

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 0/144⁷ 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 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 lose 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 Darien 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.

IVAN SAMMUT

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