and*

9 Moreno-Lax V. (2020). The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and others v. Italy*, and the "Operational Model". *German Law Journal*, 21, 385-416; Giuffré M., and Moreno-Lax V. (2019). The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows, in Juss S. (Ed.). *Research Handbook on International Refugee Law*. Edward Elgar, at pp. 82-108.

10 PCA Case Nº 2014-02, *In the Matter of the Arctic Sunrise Arbitration between The Kingdom of The Netherlands and The Russian Federation*, Award on the Merits, 14 August 2015, at para. 260.

11 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 15 November 2020, 2241 UNTS 507, Doc. A/55/383.

Construction of a Road in Costa Rica along the San Juan River,[12] satellite imagery was used to prove the existence of deltas before a road construction occurred. In contrast, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, both parties used satellite data in the proceedings to support their claims on disputed islands.[13] In the *Dispute Concerning the Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal*[14] and the *Dispute Concerning the Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*,[15] satellite evidence was used for the selection of base points.

Regarding migration monitoring, earth observation tools have been reportedly deployed shortly after the end of the EUNAVFOR *Operation Sophia* and, more recently, *Operation Triton*.[16] It is not a secret and, indeed, FRONTEX, on its official webpage, has admitted to collecting 'information to establish and maintain common situational awareness regarding patterns and trends in irregular migration and cross-border criminal activities impacting EU external borders', further explaining as follows:

> We do this by using our own surveillance assets and by receiving, integrating, analysing and disseminating intelligence from a wealth of sources, including National Border Guard authorities. We use this Europe-wide picture to coordinate the response to a variety of threats, including smuggling, trafficking in human beings and terrorism.

EU and its Member States aside, civil society organisations have also used satellite data and created online platforms to increase the effectiveness of humanitarian assistance[17]

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12 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665.

13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I. C. J. Reports 2001*, p. 40.

14 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4.

15 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4.

16 For a critical analysis of SAR operations in the Mediterranean, see Munganiu R. (2016). *Frontex and Non-Refoulement. The International Responsibility of the EU*. Cambridge University Press; Papastavridis E. (2010). Fortress Europe and Frontex: Within or without International Law. *Nordic Journal of International Law*, 79 (1), 75-112; Papastavridis E. (2016). EUNAVFOR Operation Sophia and the International Law of the Sea. *Maritime Safety and Security Law Journal*, 2, 57-72.

17 Lang S., Füreder P., Riedler B. et al (2020). Earth Observation Tools and Services to Increase the Effectiveness of Humanitarian Assistance. *European Journal of Remote Sensing*, 53(2), 67-85. Similarly, Human Rights Watch use satellite imagery to document humanitarian needs of populations at borders or in refugee camps, see https://www.hrw.org/news/2016/09/07/jordan-new-satellite-images-syrians-stranded-border.

or to document the deaths and human rights violations of migrants at the maritime borders of the EU. In contrast, UNITAR has used satellites to map refugee camps in Jordan.[18] Moreover, the technology-migration nexus is pertinent to many sustainable development goals (SDGs) and for achieving the 2030 Agenda for Sustainable Development,[19] with migration administration and management, especially, falling within the scope of SDG target 10.7 ('Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'), which is often undermined by states' use of technology to prevent migration.

Against this background, concerns have been expressed over the legality and legitimacy of digital technologies. One cannot deny that the use of such methods brings certain assets since they may place states in a position to be better aware of any distress incident occurring in the Mediterranean Sea that might trigger SAR services under the 1979 SAR Convention. At the same time, the awareness through these tools that a vessel is in distress at sea may also establish jurisdiction over the persons in distress under human rights treaties[20] and, thus, enhance the rescuing state's obligation to ensure their right to life.[21]

However, replacing rescue vessels with drones that cannot perform rescues is being condemned as a willful abrogation of the responsibility of the EU and its Member States to save lives. At the same time, new risks may emerge in relation to the protection of other fundamental rights, for example, in relation to the processing of photographs and videos of vessels with migrants by maritime surveillance systems.[22]

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18 Four Years of Human Suffering: The Syria Conflict as Observed through Satellite Imagery, UNITAR 2014, available at https://www.refworld.org/pdfid/551155c14.pdf.

19 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

20 See, eg, Art. 2(1) International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966; Art. 1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950.

21 *A.S. and others v. Italy* and Malta, Human Rights Committee, 2021.

22 How the EUROSUR Regulation affects fundamental rights (Luxembourg: Publications Office of the European Union, 2018), at p. 4.

12.3 Intra-border Policies: Lessons Learnt from the Management of Migration Flows on the Eastern Aegean Islands (Greece)

We have thus far demonstrated how the scope of border management policies has been extended beyond the physical boundaries to include the extraterritorial activities of states. This part aims to shed some light on the opposite trend, parallel to the aforementioned, and explore whether the proposed migration management scheme will likely meet its designers' expectations. In this regard, we have selected three main proposals put forward by the European Commission with respect to border management, which is, in our view, representative of the 'borderilisation' trend.

Admittedly, there is a tendency to expand the *ratione loci* and *ratione personae* scope of exceptional border procedures to cover almost all situations of irregular migrants residing in the territory of an EU state. The proposals for the CEAS reform, which were introduced by the European Commission in September 2020 and are currently under discussion between EU Member States as parts of a broader package deal (the EU Pact on Migration and Asylum), are indicative of this 'borderilisation' of common procedures related to the entry and stay of third country nationals (screening, asylum, returns). Ideally, determining the status of all third country nationals illegally entering EU territory shall be completed expeditiously and lawfully. In contrast, the third country national is still physically located at the EU external borders under the fictional legal status of "non-entry".[23] The European Commission proposes establishing

23 Both the Proposal for a Screening Regulation (Art. 4) and the amended Proposal for an Asylum Procedures Regulation (Arts. 41 para. 6 and 41a para. 1) adopt this fiction of "non-entry". The European Parliament in a recent Resolution on the implementation of Art. 43 of Asylum Procedures Directive pointed out that the fact that an applicant has not legally entered the territory of the Member State while actually remaining on that territory is a legal fiction that impacts solely on the right to entry and stay but does not mean that the applicant is not under the jurisdiction of the Member State concerned (2020/2047(INI)). Greece, Italy, Malta and Spain, in their joint comments to the New Pact on Migration and Asylum, expressed the belief that "solutions based on the *fictio juris* of not allowing entry in the EU of those not eligible for international protection are unrealistic and will not work". The UN High Commissioner for Refugees also states that international legal obligations of states remain applicable despite the artificial construct of non-entry and further deplores that "when a State is presented with an asylum request at its borders, it is required under international law to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless" (UNHCR, Practical considerations for fair and fast border procedures and solidarity in the European Union (2020)). It has also been critised by civil society and the academia. European Council on Refugees and Exiles (ECRE), Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM (2020) 610, (2021), at p. 54. Refugee Support Aegean (RSA), Comments on the amended Commission proposal for an Asylum Procedures Regulation COM (2020) 611 (2020), at p. 7 et seq. Mouzourakis M. (2020). More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status. *European Law Journal*, 26 (3-4), 171-180, at p. 174 et seq.; Thym D. (2022). Never-Ending Story? Political Dynamics, Legislative Uncertainties and

a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and, where applicable, a swift return procedure, thereby integrating currently separate processes.[24] This aims to 'close the gaps between external border controls and asylum and return procedures'.

12.3.1 Introducing a Mandatory Screening Procedure at the EU External Borders (But Not Only)

The European Commission's Proposal for a Screening Regulation sets a mandatory screening procedure at the external borders of the Member States for all third country nationals who have crossed the external border in an unauthorised manner (first category), of those who have applied for international protection during border checks without fulfilling entry conditions (second category) and those disembarked after a SAR operation (third category).[25] Screening consists of the following mandatory steps: (1) a preliminary health and vulnerability check, (2) an identity check (identification procedure), (3) registration of biometric data (Eurodac) and (4) a security check through different databases to verify that the person does not constitute a threat to internal security. The competent authorities complete these procedures and fill out a debriefing form.[26] The screening aims to refer third country nationals to the appropriate procedure, whether asylum, refusal of entry or return.[27]

In Greece, the screening procedure has already been implemented, to a certain extent, in Evros (land border with Turkey) since 2013.[28] In 2015, after the launching of the

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Practical Drawbacks of the 'New' Pact on Migration and Asylum in Daniel Thym/Odysseus Academic Network (eds), *Reforming the Common European Asylum System – Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*. Nomos, at pp. 28-29.

24 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, Section 2.1.

25 Art. 1 of the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/226, (EU) 2018/1240 and EU 2019/817, COM/2020/612 final.

26 Art. 6 para. 6 of the Proposal for a Screening Regulation.

27 Art. 14 of the Proposal for a Screening Regulation.

28 Art. 7 para. 1 of the Greek Law 3907/2011 on "first reception procedures" reads as follows: "All third country nationals arrested for entering the country without the legal formalities are subject to first reception procedures. First reception procedures for third country nationals include: (a) verification of their identity and nationality; (b) their registration; (c) their medical check and the provision of any necessary care and psychosocial support; (d) information provision on their rights and obligations, in particular the requirement under which they may claim international protection; and (e) the care for those belonging to vulnerable groups, in order to be submitted to the necessary procedure, as per the

so-called hotspot approach by the European Commission – as a means to mitigate consequences from extreme migratory pressure at the borders of frontline states[29] – the screening procedure was introduced and used systematically on the five selected Eastern Aegean Islands (Lesvos, Chios, Samos, Leros, Kos). To this end, open, temporary hosting facilities (reception and identification centres (RICs)) were established in the five Eastern Aegean Islands, where all relevant migration procedures would be placed swiftly and integrated.[30] After the entry into force of the EU-Turkey Statement and the restrictive interpretation of its terms, the five Eastern Aegean Islands became de facto border zones where detention or other restrictive liberty measures automatically applied to irregular arriving migrants indiscriminately.[31] Given the high number of arrivals until 2019, the limited hosting capacity of the islands, the delays in the examination of the international protection claims and the low pace of returns to Turkey, the situation on the islands became inviable. The Moria camp in Lesvos, which was destroyed after a fire on September 2020, became a symbol of failed EU border policies.

The Proposal for a Screening Regulation, while it regulates that screening procedures are normally conducted at or in the proximity of external borders, allows Member States to apply the screening to third country nationals "found" (according to the text of the Regulation) or "apprehended" (according to the Explanatory Memorandum)

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case". The first reception centre became operational in Evros on March 2013. Two mobile units were also occasionally performing first reception procedures on the islands of Lesvos, Samos and Chios. Hellenic Republic, First Reception Service, Annual Report 2013 (2014).

29 The objective was to provide operational support to Greece through the deployment of EU Agencies (EASO, Frontex, Europol and Eurojust) to assist the Member States in swiftly identifying, registering and fingerprinting incoming migrants; channeling asylum seekers into asylum procedures; implementing the relocation scheme (2015-2017) and conducting return operations. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM (2015) 240 final, at p. 6. European Parliament Briefing, Hotspots at EU external borders- State of play, June 2018. Asylum Information Database (AIDA), Country report on Greece, Chapter: Reception and Identification Procedure, last updated on 10th June 2021.

30 Greek Law 4375/2016 (currently replaced by Greek Law 4636/2019).

31 At the beginning, as from 26 March 2016, all existing hotspots were transformed into closed detention facilities and all new arrivals were effectively deprived of their liberty. See findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the visits carried out to Greece from 13 to 18 April and 19 to 25 July 2016 (Report, CPT/Inf (2017) 25, at p. 11 et seq). Then, once RICs became overcrowded, the detention measure was substituted by the imposition of a geographical restriction of the applicant within the territory of the particular island. Until 2020, there were some exemptions on vulnerability grounds which justified the lifting of this measure. Geographical restriction is still applicable under the current legal regime, while new closed controlled RICs have been inaugurated in 2021. For more information, see European Network of National Human Rights Institutions (ENNHRI)/Greek National Commission for Human Rights, (GNCHR) National Report on the situation of human rights of migrants at the borders – Greece (2021).

within their territory who eluded border controls on entering the Schengen Area.[32] In these cases, according to Article 6 para. 2, the screening shall be conducted 'at any appropriate location' within the territory of a Member State. In Greece, Article 39 of Law 4636/2019 states the following:

> All third-country nationals and stateless persons who enter or reside in the country without legal formalities and do not prove their nationality and identity with a public document are subject to the reception and identification procedures. These persons are brought immediately, under the responsibility of the competent police or port authorities, to a RIC.

In November 2021, a Circular note was issued by the General Secretariat for Migration Policy,[33] whereby third country nationals[34] wishing to submit a first application for international protection in one of the Asylum Offices in mainland Greece and who have not been subjected in the past to reception and identification procedures will be transferred by the competent police authorities to appropriate registration areas.

12.3.2 Reinforcing Asylum Border Procedures (and Expanding Their Scope)

One of the amended proposals of the European Commission to its 2016 Proposal for an Asylum Procedure Regulation concerns the provision of additional grounds for Member States to use the border procedure while extending the maximum length of such a procedure.[35] In addition, border procedures become obligatory for certain categories of applicants.[36] Article 41 stipulates that only applications of third country nationals who

32 Art. 5 stipulates exactly that "there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner". Hence, this provision does not apply to "overstayers", such as short-stay visa holders who stay longer than three months, or persons with a residence permit who stay after the latter expires.

33 Circular of the General Secretary for Migration Policy on the application of Art. 39 para. 1 of Law 4636/2019 and Art. 46 of Law 4636/19 (corrigendum) (2021).

34 Detainees (on administrative or criminal grounds) and unaccompanied minors are exempted from this provision.

35 The time limit for the conduct of border procedures is extended from a maximum of 4 weeks for a first-level asylum decision to 12 weeks for refugee status determination at first and second instance (Art. 43 para. 2 of the Asylum Procedures Directive and Art. 41 para. 11 of the Amended Proposal for an Asylum Procedures Regulation). This can be further extended to 20 weeks in times of crisis (Art. 4 para. 1 (b) of the Proposal for a Crisis Regulation).

36 (1) Where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to identity or nationality; (2) where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States and (3) where the applicant holds a nationality or has a country of former habitual residence for which the proportion of decisions granting international protection is 20% or lower –

have concluded the screening procedures, have not been authorised to enter the Member State's territory (para. 6) and do not fulfil the Schengen Borders Code entry conditions may be assessed under the border procedure. Decisions in a border procedure may only be taken on the admissibility of the application or the merits of the application when the application is examined under the accelerated procedure. In a crisis, Member States may apply border procedures to assess an application on its merits in cases of nationals of countries whose recognition rate is 75% or lower, according to the latest available yearly average Eurostat data. Article 43 para. 3 of the Asylum Procedures Directive currently in force provides that

> in the event of arrivals involving a large number of third country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

The same provision is maintained in the Amended Proposal for an Asylum Procedures Regulation (see Art. 41 para. 15). In the Explanatory Memorandum, it is highlighted that this option is available to Member States only temporarily and for the shortest time necessary. Article 41a paras. 2 and 6 clarify that applicants subject to the asylum border procedure shall not be authorised to enter the Member State's territory and can be accommodated anywhere in the state's territory for capacity reasons. This spatial expansion of border procedures stretches beyond the national territory of frontline states since it can also apply to the relocating or transferring to other Member States.[37]

In Greece, as a consequence of the signing of the EU-Turkey Statement, a fast-track border procedure was installed with respect to applications lodged by third country nationals entering Greece through the Eastern Aegean Islands.[38] At the same time,

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according to the latest available yearly Eurostat data (Arts. 41 para. 3 and 40 para. 1 of the Amended Proposal for an Asylum Procedures Regulation). See also Vedsted-Hansen J. (2022). Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection? in Daniel Thym/ Odysseus Academic Network (eds.), at pp. 102-109.

37 Art. 41 para. 8 of the proposed Regulation on Asylum and Migration Management (transferability of the asylum and return border procedure).

38 Art. 60 para. 4 of Greek Law 4375/2016 provided that this special border procedure applies only exceptionally in case of arrivals of a large number of third country nationals who introduce international protection applications at the border or in transit zones of ports or airports of the country or while they remain in Reception and Identification Centres. This Article was replaced by Art. 90 para. 3 of Greek Law 4636/2019 and is still in force.

a sleeping provision in the Greek asylum law related to the admissibility criterion of the safe third country was activated with respect to applications submitted by third country nationals falling under the scope of the EU-Turkey Statement. By virtue of this clause deriving from EU law (Art. 38 of Asylum Procedures Directive) and in the light of the EU-Turkey Statement's terms, applications of most Syrians reaching Greece through Turkey were being rejected as inadmissible, and they were eligible to return to Turkey. However, in practice, few returns were concluded for legal or operational reasons. In 2021, even though Turkey had suspended all returns from March 2020 due to COVID-19, the Greek government opted to expand the safe third country notions *ratione personae* and *ratione loci*. By virtue of a Ministerial Decision, since June 2021 Turkey has been considered a safe third country for Syrians, Afghans, Pakistanis, Bangladeshis and Somalis. In addition, Albania and North Macedonia were designated in December 2021 as safe third countries.

Moreover, this admissibility criterion was exported to the regular asylum procedure. Henceforth, all asylum applications submitted in any regional asylum office across Greece are being examined under the safe third country concept, and most of them are rejected as inadmissible since these nationalities (Syrians, Afghans, Pakistanis and Bangladeshis) constitute the majority of asylum seekers in Greece.[39] In this way, a derogative regime has been applied only in border asylum procedures. It is justified by the terms of the EU-Turkey Statement, a border migration management deal that transcends the geographical area of borders and applies to every asylum seeker in Greece.

12.3.3 Integrated Asylum and Return Procedures

To deal with the profile of third country nationals arriving at the EU external borders – the European Commission refers to "mixed flows including a significant share of asylum applicants who come from countries with a low recognition rate"[40] – the Proposal for an Amended Asylum Procedures Regulation (Art. 41) introduces a mandatory border return procedure following a border asylum procedure and a rejection of the

39 The UNHCR has raised concerns on the extensive use of admissibility procedures which comes with disadvantages and not necessarily efficiency gains as the situation in Greece has proven. UNHCR's Position and Recommendations on the Safe Third Country Declaration by Greece (2021).

40 "Whilst the number or irregular arrivals has decreased since 2015, the share of migrants arriving from countries with recognition rates lower than 20% has risen from 13% in 2015 to 55% in 2018 … The arrival of third-country nationals with clear international protection needs in 2015-2016 has been partly replaced by mixed arrivals of persons with more divergent recognition rates". Explanatory Memorandum of the Amended Proposal for an Asylum Procedures Regulation.

application for international protection (Art. 41a). The purpose of the joint asylum and return border procedure is, according to the Explanatory Memorandum,

> to quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union.

It is worth noting that, for the first time, the rules on the asylum and return border procedures come together in a single legislative instrument. In fact, the European Commission had already included in its 2018 Proposal for a recast Return Directive a provision on establishing a return border procedure for third country nationals whose applications had been rejected in the context of the asylum border procedure. Likewise, the European Commission proposed in the same document that Member States should issue a return decision immediately after a decision ending the legal stay of a third country national, notably a decision rejecting an application for international protection. The Court of Justice of the Union has already ruled, because of Article 6 para. 6 of the Returns Directive, that the possibility of joining the decision on the expiration of the right to stay together with the decision to return into a single administrative act enables Member States to ensure the coincidence of time, the consolidation of the administrative procedures that result on the issuance of these as well as the appeal procedures against them.[41]

In Greece, the law on returns transposing the provisions of the Returns Directive recently amended Greek Law 4825/2021 to include the provision that a single decision shall be issued by the competent asylum authorities on international protection application and return.

12.4 Conclusion

We have entered a new era of immigration control in the EU, where cross-border migration controls such as carrier sanctions, extraterritorial maritime border patrols and 'contactless' control measures that include remote surveillance techniques with the use of advanced ground-based surveillance systems call into question the foundations of the refugee protection system, which until recently was based on the concept of borders and territory. This 'digitalisation' of the control of migratory flows raises a number of issues related to the limits of the jurisdiction of states over their obligations to protect human

41 C-181/16, *Sadikou Gnandi v. Etat belge* [GC], judgment of 19 June 2018, ECLI:EU:C:2018:46, para. 49.

rights, given that in accordance with human rights treaties, states are obliged to protect persons within their jurisdiction.[42] While digital technologies increase the visibility of migrants when on the move and render them locatable, thus enforcing SAR activities, they also may be used against them, as the same digital tools may be used for enhanced border controls and migration-averting policies, sabotaging relevant SGD goals.

Controls do not stop at the borders. Managing the EU's external borders is a shared responsibility of all Member States, Schengen Associated Countries and the EU and its agencies. Effective intra-border policies at the EU external borders are key for a Schengen Area without internal border controls. Indeed, Greece has served, for the past few years, as a testing field for new approaches to EU asylum and migration management.[43] Leaving aside human rights considerations, this chapter has shown that the proposed package of CEAS reform, which is illustrative of the 'borderilisation' trend, is not a sustainable solution.

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42 Art. 1 ECHR; Art. 2 ICCPR. For an interpretation of the phrase "within their jurisdiction", see *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020, at para. 99, where the Court conferred the ordinary meaning to be given to the phrase in its context and in the light of the object and purpose of the Convention. For more on the concept of "jurisdiction" and jurisprudence on extraterritorial jurisdiction and human rights see *inter alia* Milanovic M. (2011). *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*. Oxford; Zoeteweij-Turhan M.H. (2021). State Jurisdiction and the Scope of the ECHR's Protection (Art. 1 ECHR), in D. Moya and G. Milios (eds.), *Aliens before the European Court of Human Rights*. Brill/Nijhoff.

43 For instance, this is clearly stipulated in the Proposal for Screening Regulation that "the proposal draws the lessons from the standard workflow currently implemented in Italy and in Greece in hotspot areas as referred to in Regulation 2019/1896".

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13 From St Paul to *Feilazoo v Malta*, from Asylum Law to the Sale of Citizenship – How Malta and EU Law Lost l'esprit de l'Europe and the Way Forward

Ivan Sammut

Malta boasts that it has been a welcoming post for migrants since ancient times. Malta is proud of its role in welcoming St Paul in 60 AD and also of its Christian roots. However, in practice, the Christian roots and the fact that it welcomes migrants may be just a gimmick. The article discusses Malta's egoistic approach towards migration and its structured legal and enforcement system. It seeks to attract third-country nationals by 'selling' EU passports yet treats migrants horrendously. The article aims to explain the hypocrisy of Malta's legal and political position on migration and show how its European values are compromised.

13.1 Introduction

Malta has been a country of emigration for many decades. However, since 2002, after the increasing inflow of migrants started in the early nineties, it has begun to realise its switch to a country of immigration. With a population of around 500,000 and an area of around 300 square kilometres, the island of Malta, as an independent state, has the highest population density in Europe. Since it joined the European Union (EU) in 2004, the country has seen a significant increase in undocumented migrants arriving by boat from Africa. The authorities have struggled to cope with this influx, and observers are concerned that the country's heavily criticised detention centres are unprepared to house so many people. Criticism has also been levelled at the government's policy of mandatory detention of asylum seekers. As a result, Malta has sought 'burden sharing' assistance from the EU and the international community to improve the country's capacity to receive, house and process irregular migrants and asylum seekers.

13.2 Malta from Emigration to Immigration

Like many other Southern European countries, Malta had for centuries been a country of emigration rather than immigration. This was particularly strong during the first eight decades of the 20th century when many Maltese migrated to other countries, mainly different parts of the British Empire or former colonies such as the UK, Australia, Canada and the USA.

During the two world wars, the aforementioned outflow assumed permanence, and the government even established a Department of Emigration, which was only dismantled in January 1995.[1] The Department aimed to facilitate emigration mainly to other parts of the British Empire for economic reasons. After World War II, emigration peaked owing to the economic downturn. Malta's biggest employer at the time, the Drydocks, which employed over 11,000 workers, began to downsize. Economic crises, coupled with the post-war baby boom, triggered a new phase of economic emigration. According to King,[2] around 140,000 Maltese left Malta between 1946 and 1979 through the Assisted Passage Scheme. Slightly over 57% of the total number went to Australia, while 22% went to the UK, 13% to Canada and 7% to the USA. Thus, 30% of the population emigrated.

Consequently, the population of Malta decreased (by 5,404) between 1957 and 1967.[3] During the 1970s, economic emigration started decreasing, and the country began experiencing the first influx of returnees. Returns had always been part of general migration programmes, and one in four former emigrants usually came back, contributing to a total of around 39,000 returnees between 1946 and 1996.

Despite the extensive emigration, Malta's location and historical factors also made it attractive for some groups of immigrants. For example, at the end of 2009, Malta hosted 18,100 foreign nationals, i.e. 4.4% of its total population, well below the then EU average of 6.4%. 2% of these were EU citizens, predominantly active or retired British nationals and their dependents centred in Sliema and its surrounding modern suburbs, as well as Italians and other nationalities, while 2.4% were from non-EU

1 National Statistics Office – Malta, News release No. 126/2004, 5 July 2004, available at: www.nso.gov.mt/statdoc/document_file.aspx?id=588 (accessed 20 May 2023).

2 King, R. (1979), 'The Maltese Migration Cycle: An Archival Survey', *Area* 11 (3): 245-249. www.jstor.org/discover/10.2307/20001477?uid=3739008&uid=2&uid=4&sid=21103019821863.

3 Attard, L. E. (1989), *The Great Exodus (1918-1939)*. Malta: Publishers Enterprises Group, p. xvii, available at: www.maltamigration.com/history/exodus/.

countries.[4] In addition, many smaller foreign groups, including Italians, French, and Lebanese, have assimilated into the Maltese nation over the decades.[5] Emigration has been particularly low since the mid-1980s. With Malta's accession to the EU, in 2004, many people left Malta mainly to take up jobs with the EU institutions, particularly in Belgium and Luxembourg. However, this cannot be compared with the economic migration of the 1950s and 1960s. In fact, this outflow represents a small number of expatriates who only leave for a couple of years seeking a different work experience, and, eventually, most return, to be replaced by a younger generation.

By contrast, immigration, particularly by boat, is a recent phenomenon. In the 1990s, migration outflows started reversing, and Malta became a transit country for migration routes from Africa towards Europe. According to the Ministry for Justice, Malta received between 50 and 60 migrants per year (not including EU citizens and returnees) before 2000, mostly from North Africa, generally claiming asylum on arrival.[6] During the first Gulf War, in 1990 and 1991, a few hundred Iraqis arrived in Malta, intending to move on to Northern Europe and North America eventually. Most of them were resettled.

In the first decade of the 21st century, the number of immigrants arriving in Malta increased sharply. Most of them arrived by boats during the summer, carrying irregular migrants from sub-Saharan Africa who travelled through Libya. In 2002, a record 21 boat landings brought 1,868 irregular immigrants who had no personal documents or other means of identification. In 2005, 2006 and 2007, Malta received about 1,800 immigrants every year. After reaching a peak in 2008, when 2,775 people arrived in Malta, landings totalled 1,475 people in 2009, 47 in 2010, 1,579 in 2011, 1,890 in 2012 and 2,008 in 2013. Most immigrants were then resettled elsewhere in Europe and North America.

Malta was caught unprepared and faced a considerable strain on its existing infrastructure. The majority, i.e. between 70% and 90% or more, of undocumented migrants landing in Malta were asylum seekers in need of international protection. Concerning the size of the asylum seekers' population, Malta became one of the EU's main recipients of asylum applications.

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4 Eurostat Press Release 129/2010 – 7 September 2010, Population of Foreign Citizens in the EU27 in 2009, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-07092010-AP/EN/3-07092010-AP-EN.PDF (accessed 2 July 2022).

5 Demographics of Malta, available at: www.princeton.edu/~achaney/tmve/wiki100k/docs/Demographics_of_Malta.html (accessed 2 July 2022).

6 Baldacchino, G. (2002), 'A Nationless State? Malta, National Identity and the EU', *West European Politics* 25 (4): 191-206.

The Office of the Refugee Commissioner (REFCOM), which had become operational a few months before their first arrival, had to deal with them. When the REFCOM was set up, based on previous experience, no one had envisaged such an extensive caseload. Therefore, coping with the arrival of such large numbers of asylum seekers in a relatively short time was not an easy task. Moreover, Malta found itself in a particularly disadvantaged position owing to the implementation of the so-called Dublin System in the EU context, according to which the member state usually responsible for handling an asylum claim is the state through which the asylum seeker concerned first entered the EU. Hence, it is unsurprising that immigration and asylum issues have become hot topics in Malta.

As a result, irregular immigration and asylum have been high on Malta's agenda since this irregular migration by boat from Africa's northern shores to Europe took hold. In fact, over the past decade and a half, Malta has repeatedly called for solidarity as it lacks essential resources and space to tackle the phenomenon. EU immigration and asylum policy has also developed over the past years. Still, the rhetoric has often not been followed by effective practical action, and there remains a considerable discrepancy between the asylum responsibilities of various member states. Since fair responsibility-sharing would ensure a stronger protection system within the EU, benefiting both the Member States and the asylum seekers, it has become necessary to evolve a mechanism that shares asylum responsibility more equitably among the Member States. This has been a central issue in Malta's relationship with its European partners.

13.3 *Feilazoo v. Malta:* A True Snapshot of Malta's Situation

Countless articles have been written about migration and Malta. This article is not meant to be another one of its kind on the topic but intends to expose the reality that migrants face in Malta. Malta generally boasts that it is a place that welcomes foreigners with open arms and hospitality. The patron Saint of Malta is St. Paul, and the Maltese Catholics are proud that their ancestors, circa 60 AD, welcomed St. Paul on the island after his vessel bound for Rome was put off course by a storm and landed somewhere in Malta. This is recorded in the Bible under the Acts of the Apostles following the Holy Gospel. Legends and traditions surround this incident, and St. Paul is credited with having converted the Maltese from paganism to Roman Catholicism during his stay in Malta. At this point, emphasis is placed on the fact that the Maltese deem themselves a very hospitable nation and are ready to go out of their way to help those who, for various reasons, ended up on the Maltese shores.

All nations like patriotism, and the Maltese hospitality of St. Paul are examples of heroism and patriotism mixed up with the notion of hospitality. However, the reality may be different. A good way of looking at the reality of the last decade of the 21st century is to use the case of *Feilazoo v Malta*, which was decided by the European Court of Human Rights (ECtHR) in Strasbourg.[7] This case is a typical example of an African migrant who arrives on Maltese shores and experiences how the much coveted Maltese hospitality actually plays out.

13.3.1 Facts

The case concerns the conditions of the applicant's immigration detention and its lawfulness under Articles 3 and 5 of the Convention, respectively. It also concerns complaints under Article 34 of the Convention concerning the proceedings before this Court, related mainly to interference with correspondence and domestic legal aid representation. On 12 April 2018, criminal proceedings were instituted against the applicant for assaulting and violently resisting the correctional officers, threatening or causing them bodily harm, causing them injuries of a slight nature, disobeying lawful orders, and wilfully disturbing public order and peace. He was placed in pre-trial detention on the same day. On 5 February 2019, the applicant was found guilty of all the charges against him and sentenced to 2 years' imprisonment and a fine of EUR 5,000. He was ordered to pay the costs of the expert who had examined him and was declared an illegal immigrant under Articles 5 (2) (d) and 14 of the Immigration Act. Therefore, the court held that an order for deportation would be issued once he finished serving his sentence.

An appeal judgment on 16 May 2019 confirmed the applicant's guilt. However, the punishment was reduced because of the circumstances of the case, particularly the long period of incarceration of the applicant and the behaviour of the immigration authorities. He was imprisoned for 2 years, suspended for 3 years, and fined EUR 4,000. His immediate deportation (after the payment of the fine) was ordered. On the same day (16 May 2019), the applicant was released from prison and detained there since 12 April 2018 in pre-trial detention. He was transferred to a closed detention centre for immigrants. According to the applicant, the authorities did not have the required passport to send him back to Nigeria, given that his passport had expired while in prison. According to the government, utilising a verbal note from 17 May 2019 (and another from 17 December 2019), the Maltese authorities requested their Nigerian counterparts to issue emergency travel documents to the applicant. By a further

7 App 6585/19 decided on 11 March 2021.

judgment on 24 May 2019, the EUR 4,000 fine resulting from the judgment on 16 May 2019 was converted into 6 months' imprisonment owing to the applicant's inability to pay that sum. The court sympathised with the applicant but considered that the 6 months could not be deducted from his 13 months in pre-trial detention. The court further ordered that the applicant be deported at the end of his term of imprisonment and that the immigration authorities organise themselves to deal with this in due time because of their past behaviour.

On the same day, the applicant was released from Safi Barracks, where he was serving his immigration detention, and imprisoned at the Corradino Correctional Facility. The applicant claimed that in prison, he was moved from one security regime to another in an attempt to bar him from having any contact with persons and to impede his access to legal aid to proceed with his case against the officers, as well as hindering his application to the ECtHR. He further claimed that he was being denied access to his medical documents to substantiate his complaint or to make any photocopies of his correspondence with the Court, which he considered was being tampered with. According to the applicant, the treatment he was subjected to resulted from discrimination. He was transferred from a medium security division to a high-security division owing to his unruly behaviour, in particular, instigating several prisoners to create disorder. At one point, he possessed several prohibited items in his cell. He was released from the Corradino Correction Facility on 14 September 2019 and was placed in immigrant detention at the Safi Detention Centre. He was not informed of a date for his deportation.

He refused to leave the detention centre unless he was provided with a passport to travel into Europe. He believed he was entitled to such a travel document, under European law, after spending 12 years in Malta. His request was refused on the basis that he was a prohibited alien. Consequently, the applicant declined to leave the detention centre until 22 December 2020, when he was offered accommodation at the Ħal Far Open Centre. Malta also submitted that the Nigerian authorities had refused to issue the applicant with travel documents before meeting with him.

13.3.2 Observations

Feilazoo, when interviewed by the *Times of Malta*, recounted how he had been 'humiliated' by a full-body search, accused of being a ringleader and transferred into another division the day after he complained about prison food. He said that the morning

after he complained, he was woken up abruptly at 6.30 am and taken to a room where he was stripped and 'forced to squat and the orifices of his body were searched'.[8]

In his application before the ECtHR, Feilazoo complained about excessive force used on him during his detention, the lack of an investigation into this, his conditions of detention, that some periods of his detention had been unlawful, and that the state had hindered his right of petition before the court. In its judgment by seven judges, including Maltese judge Lorraine Schembri Orland, the court observed that while Feilazoo had submitted photos of the detention conditions he had been subjected to, Malta's Attorney General merely relied on 'general, unsubstantiated statements'. It also noted that neither Feilazoo nor the government had provided sufficient data on the numbers of detainees held and potential overcrowding, so it was unable to conclude the matter. However, the court said it remained concerned about the various aspects of Feilazoo's allegations that the government had not rebutted, including claims about lack of ventilation, functioning toilets and pests.

The European Court said it was particularly striking that the applicant had been held alone without access to natural light for 77 days, during much of which time he also had no access to exercise. The Court said it was also very concerned by the unrebutted allegations that the applicant had been housed with people in Covid-19 quarantine without a medical reason for doing so. Regarding his claims that he was subjected to arbitrary interference by the state in his right to freedom, as the authorities were trying to secure a passport for him, the court said it did not accept that the entire period of detention had been for deportation. It ruled that the authorities had not acted diligently during the 14-month detention as it did not appear as though they had sufficiently pursued the passport matter with the Nigerian authorities. The Court concluded that the reasons for the applicant's detention had not remained valid throughout the period, thus finding another violation of his human right to liberty and security.

Ruling on another complaint regarding the protection of applicants from any form of pressure from the authorities to withdraw or modify their complaints, the Court found that the Maltese authorities had failed to ensure that Feilazoo was given the possibility of obtaining copies of documents that he had needed to substantiate his application and that his correspondence concerning the case before the court had not been dealt with confidentially, ruling that this amounted to an unjustified interference with his right. Moreover, the Court also found that his representation by a legal aid lawyer

8 See the *Times of Malta* 11 March 2021, available at: https://timesofmalta.com/articles/view/ex-convict-wins-25000-compensation-after-suffering-degrading-treatment.857407.

was 'inadequate' because of a lack of regular lawyer-client contact despite the court's requests, as well as the inaction on the part of the authorities to rectify the situation.

On the positive side, Malta did try to do its part to improve some issues. For example, according to Malta's report to the Council of Ministers dated 12 October 2023, several improvements may be observed.[9] The applicant was held at Safi Detention Centre between 16 May and 23 May 2019 and from 15 September 2019 until 13 November 2020. Since then, the national authorities have implemented various measures to improve detention conditions at Safi Detention Centre, including maintenance and extensive refurbishment works, introduction of a Welfare Officer and bolstering of human resources.

In 2020, the number of personnel in the maintenance section at Safi Detention Centre increased threefold, from 4 to 12. This has allowed the Detention Service (which runs the Safi Detention Centre) to embark on new projects to improve the conditions of the detention facilities while still carrying out ordinary maintenance works. Since the last quarter of 2020, the national authorities have extensively refurbished and upgraded works throughout Safi Detention Centre. All persons residing in Safi Detention Centre today live in refurbished or brand-new compounds, making the accommodation more comfortable, modernised and resistant to vandalism.

As part of the refurbishments in question, all occupied buildings have been furnished with vandal-proof systems to prevent incidents of vandalism, which naturally lead to the interruption of services offered. Thus, electricity and plumbing fittings have been installed out of reach, where possible. Shower heads have also been replaced to make them resistant to vandalism, and all buildings have been repainted with paint that allows graffiti to be wiped away easily. Furthermore, pre-emptive steps are being taken to prevent any unnecessary downtimes in the provision of essential services within the Safi Detention Centre. Thus, whereas the Centre used only electric water heaters in the past, a new heat pump has now been installed, meaning that the electric water heaters are there to serve as a back-up in case of equipment failure. Similarly, electric systems have been designed to ensure the rest of the building is not left without electricity should any circuit trip. Efforts have also been made to improve communication services. At the time of writing (March 2024), international calls with family members are possible in all sections of closed detention centres.

9 See https://hudoc.exec.coe.int/eng#{%22execidentifier%22:[%22DH-DD(2023)1212E%22]} (accessed 1 November 2023).

Refurbishment works have greatly improved the living conditions for persons accommodated at Safi Detention Centre. Apart from upgrading these living quarters' security and sanitary facilities, the Detention Service has also replaced the apertures of bedrooms, introduced a day area and improved access to outdoor spaces. Furthermore, in the first quarter of 2021, the Migrant Health Service was also launched within the Detention Service. This, together with the creation of a new clinic, has resulted in a considerable improvement in the healthcare provided to all persons residing in detention centres. The launch of such a service has resulted in a reduction of around 80% in referrals to local health centres and of around 85% to the Accident and Emergency Department at the national hospital. Specialist clinics are also being held in the main clinic. Ophthalmic, infectious disease, dermatology and sexual health specialists are doing in-house clinics, which have enhanced screening and treatment of the persons residing in detention centres. The psychiatric clinic also operates within the Migrant Health Service on alternate days when needed.

The national authorities believe that the refurbishment works have also had, and will continue to have, a positive impact on the sanitary conditions at Safi Detention Centre. In this connection, it should be noted that the Detention Service adopts a system of shared responsibility. Detention officers assist with removing larger items, such as vandalised beds, and with the daily collection of garbage. On the other hand, the residents of the compounds are expected to carry out the day-to-day cleaning. The Detention Service provides all cleaning materials and equipment needed for this purpose. Pest control measures are also implemented in all compounds.

All residents at Safi Detention Centre have access to showers daily to ensure personal hygiene. Body soap is provided to all persons in weekly rations. Furthermore, all persons residing in the detention facilities are offered brand new clothing on admission and provided with more than one set of clothing to allow them to wash their clothes regularly, which may be done within the facility itself; the necessary washing liquid is also provided for this purpose.

In the last quarter of 2020, the national authorities introduced the role of the welfare officer. The welfare officer is subject to an indefinite employment contract with the Public Service. The role of the welfare officer is to maintain close contact with the persons residing in detention centres, to receive and deal with any complaints or issues they may have, and thus to help ensure that all rights and obligations of residents are respected. The welfare officer collaborates closely with the lead doctor to help tackle health issues. He or she also maintains close contact with other entities, such as the Psychosocial Support Team of the Agency for the Welfare of Asylum Seekers, the Health Department and Mental Health Services. He is also the key contact person for NGOs and human rights organisations. The welfare officer also maintains contact with

local migrant communities, such as the Sudanese community, to help assist with issues that may arise in detention.

Combined with the role of the welfare officer, a complaints system was put in place in 2021. Complaint forms and envelopes were disseminated in every compound. Any person wishing to file a complaint may do so by filling out the complaint form, which may be sealed and handed over to the welfare officer for his investigation. The welfare officer is in charge of the complaints mechanism. He or she receives the complaint, conducts an investigation and produces a report on each complaint. The report is then handed over to the Agency's chief executive officer for follow-up and remedial action. Should there be an allegation of ill-treatment, a report is filed with the police for necessary investigation.

13.3.3 Malta's Lack of Respect for Human Rights – A Second Case

As if the *Filazoo* case was not a sufficiently good lesson for Malta, the state has once again been declared by the ECtHR to be in breach of the European Convention of Human Rights on similar grounds, involving another teenager in compulsory detention.[10] The case is *A.D. v Malta* App 12427/22, which was decided on 17 October 2023. A 17-year-old Ivorian migrant who spent 225 days in detention in Malta, including a spell of confinement inside a one-windowed container, has been awarded €25,000 in damages by the ECtHR. The minor, born in September 2004, arrived in Malta with an all-male group of boat persons in November 2021 after spending ten days at sea. Twelve fellow migrants, including children, died during the trip. The group was rescued and taken to Hal Far Initial Reception Centre (HIRC), where he was detained in quarantine until cleared by Maltese medical authorities. In the human rights case against Malta, the French-speaking teen claimed that he was not told why he was being detained in a language he could understand. The government subsequently claimed that his detention was in line with standard procedure regarding a 2-week quarantine order. However, the document presented in court in the French and English versions was neither dated nor named and neither referenced nor filled in.

For his first 2 weeks in Malta, the minor was kept at the HIRC and tested negative for Covid-19 three times. He described how he was confined to a block with twenty-three other people, including adult men, with access to only three toilets, two showers and a bucket to wash the floor as well as their clothes. The room he shared with three other

10 See *Times of Malta*, available at: https://timesofmalta.com/articles/view/young-migrant-detention-malta-breached-rights-european-court-finds.1061670 (accessed 17 October 2023).

migrants lacked natural light, was very damp and cold, had poor ventilation, and had no access to drinking water besides a tap. The applicant was subsequently targeted by a restriction of movement on public health reasons order. After being diagnosed with tuberculosis, he was treated at Mater Dei Hospital and later moved to Zone 4 of Safi Detention Centre, where he was kept until January 2022 together with other adults in his group. A psycho-social assessment carried out around that time concluded that he was an adult, aged 19.

The teen claimed that at the end of that month, he was transferred to a one-windowed container with a Nigerian man, having no access to the outside but kept all day indoors, with limited light and ventilation. After mid-April, he would be allowed outside in a fenced area for half an hour. Those claims were contested by the government, which countered that early in February 2022, the applicant was moved to a two-bedded unit with another alleged minor, separately from adult asylum seekers. Through all this, the minor had applied for asylum. The minor's claims for international protection were also rejected, and the matter is still pending before the Appeals Tribunal. Nevertheless, his lawyers filed the breach of rights case before the ECtHR, claiming that detention conditions in various immigration centres amounted to inhuman or degrading treatment. The 2-month-long restriction of the movement order also amounted to unlawful and arbitrary detention, and the constitutional proceedings before the Maltese courts did not amount to an effective remedy.

The ECtHR upheld the applicant's claims and declared that detaining migrants 'for health reasons' under the Superintendent for Public Health order was illegal. Confinement of minors raised 'particular issues' since, whether accompanied or not, they were considered 'extremely vulnerable' and presented specific needs concerning age, lack of independence and asylum-seeker status. Reception conditions had to be such as to ensure that they did not cause 'a situation of stress and anxiety, with particularly traumatic consequences'.

The Court observed that the applicant was held at Safi Detention Centre for more than 6 months out of the seven complaints. For the various phases of detention and bearing in mind his age and health situation, the Court observed that the evidence was 'more than sufficient' for it to conclude that in light of the applicant's 'vulnerabilities', accommodation conditions were not adapted to his needs nor the reasons for such detention. While upholding his claims, the Court observed that the

> problems detected in the applicant's particular case may subsequently give rise to numerous other well-founded applications which are a threat to the future effectiveness of the system put in place by the Convention.

The Court said its concern was 'to facilitate the rapid and effective suppression of a defective national system hindering human rights protection' and noted that 'general measures at national level are undoubtedly called for in execution of the present judgment'.

Relying on Articles 3 (prohibition of inhuman or degrading treatment), 5 § 1 (right to liberty and security) and 13 (right to an effective remedy) of the Convention, the applicant alleges that his conditions of detention were either inadequate and unlawful or inadequate and arbitrary and that he had no access to an effective remedy. The Court found a violation of Article 3, violation of Article 5 § 1 concerning the period between 10 December 2021 and 10 February 2022, violation of Article 5 § 1 concerning the period between 10 February 2022 until July 2022 and violation of Article 13 in conjunction with Article 3. The Court awarded the applicant €25,000 in non-pecuniary damages and an additional €3,000 to cover costs.

13.4 Malta, the EU and the Way Forward – Conclusion

Although there have been improvements, Malta often falls foul of the ECHR when treating migrants. Such a situation can be contrasted with the country's economic policy, which seeks an annual increase of around 10,000 people. While there are golden passport schemes for the ultra-rich, though these probably do not reside on the island and have a very minimal impact on the population increase, Malta's economy between 2015 and 2025 seems based on population growth. From the foregoing, one can conclude that Malta's policy is now based on convenience and economic wealth rather than humanitarian reasons.

This brings up the argument that for migration to be better coordinated between the competing interests of individual member states, more powers and resources should be shared at the union level. It is useless to blame the EU for doing nothing if the EU as a club lacks the powers to do so. If member states want more coordination and assistance, power must shift towards the supranational integration model. The alternative is that the member states complain that there is little solidarity between them, and the EU institutions remain powerless. Malta's position may also indicate that, left on its own, the member states will look inward, leaving little to no room for decent collaboration.

Migration cannot be stopped. It has been part of human history since the dawn of civilisation, if not before. Europe's efforts with its Western partners should address the problem at the source, i.e., help the countries that are the main source of migration. For example, African nations must be stronger, stabler and more affluent to decrease African migration towards Europe. This may help to mitigate but not eliminate migration.

However, a stronger, united Europe with a stronger legal base would certainly be in a better position than the current regime to tackle migration. Malta pretends to be welcoming as it welcomed St Paul two millennia ago. Nothing could be further from the truth. The truth is that most member states facing migration issues behave like Malta. Hence, a united Europe with a stronger legal base to deal with migration may prove to be better for the self-centred member states in the long run.

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Conclusions

14 Immigration: Balancing Human Rights and Public Opinion Sensitivities in an EU Peripheral State

Anthony Borg

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Malta experienced strong immigration flows between 1998 and 2008. Standing at the periphery of the European continent, Malta suffered these inflows. It was not prepared for them either logistically, administratively or legally. It is pertinent to examine the difficulties faced by peripheral states and the discriminatory effect of some EU legislation against them. Despite these pressures, the principle remains that rights and duties cannot be ignored or jettisoned at international law because of such pressures.

So, for instance, the declaration by the Maltese authorities on 9 April 2020 that in light of Covid-19 and the logistical and structural problems, Malta could no longer 'guarantee the rescue of prohibited immigrants on board any sea vessels nor ensure the availability of a "safe place" on the Maltese territory to any persons rescued at sea', effectively shutting its sea borders – as reported in the Aida Report on Malta – was an example of such an act of ignoring international law.

However, it is important to keep everything in perspective when discussing these matters. Allowing pressure and emergencies to dwarf human rights is wrong, but it is equally important to understand the position governments find themselves in when faced with such emergencies. Not doing so relegates discussion on this topic to a mere academic and ephemeral debate. Maltese law still provides for the immediate detention of any irregular migrant against whom a removal order has been issued. For years, this period of detention had no limits; the restrictions on a time limit were only introduced in part by transposing certain EU directives, particularly the one that after one year, an asylum seeker has the right to work and, therefore, could no longer be detained; partly on humanitarian considerations, for example, the release of the elderly, parents and

minor children; and partly owing to the jurisprudence of cases against Malta before the European Court of Human Rights, which ruled that when there is no reasonable prospect of repatriation, detention is illegal. Besides, any detained irregular migrant can appeal before the Immigration Board against his continued detention.

It is also pertinent to point out that recent events have changed the political and legal landscape regarding immigration. Today, certain states in Northern Europe have been facing immigration flows. Some have constructed walls to contain such flows. In Ceuta and Melilla, as we know, there have been serious incidents at the border to stem the flow of immigration into Spanish sovereign territory. A point of contention and complaint by most EU peripheral states relates to the Dublin regulations, which allow member states who receive immigrants to send them back to the states where they first entered EU space, namely the peripheral states.

However, it is a political reality that migrants move from one territory to another. Having risked their lives by crossing deserts and territories run by hostile regimes and having boarded unseaworthy vessels, they will find it relatively easy to move from the country of the EU where they landed to other EU member states. For instance, it is statistically proven that only one out of four irregular immigrants who land in Italy remain there.

Suppose this is true with Italy, which has a population of 59.5 million and a territory encompassing 301,000 square kilometres (200 per sq km population density). In that case, one can imagine how true it is with a small island like Malta, with a territory of 318 square kilometres and a population now nearing 500,000 (population density 1,200 per sq km), 20% of which is foreign. For every irregular migrant who lands in Malta, it is like at least 200 arrive in Sicily when one compares the size of the territory and population.

One must also consider the plight of the EU peripheral states in the central Mediterranean, namely Malta and Italy, and to a certain extent in the East, Greece as a peripheral state with Turkey. In the Central Mediterranean, most immigrants leave Libyan shores, Libya being a transition country. They hail mostly from the sub-Saharan states such as Sudan, Somalia and Eritrea. These EU member states cannot send the immigrants, who do not deserve protection, back to Libya for several reasons; first of all, successive Libyan administrations have held the view that they only accept Libyan nationals, and, secondly, EU rules of protection and the principle of *refoulement* do not allow repatriation of Libyan or non-Libyan immigrants to Libya, whose human rights record and immigrant protection leave much to be desired. Nor can these EU states, it seems, conclude agreements with Libya to prevent the departure of immigrants from Libya to Europe. The Treaty of Benghazi was signed between the Italian government

and the Gaddafi regime on 30 August 2008. The Gentiloni Pact, signed in February 2017 with the new Libyan regime, aimed at subsidising the Libyan economy in return for strengthening control of Libyan borders, is considered by most jurists and commentators as 'illegal' at international law.

To make matters worse, the Dublin Rules allow the forced return of immigrants to the peripheral states they entered first. As if this were not enough, the initiative of burden sharing taken by the EU has been forcefully resisted by most non-peripheral states. Following the introduction of majority voting in immigration, it was decided to share the heavy load of immigrant flows through burden sharing. Some member states openly and brazenly refused to comply.

The usual pretexts against accepting burden sharing are that (a) some countries are not used to these phenomena and do not know how to manage them, (b) burden-sharing is a pull factor for more immigrants to attempt a crossing to Europe, knowing fully well that once they land on EU territory, they will remain there; in actual fact, however, immigrants will continue to cross over to Europe, whether there is burden sharing or not, since the desire to seek a better future or to escape persecution is so strong that such attempts will still be made, (c) immigration flows increase the crime rate and in certain cases hide movements of potential terrorists. However, terrorists can enter the European continent without the need to board unseaworthy sea vessels, risking their lives in the process.

These are all reasons for EU states to do nothing and leave the problem to be solved by the peripheral states alone without any form of European solidarity. Nevertheless, as we know, this solidarity and burden sharing, if not voluntarily agreed upon, will be forcibly imposed through uncontrolled migration flows.

Recent Immigration Flows

A list of recent events shows how, under the strain of migratory flows and fluxes; populist pressure; and phobia of migration generated by social media, political parties and movements and rightist political entities, inroads in practice have been made to a common system of asylum, in practice and law. Most asylum applications in the EU aggravate the problem and remain lodged in only 5 EU member states. This has led to calls for solidarity in burden sharing, on one side, and for forming a **coalition of the unwilling**, on the other, to prevent any such scheme from taking off. At the same time, unilateral measures were taken when some hard-hit states were requesting solidarity, to take unilateral measures such as re-introducing border controls and identity checks at internal borders of the Schengen area or the refusal to receive Dublin II transfers on their territory. If a level of trust and solidarity is not reintroduced, it would be practically impossible to harmonise asylum practices and policies.

In September 2020, legislative proposals were put on the table aimed at:
(1) replace the Dublin system with a **new asylum and migration management system** that allocates asylum applications better between member states through a new solidarity mechanism and guarantees the timely processing of applications;
(2) provide for temporary and **extraordinary measures** to address crisis and *force majeure* situations in the field of migration and asylum;
(3) reinforce the **Eurodac regulation** to improve the EU fingerprint database for asylum seekers;
(4) establish a fully-fledged EU **asylum agency**;
(5) introduce the new compulsory **pre-entry screening**, consisting of identification, health and security checks, as well as fingerprinting and registration in the Eurodac database
(6) replace the **asylum procedure directive** with an amended regulation to harmonise EU procedures;
(7) replace the **qualification directive** with a regulation to harmonise protection standards and rights for asylum seekers;
(8) reform the **reception conditions directive** to ensure that asylum seekers benefit from harmonised and dignified reception standards;
(9) create a permanent **EU resettlement framework**;

Whether this legislative proposal will overcome member states' prejudices and entrenched positions remains to be seen. There are doubts, for instance, whether the Dublin Regulation will be changed, for it is convenient to let peripheral states absorb the immigration pressure. After all, this proposal was made six years ago in the Commission's action plan. On the other hand, the proposal to transform the EASO based in Valletta into a fully-fledged EU agency with a new name, namely the European Union Agency for Asylum, has been implemented with effect from this year. These legislative proposals are important for the harmonisation of the immigration and asylum law in the member states. A cursory look at the news from the different EU countries reveals divergence in practices, transposition and application.

The Asylum Information Database (AIDA) Report has been criticised several times. For instance, not all asylum systems are human rights-oriented regardless of EU or national interests. It criticises the placement of asylum authorities in some countries within ministries that follow certain objectives at the expense of the asylum seekers' right to a fair and transparent asylum procedure. Another divergence is the involvement of law enforcement agencies at the first instance level of the asylum process. Sometimes, for security reasons, asylum applications are rejected without reasons in fact and law being published; some are rejected on confidential information.

There are divergences even in transparency. Not all asylum systems make the decision-making tools and quality reports public. An example of the wide divergence relates to **the detention** of asylum seekers. France increased the period of administrative detention in 2018 from 45 to 90 days; Italy increased the time limit on detention from 90 to 180 days; and Poland adjusted its detention period to 18 months.

The divergences in **standard conditions** and access to the labour market have caused the so-called **secondary movement** when asylum seekers choose to move onwards from or through countries where they had or could have sought international protection to other countries where they may request such protection. According to UNHCR, the reasons for doing so include limits on availability and standards of protection, family separation, obstacles to the means of securing documentation, lack of comprehensive solutions, barriers to access to asylum procedures, which create risks of refoulement; the desire to join extended family and communities; lack of access to regular migration channels; and the desire to find opportunities for a better future.

One example of the consequences of serious divergences in the systems as they work in practice is the following: after judgments of the European Court of Human Rights and the Court of Justice of the European Union were delivered, which identified **systematic deficiencies in the Greek asylum system**, the member states, in 2011, suspended the transfer of applicants to Greece under the Dublin regulation. As the Commission pointed out, this incentivised asylum seekers arriving irregularly in Greece to move on to other member states. Consequently, some member states decided to reintroduce internal border controls in the Schengen area.

In 2009, UNHCR, assessing the implementation of the European Asylum System, noted **huge divergences** in the acceptance rate of asylum from less than 1% to over 50% in another state for the same nationality. Another area of concern was **forcibly returning** migrants from Iraq to central Iraq. Alternatively, they resort increasingly to granting **subsidiary protection** rather than refugee status.

Is there any foreseeable solution? The point of departure should be the packet of legislative reform proposals launched last September. The aim of the proposal for a new **asylum procedures** regulation, a **reception conditions** directive and a new **qualification** regulation is to reduce differences in recognition rates from one member state to the next; discourage secondary movements; ensure common effective procedural guarantees for asylum seekers; and establish a fully efficient, fair and humane asylum policy which functions effectively in times of normal and high migratory pressure. However, the packet also includes reforming the Dublin system to create a fairer, more efficient and more sustainable system for allocating asylum applications among member states.

Reflecting the current political mood in Europe, this latter legislative proposal is stalling the entire process. Besides, most member states treat the entire package as a whole, so they do not want to signify their consent to one regulation unless consent says the reform on Dublin is progressing or is being blocked. The new Dublin IV Regulation aims to unburden member states at the external borders, that is, those facing the biggest responsibility for examining asylum seeker applications. The way to alleviate the pressure on the states is through **burden sharing** with responsibility allocated based on the states' GDP, population and unemployment rate.

The problem is that if the countries at the external borders benefit from this measure, the same cannot be said for other EU countries, which would perceive this mechanism as interfering with their internal affairs and how they handle migration on their sovereign territory. At the same time, the idea behind the new Regulation and other legal reforms is to deter irregular migration, as also maintained by the EU Commission. However, member states seem increasingly reluctant to adopt new measures and continue to readopt the same norms that do nothing but reaffirm the *status quo*. This has led to two things: in the absence of proper burden sharing, the border states have more responsibility and take actions that are in breach of human rights to 'provoke' the EU, and on the other side, the EU does not go further into the application of burden sharing because some member states oppose it. The result is unofficial disorganised burden sharing through secondary migratory movements. (For example, in Italy, statistically, only one out of four irregular migrants remain there; the others move on.)

One has to find the **political will**, through carrot and stick if need be, for the new Regulations to be approved, not in the interests of any particular country but of the EU; Euro-sceptics have this Jekyll and Hyde approach to the EU. They oppose any further expansion of mandate to Brussels, which is viewed as the evil stepmother, yet each time a problem or crisis arises, they, who always opposed any new powers to the centre, whine and complain that the EU is not doing enough. One has to unmask this hypocrisy and work towards a political solution that most EU member states would accept. Not that this would solve all problems; however, it would be a new phase in rendering the European Asylum System common.