



# **The European Migration System and Global Justice**

Definitions and Legislative Frameworks in  
France, Germany, Greece, Hungary,  
Norway and the United Kingdom

*Antonio Zotti (ed.)*

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Germany, Greece, Hungary, Norway and the United  
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## Preface

Reconsidering European Contributions to Global Justice (GLOBUS) is a Research and Innovation Action (2016 - 2020) funded by the EU's Horizon 2020 programme, Societal Challenge 6: Europe in a changing world - Inclusive, innovative and reflective societies. GLOBUS is coordinated by ARENA Centre for European Studies at the University of Oslo, Norway and has partner universities in Brazil, China, Germany, India, Ireland, Italy and South Africa.

GLOBUS is a research project that critically examines the European Union's contribution to global justice. Challenges to global justice are multifaceted and what is just is contested. Combining normative and empirical research GLOBUS explores underlying political and structural obstacles to justice. Analyses of the EU's positions and policies are combined with in-depth studies of non-European perspectives on the practices of the EU. Particular attention is paid to the fields of migration, trade and development, cooperation and conflict, as well as climate change. Migration<sup>1</sup> is one of the most significant issues on the EU's political agenda, one that raises a number of practical questions, but also crucial normative concerns. The legality as well as the adequacy in terms of global justice of the EU's response to the so-called migration crisis has been the object of much criticism among observers and policy-makers, and the reason for major disagreements between Member States and with European institutions.

This is the second report produced by the research group on migration in the GLOBUS project, and follows the investigation of the supranational/communitarised level of the *European Union Migration System of Governance*, assessing its normative pitfalls provided in the first one.<sup>2</sup> This report comes as a complementary stage of the analysis, set to explore the characteristics of the migration-related legal frameworks of a set of states belonging to the system. National conceptual setting and legislation are going to be assessed through the

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<sup>1</sup> The term 'migration' refers here to every kind of human movement from one place to another with the intention of settling, permanently or temporarily, whatever the reasons of the movement; in this sense, 'migration' covers both voluntary (labour, family reunification, study) and forced migration.

<sup>2</sup> Fassi, E. and S. Lucarelli (eds). *The European Migration System and Global Justice. A First Appraisal*. GLOBUS Report 1. Oslo: ARENA Centre for European Studies.

analytical lenses provided in the GLOBUS project. Further research on the topic by the scholars of the Work Package has appeared or is in preparation in the publications section of the GLOBUS website.

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Coordinator of the Work Package 3: 'Migration and global justice'

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# Introduction

Migration and global justice. A case for a closer look into national legal frameworks

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Years away from the 2015 ‘crisis’ – the dramatic upsurge in the number of people trying to reach Europe in search of a safe haven from persecutions, or just looking for a chance of a better life – migration is still at the top of the political agenda of the European Union (EU). Since 2016, the number of arrivals has experienced a significant fall and pressing concerns in several other policy areas have emerged. However, the EU has been unable to address the effects of factors, such as the changing routes and composition of the migration flows, the political and economic circumstances at the places of origin and of transit, as well as the attitudes of the Member States’ (MSs’) governments and the public towards immigration.<sup>1</sup> One may argue that migration has become the most visible component of the EU’s ‘existential crisis’ and therefore has been cemented in the political and public debate.

The persisting relevance of the topic raises the following questions: Is migration just a major, yet accidental, source of troubles that the EU

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<sup>1</sup> The locution ‘Member States’ is used to include not only full members of the EU, but also those countries that participate to the European Union Migration System of Governance – i.e. Norway in this report.

somehow has to tackle? Or, as it seemed to be the case until not too long ago, is it still an issue laying at the very heart of the integration process, calling for a thorough transformation of how borders (internal and external) are thought of and practiced (Favell 2008, Geddes 2008)? Is the achievement of a 'Union without frontiers' still a priority and a value prompting higher levels of coherence and coordination in the Union's policymaking? A look at the adopted measures by the EU suggests that the opposite is true. As far as the freedom of movement is concerned, national publics' anxieties and political agendas have resulted in severe restrictions to the functioning of the Schengen Area – which in fact turned into a bone of political contention, with internal movements being reframed as 'migration', although within the EU's 'domestic' dimension. The Schengen Area has consequently been perceived more and more as a liability rather than a major accomplishment of the integration process (Pascouau 2016, Dingott Alkopher and Blanc 2017). Even the freedom of movement – a fundamental liberty and a basic component of the single market – has become an object of harsh contention (Vasilopoulou and Talving 2018).

Concerning 'international' migration, control has seemingly become the leading priority, to be pursued especially through securitisation and externalisation. The protection of migrants' rights, or the establishment of a proper dialogue with them, appears to have been largely overseen, if not actively shunted (Koenig 2017). If any, borders – both those among the MSs and the Union's external ones – seem to have in fact become even more salient and problematic than before. Yet, the comparatively weaker consideration for cosmopolitan values and the lack of significant efforts to establish a meaningful exchange with people coming from abroad do not entail that the Union's migration policies have no normative foundation. A mutual reinforcement between the EU's claims of immigrants' protection on the one hand and its protectionist policies on the other may convincingly be found, and identified as an organised hypocrisy aimed at maintaining the status quo (Lavenex 2018). Moreover, the ambition to create a 'Union of values' helps frame the migration crisis in ideational terms rather than just as a policy matter to be solved (Börzel and Risse 2017). Yet, the priority given to immigration control and the protection of the EU external and intra-EU national borders may be regarded as responding to a 'Westphalian' conception of global justice. This conception is based on the assumption that moral bonds with the community override those with the rest of humankind, and that the existing inter-



national system of discrete political units still provides the best possible order for a viable protection of migrants. Moreover, cosmopolitan conceptions of justice are not negated, as evidenced by the moderate, but significant, success of the EU in disseminating rules in neighbouring countries, which also protect and promote the inalienable rights of migrants (Mananashvili 2015). It can be claimed that the EU operates on some normative foundations, even when the emphasis is put on protection *from* rather than protection *of* migrants. On top of that, the migration policy of the Union also shows a few attempts to not only defend people on the move as a general category, such as *qua* holders of human rights. But it also presents cases where the EU watches over migrants' concrete individual and collective identities, emerging from a genuine relationship with them, based on reciprocity and dialogue.<sup>2</sup> Accordingly, the EU's domestic and external migration policies are not informed by a single overarching normative approach, but the compromise between Westphalian, Cosmopolitan and Recognitional conceptions of justice (Fassi and Lucarelli 2017).

This report is in particular built on the hypothesis that the simultaneous influence of several notions of justice has a significant bearing not only on policy outcomes, such as the measures designed and implemented by the EU to address the issue of migration, but also the very relationships between the Union's levels of governance. If the national and supranational connections are a delicate issue in virtually every area of policy, it appears to be even more critical with regards to the normatively laden issue raised by the migration crisis. MS' traditions of citizenship and other deep-seated practices of inclusion in and exclusion from national political communities profoundly affect the Union's authority in this composite policy area (combining the Internal Market and the Justice and Home Affairs). Moreover, they have a crucial influence on the Union's post-national attempt at an authentically European 'politics of belonging' (Geddes and Favell 1999). Therefore, this report is in line with the growing scientific interest for the questions of justice connected to the EU migration policy (Velasco and La Barbera 2019, Ceccorulli 2018a and 2018b, Lucarelli 2018, Juss 2016). The aims of this report are to explore the crucial aspect of the normative implication of legislation and

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<sup>2</sup> This corresponds to the notion of justice as mutual recognition, introduced below.

policies designed and implemented by states within the EU multi-level governance of migration issues (Fassi and Lucarelli 2017).

## The national dimension in the EU Migration System of Governance

Opinions on the EU management of the migration crisis are generally less than favourable. The emphasis on short-term, control-oriented measures and the resulting frustration of the Union's normative aspiration may be ascribed to a host of internal and external factors. The issue most frequently identified as the source of the failures of the post-2015 EU migration policy is the lack of solidarity among MSs and the absence of a centralised institutional system (Scipioni 2018, Collett and Le Cox 2018). Although the crisis has bolstered consensus among MSs about the need to strengthen the EU's external migration policy, governments have hardly found any significant level of agreement over how to respond to irregular and regular immigration from outside the Union. Consequently, a significant share of the responsibility for the (many) frustrations and the (fewer) successes of the EU in its contribution to global justice can be found in the role of the MSs in the EU system of migration governance. A clear sign in this direction is the response to the 'crisis', which led to an even greater role of states' governments. However, this should not be described merely as a re-nationalisation of the issue, but rather as one further proof of the structural interweaving between the EU and the MS levels in this domain.

The composite nature of the migration and asylum policy and its character as a shared normative competence creates complex relations between the levels of governance within the Union across the internal/external dimension divide. On the one hand, the commitment of the EU to 'the development of a forward-looking and comprehensive European migration policy, based on solidarity and responsibility' can be regarded as a supranational response to the challenge posed by migration to the ability of its MSs to control their borders (European Council 2010). On the other hand, MSs have maintained crucial shares of authority in almost every aspect of this policy area, despite their difficulties in facing the transnational challenge. This is evidenced by the distribution of competences between the Union's levels of governance, although premised on principles of 'solidarity and fair sharing of responsibility', as stated by articles 79 and 80 of the Treaty on the Functioning of the European Union (Official Journal

of the European Union 2012). National governments have proved to be determined to retain or demand back their prerogatives in the field, which has affected the effectiveness of the EU migration policy (Brekke and Staver 2018). Moreover, given the increasing importance of the external dimension of the EU migration policy, the latter has also become the object of the well-established debate about the vertical coherence between the EU and the MSs in the area of the Union's international relations (Gebhard 2017, Palm 2016, Portela and Raube 2012). This report aims at complementing these analyses by investigating the vertical coherence of migration-relevant conceptual and legal frameworks in terms of their adequacy to principles of global justice. This is regarded as a logical condition for the EU's actual contribution to global justice in the area of migration.

The aim of the report is to take a step back from the inter-governmental political bargain among MSs and provide a review of the definitions, rules and norms through which they participate in the daily functioning of the EU multilevel system of migration governance. The report addresses these questions by focusing on the official definitions, constitutional arrangements, legislation and institutional settings of the migration policies of five MSs: France, Germany, Greece, Hungary, the United Kingdom, and, in addition, Norway. While Norway is not a Member State, it is a country that is not only part of the Schengen Area, but also deeply involved in virtually every aspect of the EU migration policy. The report sets out to identify the claims of justice that inform these frameworks and are regarded as crucial components of the EU Migration System of Governance (EUMSG). Global justice is an analytical instrument designed to grasp the partly cooperative and partly conflicting relationship between the supranational and the national levels of governance in the EU migration policy (Fassi 2017: 4). Based on the results of the analysis, an assessment will be provided of the effects of these normative orientations on the Union's overall contribution to global justice in the migration policy area. Each chapter is based on the same basic structure, including an introduction, a discussion on relevant terms and definitions regarding migration and refugee policies, a presentation and discussion of the main legal provisions, and a final section looking at the findings of each national case study in relation to the three conceptions of justice proposed by the GLOBUS project. Within the limits of this relatively broad framework, each researcher has elaborated on those aspects they considered particularly relevant in

order to gain the fullest picture of each national case. The overarching intent is to define the input of each national framework to the EUMSG and, through this, the ultimate moral standing of the EU in the migration policy area. The heterogeneity of sources and the variations of approaches has proved useful for the advancement of the GLOBUS project's goals: we hope it can also represent a source of working material for anyone interested in this field of research.

## Conceptions of justice and the EUMSG

The normative coherence of national legal frameworks will be investigated by pinpointing their justice claims based on the three conceptions of justice adopted in the GLOBUS project (Eriksen 2016). The first is a Westphalian notion, *Justice as Non-domination*, which assumes that the interests and values of each political community are the ultimate moral standard for any subjects' conduct. Additionally, each state – corresponding to a political community – has the right to be free from arbitrary interferences coming from other states, but also from international political bodies or other kinds of non-state actors. Accordingly, domestic rules falling into this category are designed primarily to ensure the stability and the advancement of the domestic community, the members of which have special obligations to each other that outclass any entitlement of outsiders. The second, cosmopolitan notion – *Justice as Impartiality* – is premised on the unconditional ethical value of human rights. This kind of justice claims is enshrined in rules protecting and promoting the rights, the dignity, and ultimately the autonomy of those who need (and to some extent of those who wish) to move to and be accepted in a foreign country. They are often sanctioned by cogent universal norms included in global and regional regimes of protection of migration rights. Based on this moral conception, migrants' rights and liberties are independent of their motives and circumstances of life. Public power should always refrain from any action hindering the individuals' pursuit of their autonomously established ends, unless the restriction is necessary to ensure the freedom of everybody else. The third conception – *Justice as Mutual Recognition* – assumes as a moral criterion the actual knowledge of the subjects of justice, who are no longer just instances of a general category. The individual and collective identity of 'concrete others' is learned through practical, reciprocal interaction. Hence, justice can only be served by taking into account the point of view of all those involved, and the actual implications of laws and policies have to be open to contestation and

regularly reviewed. This is the only way, according to this notion, to make sure that people do not suffer from structural forms of injustice. Injustices might occur despite the best intentions of those making decisions that have an impact on others. This occurs for example due to unintentional moral bias in distributive schemes. In this perspective, rights are not pre-political entitlements but the product of relationships. Consequently, national rules and institutional settings falling under this category are those enabling the 'insiders' to meet 'actual' migrants not just as bearers of universal rights, but as people with their own specific needs, expectations and points of view, both as individuals and members of groups.

In emphasising the notion of 'global justice', the GLOBUS project advances a critical approach to the still widely accepted idea that states – and possibly hybrid polities such as the EU – are the sole bearers of right and duties (to other states) in international affairs. As a result, individuals or other non-state entities are excluded from being the objects of moral concern (Caney 2005). One of the project's main assumptions is that the global context has become a setting for justice beyond the state, which includes, but is not circumscribed to the inter-state dimension (Eriksen 2016: 16). Individual claims and public discourses, moral conflicts and political and institutional practices materialise today in genuinely *global* – and not only international – circumstances of justice. It is against this conceptual background that we came up with the analytical framework offered by the EUMSG to approach the role of the EU in the promotion of global justice in the migration policy area by analysing the normative adequateness of national legal and policy frameworks.

Although the EUMSG is expected to account for the national and the supranational dimensions of the EU migration policy (and the tension between the two), the distinctive nature of the migration issue, compared with the others investigated by GLOBUS (e.g. trade, climate change), calls for a few additional observations. The first noteworthy aspect is the more direct involvement of individuals than in the other policy areas, and the definition of their legal status, which may vary depending on the actors we decide to analyse and the processes that define this policy domain. On top of that, these processes take place, simultaneously or sequentially, in two or more countries; the country of origin and the country of destination, and possibly one or more countries of transit. A condition where the lives of individuals, as



migrants, are arbitrarily interfered with by states or supranational bodies may coexist and possibly combine with state-on-state (or supranational authority-on-state) dominations. For example, a violation of the migrants' rights, such as a repatriation without duly scrutiny of the asylum request, may be committed by the country of destination through a legislative act. This is enforced as part of the implementation of an international agreement with the country of origin or transit. Depending on whether the agreement constitutes an infringement on the third country's autonomy or not, we may have a double instance of domination, or else a situation in which a state's domination of an individual is accompanied by bilateral relations that are just in Westphalian terms. This also applies when we consider the EU as a self-standing actor. The way national legislations handle the awkward category of 'safe third states' is an example of these difficulties.

The inconsistencies arising from the perspective of justice as impartiality are even more evident. The tension between the universal scope of cosmopolitan values and the actual priorities of 'specific' groups and individuals has been the object of a great deal of scientific and political debates and finds examples in the following pages. The European regime to protect human rights also suffers from the in-built faults, which are typical of 'cosmopolitanism'. On the one hand, the discourse of universal human rights may just be expedient to gloss over the Union and its MSs' pursuit of their egoistic goals. On the other hand, even when genuinely well-intentioned, cosmopolitanism's attention to universal principles may lead to neglect the actual conditions of people and groups involved in the migratory process. In fact, as far as justice as mutual recognition is concerned, individual or collective subjectivities of migrants materialise only to a certain extent in this report, seeing how laws and regulations usually apply to general classes of individuals and groups - whereas authentic recognition requires practice and proximity.

To recap, this report looks into conceptual and legal frameworks at the national level and their embedded justice claims and tensions. The focus on the state level is adopted because the current distribution of competences and institutional settings makes it an essential component of the multi-level migration system of governance.

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# Chapter 1

## France

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As a founding member of the European Union (EU) and one of the original signatories of the Schengen agreement, France has a pivotal role in the definition of the European Migration System of Governance (EUMSG) (Fassi 2017: 4-5). It is thus crucial to understand the forming of migration policies as the intertwining between the European and national dimensions. Against this background, this chapter offers an overview of the main features of French policies, regarding the status of foreigners, migrants, asylum seekers and refugees as defined by the French national law.

Far from being the result of a stable and clear-cut distinction, the definition of the foreigner is highly dependent on historical and political circumstances, which affect the very understanding of France. Under the Sarkozy presidency (2007-2012), a debate about national identity was launched with the creation of the 'Ministry of immigration, of integration, of national identity and solidary development'. This discussion played a relevant role in shaping the French approach towards migration over the past fifteen years, by bringing the issue of national identity to the fore and exacerbating the tensions over the issue. Consequently, the question of what exactly France is can offer an entry point to understand elements that are often over-

looked in the debates over national identities. This can help, in turn, to shift our analysis from an identity-related issue to a more pragmatic overview of migration policies as political constructs.

The National Institute of Statistics and Economic Studies (Insee) describes France as the ensemble of 'metropolitan France', consisting of the 96 departments of the European continental platform and the five 'overseas departments', which are Guadelupe, Martinique, Guyana, La Réunion, and Mayotte. In addition, the 'territory of the Republic' concerns also New Caledonia, French Polynesia, the Islands of Wallis and Fortune, the Austral lands, the French Antarctic, other islands in the Indian Ocean, and Saint-Pierre-et-Miquelon (Insee 2017). This double distinction shows that the political unity of France is grounded on a graduated territorial coherence, which in turn reflects France's colonial past.

This geographical stratification is technically relevant for the purposes of this chapter because only the 'metropolitan France' and the 'overseas departments' are members of the EU, while only the 'metropolitan France' is included in the Schengen area (Art. 138 of the Convention implementing the Schengen agreement). The French law on immigration and asylum, or CESEDA ('Code de entrée et du séjour des étrangers et du droit d'asile'), considers France as the ensemble of 'metropolitan France' as defined above, plus Saint-Pierre-et-Miquelon, Saint-Barthélemy and Saint-Martin (Art. L111-3). This means that the CESEDA does not apply to the whole 'territory of the Republic' and that an individual can move inside France or from another Schengen member to France, and yet formally exit the Schengen space; while at the same time, one can enter into France, without formally entering into the Schengen area. This has huge impacts on migrants' rights and conditions in places as far as the island of Mayotte in the Indian Ocean. As formally an outermost region of the EU and one of the deadliest places in the world for border crossing, only a partial version of CESEDA applies by ordinance since 2014 (Sénat, 2012: 75-93, Gisti 2015). This heterogeneity can be considered as one of the main factors behind the different definitions of the immigrant ('immigré') and the foreigner ('étranger') in France. Even today's definitions are largely based on the historic mobility of the people from the former colonies. Recent statistics show that the number of foreigners in France are up to 4 million and the number of immigrants are up to 7,5 million (Bouvier and Coirier 2016).

This chapter offers an overview of the historic path towards the present normative framework, and then moves towards a discussion of the relevant definitions. The report will then proceed by analysing the normative framework related to migration and asylum. A contradictory picture will emerge where the coherence of the system is haunted by pitfalls and limits in the attempt to define and manage an extremely stratified and mixed population. The final section discusses briefly in which way the French case interacts with the three conceptions of justice as non-domination, impartiality, and mutual recognition proposed by the GLOBUS project.

## France and migration: A historical overview

The French approach to citizenship has often been described as a republican synthesis between a 'liberal' and a 'civic' component, merging the values of individual autonomy, the need to share common civic virtues, and distinctive national traditions. This 'synthesis' was shaped under the Third Republic (1870-1940) and reframed as a discourse on 'national integration' in the 1980s. It has entered in crisis with the emergence of practices of exclusion and the shift from inequalities to discrimination among French citizens of different social and national origins (see Laborde 2001, Oberti 2007). The fractures and imbalances of citizenship, however, do not erase the role that the foreign-citizen cleavage plays in reproducing the political and public discourse around migration as a field of political contention.

The relation of France with migration is indeed closely related to the history of French republican discourse. 'The Declaration of the Rights of the Man and the Citizen' of 1789 proclaims that men 'are born and remain' free and equal in rights (Art. I). The same Declaration states that 'the principle of any sovereignty resides essentially in the Nation' (Art. III). In the Declaration, we thus find two lines of legitimacy of political actions, whose contradictions would create tensions in the following centuries until today. In fact, if the goal of any political association 'is the conservation of the natural and imprescriptible rights of man', namely 'liberty, property, safety and resistance against oppression' (Art. II), 'no body, no individual can extern authority which does not emanate expressly from' the Nation (Art. III). The principles of 'liberty, equality, fraternity', which were drafted during the revolution as the motto of the Republic, were first adopted as a guiding slogan of the National Guard. These principles were developed together with the concept of a 'national community', that

constituted at the same time the 'foreigner' as the not national. This foreigner, just as women, slaves, and children, is historically a person that is ideally entitled with rights, but not a citizen. This means the person had no part in the formation of the 'general will' (Art. VI).

G rard Noiriel observes that it was not until the Third Republic that the concept of 'immigrant' started to circulate as part of the effort to govern a mobile working population (Noiriel 1988). The first introduction of the identity card in 1888 and the 'Code of nationality' of 1889 separated between French and non-French people in a stricter way than before. Subsequent laws introduced the distinction between working immigrants and other categories of immigrants, paving the way for the definition of a distinct category of 'immigrant worker'. The legal definition of the people from the colonies, as French subjects, but not as citizens, played a crucial role in the future evolution of the relation between France and immigration. After the end of the colonial empire and most remarkably the independence of Algeria, millions of colonial subjects became foreigners. The Evian agreements of 1962 between the French government and the provisional Algerian government provided the Algerians with the same rights as French citizens, consisting of residency and working permits in France, but not political rights. In 1964, a subsequent agreement introduced the principle of mobility for Algerian workers, which was regulated by bilateral agreements and followed the needs of the French labour market. In an attempt to regulate the movement of labour force from the former colonies, in 1968 permits were introduced that differentiate between workers, students and trainees. Family reunification was from then on linked to housing and other requirements.<sup>3</sup> The condition of particular national groups with historical bonds to France's colonial empire continued to be regulated with specific provisions, which has partially waived from the general rule until today.

The economic crisis of the early 70s signed a second watershed in the position of the French state towards migrants. After the independence of Algeria, this led to stricter ties between the release of a permit to stay and a labour contract. This change has been the beginning of a trend of mass 'irregularisation' of migrant people, mainly of Arab

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<sup>3</sup> The role of immigration from Algeria as a fundamental angle to understand the formation of French immigration policies has been examined remarkably in Abdelmalek Sayad and Alaine Gillette, 1984. See also the comprehensive summary presented in Raimondi, 2016.

origins, which made the definition of their status a highly contentious matter. In the following decades, a patchwork of policies increased the insecurity of the immigrant population, with the 'Gaullist' front and the socialist party trying to advance different visions on the issue. The 'Gaullist' front aimed to limit mobility, while the socialist party promoted the approach to integrate migrants through various regularisations. Migration became a major political issue for social and political reasons during the '80s, including the rise of the National Front in the local elections. The period marked the rise of a new discourse based on the need to control, or 'maitriser', the fluxes of migrants and the assumption that France cannot 'accept all'. In the public debate, the term 'clandestine' started to be used by the supporters of the expulsion of irregular migrants. At the same time, a rising movement in favour of migrants' rights made the term 'sans-papier' popular. The term underlined the fact that the clandestine status of migrants is the result of state's failure to recognise their presence.

Different efforts to regulate the matter in a more comprehensive way by the socialist and 'Gaullist' governments reflect this tension. The law n° 80-9 of 10 January 1980 'on the prevention of clandestine immigration', also called 'Loi Bonnet', equates the irregular entry into France to a menace to public order, allowing the expulsion and detention of migrants in order to organise their exit. With the election of Mitterrand (socialist party) in 1981, expulsions were temporarily suspended. People who entered before 1981 and had worked for at least 1 year could regularise their position. Immigrants were given the right to form independent organisations, which led to the formation of organisations, such as 'SOS Racisme'. The law n° 84-622 of 17 July 1984 introduced two types of permit: the short permit to stay of maximum 1 year, and the renewable 'carte de sejour' (residency card) of 10 years, which was detached from the labour contract. The rights of migrants were thus recognised as not fully dependent on their working position, while relatively stable documents were considered as a path towards integration.

After the victory of Jacques Chirac ('Gaullist') in the political elections of 1986, the situation changed again. Three laws were adopted in 1986, 1993 and 1997, known as 'loi Pasqua-Debré', named after the minister of the Interior in charge during their introduction. The laws established new draconian conditions that made it harder to be a regular migrant in France and acquire nationality. The debate shifted



from 'integration' to 'assimilation', which also resulted in the restriction of the 'jus soli' from a semi-automatic procedure to a process that requires activation and formal obligations.

During the same period a new rationality in migration policies emerged, which linked migration to the economic and demographic needs of France. This utilitarian vision was expressed in 1996 by the declaration of the ministry of Labour, in which Jeanneney claimed that 'even the clandestine immigration is not useless' and the full implementation of stricter regulations and international agreements would probably result in a 'lack of labour force' (Cornau and Duzenat 2008: 341). One can observe that in the following years, this rationality produced a tension between the search for a comprehensive framework to regulate migration, and the adoption of a 'case by case' approach.

After the socialist government of Jospin approved thousands of regularisations in 1997 and 1998, Sarkozy's roles as Minister of the Interior in 2002 and President of the Republic in 2007 represent both a turning point and the formalisation of a new direction in the migration policy. The discourse on the 'chosen immigration', or 'immigration choisie', openly affirmed the right of France to decide who to accept. This also consolidated the goal to increase a qualified economic migration over family migration, which represented the vast majority of new permits. This shift was not entirely new and was also reflected in the asylum policy of the period 1970-2000. During that period, the increase of asylum applications was coupled with a decrease in the rate of admissions from 90% to less than 20% (Cornuau and Duzenat 2008). This means that the other side of emerging utilitarian rationality towards migrants was the practical orientation to restrain the conditions of admissibility and the acceptance of the demands of asylum, which since 2003 also included the use of subsidiary protection.

The more recent and comprehensive reforms of CESEDA, which included a new asylum law (23 July 2015) and a new law on foreigners (7 March 2016), has confirmed this direction and has introduced a compulsory accommodation system to prevent large concentrations of asylum seekers. Moreover, the acquisition of French language skills has become a priority for the release of documents. The Reception and Integration contract ('Contract d'accueil et intégration', CAI), introduced with the law 24 July 2006, has been replaced by the

Republican Integration Contract ('Contract d'intégration républicaine', CIR). The reform carried on the approach that understands integration increasingly as the outcome of migrants' compliance with authorities' directions, rather than a social issue. The CIR provides for a personalised path to integration of 5 years with compulsory duties of civic education and the learning of French language. Other major changes concern the facilitation of mobility of high-skilled workers through the introduction of the 'passeport talent', and autonomous workers and intra-company mobility (for comprehensive analysis, see ADDE et al. 2017 and Gisti 2017).

## How to define migration?<sup>4</sup>

The High Council for Integration has developed a definition of 'immigrant' that is widely used by Insee and is of interest for this report. An immigrant is defined as 'a person who is born a foreigner and abroad, and resides in France'. The concept of immigrant is thus primarily related to the country of origin of the person and not their actual legal status in France. On the contrary, the concept of 'foreigner' ('étranger') refers to the present nationality and legal status of a person. As defined by CESEDA, art. L111-1, foreigners are 'people without French nationality, either if they have a foreign nationality, either if they don't have a nationality'. Following the law, if a person has multiple nationalities, including the French nationality, the person is considered as French in France.

The distinction between immigrants and foreigners implies that a foreigner is not necessarily an immigrant, as is for example the case with minors born in France by foreign parents before they can get the French nationality. An immigrant is not necessarily a foreigner, as in the case of the returning French born from abroad. This also implies that the status of foreigner can be contingent, while the condition of immigrant is permanent. For this reason, a person who has acquired the French nationality since his or her arrival in France is still counted as an immigrant and thus the numbers of 'immigrants' and the 'foreigners' in France differ.

The CESEDA does not refer to 'immigrants', only to 'foreigners', and widely uses the word 'ressortissant', which literally describes a foreign

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<sup>4</sup> Where not otherwise mentioned the following information is extracted from the dedicated pages of the Ministry of the Interior official website and from the institutional portal <http://www.vie-publique.fr/>.

citizen out of his or her own country. The distinction between 'étranger' and 'ressortissant' is relevant as not all foreigners are 'ressortissant', as in the case of stateless people. The same law refers to 'immigration' when it mentions the name of the institutions dealing with the process, and to mention the 'irregular immigration' ('immigration irrégulière'). The concept of 'irregularity' it is also used in reference to a 'situation', as 'the foreigners in irregular situation' (art. L111-10). The law never uses the word 'clandestine'. It uses instead the word 'migrant' when referring to the activity of facilitating the irregular entry and stay in the country, as the 'illicit traffic of migrants' ('trafic illicite de migrants'), the projects of co-development ('codéveloppement des migrants'), and the help to migrants ('aide aux migrants') (arts. L622-1, L900-1 and L316-1).

The rationale behind the use of the expression 'irregular immigration' was explained in 1998 by the Commission of Enquiry of the French Senate Masson Balarello on the issue of the regularisation. The Commission contested the use of the locution 'sans-papiers' (without papers), as used by the growing movement pushing for a mass regularisation of migrants. According to the Commission, the expression was seen as biased in the migrant's favour because 'it suggests that the concerned persons are "victims", who are somehow deprived of a right from the administration, while it concerns foreigners staying irregularly in France' (Masson and Balarello 1998).

Generally speaking, a 'foreigner' is thus a person who lacks the basic right of a French citizen: the right to enter and stay without condition in France. A foreigner needs valid papers to regularly stay in France and to have the same rights as a French citizen. Some exceptions, however, prevail. Only the citizens of a member state of the EU have political rights and can only vote in the local and European elections. Only the citizens of a member state of the EU, Norway, Iceland, Lichtenstein, Andorra, Monaco, and Switzerland have access to job positions in the public administration (the so-called 'sovereign positions', 'emplois de souveraineté', such as diplomacy, defence, etc. excluded). Non-EU citizens can only access public administration jobs in the field of research and education. Social benefits, such as health insurance, maternity leave, and similar, are recognised depending on the working position. Regular foreigners can participate in social life, including being elected as union representatives, but



they cannot be elected as members of the 'Conseils des Prud'hommes', a form of arbitration.

## Policy analysis: Migration<sup>5</sup>

### Key forms of regular migration and types of visas

A foreigner, who wishes to live in France, needs a document that allows the person to reside in French territory and to have normal access to fundamental rights, such as work, health, housing, education, and social benefits. The formal way to regularly enter France is to request a visa before the entry or at the border. The French Ministry of the Interior has two types of such visa: the short stay visa ('court séjour'), concerning stays of less than three months regulated by European law under the Schengen rules, and the long stay visa ('long séjour'), concerning stays of more than three months regulated by the CESEDA.

The recent reforms of the CESEDA have affirmed the principle of the generalisation of the multiannual visa after one year of regular stay, which in theory should relieve congestion in the Prefectures in charge of the renewal of the papers. In fact, the Ministry of the Interior records around 5 million passages in the Prefectures and 99% of these passages are due to the process of renewal of papers.

The different types of long stay visas entail different types of permits depending on their duration and the potential recipients:

1. The long stay visa is valid as a 'titre de séjour' and has a duration from three months to one year (VLS/TS). This is the most general form of visa;
2. The long stay visa can lead to a request for a 'carte de séjour' two months after the arrival in France;
3. The visa for the education of a minor in France, whose parents reside abroad, has a maximum duration of 11 months;
4. The visa 'vacances travail' (working holiday) for young people is part of specific bilateral agreements, and has a maximum duration of one year;

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<sup>5</sup> Only visas concerning diplomatic personnel, international adoption and cases relevant for the foreign policy of France are under the competence of the Ministry of foreign affairs.

5. The temporary long stay visa ('long séjour temporaire') has a duration between 4 and 12 months, and is used for visiting, study (limited to six months) and artistic activity.

The first and second type of visa included in this list concerns different types of people and include different durations. A work visa requires previous contact with a local employer, who must apply at the Regional Directorate of Enterprises, Competition, Consumption, Labour and Employment (DIRECTE) and then at the relevant office of the French Office of Immigration and Integration, or OFII ('Office Français de l'Immigration et de l'Intégration').

The VLS/TS requires the foreigner to fill out a form at the time of demanding a permit (the recipient will then be registered in the territorial office of OFII). The form concerns the following situations: husband/wife of French citizens ('vie privée et familiale', 1 year); husband/wife in case of family reunification ('vie privée et familiale', 1 year); wage workers or 'carte salarié' (CDI): 1 year for workers with a permanent contract, 4 to 12 months for workers with temporary contract; apprentices, recipients of a 'passeport talent' and their families, intra-company transfer (ICT) and their families, intra-company apprentices and people exercising a business or independent activity (4 to 12 months).

The VLS/TS is not renewable. If the holder wants to extend the stay, a multiannual carte de séjour must be requested, which is valid up to 4 years. The holder of a CDI or a 'card entrepreneur profession libérale' can obtain a 'carte de séjour', which is valid 4 years. The relatives (children or spouse) of a holder of a 'card vie privée et familiale' can obtain a 'carte de séjour' that is valid 2 years. Students can obtain a 'carte de séjour' lasting for the duration of their studies, namely 1 to 4 years. It is also possible to issue a 'carte de séjour' for health reasons and for other types of staff transfer.

The second type of long stay visa expressly requires the application for a 'carte de séjour' two months in advance of the entry into France. The following categories of persons are eligible for this type of long stay visa:

1. Parents of French minors, who want to obtain a 1 year 'temporary carte de séjour' for family reasons;

2. Holders of a multiannual 'passeport talent' or seasonal intra-company workers (ICT), who want to obtain a multiannual permit;
3. Foreign children of French citizens aged 18-21 or under the circumstances mentioned in the art. 311-3 of CESEDA, or if the child is under the responsibility of its parents;
4. Foreigners who are recipients of a work-related disability or injury allowance;
5. Foreigners who serve for the French army under specific conditions.

The law of 7 March 2017 introduced a new residence permit called 'passeport talent', which facilitates intra-company transfers ('salarié détaché' ICT) and multiannual residence permits to seasonal workers ('travailleur saisonnier'). The specific goal is to increase France's competitiveness. The 'passeport talent' is valid for four years and does not require a work permit. It is issued for specific categories of highly qualified workers (former category of the EU Blue Card), researchers, company representatives, investors, and start-uppers.

The permit for 'salarié détaché ICT' is valid up to three years, it does not require a work permit, and is not renewable. It concerns employees working abroad for a company who are seconded to a company belonging to the same group in France for a temporary assignment. Foreigners already residing in another EU country are required to have a 'salarié détaché ICT' residence permit only if the assignment in France exceeds ninety days. Intra-company training is possible for a period of up to one year. For periods of more than three months, a residence permit for 'stagiaire ICT' is required. If the worker already resides in another EU country, the name of this permit is 'stagiaire mobile ICT'. The 'travailleur saisonnier' residence permit is valid three years and is renewable. It allows stays up to six months per year. Under the new law, workers of specific and highly qualified sectors coming to France for up to three months will no longer need a work permit.

A permit 'vie privée et familiale' is valid as a working permit and may be issued also for humanitarian or other exceptional reasons, even after 10 years of irregular stay in France (Art. L313-11 and L313-14).

## Family reunification

The CESEDA describes in different articles the conditions for obtaining a permit for 'vie privée et familiale' (see sub-section 6, Arts. L313-11). The family is considered as the nuclear family, namely the couple, which includes marriage, cohabiting, and the union through PACS ('Pact civil de solidarité', a civil union which provides also for same-sex unions), and their children. The law enlists different possibilities to obtain a permit for a person that holds familial links with a French citizen, or a foreigner with a permit to stay in France. These possibilities are found under the general category of 'personal and familial links' ('liens personnels et familiaux'), which includes the process of family reunification ('regroupement familiale') and the conditions of being a parent of a French child, combining the principle to protect the concept of a normal family life with the needs to regulate migration.

In the process of family reunification, the foreigner regularly residing in France can apply, if the person complies with the conditions of at least 18 months of regular residence and stable and suitable housing. The partner should be at least 18 years old at the moment of the demand, while the children should be younger than 18 years. Eligibility includes children with legal ties to the applicant, including adoption and, following the pronouncement of the Council of State, forms of legal custody, such as the 'kafila' in Algeria. The OFII is responsible for the demand and the following process, which includes the activation of a Contract of reception and integration for families (CAIF: 'Contract d'accueil et d'intégration pour le familles'), and a language and republican values test. The family members enter France with a residence permit of one year and, after that, a renewable 'carte de séjour' of one year. After three years of regular stay, they can obtain a renewable residency card of 10 years. The partner of a refugee can apply for family reunification and obtain a residency card of 10 years and recognition of his/her refugee status by the OFPRA, following the principle of family unity. The partner of a recipient of subsidiary protection can obtain a temporary permit of one year, while the partner of a stateless person can obtain the same kind of permit as the stateless person.

A permit 'vie privée et familiale' can be delivered also to the foreign partner of French citizens if the person can prove the stability of the familial life and adherence to republican values. The parent of a French child can obtain a temporary residency card. In that case, the

person must demonstrate to have contributed to the child's life and education since his/her birth or at least for the two years before the demand. The temporary card can then be transformed into a residency card after three years, under the same conditions and if the person demonstrates integration to the republic.

## Minors<sup>6</sup>

A foreign minor can stay in France without legal papers, but papers are required to cross French borders. If the minor resides in France and is born from holders of a permit to stay, the minor can obtain a special identity card called 'Titre d'identité républicaine' (TIR) and the parents can request a circulation paper for foreign minors (DCEM), which is valid for 5 years. A different process is applied for unaccompanied minors or isolated minors ('mineurs isolés'), namely foreigners of less than 18 years, who reach the French border without any adult legally responsible for them. Even if minors can stay in France, they can not enter without a person legally responsible for them that can represent their legal interests in front of the authorities. For this reason, they are placed in a particular waiting zone for a maximum period of twenty days ('zone d'attente') and given an ad hoc administrator.

With the assistance of this person, the minor can apply for asylum, basically following the same procedure of all asylum seekers (see the section on asylum in this chapter). If an asylum application is not presented at the border, the minor should be sent to one of the Centres for the Reception and Orientation for Non-accompanied Minors (CAOMI: Centre d'accueil et d'orientation pour mineur non accompagnés). This institution should help the minor plan future steps, including the possibility to present an asylum application. The recent dismantlement of the infamous 'Calais Jungle', led on 1 November 2016 to the adoption of an exceptional plan by the Ministry of Justice concerning unaccompanied minors. It aims to discern between the minors who want to reach the United Kingdom and the ones who will stay in France and involves the CAOMIs and collaboration with the United Kingdom.

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<sup>6</sup> The information in this section is extracted from the Ministry of the Interior, the dossier compiled by the OFPRA (*Guide de l'asile pour le mineurs isolés étrangers en France*) and InfoMIE (Centre ressources sur les mineurs isolés étrangers, <http://www.infomie.net/>), Eba Nguema (2015) and Gisti (2016b).



## Notes on the 'state of emergency'

This section briefly examines the impact of the state of emergency on immigration policies. Even without a normative connection to immigration law, different sources have observed the impact of the state of emergency on a practical level, such as references to the state of emergency made by police officers in document controls or searches. The state of emergency was initially proclaimed by a decree on 14 November 2015, the day after the terrorist attacks in Paris. It was then converted into law with the law n° 2015-1501 of 20 November 2015 and renewed several times. Its main reference is the law n°55-385 of 3 April 1955, adopted against the background of the Algerian war.

The state of emergency has been accompanied with a proposal of constitutional reform, including the possibility to declare the removal of French nationality for people sentenced for crimes against the nation. The proposal was never approved, but had a large impact on the public debate. Generally speaking, the state of emergency has led to an increase of the powers of police against the normal judiciary procedure. This has produced many complaints by human rights organisations (see for example Human Right Watch, 22 July 2016).

The declaration of a state of emergency mainly has an impact on three domains (Gisti 2016):

- The reintroduction of border controls inside the Schengen area. The controls are established in reference to the Schengen treaty clause that allows the reintroduction of temporary controls in case of 'extraordinary circumstances'. The state of emergency has nevertheless ratified a situation already in place, given that France had established regular border controls even before the attacks, for example at the border with Italy in Ventimiglia, in June 2015.
- The increase in the identity control and administrative search inside the French national borders. Even if the state of emergency does not include specific provisions for identity control, it has been invoked by French police to justify identity controls outside the normal procedure provided for by the criminal code. The case is different for the administrative search, where article 11 of the law regulates the state of emergency explicitly, and extends the faculty to search also private properties and housing

- at any time. This has led to numerous reports denouncing the side effects on migrant people in irregular situations.
- The power of issuing an 'order to quit the French territory' by appealing to the 'urgency clause' included in the art. L.511-3-1 of the CESEDA. This implies the possibility to issue an order to leave the country before the thirty days usually recognised by the same article of the CESEDA and to detain the person until the removal from the national territory (see for example Prefecture de Police 2015).

## Policy analysis: Protection and asylum

### The categories of protection

Two main categories of protection exist in France: the status of refugee and subsidiary protection. The sources to define refugees and recipients of protection are the French Constitution, the Geneva Convention of 1951, and the UNHCR, while the normative framework is included in book VII of the CESEDA. A third category that does not directly imply a form of protection, but must be included in the picture, is that of stateless persons.

Art. L711-1 of CESEDA states that the status of a refugee 'is recognised to all persons prosecuted in reason of their action in favour of liberty' following the definition of the French constitution, to all persons covered by Art. 6 and 7 of the UNHCR's statute as adopted by the General Assembly of the United Nations 14 December 1950, and to persons 'who correspond to the definitions included in the first article of the Geneva convention on the status of refugees of 28 July, 1951'. Article L711-2 specifies that the 'reasons of prosecution' are evaluated according to directive 2011/95/UE 13 December 2011, concerning the conditions under which a foreign citizen or a stateless person can be a recipient of international protection. It also specifies that gender and sexual orientation are taken into account for definition of social groups and that there must be a direct link between the reasons of persecution, the specific acts or the lack of protection. Finally, it determines that it makes no difference if the subject actually carries the characteristics that motivate the acts of persecution, or these are an assumption of the perpetrator.

A second form of protection is the subsidiary protection. The term 'subsidiary' means that this form of protection is recognised only after

the evaluation of the criteria in order to be acknowledged as a refugee. The article L721-1 of CESEDA states that the subsidiary protection is given to persons who do not comply with the conditions above, but are in risk of death penalty, torture and inhuman treatment. It is also given to civilians faced with an individual risk as a consequence of a generalised violence in the country, resulting from a condition of armed conflict, 'internal or international'. The article L712-2 specifies that subsidiary protection is not recognised to persons who are responsible for criminal acts against peace or humanity, who have committed actions against the principles of the United Nations, or who can represent a serious risk to the country. The protection is furthermore not recognised to people who committed acts in their home countries that would result in imprisonment if committed in France, and who are suspected to flee in order to escape sanctions as a result of these actions. Since 2003, both forms of protection are recognised independently of whether the perpetrator of prosecution is a state or another subject.

The status of refugee or the subsidiary protection can be withdrawn in case of fraud or serious threat to the security of the state. More specifically, the status of refugee can be withdrawn as stated in the Geneva convention, in cases where a person is condemned for acts of terrorism or for other felonies with a sentence equal to ten years of prison.

In terms of reference to European legislation, the CESEDA mentions the directive 2011/95/EU on the 'qualifications' necessary for a person to become a recipient of international protection (L711-2), the regulation 26 June 2013, known as the Dublin Regulation (Art. L213-8-1 and L723-1), the MS's responsibility to examine an application for international protection, and directive 2013/32/EU of 26 June 2013 on the conditions and procedures of reception (L722-1).

The update of CESEDA in 2015 harmonised and collected the different provisions already present in the French system related to stateless persons, i.e. subjects that are not recognised as citizens by any state, following the definition given by the New York Convention of 1954.



## The application process

The policy towards applicants is formally guided by four principles: expanded protection; impartial and independent examination of the application; right to maintenance in the territory; and right to dignity in the reception conditions during the examination period.

Since 1952, the office in charge of the whole process is the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which is fully independent and under the administrative control of the National court for the right to asylum ('Cour nationale du droit d'asile', CNDA). The OFPRA is organised in different divisions which are in charge of asylum at the border, juridical European and international affairs, protection, information, documentation, and research. A board of directors of 20 members, 17 of which hold deliberative power, operate the OFPRA (CESEDA Art. L722-1). The composition of the board of directors reflects, for the deliberative part, the French parliament and representatives in the European parliament, the state, and the staff of the office. The board also includes three 'qualified persons' representing the reception system. These three persons only have a say in the decisions regarding the definition of the safe origin countries. A delegate from UNHCR participates in the meetings as an auditor.

The OFPRA evaluates the applications by analysing the documents presented by the applicants and through hearings. In case of refusal, the applicant can appeal to CNDA within thirty days after the decision has been made and has the right to legal aid. The CNDA is placed under the authority of one member of the Council of State and is composed of one president, one magistrate, and two assessors. One of the assessors is named by the UNHCR and one is named by the vice-president of the Council of State.

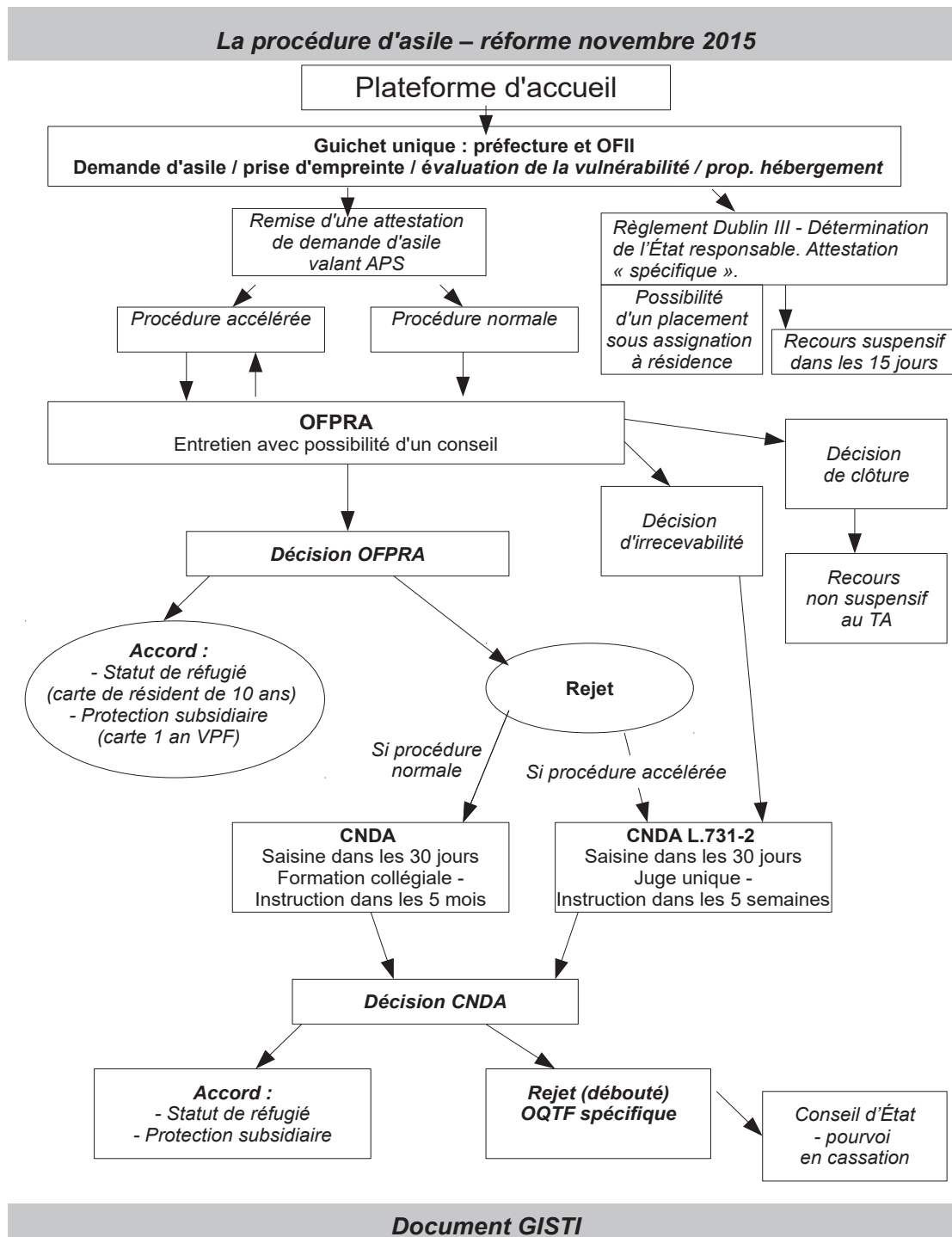
The OFPRA works in conjunction with the asylum service of the state, which assures the administrative structure and funding. The asylum service is composed of 50 members organised in three departments, namely: right to asylum and protection; asylum at the border and the admission to stay; and refugees and the reception of the asylum seekers. The asylum service is also in charge of developing and implementing French policy, and participates in the European negotiations on the matter.

The application for protection can be presented at the border, in the moment of entry into France, and at any time inside the French territory, whether or not the person entered the territory legally. If the application presented at the border is considered 'clearly unfounded', it can be refused. Art. L213-8-1 of CESEDA gives OFPRA the possibility to declare an application clearly unfounded, either because it is openly non-credible or of no pertinence. If the OFPRA declares it acceptable, its decision is compulsory for the ministry of the Interior. An application submitted inside the territory of the state can be presented at any time, including when the person is in detention or has received a decree of expulsion from the territory.

The whole process is nevertheless less clear and smooth, as France, in compliance with the European law and the Dublin agreement, only processes the applications that are of its competence. The applications that are found to be the responsibility of France are examined by OFPRA. The decision on Dublin, as well as the determination of groundlessness and inadmissibility of the application, often happens inside of what the CESEDA calls 'waiting zones' in proximity to borders areas, under the authority of the Ministry of the Interior, and in compliance with regulation n° 604/2013EU of 26 June 2013 (Art. L213-8-1 and L723-1). The decision of whether an asylum demand can reach the OFPRA is thus not entirely under the control of an independent authority, but involves the role of the Ministry of the Interior. Other complications originate from the insufficient capacities of the offices in charge of collecting the applications inside the French territory, a situation that often places migrants in the paradoxical position of being unable to submit their application before the time limits imposed by the law (see ADDE et al. 2017).

During the presentation of the application, the OFPRA is in charge of evaluating if the person is particularly vulnerable and has special needs, including the identification of unaccompanied minors, victims of trafficking or forms of sexual and psychological violence, and other persons with particular health problems, including mental diseases (Art. L744-6). The process is described in Figure 1.1 below.

Figure 1.1. The Asylum procedure



Source: GISTI – Groupe d'information et de soutien des immigrés,  
<http://www.gisti.org/>.

## The rights of asylum seekers, refugees, and recipients of subsidiary protection<sup>7</sup>

A decision of the Constitutional Council in 1993 declared that asylum is a constitutional right, confirming the legal validity of the preamble of the Constitution of 1958. As a consequence, each applicant has the right to stay in France until his or her request has been processed. An applicant seeking the status of stateless person, however, has no right to stay in French territory during the examination of the demand. Asylum seekers who are awaiting processing of their applications, in compliance with the regulation n° 604/2013EU, have no right to circulate in other EU MSs (Art. R742-2). Moreover, when receiving an asylum application, the French authorities define the asylum seeker's residence and a 'perimeter' inside which they can circulate, as well as the office where they shall present themselves, and how frequently they should do so (Art. R742-4).

Asylum seekers' mobility is thus strictly limited, but they are entitled to:

- The possibility to reside in temporary housing facilities, called CADA ('Centres d'accueil pour demandeurs d'asile'), during this process. The reception system has expanded in recent years, and the number of placements inside the CADA increased from 5.282 in 2001 to 25.637 in 2014. In 2015, an additional 4.200 places were created, while the state plans to add further 3.500 places in 2016 and 2.000 places in 2017, amounting to a total of at least 35.000 places. However, the amount of CADA places remain largely insufficient to cope with the numbers of applicants, with around 80.000 demands in 2015. This means that access to CADA housing varies and is highly competitive. In addition to CADA, the state uses other forms of emergency housing, which amounted to an extra 19.600 places in 2016. These facilities are managed partially by Adoma, a French mixed society for social housing, and partially under the direction of department prefects, who have the possibility to require private spaces, such as flats and hotel rooms, to accommodate the asylum seekers (Sénat 2016).

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<sup>7</sup> Where not otherwise mentioned the information included in this section are extracted from '*Le guide du Demandeur d'Asile en France*' published by the Ministry of the Interior in November 2015.

- Request a financial benefit ('allocation pour demandeur d'asile', ADA). The amount of the benefit varies depending on the number of people and is equal to around 6.80 euro per day for a single person. An extra 4.20 euro are provided if the person is not accommodated in a facility that is part of the reception system. Eligibility depends on the asylum seeker's personal income and financial resources.
- Access to the education system in conformity with the education law.
- Access to health care.
- The right to work, if OFPRA is unable to process the application within nine months (CESEDA, L744-11) or if the applicant entered into France with a special asylum visa from a French embassy or consulate.
- Receive a registration document that does not constitute a valid travel document outside French borders.

If the asylum application is successful, the applicant can remain in the CADA or similar public housing for up to six months before he/she finds other accommodation. While the financial help ends at this point, the person is entitled to the same welfare benefits as French citizens.

Once a person has received the refugee status recognised by OFPRA or CNDA, the person is entitled to the following rights (Art. R743-3):

- to obtain a renewable receipt with the mention 'recognised refugee' with a validity of six months;
- to a residency permit ('carte de résident'), which is first valid for ten years, and then renewable for an indefinite term (Art. L314-11);
- to work in France (Art. 314-4);
- to apply for naturalisation, without the need to wait for five years of residency in France;
- to obtain travel documents valid for two years and for all countries, except the country of origin or other countries dangerous for the same reasons that justified asylum in France. A three-month pass might be given to travel to the country of origin under specific circumstances.
- the right to health insurance and other social welfare benefits just as French citizens;

- the possibility to sign a 'contract of republican integration' (Contract d'intégration républicaine, CIR) with the French government and to enter a personalised program as part of the integration process, including insertion into the labour market;
- the right to demand a ten-year residency permit for the refugee's partner and children, if they are older than 18. This also applies to children when they turn 18 or 16 years old and want to work, and to other direct relatives and first-degree relatives if the refugee is a minor and not married;
- to access the procedure for family reunification.

Once a person has been granted subsidiary protection, the person is entitled to (Art. R743-4):

- the right to a receipt with the mention that the person 'has obtained the benefit of subsidiary protection', which is valid for six months and renewable;
- the right to a temporary stay permit ('carte de séjour temporaire'), which is first valid for one year, and then renewable for a subsequent two-year term (Art. L313-13);
- the right to work in France (Art. L313-13);
- the possibility to obtain travel documents valid for one year and for all countries, except the country of origin and other countries dangerous for the same reasons that justified protection in France. A three-month pass might be given to travel to the country of origin under specific circumstances;
- the right to health insurance and other social welfare benefits just as French citizens;
- the possibility to sign a 'contract of republican integration' ('Contract d'intégration républicaine', CIR) with the French government and to enter a personalised program as part of the integration process, including insertion into the labour market;
- the right to request a one year temporary stay permit for the applicant's partner and children, if they are older than 18. This also applies to children when they turn 18 years old or 16 years old and want to work, and to other direct relatives and first-degree relatives if the refugee is a minor and not married;
- and the right to access the procedure for family reunification.



Once a person is recognised as a stateless person, the person is entitled to:

- a temporary and renewable stay permit of one year;
- the right to work in France;
- the possibility to obtain travel documents, which are valid for one year in case of temporary stay permit, and two years in case of residency permit;
- after three years of residency in France, the stateless person can request a residency permit that is valid ten years and renewable as of right;
- the right to request the release of a one year temporary stay permit for the person's partner and children if they are older than 18. This also applies to children when they turn 18 years old or 16 years old and want to work, and to other direct relatives and first-degree relatives if the refugee is a minor and not married.

### The definition of the 'safe countries of origin'

The CESEDA (art. L722-1) declares that an origin country is considered 'safe' ('sûr'), if rule of law is applied by a democratic political regime and its general political circumstances. Additionally, it can be demonstrated that the country never resorted to persecution, torture or inhuman treatment, and that there is no threat by armed conflict, internal or international. A national list of safe countries is adopted by the board of OFPRA in compliance with the definitions and procedures described in the directive 2013/32/EU of 26 June 2013. As of the completion of this chapter, the national list of safe countries was last updated on 9 October 2015 and includes 16 countries:

- Republic of Albania;
- Republic of Armenia;
- Republic of Benin;
- Bosnia-Herzegovina;
- Republic of Cap-Verde;
- Georgia;
- Republic of Ghana;
- Republic of India;
- Former Yugoslavian Republic of Macedonia (FYROM);
- Republic of Maurice;
- Republic of Moldava;
- Republic of Mongolia;

- Republic of Montenegro;
- Republic of Senegal;
- Republic of Serbia;
- Republic of Kosovo.

### The numbers: applications and decisions<sup>8</sup>

Data released by OFPRA from 2014 reveals that 193,522 people were under some form of protection, 1,247 people were stateless people, and 14,512 were new recipients, of which 3,503 were under subsidiary protection. The number of applications received by OFPRA in 2014 was 64,811 and the number of decisions was 69,255. The number of backlog cases in December 2014 was 28,787, of which 18,441 originated from 2014, 1,358 from 2013, and 215 from 2012. The average length to make a decision by OFPRA in 2014 was 203.5 days. The number of appeals to CNDA in 2014 was 37,356, the number of decisions was 39,162 and the pending cases were 20,031 in December 2014. The number of applications concerning the recognition of the stateless status was 272, of which 175 were Europeans, 37 were Asians, and 37 Africans.

In terms of percentage, the overall recognition rate in 2014 was 28 per cent. The rate of OFPRA decisions resulting in the granting of a protection status was 16.9 per cent. The rate of CNDA decisions leading to some form of protection was 14.9 per cent. The overall rate of protection accorded to unaccompanied minors was 64.1 per cent. In 2015, a general growth of applications has been recorded (80,075; +23.6 per cent), accompanied by a drop in the number of decisions (62,057; -10.4 per cent) by OFPRA. Recipients of protection were in total 14,119, of which 11,297 received refugee status and 2,822 subsidiary protection.

OFPRA has been able to get through 77.5 per cent of the overall open demands in 2015. The positive decisions amounted to 22.8 per cent of the overall decisions, of which 18.2 per cent obtained the status of refugee and 4.5 per cent was granted subsidiary protection). The number of appeals to CNDA in 2015 was 38,646 and the number of decisions was 35,961. 5,387 persons obtained some form of protection after the pronouncement of the CNDA: 3,834 received refugee status and 1,553 received subsidiary protection. The CNDA has been able to

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<sup>8</sup> Numbers from OFPRA and the Ministry of the Interior.



get through 93 per cent of the overall open appeals in 2015. The positive decisions amounted to 15 per cent of the overall decisions: 10.7 per cent obtained refugee status and 4.3 per cent received subsidiary protection.

The OFPRA and the CNDA made 98,018 decisions in 2015. 19,506 persons obtained some form of protection, of which 4,357 were granted subsidiary protection and 15,149 refugee status. The total ratio of positive decisions was 19.9 per cent (15.5 per cent refugee status and 4.5 per cent subsidiary protection).

## Policy analysis: Relation with third countries, smuggling and trafficking

### Relocation

The relocation ('relocalisation') process was launched in collaboration with the UNHCR, the International Organisation of Migration (IOM) and in compliance with the European decisions. The two major streams of migrants that are to be relocated are directed by the European relocation system and the UNHCR. In the European Union Council of 14 and 22 September 2015, France committed to receive around 30,700 asylum seekers in the period between 2016 and 2017 from the 'hot spots' established in Italy and Greece (EMN 2017: 17). Data collected by the European Commission in early 2016 mentions a total of 283 persons relocated until the 15 March 2016, 41 from Italy and 242 from Greece (European Commission 2016). These numbers show the discrepancy between formal commitments at the EU level and a far more complex reality.

Besides participating in the European relocation system, France also signed a framework agreement with UNHCR in 2008, committing to 'consider' 100 dossier submissions under the mandate of UNHCR each year. In this framework agreement, France committed to 'accept and facilitate the resettlement of the principal claimant and family members who cannot return to their country of origin and who are not able to integrate in their first country of asylum'. A new program was then set up at the end of 2013 in collaboration with UNHCR to welcome 500 'vulnerable Syrian refugees' in 2014. This group was partly composed of the annual resettlement quota and partly of an ad-hoc 'humanitarian admission programme' (HAP) for refugees outside the UNHCR mandate. This has augmented the numbers of

refugees resettled in France, which mainly consist of Syrians: 300 Syrian nationals in 2014, and 766 refugees of various nationalities in 2015, including 643 Syrians. In addition to this national programme, France agreed to host 2,375 refugees through 'selection missions' according to the European conclusions of July 2015. Up to 6,000 Syrians refugees were resettled as part of the EU-Turkey agreement from March 2016.

Considering how the status of refugee is granted to any person falling under UNHCR's mandate, there is thus a difference between the 'resettled' refugees under the UNHCR mandate, who can automatically receive recognition by the French state, and people under the HAP. The status of people under the HAP depends on the determination and selection made by OFPRA, and they can be granted both refugee status and subsidiary protection.

### Readmission agreements<sup>9</sup>

France has signed around 40 bilateral agreements to readmit irregular foreigners that reside in France and who has received an order to leave French territory ('obligation de quitter', see CESEDA, Art. L511-1). More recently, France has adopted the framework of the EU global approach on migration and the directive 2008/115/CE of 16 December 2008 on the joint procedures to return foreign citizens of third countries in irregular situations. The framework and the directive promote voluntary return, and include the possibility to prohibit the re-entry to the European territory of the returned migrant. France is directly involved in the readmission programs signed by the EU, but it has also signed a number of bilateral agreements to manage migratory fluxes. These agreements concern different dimensions of the management of migration, including cooperation, co-development, and the readmission of irregular migrants. The main rationale behind this double level is to overcome the limits of cooperation with third countries on the return of irregular migrants. This applies for both the different administrative procedures and the structural problems of these countries. An alternative explanation for drafting national bilateral agreements is the lack of interest of a specific country in an agreement with the EU. While in cases that an EU program is in place, the bilateral agreements are considered as a

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<sup>9</sup> When not otherwise mentioned the information in this section are extracted from Panizzon 2013.

tool to strengthen the force of EU pacts, even if this clearly creates differences among the MSs in their relationship with third countries.

The process of readmission includes different procedures depending on the country and can be divided into three types:

- The readmission to an EU MS under the Schengen and Dublin rules (CESEDA, art. L531-1);
- The instantaneous readmission at the border to a country which shares a land border with France;
- The readmission to a non-EU country who signed a bilateral agreement with France.

It is relevant to note that readmission agreements vary in accordance with changing European policies and French jurisprudence. Recent agreements often include comprehensive approaches to migration and particular provisions that link control of illegal migration, securitisation of borders, and acceptance of readmission to development aid. The insertion of development aid in these agreements may suggest that countries of origin are rewarded for combating irregular migration and accepting readmission obligations. France can use the modification of the list of 'shortage occupations' as leverage in the negotiation of these agreements. The thought is to offer additional avenues for regular migration from the concerned countries, and the provision of special conditions for specific categories of workers, including young professionals, coming from particular countries.

## Smuggling and trafficking

The CESEDA dedicates a section concerning the 'help to irregular entry and stay' ('aide à l'entrée et au séjour irréguliers', arts. L621-1 to L622-10). The general sanction for any person who facilitates or tries to facilitate, directly or indirectly, the irregular entry, circulation, and stay of a foreigner in France or in any Schengen state is five years of imprisonment and 30,000 euro fine. The same sanction is applied for any person who facilitates the irregular entry or circulation of a foreigner in a signatory state of the protocol against the illicit smuggling of migrants ('trafic illicite'), signed in Palermo on 12 December 2000. The sanction includes confiscation of the vehicle used. The punishment increases to up to 10 years of imprisonment and 750,000 euro fine if an organised group commits the act. This increase also applies if the foreigner's life and dignity is threatened, if advantage is taken of an authorisation to drive in restricted access areas, such as ports or

airports, or if the act results in taking away a minor from the familiar and normal environment.

The law also mentions human trafficking (*'traite des êtres humains'*) and procurement (*'proxénétisme'*), referring to art. 225-4-1 to 225-4-6 and 225-5 to 225-10 of the criminal code, which include provisions to help and protect victims of trafficking (*'victimes de la traite'*). Human trafficking is defined in the criminal code (art. 225-4-1) as the act of recruiting, transporting, transferring, sheltering, and accommodating a person in exchange for a remuneration or any other advantage, or a promise of remuneration or any other advantage. This is done in order to put this person under the perpetrator's or someone else's disposition under conditions of prostitution or other exploitation or against his/her dignity, including sexual harassment. The general sanction for human trafficking is seven years of imprisonment and 150,000 euro fine, excluding aggravating factors. If the crime is committed against a minor, the minimum sanction is 10 years of imprisonment and 1,500,000 euro fine. A victim of trafficking or procurement collaborating with the police can obtain a temporary permit to stay for humanitarian reasons, a so-called 'private and family life'-permit (*'vie privée et familiale'*).

## Assessment of adherence to the three conceptions of justice

This section offers a first assessment of the relation between the French normative framework and the conceptions of justice as non-domination, impartiality, and mutual recognition as proposed by the GLOBUS project (Eriksen 2016). The aim of the section is to briefly discuss general issues considering the role of states as major actors in global politics and their relation with migrants. Against this background, we ask about the rationale that determines the drafting of immigration norms and rules by France. What do these laws reveal concerning the relation between France and other countries? How do these norms produce political meanings directly affecting the persons that the law defines as foreigners, asylum seekers, and refugees?

### Justice as non-domination

Justice as non-domination is understood as the need for all states to have a say on equal basis concerning common issues. In the context of this report, two dimensions are particularly relevant: the relation between the EU and the concerned MS, and the relation between the

MS and third countries. Regarding the first dimension, France is a powerful funding member of the EU and it is safe to say that France's compliance with EU regulations is accompanied by their involvement in the elaboration of these rules. The fact that France's borders are mainly internal to the Schengen area keeps the state relatively distant from the centres of the recent crisis, such as the Gibraltar straight, the Central Mediterranean, the Aegean Sea, and the Balkans. Nevertheless, the two bottlenecks at the French border reveal how the distinction between external and internal borders in the EU is becoming increasingly misleading. One bottleneck is the situation in Calais, where migrants who want to reach United Kingdom are stopped. The other situation is located in Ventimiglia, where a similar bottleneck is created on the Italian side of the border to stop migrants who want to reach France. In fact, in the current renegotiation of the Dublin regulation some internal borders have become sites of tension and leverage tools used by MSs. If we consider the relocation system developed by the EU, France formally committed to receive its quota, but the slow implementation of the whole project is making this commitment too difficult to assess. In this context, the maintenance of the Dublin regulation results, in practice, in an indirect penalisation exercised by the EU countries against the receiving countries, even if France's commitment to the European agenda is formally complete.

On the other hand, France has long-standing and more recent bilateral relations with many third countries. An overview of the agreements signed with these countries reveal a multifaceted situation. Notably, the emerging discourse based on co-development has produced a situation in which the political and economic advantage of France towards the concerned third countries is used as a leverage. The aim is to impose France's own priorities, namely, to control irregular migration and to govern mobility in a more efficient manner for its own economic system. This point is particularly evident when bilateral agreements tie development aid and the possibility to include workers' visa from specific countries to the readmission of expelled migrants and to the strengthening of control over irregular migration.

The idea behind these agreements is that development aid to countries of origin contributes to the reduction of migration flows towards the receiving countries. This economic reductionism as reason for human mobility is nevertheless contested. Real experience prove that migratory flows may not decrease even after a better economic performance in



their country of origin (Panizzon 2013). Moreover, from the angle of migration, it is possible to reconsider the relations of domination or non-domination between countries. We can indeed observe a global relation of domination between states and migrants, where states, even if in conflict among themselves over the shape of specific measures, share the goal to govern mobility in the most advantageous manner for them. Migrants' mobility thus becomes a core leverage in negotiation among countries that are more concerned with their performances as states and their capacity to affirm control, rather than with the rights and wellbeing of people on the move. These results are even more explicit considering the discussions on the international protection for refugees. Migrants and asylum seekers thus risk becoming currency of exchange for other values.

### Justice as impartiality

Justice as impartiality is seen as the application of neutral and unbiased solutions with cosmopolitan values. It is interesting for this report to see how the MSs comply with international obligations and how the recognition of particular benefits affects the idea of justice. France has strong commitments to international law, affirmed in the CESEDA and in all procedures regarding migration and asylum. The observations and limits concerning the international regime to protect migrants and asylum seekers can thus be applied to France. At least two dimensions point towards a specific position of France, namely, the definition of the list of 'labour shortages', and the list of 'safe countries' compiled by OFPRA.

The definition of 'labour shortages' responds to the priorities adopted by the EU to promote growth and employment within the context of the Europe 2020 strategy. The reforms towards 'chosen immigration' can be considered as part of France's effort to attract talent and skills 'with a sectorial approach to legal migration and flexible admission mechanism which respond to each state's priorities' (EMN 2015: 8). Following these needs, the possibility for a foreigner to get a work permit in France depends upon two conditions: first, the open occupations in relation to the nationality and, second, the employment situation criterion. This refers to a list of occupations that are open to foreigners as a consequence of registered job vacancies. The verification of the criterion is conducted while assessing the application for a work permit. The employer must thereby prove that it was not possible to fill that specific position with a national worker.



In terms of justice, it is difficult to connect this procedure with a cosmopolitan idea of justice and even less with impartiality, unless we define impartiality as a technical parameter for the efficiency of the labour market.

The definition of 'safe countries' opens up a different set of problems. As a matter of fact, it opposes the principle of impartiality as it puts national identity before any other consideration, allowing for a speedy rejection of asylum requests. This violates the principle of individual persecution, danger, and risk. This is even more critical if we consider that French law explicitly allows for recognition of protection when the source of danger is a non-state actor. Moreover, the national list of safe countries, introduced with the reform of 2003, has been criticised for following the EU list, which is based on considerations that are difficult to discern. It is possible to note a certain correspondence between the list of safe countries and some of the major sources of asylum applications in recent years, such as Kosovo and Albania. The 16 included 'safe' countries may seem both too low and too high and, in any case, it is difficult to relate to this list with some form of generally applicable impartiality.

### **Justice as mutual recognition**

This conception of justice mainly refers to the right of each individual to be recognised in his or her unique identity. Following this definition, a cultural approach would stress the need to allow foreigners living in France to follow their own cultural path. From this angle, the French state has progressively introduced normative instruments to ensure the integration of foreign nationals into the value system of the 'République'. The 'Contract d'intégration républicaine' (CIR) includes the obligation for applicants to comply with the French law and 'to respect the key values of French society and Republic'. In order to clarify the meaning of this passage of the CIR, the Ministry of the Interior has officially drafted a document entitled 'Living in France'. The document begins with the explanation of the 'key values of French Society and Republic' and states that 'France is synonymous with fundamental values to which the French are very attached' and that 'living in France means having rights as well as obligations'. It then goes on explaining the meaning of the triad 'liberty, equality, fraternity' and sketching the functioning of representative institutions. Only after six pages of introduction, the document starts to explain the procedure to enter and stay legally in France. Independently from

the values enlisted in this document, the mere existence of CIR should be understood as a lack of mutual recognition as it reflects the supremacy of the 'République' over multiculturalism.

However, this approach focuses primarily on the problem of integration and thus obscures the main tension behind migration policies. The primary problem consists of the failure to consider the right to move and live where migrants choose as part of the 'identity' of each individual. In other words, a strictly cultural approach attributes to each migrant a cultural dimension, which is often conflated with the national culture that is considered the most prominent or 'fundamental' of his or her country of origin. This cultural dimension can overshadow his/her identity as an individual whose legal status determines his/her specific condition in society. An approach of this kind hides the fact that migrants are, in practice, subjects of two states: the state of origin and that of immigration. In this regard, migration policies can be considered also as political relations between states, mediated by the particular condition of migrants.

As the discourse on the 'chosen immigration' clearly shows, the focus of French migration policy affirms this field as a prominent state prerogative and interest. The compliance with international obligations is rather an indirect consequence of the French state's engagement with the international community and its membership in the EU, than a result of specific recognition of the migrants' needs and rights.

Migration policies show that the opposition between 'the concrete other' and the 'generalised other' (see Eriksen 2016: 21) is complicated by an internal split in 'the concrete other' between the person as an individual and as a subject of a state. What is excluded from this vision is the possibility to consider the common concrete interest of people from different national origins and cultural formations vis-à-vis the hosting state politics, which is often primarily linked to obtaining regular residency and the right to stay. Migration indeed represents a political challenge both to the Member States and the EU, a supranational entity where the softening of internal borders in the name of the freedom of movement has produced harsh consequences for non-European migrants. This demands the opening up different paths for justice that do not originate in the political logic of sovereignty, as suggested, among others, by French philosopher Etienne Balibar (Balibar 2001 and 2016).

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# Chapter 3

## Germany

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Germany has undergone a laborious process to adjust its legislative and policy framework to its increasingly undeniable status as a country of immigration. This process was put under significant pressure by the migration crisis of 2015, when the country received 36 per cent of the 1.3 million asylum claims submitted throughout the European Union (EU) (Eurostat 2016). In fact, it is still open whether and to what extent the dramatic surge of humanitarian inflows has resulted in an actual change of Germany's traditional approach towards immigrants and foreign residents. While the German migration system contains comparatively liberal policies, it still rests on a notion of community linked 'by blood', and is resistant to more open notions of citizenship and post-national belonging (Diez and Squire 2008). This chapter sets out to outline the conceptual and legislative framework of Germany's migration system and ascertain the scope and significance of the numerous changes in its migration and asylum law. The chapter does not aim to provide an exhaustive or legally authoritative account of such a complex and fluid subject, but rather to draw some normative implications from these frameworks and, in doing so, lay the groundwork for the further stages of the GLOBUS research.



## Relevant legal terms and definitions

A clear distinction between socio-scientific and legal notions of the term 'migrant' is made particularly difficult by the complex and historically layered structure of Federal Republic of Germany's immigration policy. German law frequently draws on essentially socio-scientific vocabulary – e.g. Migration and Migrant – used by public administration bodies, like the Federal Statistic Office or the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge (BAMF)), the federal agency responsible for migration, integration and returns of foreigners, which is overseen by the Federal Ministry of the Interior.

## Germans, foreigners, migrants, resettlers

The notion of 'foreigner' ('Ausländer') remains central in the German legal order, as confirmed by its predominance in the 2005 Immigration Act ('Zuwanderungsgesetz'). This Act established, for the first time, an organic legal framework through which immigration as a whole can be controlled and limited. In addition, the Immigration Act takes measures for the integration of immigrants who legally reside in Germany (Bundestag 2004a). The Act defines as a foreigner a person who is not German according to Art. 116 (1) of the Basic Law, which means that he/she does not possess German citizenship (Bundestag 2004a, no. 2, section 2).<sup>10</sup>

Though without providing a straight definition of the concept, the Immigration Act establishes 'Einwanderung' and 'Zuwanderung' as legally relevant conceptions in German migration law. The notions of 'Einwanderung'/'Zuwanderung', which describe the entry of foreigners into the federal territory, does not consider whether the entry and stay is authorised or not (Gulina 2010: 36). Remarkably, the term 'illegale Ein-/Zuwanderung' is largely used by legislation and official sources, contrary to the EU's and several international organisations' recommendations to refer to 'unauthorised' ('unerlaubter') rather than 'illegal' ('illegaler') migrants. Nevertheless, references to

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<sup>10</sup> According to (AufenthG Ch.1, Section 1, Point 1), a foreigner is 'anyone who is not German within the meaning of Article 116 (1) of the Basic Law'. Art 116 (1) of the German Basic Law ('Grundgesetz') claims that: 'Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.'

'irreguläre', 'unkontrollierte', 'undokumentierte', and 'Papierlose Migranten' ('sans papiers') are present as well (Schönwälder et al. 2004: 6).

The Immigration Act also distinguishes between foreigners who enjoy the right to free movement within the EU, and those who do not. This differentiation can be found in the Resident Act ('Aufenthaltsgesetz') (Bundestag 2008a) and the Act on the free movement of persons within the EU ('Freizügigkeitsgesetz') (Bundestag 2004b). The former replaced the 1965 Foreigners Act with a new fundamental legal basis designed to 'control and restrict the influx' of non-EU foreigners, and to 'enable and organise immigration with due regard to the capacities [...], interests [...], [and] humanitarian obligation' of the Federal Republic of Germany (Bundestag 2008a Section 1(1)). The latter regulates the residence of EU citizens and their family members. The concepts of EU citizens ('Unionsbürger') and that of third country citizens ('Drittstaatsangehöriger') do not seem to be used in German residence and asylum laws in a very consistent way. The respective definitions draw on EU law and the specific legislative context. The notion of third-country nationals refers to persons from states that are not members of the EU or the European Economic Area (EEA) (at times including Switzerland). German resident and asylum law does not provide a definition of third-country national, which has to be drawn from EU legislation, as well as the context in which the terms are used – such as in the Art. 26 of the Asylum Act (Bundestag 2008b).

The conceptual distinction between German citizens and foreigners is somewhat complicated by the category of 'ethnic German late resettlers' ('Spätaussiedler'). Resettlers are defined as ethnic German nationals who left one of the successor states of the former Soviet Union or other Eastern European states after 31 December 1992 to take up residence in Germany within six months (Bundestag 2007, Section 4). This legal status is based on a definition of the 'German people' as all those who are recognised as an ethnic minority ('Volkstum') in their homeland. This recognition needs to be confirmed by certain characteristics, such as descent, language, education, culture, or simply by having German ancestors (Bundestag 2007, Section 6). Through a special acceptance process, persons are recognised and certified as ethnic Germans by the Federal Office of Administration. Afterwards, late resettlers, as well as their spouses

and descendants, receive German nationality automatically (Bundestag 2007, Section 4(3)).<sup>11</sup>

### Refugees, asylum seekers, foreigners eligible for subsidiary protection, tolerated

German law distinguishes between four possible statuses for people applying for international protection ('Antragsteller'); two entailing full recognition of a legal status ('Berechtigung') as asylum seeker (Asylbewerber) and refugee ('Flüchling'), and two only granting subsidiary protection ('subsidiärer Schutz') and 'tolerated stay' ('Duldung'). The latter grants a right to stay in Germany despite failing to meet the necessary conditions for obtaining full refugee status or an entitlement to asylum based on Art. 16 of the Basic Law.

The term 'asylum seeker' ('Asylbewerber') generally refers to people that have applied for any protection status, and whose request is still being processed, though they have been granted a residence authorisation (Aufenthaltsgestattung) entailing a series of restrictions. The German Asylum law says that persons who would be subject to a serious human rights violation should they return to their country of origin or those who have been persecuted in their home country are entitled to asylum. This includes persecution because of their race (as per the wording of the Geneva Refugee Convention.), nationality, political opinion, religious conviction, or membership of a particular social group (which may include a specific social group based on the joint characteristic of sexual orientation) under the provision that the persecution can only be organised by the state. Yet, in strict legal (constitutional) terms, based on Article 16 of the Basic Law (Parliamentary Council 1949, art 16a), an asylum seeker ('Asylbewerber') is someone who has applied for recognition as a person persecuted solely on political grounds. The reason for this difference is that the constitutional norm primarily addressed the issue of the above-mentioned 'ethnic Germans' who, as a consequence of the state's territorial downsizing after the end of World War II, found themselves outside national borders. Hence, at least in principle, the status of an asylum seeker as used in the German law

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<sup>11</sup> Between 1990 and 2015, over 2.5 million people moved to Germany as resettlers (up until 1992) and late resettlers (from 1993 onwards). After the 1990 peak (almost more than 390,000 applicants) arrivals per year have decreased - although recently the numbers picked up again, with 6,118 people registered as late resettlers (including family members) in 2015.

cannot be conflated with that of a refugee, based on the Geneva Refugee Convention. The conditions to be met in order to obtain the status of an asylum seeker are narrower than to receive a refugee status. The German Asylum law does not recognise persecutions by non-governmental actors as valid ground for the conferring of asylum. Moreover, requests are deemed void if the applicant left her/his country without there being an actual threat or a causal connection to it, if applications are submitted after secure admission to a third country, and if the unsafe circumstances only occurred during the applicant's stay in the recipient country ('Nachfluchtgrund'). The Asylum Act ('AsylG') states in chapter 2, section 2(1), that 'persons granted asylum status shall enjoy the legal status pursuant to the Convention relating to the status of refugees'; yet, given the strict requirements attached to it, today the status is only rarely granted or applied for (Bundestag 2008b).

The 'asylum status' can be regarded as a form of 'domestic protection' by contrast to the refugee status ('Flüchtlingseigenschaft'), which falls into the 'international protection' subsection of the Act. According to chapter 2, section 3(1) of the Asylum Act (Bundestag 2008b), which introduces the 1951 Geneva Convention into German law, a refugee ('Flüchtling') is any foreigner that due to a well-founded fear of persecution in the country of origin resides outside that country. The persecution can be on account of race, religion, nationality, political opinion or membership of a particular social group.

Section 3(2) states that:

a foreigner cannot qualify as a refugee [...] where there are serious reasons to believe that (s)he has committed a crime against peace, a war crime or a crime against humanity [...], or a serious non-political crime outside the federal territory before being admitted as a refugee, in particular a brutal act, even if it was supposedly intended to pursue political aims, or acted in violation of the aims and principles of the United Nations'

'Acts of persecution' include: physical or mental violence; legal, administrative, police or judicial measures which are in themselves discriminatory or are implemented in a discriminatory manner; disproportionate or discriminatory prosecution or punishment; denial of judicial redress resulting in a disproportionate or discriminatory

punishment; prosecution or punishment for refusal to perform military service in a conflict; and acts which are of a gender-specific nature or are directed against children.

Acts of persecution must, firstly, be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or, secondly, an accumulation of various measures, including sufficiently severe violations of human rights (Asylum Act, Section 3a, Bundestag 2008b). A definition of the (threats of) persecution giving access to the status of refugee is also provided by Section 60(1) of the Residence Act ('AufenthG') (Bundestag 2008a), which rules out deportation for any foreigner whose life or liberty is in danger on account of their race, religion, nationality, membership to a certain social group or political convictions.

The refugee status was established in 2007, pursuant to the Qualification directive (Council of the EU 2004), in order to provide alternative forms of protection if the demands of the asylum status failed to be met. All forms of international protection, which includes the asylum status, fall under the Dublin procedure according to the EU Regulation 604/2013 (Dublin III) (European Parliament and the Council of the EU, 2013a).

If the recognition of a refugee status is not successful, subsidiary protection can be requested. According to the Asylum Act, Chapter 4(1), 'a foreigner shall be eligible for subsidiary protection if he has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his country of origin'. Serious harm consists of death penalty or execution; torture or inhuman or degrading treatment or punishment; and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. This status is generally valid for one year, after which a re-examination of the case is necessary.

If none of the previous three statuses can be granted, the otherwise compulsory expulsion or deportation can be avoided by a 'temporary suspension of deportation' ('vorübergehende Aussetzung der Abschiebung') (Residence Act, Section 60a, Bundestag 2008a). In this case, the applicant is granted the status 'tolerated' ('geduldet'), which is subject to a semi-annual control as to whether the circumstances



resulting in the suspension have changed. The grounds for temporary exceptional leave to remain, or 'tolerated stay' ('Duldung'), are: international law reasons; humanitarian reasons; or maintaining the political interests of Germany. Technical reasons, such as missing documents, inability to travel, or the lack of means of transport, can also justify the granting of a tolerated stay. The toleration is only accompanied by a temporary residence permit, while a permanent settlement permit can only be achieved after having enjoyed this status for at least six years.

### Labour migration

Labour migration accounts for a significant share of foreigners' entries into Germany. This also creates the conceptual dilemma of whether people fleeing their countries due to dire economic conditions and in pursuit of better personal circumstances are covered by the notion of migration only, or whether these foreigners also have a claim for international protection. This issue has resulted in the non-legal term of 'Wirtschaftsflüchtlinge' (literarily 'economic refugee'). Economic refugees are anybody who enters the country irregularly and then applies for asylum with the motivation to escape unfavourable living conditions in their country of origin. The frequently negative connotations of this 'bridging' concept reflects the tensions in the German public debate about migration and refugees.

The entrance and residence in Germany for purposes of employment by citizens of third countries are primarily regulated by Sections 18-21 of the Residence Act (Bundestag 2008a) and by the Employment Ordinance ('Beschäftigungsverordnung', German Federal Government 2013). The approval by the Federal Employment Agency (BA) is always required. In principle, a residence permit must be applied for and issued by a German embassy, a German consulate or the responsible local immigration authority before entering the country. The Residence Act allows highly qualified personnel to enter the country, such as scientists with special technical knowledge, teaching personnel or scientific personnel. (Bundestag 2008a, Sections 18-19). The entry of seasonal workers is mainly regulated on the basis of bilateral agreements, which currently only exists with Croatia. The final group is illegal workers.

For third country citizens, an employment permit is issued along with the residence permit by the foreigners' registration office if



labour administration authorities approve it (if necessary). A permit-free access or a permit for gainful employment in Germany can only be issued if the applicant has a definite job offer. Permits for gainful employment are issued to foreign citizens in accordance with the needs of the German economy and the state of the labour market (Sections 1(1) and 18(1), Bundestag 2004a). If an EU citizen's stay in Germany exceeds three months, he/she must prove either to be employed, to be seeking employment or to possess sufficient funds to finance his/her stay.

Until 2013, seasonal workers were subject to a separate approval process and working permits were granted for up to six months within one calendar year (German Federal Government 2013, § 15a). The basis for these approvals were agreements between the German Federal Employment Agency and equivalent agencies of the sending nations. As of 2013, Germany no longer admits seasonal labourers from third countries.

## Definitions and concepts related to key procedures

In general, third-country nationals are only permitted to (re-)enter or reside with a valid passport or other identification documents, as well as a residence title. Exceptions can be provided by EU law, legal regulation, or by virtue of the EEC-Turkey Association Agreement. Entry is also forbidden and the stay is unauthorised if the foreigner is banned from entry and residence, due to previous expulsion, removal or deportation (Section 11(1) Residence Act, Bundestag 2008a) or has overstayed the residence title (Section 51 Residence Act, Bundestag 2008a).

Residence law provides for a total of five different residence titles ('Aufenthaltstitel'): the visa; the temporary residence permit ('Aufenthaltserlaubnis'); the Blue Card EU (Section 19 Residence Act, Bundestag 2008a); the permanent settlement permit ('Niederlassungserlaubnis'); and the EU long-term residence permit ('Erlaubnis zum Daueraufenthalt'). The temporary residence permit, the Blue Card EU, and the visa are issued for a limited period. The permanent settlement and the EU long-term residence permit are unlimited. The latter entails a right to move to or to reside in another EU Member State ('Recht auf Weiterwanderung') (Müller 2013a). Until a status is established, an asylum seeker is granted a special six-month residence permit ('Aufenthaltsgestattung'). A number of restrictions are attached, such as the access to the labour market. Both refugees

and beneficiaries of subsidiary protection are entitled to a residence permit which differs for the various groups: three years for persons with refugee status; one year for beneficiaries of subsidiary protection, renewable for an additional two years; at least one year for beneficiaries of humanitarian protection (Section 25, Residence Act, Bundestag 2008a). Local authorities have the responsibility to issue and renew permits.

### Actors and levels of government

The legal framework of Germany's migration and asylum policies is significantly affected by the federal structure of the country's government system (Schammann 2015). This is particularly visible in the asylum policy area, where the federal level, unlike in the migration domain, can exercise its authority almost exclusively through competing legislation (Parliamentary Council 1949, Art. 74). In turn, the federal competence is also split along a functional line between the Federal Ministry for Labour and Social Affairs and the Federal Ministry of the Interior. The former is in charge of creating and guaranteeing conditions favourable to the asylum seekers' access to social life, whereas the latter is responsible for asylum procedures ('Asylverfahren') and matters concerning residence law and oversees the activities of the Federal Office for Migration and Refugees (BAMF). Among the tasks of the Federal Office are the processing of asylum applications, the coordination of integration courses for migrants, researching on migration issues, as well as serving as national administration office for European Funds in the areas of refugees, integration and return. Since 2015, the BAMF has been expanding its offices all over Germany in order to shorten the waiting times and the asylum procedure through integrated refugee management in arrival centres in all federal states.

This division of labour reflects a fundamental tension between, on the one hand, a 'welfare state approach' resting on an assistance- and labour market-oriented form of integration, and, on the other hand, a regulative perspective that emphasises the management and policing of asylum seekers' entry and permanence. To a certain extent, the struggle between the two aspects can also be found at the level of the 'Länder' (federal provinces), whose governments have a considerable purview concerning the advancement of social participation of refugees as well as in the area of residence law. The federal provinces are responsible for the implementation of the Asylum Seekers'

Benefits Act ('Asylbewerberleistungsgesetz' - AsylbLG), which regulates the assistance, reception, and accommodation of asylum seekers (Bundestag 1997). For this purpose, reception facilities ('Aufnahmeeinrichtungen') provide asylum seekers with all the benefits they are entitled to, including a monthly reimbursement of 130 euro (Federal Constitutional Court, 2012a). Federal provinces also maintain the administrative jurisdiction, as applicants may resort to (state-level) administrative courts ('Verwaltungsgericht') against the decisions by the BAMF. The federal states' ('Länder') authorities enact residence law, ordinarily through their 'immigration authorities' ('Ausländerbehörde'), which are present in every district ('Landkreis') as well as in large cities, with the task of enforcing foreigners' rights. The immigration authorities issue residence permits and take measures to terminate the stay. They also decide on the issue of residence permits for asylum seekers, although the implementation of the asylum procedure as such is the exclusive responsibility of BAMF. Immigration authorities also participate in the assessment of requests for family reunification and the granting of visa. The highest state authorities ('Oberste Landesbehörden'), such as state ministries and state chancelleries, the Court of Auditors, the state parliaments, and state Constitutional Courts, can grant humanitarian residence titles for individual cases through so-called hardship commissions ('Härtefallkommissionen') and for groups in coordination with the Federal Ministry of the Interior (Schammann 2015).

Within the limits of national laws and decrees, the state provinces are also responsible for supervising the immigration authorities of the municipalities, responsible for the implementation of the Residence Act during and especially after the asylum procedure. In fact, most federal provinces pass on integration policy tasks to the municipal level, either providing local authorities with financial resources at extremely variable levels or bearing the costs directly (Müller 2013b). Variations across state provinces exist in the manner and the degree of delegation of tasks to municipalities. This is a result of municipalities not being regarded as a level of government in legal terms, but rather as the state provinces' lower administrative authorities. However, as far as non-delegated areas are concerned, municipalities can rely on their own administrative legal order. Among the municipalities' duties is the enforcement of residence law. In particular, if an asylum application is rejected, municipal immigration authorities determine whether there are deportation obstacles, and

for how long a 'tolerated stay' can be issued. They also decide whether or not asylum seekers have fulfilled their 'compulsory participation', such as in passport procurement. Municipalities are also in charge of implementing the Asylum Act. The state-level authorities decide upon the opening of new accommodation facilities and minimum standards. It is, however, the municipalities that establish exactly where and how the people will be lodged, how the decision is communicated to the affected communities, and whether additional funding is available. Moreover, the municipal level of government also provides the services of public authorities, in combination with the assistance offered by non-profit organisations, including language courses, counselling, and meeting projects.

### Asylum procedures

The law does not set a time limit for the BAMF to decide on an application, but if no decision has been taken within 6 months, it has to notify asylum seekers upon request about when the decision is likely to be taken. Since 2016, branch offices of the BAMF are entitled to set their own priorities in dealing with caseloads to enhance efficiency and flexibility. In order to fast-track procedures, in December 2015, a number of branch offices of the BAMF were established as 'arrival centres' ('Ankunftscentren'). In the arrival centres, various tasks, such as the recording of personal data, medical examinations, registration of the asylum applications, interviews, and decision-making, have been 'streamlined'. Part of this rationalisation process has consisted in clustering asylum cases into countries of origin with a high protection rate, countries of origin with a low protection rate, 'complex cases', and Dublin cases (in which it has yet to be clarified which member state is responsible for the asylum procedure).

In general, decisions on asylum applications are the result of a regular procedure, entailing a personal interview, which is conducted by the BAMF with the assistance of interpreters. The interview can be replaced by a written procedure in the case of groups of asylum seekers with good chances of being granted the required status. Asylum seekers have the right to appeal against rejection before an Administrative Court and to lodge a second-stage appeal at the High Administrative Court. Since 2016, applications can be deemed inadmissible before the end of the procedure. One reason for inadmissibility is that another country is responsible for carrying out the asylum procedure, according to the Dublin Regulation or other inter-

national treaties. It is also possible that another EU Member State has already granted international protection to the asylum seeker or that a 'safe third country' or 'another third country' is willing to readmit the foreigner (Section 29(1) and (4), Asylum Act, Bundestag 2008b). An asylum application is also inadmissible if the applicant has made a follow-up application ('Folgeantrag') or a secondary application (Zweit Antrag). The first is the case if the foreigner has filed a new asylum application after the withdrawal or incontestable rejection of a previous asylum application. The latter occurs if a foreigner has filed an asylum application in Germany after having unsuccessfully applied in a safe third country (Section 29(1) and (5), Asylum Act, Bundestag 2008b).

The examination of whether or not another state is responsible for carrying out the asylum procedure is part of the regular procedure. Thus, in legal terms, the term 'Dublin procedure' merely amounts to the shifting of responsibility to the 'Dublin Units' of the BAMF. German authorities are entitled to not deport asylum seekers whose application should be other EU Member States' responsibility. Instead they can take these cases upon themselves either by using the 'sovereignty clause' or by declaring the presence of *de facto* impediments to the transfer.<sup>12</sup> This clause provided in August 2015 the legal ground for the suspension of the Dublin procedures for Syrians.

Entry through land borders or by air does not involve particularly different legal procedures. The distinction mostly has practical implications regarding the role of the public authorities called to carry out the legal procedures. For the procedures to be carried out, the asylum seekers must be accommodated on the airport premises during the procedure and a branch office of the BAMF needs to be assigned to the border checkpoint. The sole exception to this rule is if an asylum seeker has to be sent to hospital and therefore cannot be accommodated on the airport premises. As for the application of asylum law at land borders, the Federal Police is primarily responsible for transferring applicants to a receiving facility or for refusing their entry. For

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<sup>12</sup> The European Court of Human Rights and the Court of Justice of the European Union (CJEU) have established an interpretation of the so-called sovereignty clause of Regulation 343/2003 (Dublin II) by which its activation became mandatory in certain cases of serious risk of human rights violations. See the European Migration Network Ad-Hoc Query on the application of Sovereignty Clause in Dublin procedure (European Commission 2016).



airport procedures, the Federal Police's major task is to redirect the asylum seekers to the transfer area of the BAMF (Section 18a, Asylum Act, Bundestag 2008b). The BAMF also cooperates with the security authorities ('Sicherheitsbehörden') of the federal government and the federal provinces. A significant role is played by the Federal Criminal Police Office ('Bundeskriminalamt'), who is in charge of the evaluation of documents and the collection and management of personal data (fingerprints, iris images, etc.).

A fast-track procedure ('Beschleunigte Verfahren'), which should not be confused with the abovementioned preliminary processing, was introduced in March 2016 (Bundestag 2008b, Section 30a). It can only be carried out in branch offices of the BAMF at a 'special reception centre' ('Aufnahmeeinrichtung') for asylum seekers who:

- come from a safe country of origin;
- have clearly misled the authorities about their identity or nationality;
- (are suspected to) have, in bad faith, destroyed or disposed an identity or travel document that would have helped to establish their identity or nationality;
- have filed a subsequent application in another country, after the initial asylum procedure in Germany was concluded;
- have made an application merely in order to delay or prevent the enforcement of an earlier or imminent decision for deportation;
- refuse to be fingerprinted in line with the Eurodac Regulation;
- were expelled due to serious reasons of public security and order, or if there are serious reasons to believe that they constitute a serious threat to public security and order.

The BAMF has to decide within one week whether to reject the asylum application as manifestly unfounded or inadmissible. If so, the procedure is carried out as a fast-track procedure and the asylum applicants are obliged to stay in 'special reception centres'. If the BAMF does not decide within one week, if the application cannot be immediately rejected or if protection is granted, the applicant is allowed to leave the special reception centre and the procedure is carried out as a regular procedure.



### The 'safe country' concept(s)

The Basic Law defines the 'safe countries of origin' ('Sichere Herkunftsstaaten') as those 'in which, on the basis of their laws, enforcement practices, and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists' (Parliamentary Council 1949, 16a). The Asylum Act identifies the Member States of the EU as safe countries of origin (Section 29a(2), Asylum Act, Bundestag 2008b). The list of safe countries of origin is an addendum to the Act that was adopted and can be amended by both chambers of the Parliament. If a country of origin can no longer be considered safe within the meaning of the law, the Federal Government may issue a decree to remove this country from the list for a period of six months. At present, the list of safe countries consists of Ghana, Senegal, Serbia, North Macedonia, Bosnia-Herzegovina, Albania, Kosovo, and Montenegro.<sup>13</sup> Applications of asylum seekers from safe countries of origin shall be considered as manifestly unfounded, unless the applicant presents facts or evidence, which justify the conclusion that he/she might nonetheless be persecuted (see also Bundestag 2014a).

The 'safe third country' ('sicherer Drittstaat') concept is contemplated in Section 26a of the Asylum Act. Based on the act's wording, the safe third country concept only applies to asylum, but its scope extends to the other forms of protection as well (Federal Constitutional Court 1996). The act identifies all EU Member States, plus Norway and Switzerland, as safe third countries. The list of extra safe third countries, which must ensure the application of the 1951 Refugee Convention and of the European Convention on Human Rights, is adopted by both chambers of the German Parliament. The Federal Government is entitled to remove a country from the list if changes in its legal or political situation 'give reason to believe' that it does not meet the requirements any longer. Asylum seekers who arrive from (safe) first asylum countries or safe countries of origin can be sent back without their applications for asylum or protection being considered. The federal police can refuse entry to asylum seekers coming from a first asylum country. Immediate removal is initiated if an asylum seeker from a first asylum country is apprehended without the necessary documents within an area of 30 km from the

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<sup>13</sup> In March 2017, the Bundesrat rejected the designation of Morocco, Algeria and Tunisia as safe countries (Chase 2017).

border (Section 18, Asylum Act, Bundestag 2008b). Asylum applications may not be accepted or referred to the responsible authority by the federal police if entry to the territory is denied, unless German authorities are responsible for processing the asylum procedure based on EU law, e.g. because Germany has issued a visa.

The 'first country of asylum' concept is not referred to as such in German law. However, protection is denied to a foreigner who was already safe from persecution in 'another third country' ('Sonstiger Drittstaat'). This is particularly the case, if the applicant holds a travel document from that country, or has resided there for more than three months without being threatened by persecution (Bundestag 2008b, Section 27). Although it has happened only rarely, after 2016 authorities are no longer bound by the three-month restriction within which the return to the country of first asylum could be enforced.

## Reception

Asylum seekers and people with a 'tolerated stay' ('Duldung') or a temporary residence permit are entitled to the reception conditions defined by law. These conditions apply from the moment an application has been registered and as long as an international protection status is granted, which usually includes the period of appeal (Section 1, Asylum Seekers' Benefits Act, Bundestag 1997). Entitlements to reception conditions are forfeited if the application is rejected as 'manifestly unfounded' or 'inadmissible' and no emergency legal protection is granted.

If asylum seekers have an income or capital, they are legally required to use up these resources before they can receive benefits (*ibid.*, Section 7). As a rule, asylum seekers receive both non-cash and cash financial benefits only in the assigned area of residence, or the location they have been permitted to move to. Assistance under the Asylum Seekers' Benefits Act generally consists of 'basic benefits', consisting of a fixed rate supposed to cover the costs for food, accommodation, heating, clothing, personal hygiene, and consumer goods for the household. Benefits in case of illness, pregnancy, and birth are provided too (*ibid.*, Sections 3-4). In addition, 'other benefits' can be granted in individual cases (upon application) if they are necessary to safeguard the applicant's means of existence or state of health (*ibid.*, Section 6).

In 2014, the Asylum Seekers' Benefits Act was revised so that reception conditions standard rates would be adjusted to a level of about 90 per cent of 'standard' social benefits.<sup>14</sup> Restrictions, in particular limited access to health care, would not to be applied after the asylum seeker/refugee has gained access to standard social benefits. Additionally, benefits would be primarily provided in cash.

A 2015 amendment added significant reservations to the last principle, at least for asylum seekers, who received housing in collective accommodation centres and especially for those living in initial reception centres. In these centres, non-cash benefits should be the rule, 'as long as this is possible with acceptable administrative burden'. For asylum seekers in other (decentralised) collective accommodation centres, non-cash benefits can be provided if deemed necessary. This provision gives regional and local authorities wide-ranging discretionary powers in deciding how allowances are to be afforded (Section 3 Asylum Seekers' Benefits Act, Bundestag 1997).

There are three main types of accommodation for asylum seekers. Asylum seekers are obliged to stay for up to 6 months at initial reception centres ('Aufnahmeeinrichtung'), or the entire duration of their procedure if they come from 'safe third countries'. However, this obligation has been very rarely enforced. When leaving the initial reception centres, asylum seekers stay at collective accommodation centres ('Gemeinschaftsunterkünfte'), in the municipality to which they have been allocated for the whole duration of the procedure. Centres are managed either by the local governments themselves, or alternatively by NGOs or facility management companies. Finally, asylum seekers can be housed in decentralised accommodations, which for the most part are apartments allocated to 'recipients of benefits', such as asylum seekers, 'tolerated people', and certain

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<sup>14</sup> Until 2012, asylum seekers' benefits were considerably lower than social allowances granted to German citizens or to foreigners with a secure residence status. For example, a single adult person was entitled to 224.97 euro. 184.07 euro out of this allowance was designated for basic needs and could be provided in goods and services. Only 40.90 euro (20.45 euro for children under 15 years) was paid out in cash (or vouchers). The Federal Constitutional Court declared the Asylum Seekers' Benefits Act as unconstitutional in July 2012, particularly on the grounds that the benefits provided in cash were incompatible with the fundamental right to a minimum existence. Moreover, the benefits were considered insufficient because they had not been changed since 1993 and they had not been calculated in a comprehensible manner (Kalkman 2016: 55).

foreigners with a temporary residence permit. They are usually resorted to where collective accommodations have proved inefficient, particularly due to the decreasing number of asylum applications. Their use varies greatly across Federal States. Especially in 2015 and 2016, gyms, containers, warehouses, office buildings, and tents were used as emergency shelters in order to tackle massive arrivals.

Asylum seekers accommodated in reception or accommodation centres generally have to be provided with food, heating, clothing and sanitary products. Notably, benefits supplied in these centres come at considerably lower rates than in decentralised accommodations, where rent, heating, and household goods have to be provided on top of standard allowances.

### Restrictions to benefit provision

Since 2016, material reception conditions can be reduced to the point where only 'irredeemably necessary' benefits are granted. This measure is taken if the foreigner has entered Germany for the purpose of receiving benefits; if the foreigner has been asked to leave Germany by a certain date but has culpably failed to do so (generally not applied to asylum seekers as long as their procedure is ongoing); or if the removal procedures had been scheduled but could not be carried out for reasons for which the foreigner is responsible (this provision can affect asylum seekers whose application has been rejected as inadmissible). Further reasons to allow the lowering of the reception conditions are if the foreigner has been allocated to another European state within the framework of a European distribution mechanism; if the foreigner has been granted international protection in an EU Member State or Dublin State or has acquired a right of residence for other reasons in this state; or, finally, if an asylum seeker (registered or not), or one who has filed a secondary asylum application, has failed to cooperate with the authorities (e.g. producing documents, providing information, cooperate with the BAMF, receiving the arrival certificate) (Section 11 Asylum Seekers' Benefits Act, Bundestag 1997).

Since 'irredeemably necessary' benefits have to be granted in any case, the reduction of material reception conditions usually means that cash benefits are reduced or withdrawn. Affected persons still have to be provided with accommodation, food, and other basic necessities. The Federal Constitutional Court's decision in 2012 has made virtually

any reduction of benefits unconstitutional and therefore inadmissible (Federal Constitution Court 2012b).

Asylum seekers have no right to choose their place of residence. According to the Asylum Act, their right to remain on the territory under a permission to stay (*Aufenthaltsgestattung*) throughout the duration of the asylum procedure is generally limited to the area of the Federal State responsible for them (Bundestag 2008b, sections 55(1) and 56(11)). Since 2014, however, the 'residence obligation' has been largely removed both for asylum seekers and for people with a tolerated stay. From 1 January 2015 onwards, this restriction no longer applies after an initial three-month period, unless the foreigner concerned has been convicted of a criminal offence or if deportation is imminent (Bundestag 2014b). Since October 2015, the geographic restriction has been reinstated for persons who are obliged to stay in an initial reception centre (Bundestag 2008b, Section 59a(1)).

Asylum seekers' place of residence is usually determined by the general distribution systems. Places for asylum seekers are allocated to the Federal States for the initial reception period and to the municipalities afterwards. It is possible to apply to the authorities to be allocated to a particular town or district, but such applications are only successful in highly exceptional cases (e.g. if a rare medical condition requires that an asylum seeker stay close to a particular hospital).

The distribution of asylum seekers is determined based on the capacities of initial reception centres and the branch offices of the BAMF competent for the asylum seekers' countries of origin. The BAMF makes its decisions according to a quota system called 'Königsteiner key' (Königsteiner Schlüssel), which is based on the tax revenue (accounting for 2/3 of the quota) and the number of inhabitants (1/3) of each Federal Province to determine their respective reception capacities.

### **Access to the labour market**

While refugees and persons entitled to asylum have unconditional access to the labour market, asylum seekers and tolerated persons have very limited opportunities to work. In general, the approval of employment for a foreigner is explicitly conditional on the implementation of the national labour market policy (Bundestag 2008a Section 39).



Since 2015, asylum seekers and tolerated persons have been barred from access to the labour market for the first 3 months after their arrival, or as long as they are obliged to stay in an initial reception centre (up to 6 months). Asylum seekers are not allowed to work on a self-employed basis for the whole duration of their asylum procedure. The permission to pursue self-employment is conditional on holding a regular residence title, which is different from residence permits for asylum seekers ('Aufenthaltsgestattung') (Bundestag 2008a, Section 55).

Once asylum seekers gain access to the labour market, they have to apply for an employment permit. Until August 2018, the applicant had to prove beforehand that he/she has received a 'concrete' job offer from an employer and has to pass the twofold 'priority examination' ('Vorrangprüfung') (German Federal Government 2013). With the amendment of August 2019 of the Asylum Act (Bundestag 2008b, Section 39, now abrogated), the priority examination for asylum seekers ('Asybewerber') and tolerated persons ('Geduldete') was permanently abolished nationwide. However, this does not affect old and new absolute work prohibitions. The new provision does not affect the prohibition of work pursuant to Section 61 Asylum Act (Bundestag 2008b) for asylum seekers in initial reception centres as well as the prohibitions to access the job market pursuant to Section 60a(6) Immigration Act (Bundestag 2008a) (for those who are from 'safe countries of origin', if they do not participate in their own deportation and have not immigrated to obtain benefits). Despite the abolition of the priority examination, asylum seekers and 'tolerated' are required to submit a work permit application to the Immigration Office. The Federal Employment Agency then runs checks on the correct working conditions (observance of the minimum wage, etc.) before applicants are hired or start their training.

## Education

From 1 January 2017 onwards, the new Integration Act ('Integrationsgesetz') permits asylum applicants from countries with high recognition rates to attend integration courses for free.

As for early education, asylum seekers' children are admitted to free schooling based on the principle that all children who reside in Germany have the right and the obligation to attend school regardless of their status. The education authority uses an official 'procedure to determine special educational needs' to ascertain whether a child has

special educational needs, which may derive, for instance, from trauma suffered in their home countries. Laws and practices can vary significantly across Federal Provinces, which are responsible for the education system (BAMF 2015a).

Asylum seekers generally have access to vocational training. In order to start vocational training, they need an employment permit, but in contrast to other jobs, a 'priority review' is not required. However, since asylum seeker's residence permits are issued for a 6-month period, they are often de facto denied the opportunity to enter vocational training (Kalkman 2016: 66).

### Health care

Health care for asylum seekers is restricted to instances 'of acute diseases or pain', in which 'necessary medical or dental treatment has to be provided including medication, bandages, and other benefits necessary for convalescence, recovery, or alleviation of disease or necessary services addressing consequences of illnesses.' Pregnant women and women who have recently given birth are entitled to 'medical and nursing help and support', including midwife assistance. Vaccination and 'necessary preventive medical check-ups' are also provided. Further benefits can be granted 'if they are indispensable in an individual case to secure health' (Section 4 and 6 Asylum Seekers' Benefits Act, Bundestag 1997). The term 'necessary treatment' has not conclusively been defined in legal terms, but is often taken to mean that only absolutely unavoidable medical care is provided, which is not limited to 'emergency care'.

After 15 months as recipients of assistance under the Asylum Seekers' Benefits Act, asylum seekers are entitled to 'standard' social benefits, gaining access to health care under the same conditions that apply to German citizens. Specialised treatment for traumatised asylum seekers and victims of torture can be provided by some specialised doctors and therapists and in specialised institutions (Treatment Centres for Victims of Torture – 'Behandlungszentren für Folteropfer').

### Family Reunification

The Asylum Act identifies spouses and registered partners, whose valid marriage must already exist in the country of origin, and minor, unmarried children or siblings as family members that are entitled to protection and asylum. This also includes partners in a same-sex

partnership, which has been registered in Germany or is equivalent to a registered partnership in Germany. A right to family asylum is also bestowed on parents and other adults who have personal custody of a minor. Unmarried persons for the purpose of care and custody are also included if no other person with entitlement to custody is living in Germany (Section 26 Asylum Act, Bundestag 2008b; Sections 28-29 Residence Act, Bundestag 2008a).

Persons with refugee status and, partially, subsidiary protection enjoy a privileged position compared to other foreign nationals in terms of family reunification. For instance, they do not necessarily have to cover the cost of living for themselves and their families. The application for family reunification has to be handed in at the embassy of the country where the family members are staying. In addition, the local authorities at the place of residence of the refugee living in Germany are to be notified that an application for a visa for the purpose of family reunification has been filed. If family members of refugees apply for family reunification later than three months after status determination has become final, standard rules for family reunification apply. For family reunification of spouses, a further requirement is that both spouses have to be at least 18 years of age, but the one immigrating to Germany by means of family reunification does not have to prove basic German language skill (Section 30(1) Residence Act, Bundestag 2008a).

If a child is born in Germany after the parents have filed an asylum application, the law provides for the possibility of a separate asylum procedure, and the application is automatically regarded as having been filed in the interest of the new-born. The parents can also submit separate grounds for asylum for their child. If they do not do so, the same grounds apply as for the parents (Bundestag 2008b, Sections 14a and 43(3)).

Contrary to EU laws, family reunification was suspended between March 2016 and March 2018 for those who have been granted a residence permit based on subsidiary protection. The reason was to 'to safeguard the integration of those people who are moving to Germany [under family reunification rules].' Family members of beneficiaries of subsidiary protection are not entitled to visas for family reunification either under the 'privileged' or under the 'normal' regulation (Kalkman 2016: 89).

## Unaccompanied minors

Definitions and procedures relative to unaccompanied minors in Germany are found in the EU Reception Condition Directive (European Parliament and the Council of the European Union, 2013b). Correspondingly, the German law defines 'unaccompanied minors' as children and juveniles aged under age 18 that enter or are left in the country without being accompanied by an adult responsible for them.

Unaccompanied minors who entered Germany after 1 November 2015 are provisionally taken into care ('Inobhutnahme') by the local youth welfare office, ensuring that they are accommodated with a suitable person (a relative or a foster family) or in a suitable facility (Bundestag 1990, Section 42). An initial screening establishes the minor's age and state of health, the possibility of a family reunification and the effects of a possible distribution procedure within the national territory. Adolescents under the age of 21 can apply to the youth welfare office and receive help. A tutor ('Vormund') must be appointed for unaccompanied minors. The Family Court decides who ultimately assumes the guardianship until the person is of legal age (ibid., Section 27). Once the foreigner has come of age, it is decided whether an asylum application is estimated to have a good chance of approval. The competent immigration authority may also issue a temporary suspension of deportation ('Duldung') or other orders. The guardian can continue to accompany the asylum application even after the applicant has come of age, provided a written application is filed with the BAMF by the youth welfare office or guardian (conditional on the forwarding of a 'certificate of appointment' ('Bestallungsurkunde')).

Since unaccompanied minors are regarded as a particularly vulnerable group of individuals that enjoy special guarantees, their asylum applications are taken care of by specially commissioned case officers ('Sonderbeauftragte') who have been specially trained to treat their cases in a very careful manner, in order to keep migrants from further distressing experiences. During the interviews, particular emphasis is placed on ascertaining whether there are indications of any child-specific grounds for flight.

## Detention

Detention of asylum seekers due to pending deportation or other reasons falls within the remit of Federal States, and can only be ordered by a judge. Responsible authorities can only take a foreigner into custody without a detention order if there is reason to believe that this person is trying to abscond to avoid deportation and if a judge cannot be requested to issue the order beforehand.

By law, detention can only be ordered after an asylum application was rejected as inadmissible or manifestly unfounded. Accordingly, asylum seekers can only be detained if their applications have been lodged while in pre-trial detention, in prison following a conviction for a criminal or other offence, or in custody awaiting deportation ('Abschiebungsgewahrsam'). Custody to await deportation cannot be upheld solely on the grounds of illegal border crossing. In addition, the authorities have to provide reasons, such as a risk of absconding, or an illegal stay of over one month. In general, if an asylum application does not lead to release from detention, the foreigner may be held in custody for four weeks or until the BAMF has decided upon the case. The detention may be upheld beyond that period if another country has been requested to (re-)admit the foreigner based on EU law or if the application for asylum has been rejected as inadmissible or manifestly unfounded.

A foreigner is placed in custody awaiting deportation (Residence Act, Bundestag 2008a, Section 62(3)) if the person is ordered to leave the Federal territory on account of unlawful entry or if an already issued deportation order is not immediately enforceable. Custody is also applicable if the period allowed for departure has expired and the foreigner has changed the place of residence without notifying the immigration authority of a new address. Custody is also lawful when the person has (culpably) failed to appear at the location stipulated by the immigration authority on the date fixed for deportation, has evaded deportation by any other means, or there is a well-founded suspicion that the person intends to evade deportation by 'absconding'.

The grounds for such suspicion are listed in Section 2(14) of the Residence Act, introduced on 1 August 2015 and include: evading apprehension; providing misleading personal information, in particular by withholding or destroying documents or by claiming a false identity; lack of cooperation with the authorities in their efforts to



establish identity; active resistance to deportation; having paid substantial amounts of money to smugglers or traffickers in order to resist deportation; declaring the intention to resist deportation; or having committed other acts of comparable severity to evade an impending deportation.

Detention is also possible for third country nationals or stateless persons during the ascertainment of the Member State responsible for examining an application for international protection, such as the Dublin procedures (*ibid.* Section 2(15)). However, the Federal Supreme Court has ruled that detention based on an alleged 'risk of absconding' had been irreconcilable with the Dublin III Regulation (Kalkman 2016: 75).

As for the place of detention, the use of regular prisons has been discontinued since the CJEU ruling in July 2014. Therefore, the detention for the purpose of removal of illegally staying third-country nationals can only be carried out in specialised detention facilities in all Federal States. If necessary, the foreigner can be put under 'custody to secure departure' ('Ausreisegewahrsam') in the transit zones of airports or in other accommodations 'from which the foreigner's subsequent departure is possible' for no longer than four days (Residence Act, Bundestag 2008a, Section 62b). Asylum seekers can also be apprehended in the transit zones for up to nineteen days in the course of airport procedures (although in legal terms this does not constitute detention).

According to the Residence Act's opening general clause, custody awaiting deportation has to be enforced in obedience to the principle of proportionality. This means that detention should only be used if the purpose of the detention cannot be achieved by less severe but equally efficient means. The detention has to be limited to the shortest possible duration. Minors and families with minors may be taken into detention awaiting deportation only in exceptional cases and only for as long as it is adequate considering the well-being of the child (Residence Act, Bundestag 2008a, Section 62(1)). In fact, a high number of detention orders have been overturned by courts upon appeal (Kalkman 2016: 76).

Other than detention, 'further conditions and sanctions' may be imposed on foreigners who are obliged to leave the country, including reporting duties and obligations to consult a counselling

service (Residence Act, Bundestag 2008a, Section 61(1)). Residence obligations, which are usually in force for no longer than 3 months, can be applied (*ibid.*). The authorities may confiscate the passports of foreigners obliged to leave the country, and also ask them to make a deposit to cover for the costs of a possible deportation (Residence Act, Bundestag 2008a, Section 50(5), 66(5)).

## Return

The notion of 'return' as such is not defined by German law, which focuses instead on the conceptual area of 'forced return' ('Rückführung'). This means the removal of foreigners who are under a legal obligation to leave the country and the relative enforcement regulations.

The (forced) return is outlined in the Residence Act, which contains the regulations on the 'obligation to leave the federal territory' ('Ausreisepflicht') (Residence Act, Bundestag 2008a, Section 50) The duty to leave the country is a result of the non-possession or the discontinuation of the necessary residence title and the lack of a right of residence. The obligation to leave the territory of the Federal Republic of German is not conditional on the issuing of an expulsion order or any executive measure, but derives from law alone. The local/regional authorities and the federal police hold the responsibility to carry out removal procedures. Usually authorities make the person aware of the duty by issuing an order to leave the country ('Ausreiseaufforderung'). Among the individuals under a legal obligation to leave the country are asylum seekers, whose application has been conclusively rejected by the BAMF. However, the obligation to leave the country does not necessarily result in the foreigner's deportation. People whose asylum application has been turned down may opt to return voluntarily, as long as the legal proceedings on the deportation are ongoing. In that case, the BAMF offers promotional programmes that for example take on travel expenses, provide start-up aids, and offer reintegration programmes (BAMF 2015b).

Related to the concept of return are the notions of 'refusal of entry' and 'expulsion'. A 'refusal of entry' or rejection ('Zurückweisung') is an administrative act by the federal police that is immediately executed against a foreigner who intends to enter the country illegally. A rejection can, among other things, be executed if there is a public interest for expulsion. In addition, entry can be denied if well-

founded suspicion exists that residence would not be in compliance with the declared purpose of entry, or if the requirements for entry according to art. 5 of the Schengen Agreement are not fulfilled (Residence Act, Bundestag 2008a, Section 15). If a court ruling has issued a refusal of entry that cannot be enforced immediately, the foreigner concerned is to be taken into custody, awaiting a pending exit from the federal territory ('Zurückweisungshaft').

'Expulsion' (Ausweisung) is an administrative act aimed at ending the presence of foreigners whose stay endangers public safety and order, the free democratic order or other significant interests of the country (Residence Act, Bundestag 2008a, Section 53). Interestingly, since 2016, the amended Resident Act no longer identifies expulsion as a function of national interests alone, but the result of weighting the public interest in expulsion ('Ausweisungsinteresse') against the foreigner's interests in remaining ('Bleibeinteresse'). The foreigner's personal history, social and economic ties with the host country, and all the circumstances of the case are taken into consideration (ibid., Sections 54-55). Persons entitled to asylum can only be expelled if the measure is essential to protect the country from a serious threat to public safety, order, and democracy posed by their stay. Asylum seekers, on the other hand, may solely be expelled under the condition that the asylum procedure has resulted in the denial of all possible refugee statuses, the foreigner's presence poses a threat, and if a rightfully issued deportation warning ('Abschiebungsandrohung') has become enforceable.

The enforcement of the obligation to leave the federal territory can either be a legal obligation or, more frequently, a duty deriving from an administrative act. The removal ('Zurückschiebung') on the other hand, is an administrative act to remove a foreigner that over the previous six months has unlawfully entered the federal territory and to return the person to the country he/she came from (ibid., Section 57). Like a refusal of entry, it can be carried out immediately, but in contrast to the former, a removal is enacted when the foreigner is already in the federal territory. The measure is designed to implement an obligation to leave and does not presuppose a threat by part of the foreigner, nor an enforcement deadline.

'Deportation' ('Abschiebung'), on the other hand, entails forcibly carrying out the obligation to leave the country when the voluntary

compliance with this obligation is not guaranteed or the supervision of the departure is necessary due to reasons of public safety and order (*ibid.*, Section 58(1)). While the expulsion is an act that revokes the foreigner's right of residence and establishes a ban on re-entering, deportation is an enforcement measure that terminates the foreigner's residence and includes the actual transport of the foreigner out of the federal territory. Deportations is not necessarily based on an expulsion order, as it may be a means to enforce other measures of residence termination. Such measures might follow the refusal of a foreigner to leave voluntarily after the application for a residence permit has been rejected.

## Resettlement, humanitarian protection and relocation

German law regulates the resettlement of foreigners who have no prospect of becoming integrated in their first asylum state and are unable to return to the country they fled from (Residence Act, Bundestag 2008a, Section 23(4)). The Federal Ministry of the Interior, in consultation with the provinces' supreme authorities, can order the BAMF to grant admission and/or a residence title outside ordinary procedures. Accordingly, a temporary permit of residence can be granted to 'Resettlement refugees' (Resettlementflüchtlinge), which can potentially be upgraded to a permanent settlement permit. This occurs in order to preserve the integrity of the family unit or other ties to Germany. The ability to become integrated, such as the level of schooling/vocational training received, work experience, knowledge of the language, is also taken into consideration, together with the degree of vulnerability of the subjects.

Foreigners from specific states or belonging to certain categories can be granted approval for admission by the BAMF through the 'humanitarian reception' procedure and specific programmes (Residence Act, Bundestag 2008a, Section 23(2)). The latter are designed, for instance, to provide immediate humanitarian assistance and time-limited protection to people who have fled their countries of origin because of an acute crisis. This was for example the procedure applied to receive vulnerable Syrians from 2013 to 2015. The persons selected are initially given a temporary residence permit, which can be extended according to section 8 of the Residence Act.

As for asylum seekers, Germany also participates in the 'relocation' procedure from EU Member States, whose asylum and reception systems are under particular pressure (Council of the EU 2015).

## Residence-related criminal offences: Trafficking and smuggling of foreigners

The concept of 'smuggling of foreigners' is rendered into German legal wording as 'Einschleusen von Ausländer', although the approximately equivalent English-derived term *Menschenschmuggel* is often used in the media. The offence consists in inciting another person to commit, or assist that person in, entering or residing in the federal territory illegally, and obtaining a residence title (Residence Act, Bundestag 2008a, Section 96). Aggravating circumstances of the offence are: carrying weapons; causing the death of the smuggled person; subjecting the smuggled person to potentially fatal, inhuman or humiliating treatment or a risk of sustaining severe damage to their health; acting for gain and/or as a member of a criminal organisation; and encouraging abusive application for asylum (*ibid.*, Sections 96, 97).

As for the related concept of trafficking ('*Menschenhandel*'), the section of the German Criminal Code (Bundestag 1998) regulating it was amended and came into force in October 2016, in order to implement the Directive 2011/36 of the EU (European Parliament and Council of the EU 2011). The new rule identifies human trafficking as an offence against personal freedom. The Code distinguishes between human trafficking for the purpose of sexual exploitation ('*Zwangsprostitution*'), and for the purpose of work exploitation ('*Zwangsarbeit*'). Trafficking is defined as the exploitation of another person's predicament or helplessness arising from being in a foreign country. Exploitation can occur in order to induce foreigners to engage in or continue to engage in prostitution, to engage in exploitative sexual activity with or in the presence of the offender or a third person, or to suffer sexual acts on his own person by the offender or a third person (Bundestag 1998, Section 232a). Additionally, exploitation includes to subject foreigners to slavery, servitude or bonded labour, or make persons work for the offender or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity (*ibid.*, 232b). The latter offence may also be punishable as employment of foreigners without authorisation or residence permit and unfavourable working conditions (Bundestag 1998, Section 10).



## Adherence to the three conceptions of justice

### Justice as non-domination

Since the end of World War II, Germany's international identity has been that of a distinctly non-threatening, highly reliable actor. Article 25 of the Basic Law certifies this characteristic by establishing the primacy of general rules of international law in the German legal order (Parliamentary Council 1949). This constitutional provision is largely substantiated by the country's actual compliance with international rules and principles. Moreover, the Federal Constitutional Court has referred to a principle of 'friendliness to international law' ('Völkerrechtsfreundlichkeit') – although within certain limits (Federal Constitutional Court 2015; Talmon 2013). According to this, the Basic Law presumes that the State is integrated into the international legal order of the community of States, and the Basic Law is therefore to be interpreted as consistently as possible with international law ('Völkerrechtsfreundliche Auslegung').

A 'conservative' interpretation of this constitutionally sanctioned international identity of the country is consistent with a notion of justice as non-domination. Accordingly, norms are interpreted in accordance to a global regime that ensures primarily freedom from the potential influence of other countries and the possibility of international cooperation rather than directly advancing the rights of migrants. In sustaining a 'reliable' international environment, Germany ensures that issues such as migration, though not effectively regulated on a global scale, are discussed in a reasoned manner and dealt with through cooperation with other countries that abide by with the same global justice claim. The legislative framework consequently represents a guideline and a condition for the pursuit of national interests in migration policy – especially regarding the protection and advancement of national economy. This is in line with the non-domination principle as long as inter-governmental relations are mitigated by non-discriminatory rules and practices. Germany's migration law can still be deemed as just, and in line with the principle of 'friendliness to international law'. Non-domination assumes that only reasonableness from fellow governments is expected concerning the law that grants the opportunity to obtain residence permits for the nationals of a few economically advanced countries, including Australia, Israel, Japan, Canada, the Republic of Korea, New Zealand and the US.

Moreover, compliance with justice as non-domination has not prevented Germany from taking a more active foreign policy stance. This is visible through measures aimed at avoiding crises causing flight (e.g. peace missions in Congo and Mali), defusing crises (e.g. Vienna process towards a political solution in Syria), providing direct aid 'on the ground', and supporting international organisations (e.g. stabilisation projects open up the prospect of being able to stay in or return to Afghanistan and Iraq). Other actions include contributions to the European response (e.g. protection of the EU's external borders) and information about flight and migration (e.g. fight against trafficking) (Federal Foreign Office n.d.).

Yet, domestic demographic and macroeconomic interests do seem to be preserved not only at the expense of the pursuit of humanitarian purposes, but also with no guarantee that the mere possibility of cooperation and dialogue is actually offered to the countries of origin/transit of the migration flows. Despite a generally strict compliance with the rule of law and European and international standards, criteria to grant protection to asylum seekers, for instance, appear to be influenced by contingent concerns and interests. These are not warranted by inter-state reasonable discussion, and are short of any prejudice to the principle of non-interference and autonomy. The threat to cut foreign aid to countries that do not cooperate in the readmission of deportees is in principle consistent with justice as non-domination. However, it may also imply the use of power differentials to advance the most advantaged country in the pursuit of its strategic goals. Finally, it is worth mentioning that many doubts have been raised about the legal and moral standing of the 2016 EU-Turkey deal, whose reported main sponsor was the German government (Okuy and Zaragoza-Cristiani 2016).

### **Justice as impartiality**

In general, safeguarding immigrants' dignity from the arbitrariness of others does not appear to be the primary goal of the legal framework underlying Germany's migration policy. That does not mean that impartiality is, in principle or in practice, denied as a criterion of justice. In fact, the rights that secure foreigners' autonomy are amply recognised and protected at a constitutional and a primary legislation level, both directly and through the integration of international agreements into the domestic order. Participation in human rights protection regimes is part of Germany's engagement in promoting

and strengthening collective institutions and cosmopolitan law. Yet, ensuring a satisfactory degree of legitimacy and accountability seems an important but subsidiary target compared to the prime concern of effectively controlling foreigners' entry and residence in the country. Consistent with this ranking of priorities is also the sporadic emphasis on 'national belonging' as a requisite. This is illustrated by the special status of expellees and ethnic Germans applying for citizenship or asylum, or the importance given to the linguistic proficiency of immigrants and asylum seekers. These requirements are to a great extent based on practical reasons, and they do not seem to imply nationalistic or xenophobic undertows. At the same time, though, they signal an underlying conception of society emphasising 'internal cohesiveness'. A cohesiveness that requires the economic, but also cultural and social integration of newcomers in a well-ordered economic system and a closely-knit national community.

In line with this idea is also the selective labour migration with the purpose of addressing the lack of qualified personnel ('Fachkräftemangel') through the implementation of the EU Blue Card system for highly qualified persons, which ensures a faster access to permanent residence. Another aspect that makes the German asylum legislation inconsistent with the protection of individual freedom is the biased regulation of the safeguards granted by different forms of international protection. In order to curtail the number of incoming foreigners, the executive changed the regulation in 2016 so that a larger share of asylum seekers would only be granted subsidiary protection, instead of the 'refugee' status. On the other hand, the government's crackdown on migration has resulted in a string of successful appeals before Germany's administrative courts. National courts can therefore be regarded as effective subsidiary enforcers of impartiality principles and personal freedom, although they do not necessarily promote collective (supranational) institutions as default modes to pursue this notion of justice.

At the same time, the selection of third safe countries, for instance, is patently limited to nations expected to put further strain on the German reception system.<sup>15</sup> Renewed talks of adding Tunisia, Algeria,

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<sup>15</sup> Notably, Germany's current asylum system was made possible by the so-called 1993 *Asylkompromiss* – a constitutional change to tighten the hitherto generous conditions for accessing the status of refugee in the wake of the 1980s increase in the inflows of asylum seekers, mainly from Yugoslavia, Romania and Bulgaria.

and Morocco to the list confirm the impression that the fast-track return procedure is used as a diplomatic leverage rather than an instrument to treat asylum seekers with different backgrounds in a fair manner. The parliamentary procedure needed to amend the list of safe countries only partly compensates for the domination implied by the concept. On the other hand, in line with general international practice in the field of asylum, the notion of safe third country does in principle abide by a non-domination criterion in that deportations can only be carried out through repatriation agreements with the countries of origin.

Since 2016, the amended Resident Act no longer identifies the authoritative decision about the expulsion of an immigrant based on considerations relative to Germany's national interests alone. Beforehand, national interests trumped considerations relative to the rights of immigrants. More in line with the idea that the migrant is the holder of rights independent of collective goals or even national sovereignty, current rules explicitly require the decision to be taken by weighing the public interests in expulsion against the foreigner's interests in remaining. Finally, an instance of German legislation's effort to refrain from paternalism (Eriksen 2016: 12) is to be found in the distinction between human trafficking 'with the intent of sexual exploitation' and 'with the intent of labour exploitation'. This is at odds with the principle of impartiality insofar as it limits the autonomy of the subject. In doing so, countermeasures are not only devised so that they are better suited to each set of circumstances, but the protection of foreigners avoids morally-biased repercussions on prostitution activities, which are legal in Germany.

### Justice as mutual recognition

Germany's conceptual and legal framework appear quite 'sensitive' to the multifariousness of the individual and collective conditions of immigrants and asylum seekers. At the same time, these structures can hardly be deemed as 'fair' according to a notion of justice that addresses the structural inequities resulting from applying general rules to unequal real circumstances. Admittedly, since justice as mutual recognition rests by definition on reciprocal practical knowledge, general frameworks are only moderately relevant, unlike policy practices. However, even legislation seems to a certain extent at variance with this idea of justice. The causes are not only the overriding pragmatic concerns about the feasibility of migration and

asylum policies, but also unwarranted assumptions (even the positive ones) and misrecognitions about foreigners.

This appears to be the case with special reception conditions for specific nationalities. The goal of accelerated and fast-track reception procedures, dedicated reception centres, and specific regimes is certainly to streamline the asylum policy and clear out pending cases. However, the special reception is also grounded on the normative standard that requires the prioritisation of the 'objectively' more serious cases. These procedures might actually be based on well-intentioned assumptions about who is in immediate danger and who and where can be considered 'safe'. Nevertheless, they end up thwarting the painstaking dialogue essential to root out the unintended consequences of applying abstract principles of justice to unequal conditions.

Moreover, migration and asylum legislative measures seem prone to what might be called 'local compulsive universalism'. Instead of laying the groundwork for coping with the lack of common institutions and understandings, they tend to abridge it through the mentioned requirements to integration, for instance the specific integration courses designed for special target groups and immigrants with additional advancement needs. Although it may well be a practicable vessel of cosmopolitan values, a strategy based on so-called open 'national sameness' is still liable to overlook the unique conditions of the 'concrete other', provided that it does not result in plain domination.

One particular aspect consistent with mutual recognition is the role assigned to province-level entities, like foreigners' authorities, registration offices, and state courts. Their proximity creates conditions that are more favourable to a genuine dialogue and the recognition of the other's specific features. As for asylum-related regulation, the BAMF guidelines ('Dienstanweisung Asylverfahren - Belehrungen') set forth exceptional care, extra benefits, and specially-trained decision-makers for the handling of the procedures of 'specific social groups' to identify innate features or common backgrounds. Specific social groups include for example minorities discriminated by the rest of their national society, groups defined by their sexual orientations or their gender, or by the violence suffered (like in the case of the victims of genital mutilation or torture) (BAMF 2016). However,



reportedly, the lack of systemic procedures for the identification of this class of individuals structurally impairs the provisions' normative coherence (Kalkman 2016: 41).

## **Conclusions**

To sum up, the legal framework underpinning Germany's migration and asylum system of governance has proved quite reactive to the ongoing changes in nature and magnitude of incoming flows of foreigners. This response appears informed by what may be broadly called a 'governmentality' rationale, such as the orientation to enhance (public) authorities' techniques and strategies to render the issue governable. Amendments and new rules are to a large extent consistent with principles like the rule of law, protection of human rights, observance of non-discrimination against third countries, and adaptability to the specific needs and conditions of foreigners. Nevertheless, the German legal order seems to hinge on a very 'conservative' distinction criterion between insiders and outsiders. This system is complementary to a quite exclusionary concept of national community, whose membership criteria rest on a mix of ethnicity and capacity to act as an effective component of a highly cohesive national economic and social system.

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# Chapter 3

## Greece

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Greece is a relatively 'new' country of immigration. Previously a country of emigration, it was transformed into a country of transit and settlement in the 1990s (Gropas and Triandafyllidou 2007; Kasimis 2012). At that time, significant numbers of migrants from the former Soviet Union republics and Balkan countries settled in Greece following political and economic unrest after the collapse of communist regimes. These flows also included ethnically Greek returning migrants, such as members of the Greek minority in Albania and Greek post-civil war refugees in Eastern European communist states (Gropas and Triandafyllidou 2007). In addition, because of its geographical position, Greece has become a main point of entry to the European Union for migrants from Asian, Middle Eastern and African countries fleeing armed conflict and political and economic instability (Triandafyllidou and Maroukis 2012). This includes, more recently, Syrian refugees displaced by the Syrian conflict (The United Nations Refugee Agency (UNHCR) 2016a).

Against this backdrop, the Greek framework on asylum and immigration developed rapidly, influenced considerably by the country's membership in the European Union. This chapter explores definitions of key legal categories and their interaction with global justice norms.

It is organised in four sections. The first section discusses key developments in terms of legislation and debates on migration, and outlines the main legislative instruments regulating migration and asylum in Greece. The second outlines a) key definitions of categories of migrants, b) definitions relating to migration and asylum processes and c) the rights attributed to different migrant categories. The third section discusses the relation between legal categories and adherence to the three conceptions of justice as non-domination, impartiality and mutual recognition (Eriksen 2016). Lastly, the conclusion summarises the peculiarities of the Greek case and their implications in terms of global justice.

## **Background and legislative framework**

Since the 1990s, several legislative instruments have been introduced to address the new dynamics of migration. Law 1975 of 1991 was a first attempt to regulate entry and residence and was followed by Law 2910 in 2001. Both laws were predominantly focused on controlling entry and considered economic migration as temporary. These tendencies are also evident in Law 3386, introduced in 2005, which nevertheless attempted to provide for long-term residence and integration (Baldwin-Edwards 2009; Triandafyllidou 2009). However, migrants faced significant difficulties in maintaining legal status because of strict provisions on entry, residence and work permits, and administrative inadequacies (Triandafyllidou 2009; Maroukis 2013). As a result, four regularisation programs took place between 1997 and 2007 (Baldwin-Edwards 2009). The emphasis placed on control and preventing irregular entry in legislation reflects negative attitudes towards migration and migrants in Greek society. In this context, the use of the terms ‘illegal immigrant’ and ‘illegal immigration’ is particularly significant since it has framed media and public debates on migration since the 1990s (Karamanidou 2016; Pavlou 2009). Their widespread use reinforced perceptions of migration as a predominantly negative phenomenon, associated with crime and depicted as a threat to the country. The control-oriented legislation of the 1990s and 2000s is also indicative of the lack of political will to provide for long-term solutions through legislation (Triandafyllidou 2009).

In parallel with the legislation on migration, the first law specifically on refugee protection was introduced in 1996. It established normal and accelerated procedures and introduced the concepts of mani-

festly unfounded applications and safe third countries in line with developments in EU soft law. The Europeanisation of refugee and asylum law accelerated in the late 2000s with the transposition of the Dublin Regulation (2003) and the Reception (2007), Procedures (2008), and Qualifications (2008) directives. However, approaches to unauthorised migration remained focused on – largely ineffective – control policies, at the expense of developing appropriate asylum and reception infrastructures (Karamanidou and Schuster 2012; McDonough and Tsourdi 2012). These shortcomings were extensively documented by human rights organisations (e.g. Council of Europe 2008) and NGOs (e.g. Amnesty International 2010), and led to several decisions against Greece in the European Court of Human Rights (for instance *SD v Greece* (2009), *MSS v Greece and Belgium* (2011)) and the Court of Justice of the European Union (EC-4/11/13 and EC-411/10). In turn, this led to the suspension of returns under the Dublin Regulation.

Following these developments, Law 3907/2011 introduced significant reforms of the asylum and reception systems, establishing three independent authorities – the Asylum Service, the First Reception Service, and the Appeals Authority. It also transposed the Returns Directive. While these reforms aimed at addressing structural deficiencies that undermined the integrity of the asylum procedure – mainly the dominant role of the Ministry of Citizen Protection and Public Order and the Hellenic Police – many problematic aspects persisted. Reception capacity, for instance, remained extremely limited, and despite government announcements that it would create more reception spaces (Ministry for Public Order and Citizen Protection 2012), only two reception centres were operational by the end of 2014 (European Migration Network (EMN) 2014a). While the austerity crisis undermined the ability of Greek governments to implement the reforms stipulated by Law 3907/2011, they prioritised control measures such as the construction of a fence across the land border with Turkey in Evros, pre-removal detention centres, and arrest-and-deport operations such as *Xenios Zeus* in 2012 (Cheliotis 2013).

Key controversies relating to legislation between 2009 and 2015 concerned citizenship, violence against migrants. In 2010, the government introduced Law 3838/2010 which facilitated the granting of citizenship to migrants and gave them the right to vote in local elections. The law challenged dominant exclusionary perceptions of



ethnic citizenship, was opposed by right-wing parties, and eventually declared unconstitutional by the Greek Supreme Court. Incidents of violence against migrants, linked to the extreme right party of Golden Dawn, highlighted the shortcomings of anti-discrimination legislation and attracted widespread criticism by human rights organisation (Council of Europe 2013). The provisions of Law 3386/2005, subsequent amendments and other laws transposing EU directives – for instance on family reunification and long term residence status – were codified in Law 4251/2014.

Since 2015, legal developments and public debates have been dominated by the migratory movements in summer 2015 and the EU and Greek policy responses to them. The EU-Turkey statement, the establishment of the hotspot regime in the Eastern Aegean islands, and the persisting policies of containment have engendered inhumane and degrading conditions for those crossing borders in both the islands and on the mainland. In order to facilitate the implementation of the hotspot approach and of the EU-Turkey agreement, Law 4375/2016 made significant and controversial changes to asylum and reception procedures. Most notably, it introduced an ‘exceptional’ border procedure, the blanket detention of migrants in closed ‘Reception and Identification Centres’, and the application of the concept of ‘safe third country’ so as to facilitate their return to Turkey (Hellenic League for Human Rights 2016). In 2018, Law 4540/2018 fully transposed Directive 2013/33/EU, further institutionalising the ‘hotspot’ regime.

### **Legislative framework**

Greece has ratified key international and regional human rights instruments – including the Geneva Convention, the Universal Declaration of Human Rights, the International Covenant of Social, Economic and Cultural Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights – which safeguard the human rights of migrants. In addition, the Greek Constitution prohibits the ‘extradition of aliens prosecuted for their action as freedom-fighters’ and guarantees the ‘protection of [the] life, honour and liberty’ of every person in Greek territory ‘irrespective of nationality, race or language and of religious or political beliefs’ (Hellenic Parliament 2008, Art. 5, par. 2). It also guarantees equal access to social security for all workers. However, these provisions have little bearing on the designation of legal

categories and regimes of rights related to migration and asylum, since 'in practice, constitutional provisions alone may not provide protection if they have not been accompanied (given effect) by ordinary (statutory) legislation' (Sitaropoulos, 2004: 130).

The key legislative documents regulating migration and asylum since 2009 are outlined in Table 3.1. The discussion of legal categories in the following sections is based on the provisions of this legal framework.

Table 3.1: Key laws on migration, asylum and related issues

Immigration, including entry, residence and citizenship	Asylum procedures and refugee determination
<b>Law 3064/2002</b> on combating trafficking in human being (Council Framework Decision 2002/629/JHA)	<b>PD 220/2007</b> Transposition of Directive 2003/9 EC on minimum standards for the reception of asylum seekers
<b>Law 3386/2005</b> Entry, residence and social integration of third country citizens into the Greek Territory	<b>PD 90/2008</b> Transposition of Directive 2005/85 / EC on minimum standards on procedures for granting and withdrawing refugee status
<b>Presidential Decree [PD] 131/2006</b> incorporating the provisions of directive 2003/86/EC on family reunification of recognised refugees	<b>PD 96/2008</b> transposing Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees
<b>PD 150/2006</b> transposing directive 2003/109/EC on the status of long term resident third country nationals	<b>PD 167/2008</b> amending PD 131/2006 regarding the right to family reunification
<b>Law 3536/2007</b> Special arrangements on migration policy issues	<b>PD 81/2009</b> Amendment of PD 90/2008 on minimum standards of procedures for granting and withdrawing refugee status
<b>PD 161/2007</b> transposing directive /2004/EC on the free movement and residence of EU citizens	<b>PD 114/2010</b> Establishing a single recognition procedure for granting refugee status or subsidiary protection (Directive 2005/85/EC)
<b>PD 128/2008</b> transposing directive 2005/71/EC for admitting third-country nationals for the purposes of scientific research	<b>Law 3907/2011</b> Establishment of Asylum Service, First Reception Service and Appeals Authority, transposition of Directive 2008/115/ EC on common standards and procedures in Member - States for returning illegally staying third-country nationals
<b>PD 101/2008</b> transposing directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, student exchange, unremunerated training or voluntary service	<b>PD 102/2012</b> Organisation and operation of First Reception Service
<b>Law 3875/2010</b> transposing the 2000 Convention against Transnational Organized Crime and Palermo Protocols	<b>PD 104/2012</b> Organisation and operation of the Asylum Service

<p><b>Law 3838/2010</b> Current provisions for Greek Citizenship (nationality) and political participation of expatriates and legally resident immigrants</p>	<p><b>PD 113/2013</b> Establishing a single procedure for granting refugee status or subsidiary protection (compliance with Directive 2005/85 /EC)</p>
<p><b>Law 4198/2013</b> transposing directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims</p>	<p><b>PD 141/2013</b> – Transposition 2011/95/EU on minimum standards for the qualification and status of third country nationals or stateless persons as refugees</p>
<p><b>Law 4251/2014</b> Immigration and Social Integration Code and other provisions</p>	<p><b>Law 4375/2016</b> Organisation and operation of the Asylum Service, Appeals Authority, Reception and Identification Authority and other provisions</p>
<p><b>Law 4244/2014</b> Article 4, Repeal of Law 3838/2010 and 3870/2010.</p>	<p><b>Law 4399/2016</b>, amending the composition of appeals committees</p>
<p><b>Law 4332/2015</b> Modification of provisions of the Code for Greek nationality; Amendment of Law 4251 / 2014</p>	<p><b>Law 4540/2018</b>, amendments of the Greek legislation in accordance with the provisions of Directive 2013/33/EU of the European Parliament and of the Council of Europe of June 26 2013, on the standards required for the reception of applicants for international protection (recast, L 180/96/29.6.2013) and other provisions – Amendment of Law 4251/2014 (A 80) to transpose to Greek Law Directive 2014/66/EU of May 15 2014 of the European Parliament and of the Council concerning conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer – Amendment of asylum procedures and other provisions.</p>

## Definitions

### Legal terms and definitions

#### *Migrants/Third country nationals/Irregular migrants*

The term ‘migrant’ is not used in Greek law. Prior to the introduction of Law 3386/2005, Greek legislation (Government of Greece 1991; Government of Greece 2001) referred to migrants as ‘foreign nationals’. The category ‘third county national’ first appeared in Law 3386/2005 and was seen an indication of the Europeanisation of Greek migration policy (Veropoulos 2007). Current law on migration contains the following definitions:

- ‘*Allodapos*’ which is translated as a ‘foreign national’ or ‘alien’ and defined as a ‘natural person who does not have Greek nationality or is stateless’ (Government of Greece 2005, art.1 par. a; 2014a, art.1 par. a).
- Third country national is defined as ‘any natural person who is not a Greek national or the national of any other EU Member State within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union’ (Government of Greece 2005, art.1, par. b; 2014a, art.1, par. b).
- EU national is defined as ‘any person who is a national of an EU Member State (Government of Greece 2014a, art. 1, par. d).
- Third country worker is defined as ‘a third country national who has been admitted to the Greek state and who is residing legally and received a residence permit for employment, or a residence permit with a right to work’ (Government of Greece 2015, art 6) . This category was introduced with Law 4332/2015.

Similarly, current legislation does not use the main equivalent of the term ‘illegal immigrant’ in Greek –‘*lathrometanasths*’ or ‘*paranomos metanastis*’. With reference to illegality, the distinction made is between third country nationals who ‘reside legally’ (‘*diamenoun nomima*’) or ‘reside illegally’ (‘*diamenoun paranoma*’) (Government of Greece 2014a). However, the terms ‘migrant’, ‘economic migrant’ ‘economic migration’ and ‘illegal immigration’ has been used in official documents such as reports submitted to UN or EU bodies (e.g. EMN 2009), press releases by the government and ministries and parliamentary debates.

Available statistics on the migrant population in Greece show a decline in the number of legally resident third country nationals (Table 3.2), which can be attributed to the effects of the crisis, both in terms of migrants returning to their country of origin, as well as their lapse into irregular status which is not reported in official statistics.

Table 3.2. Migrant population in Greece 2009-2013.

Year	Total population in Greece	Foreign Population <sup>16</sup>	Foreign-born population <sup>17</sup>
2009	11,094,745	927,584	1,304,670
2010	11,119,289	931,424	1,321,149
2011	11,123,392	934,395	1,325,255
2012	11,086,406	921,447	1,312,519
2013	11,003,615	886,450	1,279,516
2014	10,926,807	854,998	1,265,165
2015	10,858,018	821,969	1,242,924
2016	10,783,748	798,357	1,220,395
2017	10,768,193	810,034	1,250,863
2018	10,741,165	816,059	1,277,861

Source: Eurostat

### *Asylum seekers and refugees*

'Refugee' is defined in accordance with the definition provided in Art 1A of the Geneva Convention (UNHCR 2011) as a person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

(Government of Greece 2008a, art. 2 par. 3; 2013a, art. 2. p. 5; 2016a, art. 34, par. 6)

The category 'person eligible for subsidiary protection' is defined as a 'third-country national or a stateless person who does not qualify as a refugee' but there are substantial grounds

<sup>16</sup> Number of persons not having the citizenship, including citizens of other EU Member States, non-EU citizens as well as stateless persons (Eurostat 2019)

<sup>17</sup> Number of persons born abroad, (according to present time borders), whether in other EU Member States or non-EU countries, who are usually resident in the reporting country on 1 January of the respective year (Eurostat 2019).



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.

(Government of Greece 2016a, art. 34 par. 8; 2013a; art. 2 par. 6; 2010a art. 2 par. 8)

Serious harm is defined as facing a) the death penalty or execution (b) torture or inhuman or degrading treatment or punishment in the country of origin; or (c) serious and individual threat to life or person by indiscriminate violence in situations of international or internal armed conflict (Government of Greece 2013a, art. 2 p15; 2008b art. 15).

The term 'asylum seeker' is not used in law, but corresponds to the definitions of 'applicant for international protection' or 'applicant for asylum' defined as

the alien [*allodapos*] or stateless person who declares before any Greek authority at entry points of the Greek State or in the inland, declares, in written or oral form, that he is requesting asylum or subsidiary protection in our country or in any other way asks not to be deported to a country on the grounds of his fear of persecution because of race, religion, nationality, social class or political opinions according to the above mentioned Geneva Convention or risks suffering serious harm [...] no final decision has yet been taken.

(Government of Greece 2016a Art 34, par. 4; Government of Greece 2013b, Art 2 par. 4; 2010a Art2 par. 4)

Any third country national who is transferred to Greece under the Dublin Regulation is also considered to be an 'asylum applicant'.

## Definitions and concepts related to key procedures

### *Asylum procedure and status determination*

Before June 2013, the authority responsible for receiving and examining applications was the Hellenic Police (Government of Greece 2008b; 2010a). Since June 2013, the designated authority is the Asylum Service, including its central offices in Athens and Regional Offices across the country. If intention of submitting an asylum

application is expressed before a non-competent authority (e.g. the police or the Reception and Identification service), it is obliged to notify the competent receiving authority immediately and refer the applicant to it (Government of Greece 2016a; 2013b).

The authorities responsible for examining appeals before June 2013 were Appeal Committees comprised of a civil servant from the Ministry of Interior or from the Ministry of Justice, a representative of the UNHCR, and a lawyer specialised in refugee law and human rights law (Government of Greece 2010a, art. 26, par 1; Government of Greece, 2008b). Since 2013, appeals are examined by the Appeals Authority established by Law 3907/2011. Under this regime, as well as under Law 4375/2016, the members of Appeal Committees were mainly experts in refugee protection and human rights. Since May 2016, appeal committees are comprised of two judges and an expert indicated by the United Nations High Commissioner for Refugees (Government of Greece 2016b).

Following the examination of claims, the result will be one of the following:

- a) The applicant is granted refugee status, defined as ‘the status granted following the recognition by the competent Greek authority of an alien or stateless person as a refugee’ (Government of Greece 2016a; art. 34, p. 7; 2013a, art. 2, p. 6)
- b) The applicant is granted subsidiary protection, defined as the status granted following the recognition of the applicant as a beneficiary of subsidiary protection (Government of Greece 2016a art. 34, p. 9)
- c) The applicant is granted leave to remain for humanitarian reasons (humanitarian status). This is normally granted under the provisions of Law 4251/2014 after the recommendation of the Asylum Service. Grounds for obtaining humanitarian leave include the impossibility of effecting a return decision because of the principle of *non-refoulement* or other objective reasons, or if the migrant is a victim of trafficking, crime or domestic violence, has serious health problems or is a minor in the care of the authorities (Government of Greece 2014a, art. 19; 2011, art. 42; 2010a art. 28). Additionally, Law 4375/2016 provided for residence permits for humanitarian reasons to applicants who are holders of a valid asylum seeker’s card, had lodged

applications up to five years before the entry into force of the law, and whose examination is pending in second instance, unless there is a risk to national security or public order (Government of Greece 2016a, art. 22). Humanitarian residence permits are renewable and are normally issued for two years; in some cases for one (Government of Greece Law 2016a; 2011, art. 42; 2010a, art. 28).

- d) The application is deemed inadmissible if a) another EU member state has granted the applicant international protection status b) another EU member state or a state bound by the Dublin Regulation has taken the responsibility to examine the relevant application, pursuant to this Regulation c) the applicant enjoys adequate protection by a country which is considered as a first country of asylum d) a country is considered a safe third country for the applicant e) the application is a subsequent one and the preliminary examination has not revealed new substantial elements f) a member of the applicant's family lodges a separate application even though he/she was included in the original application (Government of Greece 2016a art. 54; 2013b art. 18; 2010a art.18).

A safe third country is a country where the applicant's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; there is no risk of serious harm; the principle of *non-refoulement* in accordance with the Geneva Convention is respected; the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention (Government of Greece 2016a, art. 56; 2013b, art. 20; 2010a, art. 20).

- e) The application is rejected.

The number of asylum applications have fluctuated over the years (Table 3.3). While decisions granting international protection rose, especially since the establishment of the Asylum Service in 2013, they remain low in comparison to rejections. A similar pattern can be observed in second instance decisions (Table 3.4). Recognition rates in

Greece also remained below the EU average until 2016, but are higher in 2017 and 2018 (Table 3.5). Another significant development is the steep rise of asylum applications since 2016 (Asylum Service 2016). This is attributed to the impact of the Greek-Turkish agreement, which dictates that apprehended migrants will be automatically returned to Turkey unless an asylum application is submitted.

Table 3.3. Applications and First Instance Decisions

Year	Total applications	Total decisions	Total positive decisions	Geneva convention status	Humanitarian status	Subsidiary protection	Rejected
2009	15,925	14,350	165	35	25	105	14,185
2010	10,275	3,455	105	60	30	20	3,350
2011	9,310	8,670	180	45	45	85	8,490
2012	9,575	11,195	95	30	20	45	11,095
2013	8,225	13,080	500	255	70	175	12,580
2014	9,431	6114	1,710	1,270	115	487	11,335
2015	13,187	8,428	3994	3,665	10	347	5,610
2016	51,053	9,285	2,700	2,467	0	249	6,608
2017	58,683	23,524	10,347	9,302	0	1045	12,132
2018	66,966	30,751	15,192	12,618	0	2574	15,559

Source: Eurostat/ Asylum Service<sup>18</sup>

Table 3.4. Appeals

Year	Total decisions	Total positive decisions	Geneva Convention status	Humanitarian status	Rejected
2009	2,105	40	30	0	2,065
2010	45	40	35	0	5
2011	625	410	195	135	215
2012	1,650	530	185	255	1,115
2013	3,900	910	325	365	2,990
2014	7,665	1,880	805	775	5,785
2015	7,655	1,845	1,355	140	5,810
2016	12,485	5670	770	4900	6655
2017	9545	1465	510	955	7985
2018	7200	500	175	325	6605

Source: Eurostat

<sup>18</sup> These statistics are drawn from Eurostat, except for 2016 for which the statistics of the Asylum Service are used.

Table 3.5. Comparative recognition rates – first instance

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Greece %</b>	1	3	2	0.8	3.8	28.8	47.4	29.1	46	49.5
<b>EU %</b>	27	27	25	25	32	33	48	61	46	37

Source: Eurostat, ESI, EASO

In terms of gender and age, applicants are predominantly male and young (18-34 years old, Table 3.7).

Table 3.7. Gender and age of asylum applicants

Year	Gender			Age					
	Total	Male	Female	<13	14-17	18-34	35-64	>65	Un-known
<b>2009</b>	15,925	13,410	2,515	200	590	12,415	2,710	10	0
<b>2010</b>	10,275	8,650	1,590	175	290	7,950	1,825	5	25
<b>2011</b>	9,310	7,155	2,130	250	305	7,125	1,540	60	30
<b>2012</b>	9,575	7,925	1,655	280	230	7,920	1,135	10	0
<b>2013</b>	8,225	6,470	1,755	585	455	5,685	1,480	20	0
<b>2014</b>	9,430	7,645	1,785	695	655	6,085	1,970	20	0
<b>2015</b>	13,205	9,875	3,330	1,715	785	7,670	2,950	85	0
<b>2016</b>	51,091	31,996	19,075	14,786	4,992	21,847	9,150	321	0
<b>2017</b>	58,683	40,114	18,524	14,332	28,635	5,442	9,991	23	0
<b>2018</b>	66,966	45,218	21,748	16,300	33,514	11,402	5,468	282	0

Source: Eurostat; Greek Asylum Service

## Reception

Reception is not defined in Greek law (or directives 2003/9/EC and 2013/33/EU ) but ‘reception conditions’ are defined as ‘the full set of measures’ that are implemented for ‘the benefit of asylum seekers in accordance with the law’ (Government of Greece 2018, art .2 par 6; 2007, art. 1 par. 15) while ‘material reception conditions’ include housing, food and clothing provided in kind or in the form of financial support or vouchers, and a daily expenses allowance (Government of Greece 2018, art. 2 par 7; 2007, art. 1 par. 16). The definitions follow Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, transposed by PD 220/2007 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which was partially transposed by Law 4375/2016 and fully transposed by Law 4540/2018.



While not explicitly addressed in either Directive, procedures of identification, determination of nationality and registration fall under the scope of reception in Greek law and concern 'all third country nationals arrested at the border when entering the country without legal authorisation' (Government of Greece 2018, art 4, par 1; 2016a, art. 9, par 1; 2011 art. 7 par 1; 2007, art. 2 par. 1; Reception and Identification Service 2019). Law 4540/2018 further expands the scope of reception to maritime borders and transit zones (art. 4, par. 1). In addition, first reception provisions include:

- a) medical screening, provision of healthcare and psycho-social support if necessary;
- b) the provision of information regarding rights and obligations, in particular the procedure for international protection or the procedure for entering a voluntary return program;
- c) identification of those belonging to vulnerable groups so as to provide specialised care or direct them to appropriate procedures;
- d) referring those who wish to submit an application for international protection to the relevant authority (Government of Greece 2016a, art. 9; 2011 art. 7 and 11; 2007 art. 8).

It should be noted that all migrants entering Greece in an unauthorised manner and without appropriate documentation are in breach of the provisions of Law 3386/2005 on unauthorised entry. Based on its provisions they are liable to be detained and deported, unless they apply for international protection.

While these initial reception procedures have remained largely the same between 2009 and 2016, the competent authorities have changed. The Hellenic Police was largely responsible for reception processes until the establishment of the First Reception Service in 2011. The First Reception Service was re-established as a 'Reception and Identification Service' (art. 8, par. 2) with Law 4375/2016. This law stipulates that the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (FRONTEX) personnel can assist with identification and registration procedures, while UNHCR and the International Organisation of Migration (IOM) have observer status and can provide information (art. 14). Law 4540/2018 designated both Reception and Identification Service and the Directorate for the Protection of Asylum Seekers in the

Ministry for Migration Policy.<sup>19</sup> It also designated the Directorate General for Social Solidarity of the Ministry for Employment, Social Security and Social Solidarity as responsible for the provision of reception of unaccompanied and separated minors (Government of Greece 2018, art 22).

In terms of facilities, First Reception Centres, established by Law 3907/2011, were replaced by Reception and Identification Centres (RICs)<sup>20</sup> where initial reception and screening procedures take place, and Open Temporary Reception<sup>21</sup> facilities predominantly on the mainland. Migrants have to remain in closed facilities until the completion of identification and registration procedures. During this time, the examination of asylum claims – if submitted – may also be completed (Government of Greece 2011 art. 11; Government of Greece 2016a, art. 14). The maximum stay period is 25 days but can be extended under provisions for detention, which are explored further in the next section. If an asylum application is not submitted during the initial screening process, or the application is examined and rejected, asylum seekers will be referred to authorities responsible for initiating return procedures (see the section on return), normally the Hellenic Police (Government of Greece 2016a, art. 9; 2011 art. 11). Further, a geographical restriction, whereby asylum seekers cannot leave the islands where RICs are located until the end of the asylum procedure was imposed by the EU-Turkey statement and Law 4375/2016. This was challenged in court and annulled by the Supreme Court in 2018, but reinstated by Law 4540/2018 (AIDA 2019a; Ilias et al. 2019)

Asylum seekers released from first reception procedures are entitled to accommodation in open facilities (Government of Greece 2011) as well as the open temporary accommodation sites stipulated by Laws 4375/2016 and 4540/2018. Under PD 220/2007, asylum seekers can stay in open facilities for up to a year (art. 13), but subsequent legislation does not specify a time limit (Government of Greece 2018; 2016a).

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<sup>19</sup> This ministry was abolished in 2019 after the election of the New Democracy party, and its competencies were transferred to the Ministry for Citizen Protection.

<sup>20</sup> Located in the Easter Aegean islands of Lesbos, Chios, Samos, Leros, Kos, and Fylakio on the Greek-Turkish border in Evros. The latter operates outside the hotspot system.

<sup>21</sup> <https://data.unhcr.org/mediterranean/country.php?id=83>.

During the reception procedure, asylum seekers have the right to be informed in a language they understand and to be able to submit an application to the responsible authority, to access to interpretation and legal aid (Government of Greece 2018; 2016a; 2013b; 2010a). Asylum seekers are also entitled to a document certifying their status as an asylum seeker (Government of Greece 2018 art. 6; 2007, art. 5). If residing in open structures, they have the right to move freely within Greece, but must report changes of residence to the authorities (Government of Greece 2018, art. 7; 2007, art. 6). The right to family unity is also explicitly protected (Government of Greece 2018, art 11; 2007, art. 13) and specific provisions are made for asylum seekers belonging to vulnerable groups (Government of Greece 2018, art. 20-23; 2007, art. 17-20). Regarding material conditions, the authorities must provide adequate living conditions, which ensure the health and subsistence of asylum applicants and protect their fundamental rights (Government of Greece 2018, art. 17; 2007, art. 12). However, the provision of material conditions of reception such as assistance with housing or healthcare depends on asylum seekers not having adequate financial means to cover their needs (Government of Greece 2018, art. 17; 2007, art. 12). Entitlements to social rights are outlined in the section on the rights of third country nationals.

## **Detention**

Detention is defined as ‘the confinement of a person within a particular place, resulting in depriving the person’s freedom’ (Government of Greece 2016a, art. 34, par. m). This section addresses detention following unauthorised entry and detention of asylum seekers. Detention in the context of return procedures is discussed in the section on Return.

Current legislation allows the detention of all migrants entering Greece in an unauthorised manner and apprehended by Greek authorities. Under Article 76 (3) of Law 3386/2005, apprehended migrants can be detained for 48 hours (Government of Greece 2005; Ilias et al. 2019). If they express the intention to claim asylum, they are transferred to a RIC and reception procedures are initiated. Otherwise, the local Administrative Courts can issue a deportation order, in which case detention can be extended to three months. Migrants can appeal against their detention. If the migrant is not deemed in risk of absconding or a threat to public order, the Administrative Court objects to their detention, or the deportation

cannot not be effected, the migrant is issued with an order to leave the country within 30 days (Art. 76 par. 4).

The legal framework stipulates that asylum seekers cannot be detained for the sole reason that he/she has submitted an application for international protection or entered without authorisation (Government of Greece 2016a, art. 46; 2013b, art. 12; 2010a art. 13). However, the reception procedure imposes the *de facto* detention of all apprehended migrants in Reception and Identification Centres – and previously First Reception Centres – for 25 days (Government of Greece 2016a, art. 14; 2011 art. 11). Further, if an application is submitted while a migrant is in detention, the detention can continue ‘exceptionally and if this is considered necessary after an individual assessment under the condition that no alternative measures exist’ (Government of Greece 2016a, art. 46).

The decision needs to be necessary for one of the following reasons:

- a) in order to determine the applicant’s identity or nationality;
- b) in order to determine elements of the application for international protection which could not be obtained otherwise, in particular when there is a risk of absconding;
- c) when it is ascertained on the basis of objective criteria that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of a return decision;
- d) when applicants constitute a danger for national security or public order, according to the reasoned judgement of the competent authority;
- e) when there is a serious risk of absconding.

Reasons c) and e) first appeared in Law 4375/2016, while national security and public order were not grounds for detention before PD 113/2013. Decisions to detain are currently the responsibility of the Hellenic Police, with the recommendation of the Asylum Service in all cases except d) and must be fully justified (Government of Greece 2016a). They are issued for 45 days in cases a), b) and c), which can be extended for a further 45 days if the reason for detention was the belief that the applicant intends to delay return, and three months in cases d) and e). Law 4375/2016, however, stipulates that the maximum detention limit is 18 months, in line with the transposed Returns Directive (Government of Greece 2011, art. 30). Under PD

113/2013, the maximum detention period was 12 months; under PDs 96/2008 and 114/2010 up to 90 days.

## Return

Law 3097/2011 transposing the Returns directive has been the main instrument regulating return and removal since 2011. Following closely the provisions of the directive, 'return' is defined as the process of a third-country national going back, whether in voluntary compliance with an obligation to return, or enforced, to a) his or her country of origin, b) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or c) another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted (Government of Greece 2011, art. 18).

'Return decision' is defined as an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing on him/her an obligation to return (Government of Greece 2011, art. 18). 'Removal' is defined as the enforcement of the return decision with physical transportation out of the Member State (art. 18). Migrants who are in the process of being returned can be detained up to 18 months, normally in pre-removal centres under the responsibility of the First Reception and Identification Service (Ilias et al. 2019). The provisions of Law 3907/2011 transposing the Returns Directive apply to migrants residing in Greece without legal status, including refused asylum applicants and undocumented migrants. Similarly, those subject to reception and identification procedures and who are not granted international protection following their completion, are referred by the director of the RIC to the Hellenic Police for the initiation of return procedures (Government of Greece, 2016a, art. 14).

However, these provisions do not apply to migrants 'apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border' (European Parliament and Council 2008, art. 2, par. 2a; Government of Greece 2011, art. 17 par. 2a). Following the provisions of Article 2 of the Directive, which leave the decision to individual Member States, Greek authorities opted to exclude border areas from its remit. Thus, migrants entering in an irregular manner fall under the provisions of Law 3386/2005. Upon their unauthorised entry to Greek territory the



authorities can order their readmission to the country of transit or origin (Art. 83), most often Albania or Turkey. If immediate re-admission is not possible, the authorities can obtain an administrative deportation order (Art 83, art. 76). In this case, the migrant has to leave the country within 30 days (art. 76). The principle of *non-refoulement* must be taken into account.

Greece has bilateral readmission agreements with a number of third countries, including Switzerland (L. 3726/2008), Bosnia and Herzegovina (L. 3547/2007), Hungary (L.3321/05), Turkey (L. 3030/02), (EMN 2014b). In addition, Greece can return migrants to their countries of origin or transit on the basis of EU readmission agreements with Georgia, Pakistan, Moldova, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Republic of Montenegro, Serbia, Ukraine, Russia, Albania, Sri Lanka, Macao, and Hong Kong.

Of these, the Readmission Agreement with Turkey is particularly significant since the Greek-Turkish border is a key entry point for unauthorised migrants. The Agreement allows Greek authorities to initiate the return to Turkey of migrants arriving in an irregular manner at the Greek borders immediately upon their apprehension. Return has to be effected within 80 days (Government of Greece 2002). More importantly, the Readmission Agreement has been used as the basis for allowing returns of Syrian and other nationals to Turkey under the EU-Turkey Agreement (European Commission 2016a). However, the Turkish government suspended this Readmission Agreement in June 2018, in response to the arrest of two Greek soldiers in its territory near the Greek-Turkish land border (Reuters 2018; Ilias et al. 2019). This development has suspended returns from the border region of Evros, which falls outside the scope of the EU-Turkey statement. It also created challenges for the implementation of returns for the islands since the EU-Turkey statement is not a legal instrument. In June 2019, the Turkish government also suspended the implementation of the EU-Turkey readmission agreement (Euractiv 2019).

## Relocation and resettlement

Relocation (*metegkatastasi* in Greek) is not defined in Greek law, even though it is referred to in Law 4375/2016, but the website of the asylum service defined it as 'the transfer of persons who require international protection (asylum and subsidiary protection) from one

member state of the European Union to another' (Ministry for Migration Policy 2017). The EU relocation scheme ended in September 2017, but transfers were effected by the Relocation Unit of the Greek Asylum Service and the International Organisation of Migration until March 2018 (AIDA 2019b; Asylum Service 2019). Asylum seekers were eligible for relocation if they have submitted an asylum application in Greece, have been fingerprinted, registered in the asylum service's pre-registration of asylum applications that took place in 2016, entered Greece between 16 September 2015 and 19 March 2016, and belong to one of the nationalities with an EU recognition rate of over 75% (AIDA 2019b; Ministry for Migration Policy 2017). There was, however, significant vagueness both on the part of EU institutions and the Greek authorities regarding eligibility for inclusion in the programme, in particular regarding the cut-off dates (AIDA 2019b).

At the end of the scheme, 21,999 persons were relocated to other EU Member States, out of a total of 63,302 pledged places in the Council decisions (Table 3.8). Of these, 596 were unaccompanied minors, including children separated from their families (Asylum Service 2018; 2019).

Like relocation, resettlement (*epanegatastasi*) is not defined in Greek legislation, and there is no information on resettlement available in the website of the Greek Asylum Service or any relevant Ministry. Although Greece pledged 354 places, no resettlement has taken place so far (EU Commission 2016b).

### Smuggling and trafficking

Legislation on human trafficking was first introduced in 2002, although trafficking for sexual exploitation in particular had been a significant problem in Greece since the previous decade (Bouklis and Chatzopoulos 2015; Lymouris 2009). Law 3064/2002 amended the Greek Criminal Code by introducing new offences related to human trafficking. PD 233/2003 and Law 3386/2005 introduced further provisions for the protection of victims of trafficking, including a 'reflection period' to decide on cooperation with the police and judicial authorities, the suspension of deportation, provision for residence permits and special arrangements for minors. These changes reflected the provisions of Council Framework Decision 2002/629/JHA (European Council 2002).

The current definition of human trafficking was introduced into the Greek Criminal Code by Law 4198/2013 (Government of Greece 2013c) which transposed directive 2011/36/EU (European Parliament and Council 2011). Here, human trafficking refers to offenses whereby a perpetrator

with the use of violence, threat or other means of coercion or the imposition or abuse of power or by abduction hires, transports, transfers within or outside the territory of the state, detains, harbours, transfers or receives a person to or from others, with or without benefits, with the purpose of removing cells, tissues or organs from their body, or for exploiting their labour or begging for him-/herself or for others

(Government of Greece 2013c, art. 1)

This amended the previous definition by including forced begging in line with directive 2011/36/EU, as well as adding the references to 'cells' and 'tissues' which are not explicitly mentioned in the directive. Trafficking is punishable with imprisonment of up to ten years and a fine of ten thousand to fifty thousand euro. If committed against minors, as a professional activity or by a public official, or if it results in particularly serious harm or threat to the life of the victim, human trafficking is punishable with imprisonment of at least ten years and a fine of fifty thousand to a hundred thousand euro. If it results in the death of the victim, it is punishable by life imprisonment (Ministry of Justice 2017, Art 323).

In addition to the above, Greek legislation further defines human trafficking by reference to victims of specific offences of the Criminal Code. 'Victims of human trafficking' are persons who have been victims of the crimes of human slavery, human trafficking, sexual exploitation, sexual abuse, sexual tourism and its facilitation, solicitation and sexual offences against minors under 15, pornography and sexual exploitation involving minors (Ministry of Justice 2017, art. 323, 323B, 339 par. 1 and 4, 342 par 1 and 2 348A, 348B, 349, 351, 351A). The category 'victim of human trafficking' applies regardless of immigration status or of judicial prosecution of the above crimes.

The definitions and categories of offences stipulated in Greek law are in line with Directive 2011/36/EU as well as with United Nations 'Protocol to Prevent, Suppress and Punish Trafficking in Persons,

Especially Women and Children', which was transposed by Law 3875 (Government of Greece 2010b). In some cases, the scope of Greek law is broader – for example it includes sexual tourism as a distinct offence even though it is not mentioned in the Directive (O'Neill 2011). However, while the Directive defines children as any person below 18 years of age (Art 2), penalties for sexual offences against minors included in the definition of human trafficking in Greek law depend on the age of the child and refer to the age of consent, which is 15 years old.

The only specific definition of 'smuggling' in Greek legislation is found in Law 3875/2010, which ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. Smuggling, translated as 'clandestine transportation of migrants' in Greek, is thereby defined as the 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. However, 'smuggling' or 'facilitation of unauthorised entry' in the sense of Directive 2002/90/EC were heavily penalised in earlier legislation. Laws 1975/1975 and 2910/2001 penalised any person transporting or facilitating the transportation of third country nationals without proper documentation with both imprisonment of at least one year and substantial fines, regardless of financial motive (Government of Greece 1991, art. 33; 2001, art. 55). Thus, when Directive 2002/90/EC came into force, Greek legislation largely complied with its provisions, although there were issues around the determination of sanctions (Hailbronnen and Jochum 2007).

The current law regulating entry (Government of Greece 2014a) penalises any person who facilitates the unauthorised entry or exit of third country nationals from the Greek territory with up to ten years of imprisonment and a fine of minimum 20,000 euro. Heavier penalties are imposed when facilitation takes place in an organised, for-profit manner, whereby it carries imprisonment of at least ten years and a fine of minimum 50,000 euro (art. 29). Carriers - such as captains of boats and drivers - and those who facilitate the movement of migrants within Greece are liable to the same imprisonment sentences but to higher fines of at least 10,000 euro per transported migrant - up to 60,000 euro in the case of public officials and travel agents. Endangerment of human life and death of the transported

migrants carry a sentence of 15 years and life imprisonment respectively, and fines of up to 700,000 euro per transported migrant. With the exception of lower fines, the provisions of law 3386/2005 were identical. Overall, sanctions for offences related to smuggling and facilitation are higher than those prescribed for human trafficking, especially considering that fines for carriers are imposed on the basis of transported persons.

Both laws 3386/2005 and 4251/2014 as amended by Law 4332/2015 include a humanitarian clause which stipulates that 'the above penalties shall not be imposed in case of rescue of people at sea or transport of people in need of international protection as required by international law' (Government of Greece 2014a, art. 6; 2005, art. 6). The amendment of this provision in July 2015 - as numbers of refugee arrivals in Greek islands were increasing dramatically - extended its scope to 'cases of transport or facilitation of transport inland' with the knowledge of police and coastguard, in order to enable migrants' access to reception services or initiate return procedures (Government of Greece 2015, art. 14).

### **Family reunification**

Family reunification is defined following Directive 2003/86/EC as 'the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry' (Government of Greece 2014a, art. 1, par. xxxi; 2006 art. 2 par. 3). Third country nationals holding a residence permit valid for at least two years and recipients of international protection are eligible for family reunification. However, the existing legal framework does not specify whether recipients of subsidiary protection or humanitarian status are eligible, despite generally having the same rights as refugees (Government of Greece 2014a, art. 67; also Kasapi 2016).

Third country nationals legally residing in Greece can apply for reunification with a) spouses over 18 years old, b) their biological or legally adopted children under 18, c) biological or adopted children under 18 of either of the spouses, included those legally adopted where the spouse has custody and the children are dependent on him or her d) in cases of polygamy, with children under 18 by another spouse only if the applicant has guardianship (Government of Greece



2014a, art. 70). In addition to the above family members, refugees can request reunification with a) adult unmarried children of the applicant if they are unable to provide financially for themselves because of health issues, b) parents dependent financially on the applicant in their country of origin, c) partners to whom they are not married if there is sufficient evidence of a long-term relationship (Government of Greece 2008c art. 13 par. 1).

Recognised refugees who are unaccompanied minors can ask for unification with a) first-degree relatives in the direct ascending line of the applicant b) the legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced (Government of Greece 2008c, art. 13).

## Rights of third country nationals

### Legally resident third country national

Legally residing third country nationals are guaranteed free movement within Greece and freedom to choose their place of residence, although residence or settlement may be prohibited in certain geographic regions of the country for reasons of public interest (Government of Greece 2005, art. 71, 1; 2014a art. 21). If employed, they have the same social insurance, healthcare and social welfare rights as Greek nationals, and the right to equal pay. Equality is also guaranteed in relation to accessing services provided by public agencies or entities, local government organisations and public utilities. Minors have the right to access to education and healthcare irrespective of legal status, while adult third country nationals have access to higher education if they have completed secondary education in Greece. If detained or imprisoned, they have the right to be informed of their rights in a language they understand, and access to legal representation and consular representation of their country of origin (Government of Greece 2014a, art. 21, 26, 44; 2005, art. 71, 72). Legally resident third country nationals were granted the right to vote and be elected in local elections with law 3838/2010 (Government of Greece 2010c). However, the relevant provisions of this law were deemed unconstitutional by the Council of the State (the Supreme Court) and repealed in 2014 (Government of Greece 2014b).

EU citizens are also guaranteed the same social and economic rights as Greek citizens. They have the right to vote in local elections

(Government of Greece 2014a) but are excluded from voting in national elections. Migrants with long-term resident status are guaranteed additional rights in relation to accessing employment and professional activities, higher education and vocational training, but they are not entitled to vote or access positions that involve the exercise of public authority (Government of Greece 2014a, art. 98).

### **Irregular migrants**

Other than human rights protected under international and regional instruments, irregular migrants have very few rights under Greek immigration law. They are entitled to emergency healthcare in Greek hospitals and primary healthcare if they belong to a vulnerable group (Government of Greece 2014a, art. 26; 2005, art. 82; Ministry of Health 2019). They have the right to seek the services of Greek authorities related to issuing residence permits and concerning voluntary return (Government of Greece 2014a, art. 26). The children of undocumented migrants are entitled to register in Greek schools (Government of Greece 2005, art. 72). Given that irregular migrants cannot access legal employment, they have no entitlement to social insurance arrangements or pensions, income support or benefit, or emergency social assistance (European Social Charter 2013).

### **Rights of refugees, recipients of subsidiary protection or humanitarian status and asylum seekers**

Refugees and recipients of subsidiary protection are guaranteed free movement within Greek territory. They are entitled to access to the labour market subject to the issuance of work permits and to pay conditions and access to social insurance equal to that of Greek citizens in what concerns employment and self-employment (Government of Greece 2008a, art. 26; 2013a, art. 26). These rights are extended to family members of beneficiaries of international protection who hold a valid residence permit. The duration of residence permits for refugees was reduced from five to three years in 2013, while the duration of residence permits for recipients of subsidiary protection was increased from two to three years (Government of Greece 2013a). Refugees and recipients of subsidiary protection have access to education, vocational training and employment-related educational programs under the same terms and conditions as nationals (Government of Greece 2016a, art 70; Government of Greece 2013a, Art 27).

Access to healthcare is guaranteed at equal basis with Greek citizens, including specialised treatment for persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence (Government of Greece 2008a art. 29; 27; 2013a, art. 31). Recipients of international protection who are uninsured or destitute are entitled to free healthcare (Ministry of the Interior and Administrative Reform 2016). In addition, they have access to social assistance, access to accommodation on the same conditions as provided to Greek nationals (Government of Greece 2013a art. 29, 31; 2008a, art. 27, 29). Access to social integration programmes is also guaranteed (Government of Greece 2016a).

Recipients of humanitarian status are given rights equal to refugees and recipients of subsidiary protection (Government of Greece 2016a). However, they are excluded from family reunification (Kasapi 2016) and residence permits are issued for variable lengths of time, normally one or two years (Government of Greece 2014a; 2016a; 2010a).

Asylum seekers, apart from provisions outlined in previous sections, have access to employment as soon as they receive an 'international protection applicant card' or an 'asylum seeker's card' (Government of Greece 2016a, art. 71). However, before the introduction of law 4375/2016 they could only be employed if no Greek or EU citizens or recognised refugees had expressed interest in the same position (Government of Greece 1998). They are entitled to healthcare and support for other material conditions (e.g. accommodation) but only if they do not have sufficient funds. In addition, they are entitled to vocational training (Government of Greece 2007, art. 11), while the children of asylum seekers are entitled to education.

### **Unaccompanied minors**

An 'unaccompanied minor' is defined as 'a person below the age of 18, who arrives in Greece unaccompanied by a person who exercises parental care according to Greek legislation and for as long as such parental care has not been assigned by law and exercised in practice, or a minor who is left unaccompanied after he/she has entered Greece' (Government of Greece 2016a, art. 34 par. 11). Definitions in previous laws and presidential decrees were slightly different, referring for instance to parental care being determined also by 'custom applying in the country of origin' (Government of Greece 2007 art. 2 par. 6; 2008b art. 2 par. 7; 2010a art. 2 par 10).

Unaccompanied minors are afforded additional protections under legislation on reception, asylum and refugee protection. In terms of reception, unaccompanied minors must be identified during the identification and registration procedures and they have access to appropriate medical and psycho-social support (Government of Greece 2018, art. 22; 2016a; 2011). When identifying unaccompanied minors, the competent authorities must inform the nearest prosecutorial office – who act as interim guardians – and the Directorate General for Social Solidarity of the Ministry for Employment, Social Security and Social Solidarity (Government of Greece 2018, art. 22; 2008b art. 30; 2013b, art. 32). The First Reception and Identification Service in cooperation with the local prosecutorial authority must take steps to locate an adult relative of the unaccompanied minor to act as a guardian if this is deemed in the best interests of the minor (Government of Greece 2018, art. 22) Further, Law 4540/2018 stipulates that the Directorate General for Social Solidarity is responsible for ensuring the legal representation of unaccompanied and separated minors, locating their family members, placing minors with their relatives or in foster families, or if this is not possible, in specialised accommodation structures (Government of Greece 2018, art.22).

While current and previous legislation stipulates that the detention of minors should be avoided and kept to a minimum (Government of Greece 2016a, art. 46; 2013b, art. 11; 2011; 2010a), it is not explicitly prohibited. Under the current legal context, unaccompanied minors who have applied for asylum while in detention can be detained for 25 days, extended for another 20 days in cases of mass arrivals when it is not possible to provide for their safe referral to appropriate accommodation facilities (Government of Greece 2016a, art. 46). However, Law 3386/2005 does not include any safeguards against detention (Government of Greece 2005). Unaccompanied minors must be detained separately from adults and have access to recreational activities (Government of Greece 2016a, art. 46).

In terms of the asylum procedure, unaccompanied minors over the age of 14 can submit applications on their own behalf, if the competent authorities deem that they have the maturity to understand the consequence of their actions. Unaccompanied minors below 14 can lodge an application through their representative. Applications lodged by unaccompanied minors are examined in priority and

according to the regular procedure (Government of Greece 2016a, art. 45; 2013b art. 11; 2010a). In relation to return, Law 3907/2011 stipulates that before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child. In addition, before removing an unaccompanied minor, the authorities must ascertain that they will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return. Staff working with unaccompanied minors must have had or receive appropriate training concerning their needs (Government of Greece 2007, art. 17; Government of Greece 2008b, art. 30).

## Discussion

### Justice as non-domination

If justice as non-domination is conceptually located in relations between EU Member States on the one hand and third countries on the other, it appears difficult to relate it to the Greek context. There is little evidence that the Greek state has imposed migration-related measures on third states as an independent actor. For example, while Greece has bilateral readmission agreements with neighbouring states such as Turkey, most of these agreements are EU-wide (EMN 2014b). Under the Greece-Turkey readmission agreement, only 1590 returns were effected between 2009 and 2013, despite 69,244 requests being submitted by Greek authorities. While the Greek authorities attributed the low number of returns to non-cooperation by Turkey (EMN 2014b), this also indicates that the Greek state does not have the capability to dominate in the context of Readmission Agreements. This was also illustrated by the unilateral suspension of the Readmission Agreement by the Turkish government. Based on the assessment of the Greek government, returns to Pakistan were similarly impeded by the receiving state (EMN 2014b), suggesting again the inability to 'dominate' in the context of a Readmission Agreement between the EU and a third country.

A more pertinent approach would consider the extent to which Greek legal frameworks and practices *are dominated by the European Union and other Member States*. The Europeanisation of domestic migration and asylum laws and harmonisation with EU legislative developments is an outcome of the country's membership, but it has not



always served its interests nor safeguarded migrants' human rights. The Dublin Regulation, for example, exacerbated pressures on already weak asylum and reception systems (Karamanidou and Schuster 2012; McDonough and Tsourdi 2012) before the suspension of returns to Greece following the *MSS v Belgium and Greece* judgement of the European Court of Human Rights and the EC-4/11 and EC-411/10 judgements of the European Court of Justice.

Responses to the migratory movements of 2015 further illustrated these tensions. The hotspot approach and the EU-Turkey agreement resulted in migrants being contained in Greece in order to facilitate return to Turkey, which placed disproportionate pressures on the Greek border control, asylum and reception systems (Amnesty International 2016a; European Council of Refugees and Exiles 2016a). At the same time, policies aimed at alleviating pressure in Greece, such as support by EASO and FRONTEX personnel, relocation of asylum seekers to other EU states, and financial assistance have proved insufficient in addressing the challenged poses by the intensity of refugee and migration flows (Amnesty International 2016a; European Commission 2016b). It is thus questionable if the hotspot approach and the EU-Turkey agreement adhere to the principle of non-domination, since they do not appear to take into account the interests of the Greek state.

### Justice as impartiality

The principle of justice as impartiality suggests that human rights norms should apply to all migrants equitably and requires states to avoid causing harm by putting migrants in situations where their basic human rights are violated (Eriksen 2016). Serious harm, defined as facing the death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat by indiscriminate violence in international or internal armed conflict, is a key concept in both European and Greek law (European Parliament and Council 2011, Art 15; Government of Greece 2013a Art 2). The Greek legal order, however, gives rise to several categorisations that appear not to adhere to the principle of impartiality and that are likely to expose migrants to serious harm.

First, the designation of migrants as 'illegal' upon entry, while rooted in law, risks causing harm to migrants because they are excluded at the point of entry from legal provisions on reception and asylum

procedures. In addition, by being labelled 'illegal', migrants are placed under the remit of Law 3386/2005 on unauthorised entry, which allows for their detention and return. This risks the possibility of *refoulement* to a country with insufficient protection safeguards. If entering through the Greek-Turkish borders, the Readmission Agreement between the two countries allows Greek authorities to initiate an immediate return to Turkey (Government of Greece 2002). While the implementation of the Readmission Agreement has not been successful (EMN 2014b), the legal context it established has allowed for practices of both informal and formal return mainly to Turkey (Amnesty International 2010; 2013).

Second, access to the asylum procedure and international protection was further complicated by considering Turkey a 'first country of asylum' for Syrian nationals and a 'safe third country' for migrants of other nationalities following the EU-Turkey Agreement (UNHCR 2016b). On this basis, most applications by Syrian, Afghani and Iraqi nationals have been declared inadmissible (Asylum Service 2019; ECRE 2016a) and not examined in their substance. The blanket application of the safe third country concept contradicts the requirement for individual assessment of the circumstances of each application (ECRE 2016b; UNHCR 2016b) and increases the risk of *refoulement*. There are also serious doubts on whether Turkey is in fact a safe country, given that instances of chain-*refoulement* to unsafe countries of origin or transit have been recorded both before and after the EU-Turkey Agreement (Amnesty International 2013; 2016b). Therefore, the application of the safe third country concept increases the risk of harm and may not adhere to conceptions of justice as impartiality.

Third, recognition rates in Greece until 2017 were very low in comparison to the EU average, despite an increase after the establishment of the Asylum Service in June 2013. For instance, the recognition rate in 2012 was 0.8 per cent compared to the EU average of 25 per cent and in 2014, it was 14 per cent compared to 33 per cent (European Stability Initiative 2015; Asylum Service 2016). Given that the Common European Asylum System entails the harmonisation of both definitions and procedures for examining and deciding on asylum applications, the significantly lower recognition rate in Greece suggests that legal categories were interpreted in a more restrictive manner than in other Member States, which is not compatible with the principle of impartiality. It could further suggest

a degree of arbitrariness (Eriksen 2016) contrary to conceptions of justice as non-domination.

Fourth, domestic law occasionally accords rights in a manner that does not adhere to the principles of equality and impartiality. For instance, legally resident third country nationals and recognised refugees are eligible for family reunification, but recipients of subsidiary and temporary protection and humanitarian status are not (Kasapi 2016). Refugees can also be unified with a broader range of family members than legally resident third country nationals, even if this only applies for three months following recognition (Government of Greece 2008c; Government of Greece 2014a). Similarly, unaccompanied minors with refugee status have full access to mainstream education, while those in detention do not. Further, domestic law differentiates between ethnically Greek migrants [*omogeneis*] and non-ethnically Greek foreign nationals. For instance, spouses of *omogeneis* entering Greece through the family reunification procedure can obtain a residence permit for five years compared to the maximum of three years proscribed for long-term residents (Government of Greece 2014a, Art 71, 81). These arrangements suggest that access to human rights is not equal or impartial, but determined by legal definitions as well as by nationality and migrant status (Morris 2012).

### Justice as mutual recognition

Greek legislation on asylum and immigration recognises, to an extent, the specific identities of migrants through the category of 'vulnerable groups'. This category includes unaccompanied minors, persons who have a disability or an incurable or serious illness, the elderly, women in pregnancy or having recently given birth, single parents with minor children, victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, victims of trafficking in human beings, and persons with a post-traumatic disorder, in particular survivors and relatives of victims of shipwrecks, a sub-category added in Law 4375/2016. In relation to reception, individuals belonging to vulnerable groups are entitled to special care, socio-psychological support and medical treatment (Government of Greece 2007; 2011; 2016a). In the case of hotspots, the Director of Reception and Identification Centres can transfer unaccompanied minors and those belonging to a vulnerable group to a Reception and Identification Centre located inland or to other

appropriate structures (Government of Greece 2016a, Art 15). In addition, asylum applications by individuals belonging to vulnerable groups should be examined by priority, and caseworkers conducting interviews should have training on the specialised needs of women, children, and victims of violence and torture who apply for asylum (Government of Greece 2016a, Art 52). Female applicants, in particular, can request to be interviewed by female caseworkers and with the aid of female interpreters (Government of Greece 2016a, Art 52). Yet recognising specific identities through the concept of vulnerability narrows mutual recognition only to those labelled as 'vulnerable' by the state, while ignoring the specific identities of those who are not.

However, other legal categories and definitions interfere with the recognition of specific identities and vulnerabilities. While the transposed Procedures Directives of 2005 and 2013 state that the detention of asylum seekers should be exceptional, and advise against the detention of unaccompanied minors and pregnant women (Government of Greece 2016a, Art 46) the blanket application of illegality upon entry to Greek territory and provisions relating to hotspots have allowed for the detention of vulnerable groups (Fundamental Rights Agency 2011; Amnesty International 2016a). Similarly, the detention of individuals belonging to vulnerable groups under return procedures is permitted (Government of Greece 2011). In addition, the application of the safe third country concept can be interpreted as challenging conceptions of justice as mutual recognition, since Turkey is considered safe without regard to the specific identities and experiences of individual asylum seekers.

A further arrangement that ran counter to justice as mutual recognition concerned the selection of asylum applicants for relocation, which is made on the basis of EU-wide recognition rates, and therefore according to nationality. However, selection on this basis ignores the specific circumstances and identities that might render applicants of other nationalities eligible for international protection.

Lastly, while the concept of integration may entail the recognition of migrants' specific identities in other national contexts, in Greek law it is conceptualised primarily as a process of socio-economic participation and familiarisation with Greek culture, history and language (Government of Greece 2014a). As such, there is little in law to suggest conformity with the principle of mutual recognition.

## Conclusion

Legal definitions and categories in Greek law are generally transposed from EU legal instruments. There are, however, some differences between domestic and EU legal norms. For instance, in Greek law, border areas are excluded from the remit of the transposed Returns directive, while the legal framework on reception includes security-oriented procedures such as identification and fingerprinting. While ‘children’ and ‘minors’ are defined as persons under 18 in EU directives (European Parliament and Council 2013; 2011), the Greek law defines minors as below 14 in asylum law or below 15 in what concerns crimes related to human trafficking. In addition, there is no list of designated safe third countries in Greek law. Such discrepancies raise questions both in terms of the consistency of EU legal categories among Member States (see den Heijer et al. 2016) and conceptions of justice as impartiality.

However, the particularities of the Greek case suggest that *both* the designation of categories in law *and* their interpretation and application have implications in terms of global justice. The designation of migrants who enters Greece in an unauthorised manner as ‘illegal’ risks causing harm because of potential exclusion from the asylum procedure and the possibility of *refoulement*. This is contrary to the principle of avoiding harm which underpins conceptualisations of justice as impartiality (Eriksen 2016). The possibility of harm is further increased, in the context of the EU-Turkey Agreement, by the application of the concepts of first country of asylum and safe third country on Turkey so as to facilitate return. The imposition of this interpretation by the European Union both on Greece and migrants in need of international protection points to tensions with conceptions of justice as non-domination.

Lastly, while there is some evidence that the specific identities of migrants are recognised through provisions for vulnerable groups, the blanket application of concepts – such as ‘safe third country’, detention or eligibility for relocation – runs the risk of ignoring the needs and experiences of individual migrants, and challenges conceptions of justice as mutual recognition. While these issues are not unique to the Greek context, they are exacerbated by pressures engendered by EU policies in response to the migratory movements of summer 2015.



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# Chapter 4

## Hungary

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Since the late 1980s, due to the increasing competition in the world economy, the rise of FDI, and the evolving EU integration, the role of migration as a source of labour and human capital has been increasing. Throughout the EU, regions and people have become increasingly involved in the global systems of migration. Over the past sixty years, net migration rates have been fluctuating significantly in south-eastern Europe. In the 1950s, it was a region of net emigration, with the exception of countries in the south-west of the Soviet Union. Changes that occurred between the 1960s and 1990s turned some areas into destinations of immigration flows, while others became or remained areas of emigration.

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<sup>22</sup> This draft was written in 1 December 2016, so it reflects the state of affairs up until that time.

Over the last 60 years, the destination countries of emigration from Hungary have not changed significantly, which shows how important historical links are in mass migration. Hungarian emigrants have traditionally been moving to Austria, Germany, the United Kingdom, North America (USA and Canada), to some extent Australia, and to Israel in the 1970s. At the same time, in line with regional trends, Hungary's external relationships have become more Eurocentric. Even if we look at the refugee inflows to Hungary since 1989, when the country signed the Geneva Convention, and especially between 1997 (when geographical limitations concerning the non-European countries were lifted) and early 2015, the cyclical inflows were based on incoming Hungarians (in the early years), Bosnians (1994-95) and Kosovars. Afghanistan, Pakistan and Iraq, however, played smaller role until 2015, when large crowds went through without stopping in Hungary.

Concerning immigration, the key feature is that the whole region including Hungary, while sending massive flows of people through the historical links to the 'West', receives migrants only from its neighbourhood. Further immigration links are rare and relatively weak (like China, Vietnam or other areas of the world). Thus, in addition to low fertility, there is also an 'emptying' process in Hungary and the surrounding region when it comes to migration.

### **Brief history of migration legislation**

After 1989, the first legal change was to favour the return of Hungarians who lost their citizenship due to restrictive policies (Hungarian National Assembly [HNA] 1989, Act XXXI). When Hungary joined the Geneva Convention, this legislation was mainly used by ethnic Hungarians from neighbouring countries and by East German citizens. Legislation changed as the number of immigrants and asylum seekers radically increased. In 1993, the 'Aliens' Act' (HNA 1993b, Act LXXXVI) came into force to tighten the 1989 law. As a result, the process of naturalisation for a foreign citizen requires eight years of residency in Hungary, and at least three years of living and working in Hungary with a residence permit is required in order to gain a settlement permit.

Finally, in 1998 an Act on Asylum entered into force (HNA 1997, Act CXXXIX), which ended geographical limitations of refugees and specified the three categories with different procedures and rights:

refugees, the temporarily protected and persons granted subsidiary protection.

### Entering the EU and the creation of a four-pillar system

By the early 2000s, Hungary established a four-pillar immigration system directed at:

- EEA citizens
- Third country nationals without an ethnic-historical background connected to Hungary
- Foreign citizens with historical or ethnic ties to Hungary
- Asylum seekers based on EU and international legislation<sup>23</sup>

During the EU pre-accession period, national rules and legislations on migration were adapted in harmonising with EU legislations and norms. The 2001 Act on the Entry and Residence of Foreigners (HNA 2001, Act XXXIX), which entered into force in 2002, was the legal basis of the free movement of EU citizens in Hungary and divided the legal status of immigrants into EU citizens and third-country nationals (TCNs). However, it preserved the requirements for settlement permission even for EU citizens, namely three years of working and living in Hungary with a residence permit. For TCNs, it required eight years of residence for naturalisation. Certain ethnic privileges were also built into the system, most importantly social and educational support for ethnic Hungarians living outside the country and legal support when applying for Hungarian citizenship (HNA 2001, Act LXII). This shows that the Hungarian immigration policy and legal framework followed the previously existing German model of selective exclusion and system of ethnic privileges. In the same period, Hungary, just like other applicant countries, signed all relevant EU legislation concerning refugees and human rights.

In 2004, both regulations and the institutional system of migration issues were transformed. The 2004 XXXIX Act established the Office of Immigration and Nationality (OIN). The 2007 Act I (Government Decree 113/2007, Hungarian Government 2007) defines the rights of EEA citizens to free entry, registration and rights of permanent residence, but do not really support their access to public education or health care. Act II of 2007 on the Entry and Stay of Third Country

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<sup>23</sup> More detailed background material concerning various purposes and conditions of stay and settlement in Hungary, naturalisation, and forms of international protection can be accessed by sending an email to [attilamelegh@gmail.com](mailto:attilamelegh@gmail.com)

Nationals (Government Decree 114/2007, Hungarian Government 2007) defines the rights of TCNs, which is in accordance with EU criteria.

There has been several attempts to further enhance the ethnic privileges of people of Hungarian origin, including a referendum (2004) on providing automatic citizenship if their ancestors lived on previous territories of the Hungarian Kingdom. In 2007, Hungary joined the Schengen Zone, which introduced complete freedom of movement. In the same period, Hungary also introduced complete freedom of employment for EEA citizens. This structure has been reconfigured since 2010.

In 2011, an amended citizenship law was established (HNA 2010, Act XLIV amending HNA 1993, Act LV). It offers full citizenship to everyone who knows the language, is able to claim historical Hungarian background and has one ancestor who lived on the territories of historical Hungary. This law provides them rights to move freely and to settle in Hungary, even if they come from non-EU countries. For TCNs without such a background, however, the process of naturalisation still takes 11 years overall, preserving the continuous ethnic-historical privilege built into the Hungarian system of immigration.

In 2012, the government created a special proceeding for immigration with national economic interest, the so-called national settlement permit (HNA 2007, Act II, Article 35/A, enrolled by the HNA 2012, Act CCXX) for those who have been holding a residence permit for any purpose for at least six months prior to the submission of the application and provided securities with a total nominal value of 300 000 EUR have been registered (which should be invested into a special personal treasury bond issued by the Government Debt Management Agency) (HNA 2012, Act CCXX). This new legislation was introduced in order to finance governmental debt and to provide privileges not on the basis of ethnic-historical grounds.

In September 2013, the government (Government Resolution 1698/2013, Hungarian Government 2013) implemented the Migration Strategy based on the seven-year-long strategic plan document related to the Asylum and Migration Fund of the EU for the period of 2014-20. The main principles of the strategy are 1) safeguarding free movement with enhancing the simplified naturalisation of the Hungarian diaspora, 2) providing international protection for asylum



seekers based on international and national laws, 3) integration focusing on legal migrants and beneficiaries of international protection, 4) protecting stateless persons by assistance of granting independent status and protection, 5) fighting illegal migration by actions against violations of the rules of entry and for terminating the illegal situations stemming from abuse of legal migration and residence opportunities; and 6) the importance of communication. These principles also show the hierarchical structure of the migration policy, the focus on securitisation, and the exclusion of topics like the preferential provision of citizenship (i.e. ethnic policies), emigration, or a detailed discussion of integration.

## Amendment of legal regulations concerning refugees after 2013

With the arrival of large numbers of asylum seekers from Kosovo in 2014-2015, Hungary started experimenting with various symbolic and real legal changes in order to slow down and even stop the incoming flow of refugees.

These changes included the following:

1. Changed the legal status of Serbia and various other countries to 'safe countries' (Government Decree 191/2015, Hungarian Government 2015).
2. Built a border fence (HNA 2015, Act CXL) along the Hungarian-Serbian border (HNA 2015, Act CXXVII) and restricted entry points for refugees.
3. Started criminalising the illegal crossing of borders (HNA 2015, Act CXL).
4. Introduced a so-called crisis situation ('state of exception') due to extreme migratory pressure (09.03.2016).

5. Restricted several rights of people seeking and receiving international protection (Amendments on HNA 2007, Act LXXX on Asylum and Act LXXXIX on State Borders 2016).<sup>24</sup>
6. Started a (to a large extent) symbolic fight against the ‘forced settlement’ of immigrants by the EU which ended in an inconclusive referendum and an attempt to change the constitution.

## Relevant definitions

### Migration

The Hungarian legal system defines the main types of migration in reference to the EU legislation. In addition, it intends to provide exclusive rights to TCNs with a Hungarian background. Four main types of migrants are recognised in the Hungarian law: the asylum seekers and beneficiaries of international protection (HNA 2007, Act LXXX), the EEA citizens (HNA 2007, Act I), the TCN migrants, except asylum seekers (HNA 2007, Act II), and the ‘Hungarians abroad’ (co-ethnic Hungarians living outside of the country).

### *Key categories used in the Hungarian legal system*

The Hungarian legal system uses the term ‘illegal’ migration/ migrants rather than ‘irregular’. On the other hand, it does not refer to ‘legal’ or ‘regular’ migration/migrants, as the focus of the relevant laws is on the process of permissions and visas.

Only a few official documents refer to the term ‘illegal immigrants’ in reference to the Schengen Borders Codex, and uses the term in

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<sup>24</sup> Amendment of the Asylum Government Decree (from 1 April 2016): Termination of monthly cash allowance of free use for asylum-seekers (monthly HUF 7125/ EUR 24). Termination of school-enrolment benefit previously provided to child asylum seekers. Amendment of the Asylum Act (from 1 June 2016): Terminating the integration support scheme for recognised refugees and beneficiaries of subsidiary protection introduced in 2013, without replacing it with any alternative measure; introducing the mandatory and automatic revision of refugee status at minimum 3-year intervals following recognition or if an extradition request was issued (previously refugee status was not limited in time, yet it could be withdrawn any time); reducing the mandatory periodic review of the subsidiary protection status from 5 to 3-year intervals following recognition; reducing the maximum period of stay in open reception centres following the recognition of refugee status or subsidiary protection from 60 days to 30 days; decreasing the automatic eligibility period for basic health care services from 1 year to 6 months following the recognition of refugee status or subsidiary protection (Hungarian Helsinki Committee 2016).

reference with crossing the Hungarian border in an illegal way (HNA 2007, Act II, Section 43), such as entering the country without visa if it is required, or not entering through the official border crossing points, especially since the recent migration crisis in 2015. A fence has been built on the south borders of the country which is considered as a state facility (HNA 2015, Act CXL). Therefore, crossing it is a crime punished with three years' imprisonment or, if the crossing was committed as part of a mass riot or by using arms, it can be punished with five years' imprisonment (HNA, 2015 Act CXL, Section 352/A-C).

Only the act CLXXV of 2015 (HNA 2015, Act CLXXV) refers to 'irregular migration' in relation to the recent migration crises. According to the preamble of the act, the Hungarian Parliament is 'aware of the historical challenge of the irregular migration meant for the European Union and Hungary', and acknowledges and approves the efforts made by the Hungarian government to protect the national borders by building a fence.

### ***Key forms of legal migration and related basic rights***

Legal/regular migration, in reference to EU legislation, is separated into four groups: the migration of EEA citizens whose rights are in accordance with EU legislation; TCNs, for whom there are ways of acquiring Hungarian citizenship outside the country; asylum applicants who receive the same rights as Hungarian citizens if they are recognised as refugees or beneficiaries of subsidiary protection (see below in the section on Asylum seekers and refugees), and Hungarian citizens naturalised outside of Hungary and who have established a residence in Hungary.

### ***Who is an economic migrant?***

The Hungarian legal system does not refer to the term 'economic migrants'. Nevertheless, those persons who hold a permit which allows the lawful performance of gainful work could be considered as 'economic migrants'. This includes the following permits: 1) residence permit for the purpose of gainful employment, 2) seasonal employment visa, 3) family reunification (which enable the family member without any restriction), 4) EU Blue Card, 5) residence permit granted on humanitarian grounds, and 6) to a limited extent those who stay in Hungary in order to pursue studies. Moreover, it includes all kinds of settlement permits, such as 7) Permanent

Residence Card, 8) EC Permanent Residence Permit, 9) Temporary Settlement Permit, 10) National Settlement Permit.

### ***What is the legislation referred to? (EU/UN)***

The Hungarian legal system mainly refers to EU law as a reference point in the relevant texts and it has limited reference to UN legislation. UN legislation and UN principles are referred to mainly in the Preambles of the relevant pieces of legislation. Hungary as an EU Member State (MS) has the obligation to adapt its legislation to the EU law and therefore references to EU law can be found in the so-called approximation clauses in the relevant pieces of legislation. The Hungarian state administration is willing to integrate UN initiatives if the EU approves such legislation. This has been a continuous policy since Hungary's EU accession.

### ***What rights are granted to an irregular migrant?***

Hungary has signed all international human rights conventions, thus fundamental human rights should in principle apply to irregular migrants as well. However, Hungary has been criticised by international organisations for not applying those in all cases (UNHCR 2016).

A special case of irregular migrants is the 'stateless person', who is not recognised by any state as its citizen under the operation of its own law. Hungary is party to both UN Conventions on statelessness. It was also the first country to implement, in cooperation with UNHCR, a quality assurance initiative with regard to statelessness determination. Hungary - in line with all other EU MSs - has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

### ***How does family reunification work?***

For the purpose of family reunification, residence permits could be granted for TCNs if the person is a family member of a Hungarian citizen, an EEA national or a TCN who has residence, immigration, permanent residence, national permanent residence, or EC permanent residence permit (hereinafter sponsor). In case of family members of a Hungarian citizen, an EEA national and a refugee, work permits are granted.

The following family ties are recognised in relation to family reunification: spouse, minor children common with his/her spouse, minor children of his/her spouse (including adopted children in both cases), dependent parent(s), sibling(s) or other direct relative(s) if he/she is unable to care for oneself due to his/her health status. For third country nationals born in Hungary, residence permits should be granted in purpose of family reunification.

In the case of a refugee's family members, the above-mentioned kinships are recognised even when there is a lack of documentation proving the family relationship. However, marriage with the spouse must have occurred prior to the arrival of the refugee. Moreover, for parent(s) of unaccompanied minors, residence permits should be granted also in purpose of family reunification. Family members of Hungarian citizens are granted preferential routes of naturalisation as mentioned above. The validity of residence permits issued for family reunification could not be longer than the residence permit of the sponsor.

The right of residence of a family member who is a TCN shall terminate if the relationship is terminated within six months from the time when the right of residence was obtained, provided that it was contracted solely for the purpose of obtaining the right of residence (HNA 2010, Act CXXXV 2§ (2)). Accordingly, the TCN family members of EEA citizens have all the rights granted by EU law which is extended to the family members of Hungarian citizens. Concerning the family reunification of TCNs, Hungary has transposed the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (European Council 2003).

#### *Which provisions do exist for non-accompanied minors?*

In the Hungarian law, 'unaccompanied minor' means 'any third-country national below the age of eighteen, who arrive on the territory of Hungary unaccompanied by an adult responsible for them whether by law or custom, for as long as they are not effectively in the care of such a person, including minors who are left unaccompanied after they entered the territory of Hungary' (HNA 2007, Act II, 2§ e). The same definition is used in the asylum legislation (HNA 2007, Act LXXX).



The law offers no details about specific provisions for unaccompanied minors because they are not considered as a separate group of migrants, but as TCNs having special (procedural or reception) needs, meaning that asylum applications of unaccompanied minors have to be prioritised. Moreover, the asylum authority has to arrange the temporary placement of the minor in a childcare institution and notify the guardianship authority without delay. The guardianship authority then has to appoint the guardian in no later than eight days from the notification. Unaccompanied minors may never be detained. In the case of an unaccompanied minor whose application is rejected, besides the fundamental guarantees for *non-refoulement*, return may not be implemented except if family reunification or (public) institutional care is provided in the country of origin. If this condition is not met, the unaccompanied minors receive a humanitarian residence permit.

## Asylum seekers and refugees

### *Which categories of protection exist and which rights are these entitled with?*

The Hungarian legal system distinguishes four types of protection, which relate to refugee status in EU law. These are refugee (*menekült*), beneficiary of subsidiary protection (*oltalmazott*), beneficiary of temporary protection (*menedékes*), and tolerated stay (*befogadott*) (HNA 2007, Act LXXX).

Table 4.8. Protection categories and corresponding rights

Status	Work	Family reunion	Residence document	Travel documents	Basic health care
<b>Refugee</b>	Yes, same as HU nationals	Yes	Yes – ID card	Yes – Convention travel document	Yes
<b>Beneficiary, subsidiary protection</b>	Yes, same as HU nationals	Yes	Yes – ID card	Yes	Yes
<b>Beneficiary, temporary protection</b>	Yes	No	Yes	Limited – for a single travel	Yes
<b>Tolerated stay</b>	Yes	No	Yes – humanitarian residence permit	Only for a single travel to the country of origin	Yes

### Who processes asylum applications?

The asylum procedure is aimed at determining whether a) a foreigner seeking recognition satisfies the criteria of recognition as a refugee, a beneficiary of subsidiary protection or a beneficiary of temporary protection, b) the principle of *non-refoulement* is applicable with regard to foreigners seeking recognition, c) a foreigner seeking recognition may be expelled or deported where the principle of *non-refoulement* is not applicable, d) a foreigner can be handed over in the framework of a Dublin transfer (HNA 2007, Act LXXX, Section 32).

The procedure starts when an application is submitted to the asylum authority. It must be submitted in person before the authority, but the statement on the intent to apply for asylum could also be made during the alien's police procedure, infringement or criminal procedure (OIN, n.d.). OIN is responsible for the asylum procedure, and the integration of the beneficiaries of international protection. However, it is also the migration authority. This centralised administration means unified application of law on the one hand, but also that local authorities have no role in the process.

Table 4.9. Asylum seekers in Hungary and persons granted international protection status (2000-2015)

Year	Asylum seekers	Refugees	Subsidiary protection	Tolerated stay
2000	7 801	197	-	680
2001	9 554	174	-	290
2002	6 412	104	-	1 304
2003	2 401	178	-	772
2004	1 600	149	-	177
2005	1 609	97	-	95
2006	2 117	99	-	99
2007	3 419	169	-	83
2008	3 118	160	88	42
2009	4 672	177	64	156
2010	2 104	83	132	58
2011	1 693	52	139	14
2012	2 157	87	328	47
2013	18 900	198	217	4
2014	42 777	240	236	7
2015	177 135	146	356	6
<b>2000-2015 total</b>	<b>287 469</b>	<b>2 310</b>	<b>1 560</b>	<b>3 834</b>

Source: Hungarian Central Statistical Office

### ***To what extent does the protection actually granted comply with existing legal frameworks?***

The Hungarian asylum law is based on the Geneva Convention but it also uses the related EU legislation in fields not covered by Geneva, such as subsidiary protection or temporary protection. Moreover, the Hungarian legislation introduced the 'tolerated stay' status in cases where none of the categories of international protection are applicable.

Before 2010 the Hungarian immigration policy on beneficiaries of international protection was rather permissive concerning obligations or optional provisions stemming from EU law. From 2010 onward the Hungarian legislation has become steadily stricter. Within the framework of the EU directives of the Common European Asylum System, it means that Hungary has mainly transposed the stricter rules from the Acquis such, as the asylum detention that was introduced in 2013.

### ***References to international protection in national documents***

The Hungarian legal system mainly refers to EU law as a reference point in the relevant texts and it has limited reference to UN legislation. UN legislation and UN principles are referred to mainly in the Preambles of the relevant pieces of legislation. Hungary as an EU MS is obligated to adapt its legislation to EU law and therefore, references to EU law can be found in the so-called approximation clauses in the relevant pieces of legislation.

## **Reception system**

### ***Organisation of reception***

Reception as outlined below is only available for asylum seekers in Hungary, so this part should be understood accordingly. As elaborated on in the previous sections, OIN grants four types of protection in Hungary. After a formal asylum process, the type of protection is determined and applicants may be granted asylum.

The reception mechanism is outlined in Chapter VI of the Asylum Act, under the title 'Reception conditions (*befogadási feltételek*), asylum detention (*menekültügyi őrizet*); benefits and support for the refugee, the person of subsidiary protection, and the beneficiary of temporary protection'. The process is put in motion as soon as the person crosses the Hungarian border and applies for one of the above titles. The aim of the process – apart from assessing the correct category of the asylum

seeker – is to determine whether the principle of *non-refoulement* shall be applied, and if not, whether the asylum seeker should be expelled, extradited, or be transferred to another MS based on the Dublin procedure (HNA 2007, Act LXXX, Section 33). The basic rights, benefits and material conditions are the same for both ‘regular’ applicants and those who are put under asylum detention (HNA 2007, Act LXXX, Section 28, modification on HNA 2013, Act XCIII, Section 89). The difference regarding the right to the provided benefits lies between those who are indigent (in case of first-time applicants, the reception with all the benefits is free of charge) and those who are not, or who are later proven to have concealed their financial possibilities (they either have to pay or refund later) (HNA 2007, Act LXXX, Section 26 (2-5)). Material conditions include in-kind contributions, such as accommodation, three meals per day/food allowance, hygienic tools/allowance, clothes, travel discounts (for train and bus) and funeral costs. The original practice (Government Decree 301/2007, Sections 22-23, Hungarian Government 2007) also included cash allowance, in the form of an (extremely low) amount of pocket money and the right to a share of donations, but these possibilities were eliminated by a 2013 and a 2016 Decree (Government Decrees 62/2016 and 446/2013, Sections 8 (d) and 36 (2) b, Hungarian Government 2013 and 2016). As per the version of the 2007 Decree currently in force, ‘the reception institution may offer work opportunities for the asylum seeker within its own territory,’ for ‘a monthly remuneration of up to 85 per cent of the smallest amount of old-age pension’. The expected work is to contribute to the maintenance and preservation of the facility. Since 2015, applicants who are not in detention are also entitled to join the Hungarian public work programme (HNA, 2015, Act CXXVII).

### Type of structures, time length

The reception is organised around three types of facilities: reception centres (*befogadó állomás*), community shelters (*közösségi szállás*) and guarded asylum reception (detention) centres (*menekültügyi őrzött befogadóközpont*). As for reception centres, there are two currently operating in the country, in Bicske and in Vámoszabadi, after the biggest one in Debrecen (capacity above 700 persons) was closed at the end of 2015. The Bicske centre has been in place since 1989, accepting refugees without geographic limitation since 1998. Its ‘normal’

capacity is around 300 persons.<sup>25</sup> The Vámoszabadi centre is quite new, operating since 2013, with a capacity of more than 200. Apart from these permanent facilities, there are temporary centres also in Nagyfa, Körmend and Kiskunhalas. There is currently one community shelter in Hungary, located in Balassagyarmat, with a capacity of 110. The maximum length of stay in reception centres and the community shelter for those granted protection, is currently 30 days.<sup>26</sup>

Asylum detention was introduced to Hungarian law in 2013 (HNA 2013, Act XCIII, Section 92). As for the detention centres, the maximum duration of detention is six months. It can be ordered by OIN for up to 72 hours. This can be extended by the court by 60 days, and after that prolonged by another 60 days. The system was introduced in 2013 with the amendment of the Asylum Act, and detention facilities currently operate in Békéscsaba (capacity 185), Nyírbátor (capacity 105) and Kiskunhalas (capacity 76). The rationale for the detention is to 'ensure the availability of third country applicants' during the asylum procedure. According to the Asylum Act (HNA 2007, Act LXXX, Section 31/A (1)), the OIN may detain the applicant:

- (a) to establish his/her identity or nationality;
- (b) when a procedure is ongoing for the expulsion of the applicant and it can be proven or there is a well-founded reason to presume that the person is applying for asylum exclusively to sabotage the expulsion;
- (c) in order to establish the required data for conducting the procedure;
- (d) to protect national security, public safety, or public order;
- (e) when the application has been submitted in an airport procedure;
- (f) where Dublin transfers are proved to be problematic.

Families can only be detained under exceptional circumstances, while for unaccompanied minors, it is prohibited. However, civil society groups and international organisations question whether transit zones are not detention centres and that the government violates non-detention rules. The Hungarian regulation is in line with EU Directive 2013/33 (European Parliament and European Council 2013), which sets

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<sup>25</sup> According to press releases, the Government decided to close the Bicske reception centre by the end of 2016 (Hungarian Government, Press release, 2016.09.13).

<sup>26</sup> Previously two months (HNA 2007, Act LXXX, Section 41 (1)). Reduced to 30 days as from 1 June 2016 by HNA 2016, Act XXXIX.



out the legal and material conditions and guarantees for detention. However, though the directive sees detention as a last resort, in Hungary, 'detention became a key element in the Government's policy of deterrence,' UNHCR observed (UNCHR 2016).

Cases of unaccompanied minors are treated by the Guardianship Office of Hungary, while their accommodation is organised in two specialised childcare facilities in Fót and in Hódmezővásárhely (the latter closed in 2016). While their detention is explicitly banned by law (HNA 2007, Act II, Section 56; HNA 2007, Act LXXX, Section 32/B), the rules for other vulnerable groups are less restrictive. As the number of asylum seekers started to increase significantly in Hungary in the middle of 2015, the reception system underwent some important changes, reacting to the enhanced challenges. In the peak period of 2015, the authorities decided to effectuate temporary facilities, 'registration centres', in order to provide for the primary humanitarian needs of asylum seekers and for the registration prescribed by the EU *acquis*. These facilities ceased to operate following the decrease of the migratory pressure. Moreover, simultaneously to completing a border fence, the Government introduced the so called 'transit zones'. These zones were established at the southern border of Hungary (in Tompa, Röszke, Beremend, and Letenye, the latter two at the Hungarian-Croatian border has never been operational). In the transit zones, asylum and immigration authorities, and the security services are present. This is where applicants for asylum are registered, and primary interviews are conducted. In case of applicants who do not belong to any of the vulnerable groups, a specific accelerated procedure, the so-called border procedure is conducted. There is room to appeal the decision on the spot. In practice, the applicants detained in the transit zones until a decision is made in their cases. The border procedure, however, does not apply to vulnerable applicants, who are given special attention and are moved to open reception facilities as soon as possible.

## Return of migrants

### *When is return possible?*

Return is applicable when a TCN does not satisfy (or does not satisfy anymore) the conditions of stay in the country. This includes those who have never had any kind of permission, those whose permit has expired and those whose applications (asylum or other stay) has been

refused. Here, we only examine the practice regarding refugees. Hungary's Fundamental Law reaffirms *non-refoulement* in its Section XIV (3). Based on these rules, the case of every asylum seeker, who declare their intention of applying for asylum in Hungary by one of the above-mentioned procedures, should be carefully scrutinised. Before any such declaration of intention, the alien policing authorities are responsible for deciding whether a person crossing the border has a right to stay in the country. If he/she does not have that right, the authority can order either his/her return or expulsion. The alien policing is 'obligated to examine the principle of *non-refoulement* in all procedures regarding the order and execution of return and/or expulsion' (HNA 2007, Act II, Section 52 (1)), for it is the most basic prerequisite in the asylum procedure, guaranteeing that the asylum seeker can access the territory of the state.

### 'Safe' countries

In 2010, with a modification of the Asylum Act, the concept of 'safe third country' was introduced in the asylum procedure (HNA 2010, Act CXXXV, Section 2(i)). The criteria for 'safe third countries' included that:

- (a) the applicant's life or freedom should not be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion;
- (b) the principle of *non-refoulement* is respected;
- (c) the international legal rule that aims to prevent deportation to a country where he/she would face the danger of murder, torture, or any kind of inhumane treatment is respected and applied; and
- (d) applying for asylum is possible and once granted, protection in accordance with the Geneva Convention is assured.

In the case of a safe third country, the asylum authority could find the application inadmissible, and thus reject it without examining it in merit – while the applicant could claim that the specific country was not safe in his/her respect. Hungary had not adopted a list of safe third countries at that time (along with the 2010 change in legislation). The government went further in this sense only in 2015, by publishing a list of safe third countries in a governmental decree (Government Decree 191/2015, Hungarian Government 2015). The list included: all EU MSs, EU candidate countries (except Turkey), MSs of the European Economic Area (EEA), US States that do not

have the death penalty, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia, and New Zealand. Serbia, therefore included in the list, is still the main problematic point, as it remains highly debatable whether it can be recognised as safe. Many relevant international actors argue that it cannot, because of its lack of capacity of properly handling the difficult situation (how to manage sudden surges in migration) and for the risk of chain-*refoulement* it holds (see Bakonyi et al. 2011 for details). This 2015 legal development, along with others already mentioned from the same year, could mean a 'quasi-automatic rejection at first glance of over 99 per cent of asylum claims (as 99 per cent of asylum-seekers enter Hungary from Serbia), without any consideration of protection needs' (Hungarian Helsinki Committee 2015) Under these circumstances, the only remaining legal guarantee - that nobody can be returned or expelled whose application for asylum is lodged by the authority - seems to be unsatisfactory.

### ***Readmission agreements***

The above-mentioned Act II of 2007 specifies the concept of readmission agreements (an international treaty on the authorisation of transfer, officially accompanied transit, and travel of persons through state borders), which constitute the basis of this sort of removals, and sets forth the procedural regulations that apply (HNA 2007, Act II, Sections 2 (i), and 45/B). Since the Amsterdam Treaty delegated readmission issues to the EU level, the EU agreements apply automatically to Hungary. However, this is a shared competence, which means that in case there is no agreement with a specific country on the EU level, MSs can have their own agreements with third countries. Thus, while many agreements exist on the EU level,<sup>27</sup> this system mostly builds on bilateral agreements between states. Hungary has agreements with all its neighbours and other countries, regulating the execution of the readmissions in the specific cases (Manke 2016). For Hungary, this shared competence system first became important in regard to Kosovo. Since the EU did not have (and still does not have) a readmission agreement with Kosovo, and Serbia was unwilling to accept transfers based on the EU-Serbia agreement, during the enhanced migration period from 2012,

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<sup>27</sup> The EU currently has 17 Readmission Agreements with third states (see European Commission, n.d.).

Hungary was able to effectuate transfers based on its bilateral agreement with Kosovo (HNA 2012, Act LXXXVII).

## Search and rescue operations, hotspot approach

### *How are they defined at the national level?*

In September 2015, Hungary was offered 'hotspot assistance' by the European Commission, which was shortly after turned down by the government (Hungarian Government 2015). Behind this move was two basic convictions. First, Hungary is not a 'frontline state', meaning that asylum seekers arrive to its territory after having already been to another EU MS, namely Italy or Greece (this can be important when it comes to executing transfers based on the Dublin Regulations). Second, migration should not be simply 'handled,' it should be stopped. According to government officials, the hotspot system design builds on the opposite conviction, because of the different relocation and resettlement options, and the establishment of hotspots within the territory of the EU.

### *Is there a national legislation managing the hotspot approach?*

The government elaborated only a semi-official action plan, the so-called Schengen 2.0 (About Hungary, 2016). This plan includes the following ten points: 'borders', 'identification', 'corrections', 'outside', 'agreements', 'return', 'conditionality', 'assistance', 'safe countries' and 'voluntary'.<sup>28</sup> The action plan, including the Hungarian approach to the hotspot policy, is not (yet) codified in law. The most characteristic element of the government's position on the 'migration problem' is thus, probably, that it should be solved before it reaches Europe. Taking into account this fundamental assumption, Hungary has been taking part in joint Frontex operations, and has been cooperating with its partners in the framework of the Visegrad Group in order to strengthen external border control. The Hungarian government has also supported the idea of a new agency replacing Frontex, and on 6 October 2016, the new European Border and Coast Guard was officially launched with a Hungarian contribution of 65 persons (European Parliament and European Council 2016). Border protection

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<sup>28</sup> These are keywords which outline the government's strategy: 'border' means the protection of borders, 'identification' means the compulsory registration of biometric data, 'corrections' means the reestablishment of the proper functioning of the Dublin System, 'outside' means that asylum procedures should be completed outside the EU, and so on. The full program is available under the link.

however, is only one element in preventing migrants from reaching EU territory. Hungarian government officials also emphasise the need to 'get help to those in need instead of bringing the problem to Europe' (Hungarian Government 2016) According to the Department for International Development and Humanitarian Aid (Ministry of Foreign Affairs, n.d.), Syria and Libya are, among others, set as target countries for Hungarian humanitarian aid. According to the information provided on the website, Hungarian aid diplomacy has been focusing on Syria since 2012, directing 60 per cent of the resources to its neighbouring countries. The official strategy for 2014-20, however, does not highlight or even mention Syria, instead, focuses on Eastern European and Western Balkan targets (Ministry of Foreign Affairs and Trade, n.d.).

## Resettlement and relocation

### *How are 'resettlement' and 'relocation' defined?*

The definitions of resettlement or relocation in the Hungarian legal framework concerning migration are based on Act LXXX of 2007 on Asylum 7 § (5) and its decree 301/2007 (XI.9.) 7/A. Hungary undertakes only the resettlement or relocation of refugees – according to international regulations – which must be based on solidarity, but most importantly, it must be voluntary. Although the concepts of resettlement and relocation in the Hungarian legal system are not very well-defined, these issues were treated at EU level as Hungary was part of the implementation and evaluation of the EUREMA project (European Union's Relocation Project for Malta, which was evaluated by the European Asylum Support Office 2012). This was an intra-EU-location pilot project relocating refugees from Malta in 2011-2012, organised by the European Resettlement Network. Hungary is also a participant of the European Solidarity - Refugee Relocation System (Government Decree 1139/2011 and 91/2012, Hungarian Government 2011, 2012).

The Hungarian government also announced its decision to become a resettlement country, confirming its commitment through a pledge submitted to the Ministerial Conference organised by UNHCR in Geneva in December 2011 (UNHCR 2011). Later, it became member of the EUREMA project. However, according to a UNHCR report from 2012 (UNHCR 2012), Hungary as a country of asylum is not taking steps for establishing a framework of relocation and resettlement.



In line with the relevant Council decisions, Hungary should have to accept 1,294 refugees from other MSs, but together with Austria, Croatia and Slovakia, it has not pledged any places for relocation under Decision 2015/1523 and Hungary has lodged actions before the Court of Justice of the EU against Decision 2015/1601 (European Council 2015a, 2015b). In the case of resettlement, the European Commission Recommendation on a European resettlement scheme (European Commission 2015), 27 MSs and Dublin Associated States agreed on resettling 22,504 displaced people from outside the EU through multilateral and national schemes. Hungary did not participate in this agreement.

In February 2016, the prime minister announced that Hungary would hold a referendum on whether the country should accept the proposed mandatory quotas of settling (the expression he used was not relocation or resettlement, but settling or settlement.) Thus, the so-called Hungarian Migrant Quota Referendum on 2 October 2016 asked the following question: 'Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?'<sup>29</sup>

As we can see, the EU decision in 2015 was about relocation and the translation of the referendum into English used the word resettlement. However, the question in Hungarian was about future obligatory settling/settlement or, more precisely, forced settlement. As the public in general – including most representatives of the media – do not know the difference between the two concepts (or even three: relocation, resettlement and settlement) and as it is not defined in any Hungarian legal documents, the goals and effects of the EU decision about relocation or resettlement could have easily been misunderstood. The referendum was dealing with a future possibility of an EU decision about forced settlement of non-Hungarians in the country. The turnout of the referendum was too low to make the poll valid, and although the government stated its political validity (98% of the valid votes were 'no') and tried to amend the Fundamental Law of Hungary, this has also failed.

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<sup>29</sup> In Hungarian: 'Akarja-e, hogy az Európai Unió az Országgyűlés hozzájárulása nélkül is előírhasssa nem magyar állampolgárok Magyarországra történő kötelező betelepítését?'

### *Human smuggling*

Smuggling of human beings is defined in §353 of the Penal Code of Hungary and it follows EU regulation as defined in the Charter of Fundamental Rights. Recently the punishment for human smuggling has been strongly tightened (HNA 2015, Act CXL).

Human smuggling is currently punished as follows:

- (1) Any person who provides aid to another person for crossing state borders in violation of the relevant statutory provisions is guilty of a felony punishable by imprisonment not exceeding five years.
- (2) The penalty shall be imprisonment between two to eight years if the smuggling of human beings: a) is carried out for financial gain or advantage; or b) involves several persons crossing state borders.
- (3) The penalty shall be imprisonment between five to ten years if the smuggling of human beings is carried out: a) by tormenting the smuggled person; b) by displaying a deadly weapon; c) by carrying a deadly weapon; d) on a commercial scale; or e) in criminal association with accomplices.
- (4) The penalty shall be imprisonment between five to fifteen years if the smuggling of human beings is carried out in the different combination of the crimes mentioned in point 3).
- (5) The penalty shall be imprisonment between 10 to 20 years to any person who is the organiser or perpetrator of a crime defined in (3) and (4).
- (6) Any person who engages in preparations for the smuggling of human beings is guilty of misdemeanour punishable by imprisonment not exceeding three years.

The Unlawful Employment of TCNs is a separated criminal activity from human smuggling and is defined in §356.

Table 4.10. Human smuggling crimes broken down by border sections

	2014	2015	Total % of 2015	2016 until September	2016 Total % (until September)
<b>Austrian</b>	0	0	0 %	-	-
<b>Budapest</b>	2	1	0 %	0	0 %
<b>Croatian</b>	31	83	7 %	7	1 %
<b>Romanian</b>	69	63	5 %	23	10 %
<b>Serbian</b>	231	550	46,73 %	80	35,87 %
<b>Slovakian</b>	0	0	0 %	-	-
<b>Slovenian</b>	0	0	0 %	-	-
<b>Ukrainian</b>	27	13	1 %	3	3 %
<b>Inland</b>	233	467	39,68 %	110	49,33 %
<b>Total</b>	593	1177	100 %	223	100 %

Source: Hungarian Police, Border Police, 2016

### *Human trafficking*

Concerning human trafficking, the fundamental EU regulations are the foundations of the Hungarian legislation: the Charter of Fundamental Rights of the European Union, Article 5 about the Prohibition of Slavery and Forced Labour, or the special directive (European Parliament, 2000) created due to the high number of human trafficking in the EU. In 2006, Hungary also ratified the United Nations Convention against Transnational Organized Crime and its Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (HNA 2006, Act CI). Although there were some national strategies before 2013 (Government Decision: 1018/2008, Hungarian Government 2008), the actual legal framework of defining and punishing the different forms of human trafficking came into force on 1 July 2013 based on the Penal Code 2012/C regulation. This new definition emphasises the purpose of trafficking, for example for the purpose of exploitation.

In paragraph 143 of the Hungarian Penal Code, in section 'Crime Against Humanity', human trafficking is mentioned for the first time as '[a]ny persons who - being part of a widespread or systematic practice [...] engages in the trafficking in human beings or in exploitation in the form of forced labour'.

The exact definition and the punishment are stated in § 192, which distinguishes between two types of human trafficking:

(1) Any person who: a) sells, purchases, exchanges, or transfers or receives another person as consideration; or b) transports, harbours, shelters or recruits another person for the purposes referred to in paragraph a), including transfer of control over such person;

(2) Any person who - for the purpose of exploitation - sells, purchases, exchanges, supplies, receives, recruits, transports, harbours or shelters another person, including transfer of control over such person.

Thus, it differentiates between human trafficking for not defined reasons and for the purpose of exploitation. The first is punished with maximum three years, and the second with maximum five years of imprisonment. There are aggravating elements which can prolong the duration of imprisonment, such as different forms of physical abuse and endangering human life, targeting a disadvantaged group or a certain age group (the younger the worse) or doing it in an organised form for financial gain. In this system, the most serious punishment can be 20 years. Participating in the preparation of this crime can lead to up to two years' imprisonment.

In the Hungarian legislative system, smuggling of illegal immigrants has a similar weight regarding punishment as human trafficking, although the characteristics of the victims are not as well explained in case of smuggling, nor do they play an important role in defining the exact punishment.

## Three conceptions of justice

### Justice as non-domination

From a Westphalian perspective, with the necessary simplifications, we can treat the Hungarian state as a sovereign actor, who articulates and enforces migration policies, and therefore possesses power which might be abused to the detriment of either individuals (migrants) or other states. On the other hand, it is also a unit exposed or subjected to the possible domination of other actors, primarily the EU. These two aspects, however, are closely interlinked.

The problem of dominance appears basically on two territories of legal and institutional arrangements. The first is defined by procedures and arrangements concerning TCNs seeking international protection: arbitrary actions of the Hungarian state for limiting access to international protection. The second is the set by procedures and arrangements concerning TCNs with historical-ethnic ties to Hungary: arbitrary actions of the Hungarian state introducing exterritorial naturalisation without consulting the concerned states.

In the first case the Hungarian state gave way to, and engaged in, dominating practices vis-à-vis individuals and third states alike, by for example amending the existing law in Act CXL of 2015 to include the criminalisation of 'illegal immigration', the legally questionable implementation of the accelerated border procedure, and the introduction of a state of exception in case of crisis situations caused by mass immigration. In addition, it brought in new legal arrangements, such as the concept and the list of safe third countries, as noted above. With this, the state managed to effectively exclude potential asylum seekers from enjoying their internationally guaranteed rights, and arbitrarily altered a sensitive, interstate legal procedure, which by pushing back refugees impaired the interests of a third state (Serbia). Act CXL of 2015 is also noteworthy because it introduced the concept of 'crisis situation caused by mass immigration', a state of exception in the Agambenian sense, in which legal guarantees of non-domination may be suspended, allowing the government to use exceptional measures and disregard important laws. Also, Hungary is trying to block the return of asylum seekers to Hungary within the Dublin system. The rationale behind these legal actions, and a basis for the relating (political) narrative, was an extreme burden on the Hungarian migration system, interpreted as threatening to the state's authority, sovereignty and even existence.

Concerning the second category of dominance, as of Act XLIV of 2010, ethnic Hungarians can be naturalised on preferential terms. This act aimed for the unification of the Hungarian nation in its symbolic sense, including those ethnic Hungarians who have been excluded since the Treaty of Trianon (1920), which after World War I distributed two thirds of the historic Hungarian territories among the neighbouring countries. The highly political decision was not conciliated with these countries, specifically with those prohibiting dual citizenship, and caused tensions in bilateral diplomatic relationships.



As a way to understand this, we have to be aware that this situation was partially produced in a context where states – although formally equal partners – are involved in complex and highly unequal relationships, including their common exposure to global migratory flows. Without a deeper analysis of the frustrations this has caused, we risk to assume that the recent Hungarian rhetoric and policy of dominance is just a factor of political will, while there are also structural processes to consider. The Orbán government, when addressing these structural issues (like inequalities among Member States – noticeably, for the first time since Hungary’s accession to the EU), it has been verbally hostile to EU ‘dominance’ since its 2010 inauguration. And as we have seen, the ‘migration crisis’ provided an excellent opportunity for further criticisms of the incorrect policies invented and enforced by EU bureaucrats: the most conspicuous issue was the ‘forced settlement quota’, as explained earlier. Interpreting policies laid down in Council Decision 2015/1523 as arbitrary interference in Hungarian sovereignty, the government brought ‘external domination’ directly to the centre of the debate.

Thus, it can be concluded that in the Hungarian case the state is no guarantee of (interstate) non-domination. On the contrary, it tends to engage in practices that can be labelled as arbitrary interference vis-à-vis other states, not to mention vis-à-vis asylum seekers themselves. Nonetheless, we have to be aware that its position within the EU holds the risk of being dominated by other actors who have vastly different institutionalised practices and historical migratory processes than that of Hungary, which has traditionally been either an emigrant country or only received migrants from neighbouring countries.

### Justice as impartiality

The principle of impartiality is endangered in various ways in Hungary, most notably in the following points:

- The lack of an integrated view on the various categories of migrants in migration policy documents and the lack of implementation of any strategy of integration of migrants.
- The Hungarian state has established a four-pillar system which contains various hierarchies and priorities with differential procedures among and within categories of migrants.

Prior to September 2013, there was no governmental strategy in Hungary that could have provided some normative principles to the various categories of migrants. The 2013 Migration Strategy had many general and positive features, but also some challenges from the perspective of impartiality:

- It could not integrate all the processes of migration, most importantly immigration and emigration. This could have given a basic impartial perspective as it would have handled the rights of outgoing 'Hungarians' and incoming 'foreigners' in the same way. This lack of a combined perspective has become very clear when the Hungarian government has been trying to reduce various forms of immigration while at the same time fighting for the rights of outgoing Hungarians.
- The document promised the construction of a universal perspective for an integration strategy for all migrants, but this has not yet been adopted.
- The strategy stated that Hungary supports and facilitates all forms of legal migration, although the official communication of the government since 2015 blatantly contradicts this principle.
- Lack of monitoring and evaluation of the strategy (UNHCR 2013).

The state's priority is clearly to ensure full rights for Hungarian minorities living outside the country. There are certain privileges explained above, the most important one is that Hungary provides full citizenship for those who can prove that he/she had a Hungarian ancestor born in the territory of (historical) Hungary (HNA 2010, Act XLIV amending HNA 1993, Act LV). Another pillar of the policy is the category of EU and EEA citizens benefiting from free movement (of persons and labour) according to EU law. A third pillar consists of the TCNs who are treated in accordance with the *acquis communautaire*. Finally, regarding those who are seeking international protection and/or are crossing the borders of Hungary in an irregular manner, rights were strictly tightened in 2015 and 2016 as an answer to the migration crisis. The hierarchical treatment of these different 'types' as demonstrated above, could be a sign of a lack of impartial treatment. We also have to add that the tightening of the punishment for human smuggling was parallel to the tightening of the punishment for illegally crossing the temporary border protection fence. It shows the importance of defending the state border in every related issue. However, the punishment for unlawful employment of a TCN

has not changed, even under exploitative working conditions. It is still punished with only a maximum of three years imprisonment. Those differences show the unequal treatment of one of the most vulnerable groups of people.

### Justice as mutual recognition

We recognise three areas where justice as mutual recognition is clearly in danger.

- The unequal access to citizenship: for the sake of preferential treatment, the government reduced the institutional capacities toward immigrants without historic-ethnic ties to Hungary. In addition, there is a preferential treatment for ethnic Hungarians that have not (yet) obtained the Hungarian citizenship.
- The unequal recognition of migrants who do not form an accepted 'historical minority' (historical minorities enjoy a certain legal and cultural support).
- The lack of recognition of cultural diversity.

With regard to the unequal treatment in providing citizenship, we can refer to the Migration Integration Policy Index (Huddleston et al. 2015) which evaluates policies to integrate migrants. According to MIPEX, Hungary's overall score is 45 which is an average in the region, but Hungary ranks much lower, even compared to the regional average, in those fields that are related to mutual recognition such as education (score 15), political participation (score 23), and access to nationality (score 31). The exception is anti-discrimination policy, where Hungary's score is 83 of 100.

With regard to the access to citizenship, the key problem is not the preferential treatment of certain groups, but the reduction of the institutional capacity to handle the applications of other migrants after 2011. Co-ethnic Hungarians originating from non-EU states have favourable conditions at all levels of the immigration process compared to other TCNs (National residence and National settlement permits, or preferential naturalisation) if they can claim some ethnic background and/or one ancestor living on Hungarian territories (HNA 1993, Act LV, Article 5(3), enrolled by HNA 2010, Act XLIV).

Beside these policy measures, it should be noted that Hungary does not have any overall policy document on integration of immigrants.

The common praxis has been following the same logic of the immigration policies' four pillars, which is favourable to EEA nationals, co-ethnic Hungarians from neighbouring countries and immigrants of historical minorities, but non-supportive toward other TCNs and asylum seekers. From the perspective of mutual recognition, this means a clear geographic East-West divide on the one hand, and ethnic preferences on the other.

EEA migrants enjoy the social and political rights that come with EEA citizenship, creating a privileged zone of 'Europeans' which governmental priority is not independent from the increasing number Hungarian emigrants directed mainly to EEA countries. Mutual recognition of immigrants with ethnic backgrounds of historical minorities is more favourable because they are permitted to establish autonomy on a local governmental level and organisations which facilitate their socio-cultural recognition and integration. At the same time, they enjoy preferential treatment in accessing local and national media and various forms of cultural funds. They also enjoy certain privileges of political representation on a national level. In the meantime, other TCN groups receive no institutionalised support such as language and vocational training, or housing support.

Mutual recognition with regards to cultural diversity is institutionalised only in a limited way. There is a clear hierarchy of general recognition of diverse cultural origins and identities. The Hungarian government is maintaining a repressive and assimilatory discourse and a goal of building a homogeneous nation. In addition, in the educational sphere, there is substantial evidence that schools and educators follow a 'culturally blind' approach, meaning that they disregard the possible specific cultural and religious needs of children. These homogenisation efforts are also related to the structure of the historical migration processes Hungary has been experiencing.

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## Appendix

Data and statistics on the different categories of migrants:

Table 4.1. People holding permits entitled to reside or settle in the territory of Hungary

<b>Status</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016 by 30 Sept</b>
Immigration permit issued by OIN	-	-	-	-	-	5 574	5 073	4 924
Settlement permit issued by OIN	-	-	-	-	-	2 973	2 726	2 585
Immigration permit	47 205	42 659	40 781	39 267	38 505	37 528	-	-
Settlement permit	23 475	20 588	18 120	4 845	4 376	3 655	-	-
Residence permit	33 682	32 897	33 108	32 276	33 585	40 269	45 497	53 336
National residence permit	-	-	5 012	2 005	784	439	242	156
EEA resident permit	20 855	12 990	7 847	8	7	7	-	-
Registration card	70 248	72 938	88 465	101 795	113 507	101 071	112 752	113 509
Permanent Residence Card	8 319	14 272	16 508	17 014	17 344	17 563	18 960	18 093
TCN family member of a Hungarian citizen	5 562	7 025	7 764	6 321	3 530	1 805	3 932	4 519
TCN family member of an EEA citizen	382	432	469	375	273	171	434	574
EC Permanent Residence Permit	206	398	472	479	478	529	574	632
National Settlement Permit	4 063	5 504	6 513	6 947	6 672	7 387	10 755	15 631
Temporary Settlement Permit	6	9	12	5	5	3	7	10

Source: Office of Immigration and Nationality



Table 4.2. Number and percentage of purpose to stay (2008-2015)

Purpose of stay	Gainful employment	Study	Family reunification	Other purpose	Official	Other purposes of stay	Total
2008	17 681	8 687	4 780	2 654	264	604	<b>34 670</b>
% of total	51,00%	25,06%	13,79%	7,66%	0,76%	1,74%	
2009	14 043	9 814	4 260	2 451	963	723	<b>32 254</b>
% of total	43,54%	30,43%	13,21%	7,60%	2,99%	2,24%	
2010	16 060	11 179	4 678	2 685	1 646	784	<b>37 032</b>
% of total	43,37%	30,19%	12,63%	7,25%	4,44%	2,12%	
2011	13 187	10 236	4 452	2 465	2 218	907	<b>33 465</b>
% of total	39,41%	30,59%	13,30%	7,37%	6,63%	2,71%	
2012	13 580	10 176	4 635	2 635	2 471	1 115	<b>34 612</b>
% of total	39,23%	29,40%	13,39%	7,61%	7,14%	3,22%	
2013	12 787	12 276	5 609	3 317	2 531	1 027	<b>37 547</b>
% of total	34,06%	32,70%	14,94%	8,83%	6,74%	2,74%	
2014	13 010	10 615	7 742	5 576	1 611	929	<b>39 483</b>
% of total	32,95%	26,88%	19,61%	14,12%	4,08%	2,35%	
2015	12 650	12 576	6 984	5 895	1 742	499	<b>40 346</b>
% of total	31,35%	31,17%	17,31%	14,61%	4,32%	1,24%	

Table 4.3. Number of submitted and recognised residence and settlement permits (2008-2015)

		Resi- dence permit	National residence permit	EC permanent residence permit	National settle- ment permit	Temporary settlement permit	Total
<b>2008</b>	Submitted requests	34 670	-	128	1 821	2	36 621
	Recognised requests	84,3%	-	34,4%	60,0%	50,0%	82,9%
<b>2009</b>	Submitted requests	32 354	-	123	2 083	3	34 463
	Recognised requests	86,2%	-	52,8%	62,0%	33,3%	84,6%
<b>2010</b>	Submitted requests	37 032	-	99	1 952	3	39 086
	Recognised requests	87,9%	-	61,6%	73,8%	100,0%	87,1%
<b>2011</b>	Submitted requests	33 465	761	91	1 889	6	36 212
	Recognised requests	82,5%	93,8%	70,3%	69,2%	50,0%	82,0%
<b>2012</b>	Submitted requests	34 612	722	218	1 999	3	37 554
	Recognised requests	83,4%	93,9%	64,7%	62,4%	33,3%	82,3%
<b>2013</b>	Submitted requests	37 547	357	232	2 558	0	40 694
	Recognised requests	83,1%	96,9%	78,4%	71,9%	0,0%	82,5%
<b>2014</b>	Submitted requests	39 483	46	165	3 477	2	43 173
	Recognised requests	76,1%	87,0%	57,6%	61,4%	0,0%	74,9%
<b>2015</b>	Submitted requests	40 346	14	162	5 797	9	46 328
	Recognised requests	75,9%	78,6%	36,4%	57,6%	44,4%	73,5%

Table 4.4. Foreign citizens residing in Hungary by country of citizenship (1995-2016)

<b>Country</b>	<b>1995</b> <i>(1 Apr.)</i>	<b>2001</b> <i>(1 Jan.)</i>	<b>2005</b> <i>(1 Jan.)</i>	<b>2011</b> <i>(1 Jan.)</i>	<b>2012</b> <i>(1 Jan.)</i>	<b>2013</b> <i>(1 Jan.)</i>	<b>2014</b> <i>(1 Jan.)</i>	<b>2015</b> <i>(1 Jan.)</i>	<b>2016</b> <i>(1 Jan.)</i>
<i>Europe</i>									
Austria	606	694	544	3 926	3 331	3 702	3 917	3 990	4 007
Belgium	113	113	107	658	637	740	848	918	1 000
Denmark	41	41	57	230	219	252	277	280	285
United Kingdom	631	624	440	2 486	2 078	2 380	2 639	2 768	2 975
Finland	100	243	105	437	342	384	414	439	490
France	364	511	330	2 058	1 886	2 067	2 254	2 429	2 615
Greece	1 362	710	299	488	321	381	444	471	538
Netherlands	191	324	236	1 933	1 858	2 166	2 395	2 544	2 704
Ireland	22	38	27	384	394	412	444	459	496
Luxembourg	3	5	6	28	24	28	27	27	33
Germany	7 427	7 493	6 908	20 232	15 834	17 418	18 669	18 773	19 403
Italy	514	542	404	1 773	1 606	1 992	2 323	2 670	3 098
Portugal	28	22	20	216	232	296	267	395	454
Spain	54	64	50	621	689	874	1 112	1 337	1 597
Sweden	319	299	181	1 017	901	965	994	967	994
<b>EU-15</b>	<b>11 785</b>	<b>11 723</b>	<b>9 714</b>	<b>36 487</b>	<b>30 352</b>	<b>34 051</b>	<b>37 124</b>	<b>38 467</b>	<b>40 689</b>
Bulgaria	1 712	1 200	1 177	1 259	539	608	638	673	716
Croatia	305	917	837	953	676	674	650	831	1 012
Poland	4 628	2 279	2 178	2 734	1 385	1 631	1 863	1 964	2 129
Romania	68 439	41 561	67 529	76 878	41 596	34 795	30 924	28 641	29 665
Slovakia	231	1 576	1 225	7 297	6 705	7 573	8 275	8 744	9 393
<b>EU-28</b>	<b>87 304</b>	<b>59 812</b>	<b>82 903</b>	<b>128 017</b>	<b>82 243</b>	<b>80 509</b>	<b>80 817</b>	<b>80 758</b>	<b>85 143</b>
Norway	77	607	73	911	990	971	1 010	1 094	1 137
Russia	277	1 893	2 642	3 483	2 864	3 390	3 657	4 341	4 935
Switzerland	186	330	440	911	698	791	879	907	988
Serbia	15 297	12 664	13 643	16 301	8 281	4 894	3 051	2 430	2 426
Turkey	483	455	615	1 691	1 657	1 727	1 741	1 842	1 912
Ukraine	3 501	8 947	13 933	16 537	11 894	10 849	8 317	6 906	6 749
Other European	15 792	8 489	8 012	4 065	1 495	1 832	2 066	2 223	2 535
<b>Together</b>	<b>122 917</b>	<b>93 197</b>	<b>122 261</b>	<b>171 916</b>	<b>110 122</b>	<b>104 963</b>	<b>101 538</b>	<b>100 501</b>	<b>105 825</b>
<i>Asia</i>									
Israel	518	781	732	1 176	996	1 029	951	888	885
Japan	314	431	582	1 232	1 117	1 085	1 161	1 336	1 507

China	3 470	5 819	6 856	11 829	10 114	11 504	12 716	16 467	19 811
Mongolia	528	738	856	1 169	1 008	880	817	745	757
Syria	680	583	674	803	626	786	965	1 158	1 396
Vietnam	1 276	1 893	2 521	3 149	2 612	3 056	3 073	3 078	3 242
Other Asian	2 849	2 358	2 900	6 937	8 260	8 697	9 149	10 196	11 640
<b>Together</b>	<b>9 635</b>	<b>12 603</b>	<b>15 121</b>	<b>26 295</b>	<b>24 733</b>	<b>27 037</b>	<b>28 832</b>	<b>33 868</b>	<b>39 238</b>
<i>America</i>									
United States	1 700	1 636	1 679	3 266	3 060	3 102	3 021	3 090	3 299
Canada	277	235	262	476	473	469	454	426	491
Other American	918	617	726	1 341	1 180	1 328	1 627	2 492	1 618
<b>Together</b>	<b>2 895</b>	<b>2 488</b>	<b>2 667</b>	<b>5 083</b>	<b>4 713</b>	<b>4 899</b>	<b>5 102</b>	<b>6 008</b>	<b>5 408</b>
<i>Africa</i>									
Nigeria	178	144	230	842	988	1 164	1 260	1 381	1 487
Other African	1 903	1 089	1 326	1 937	2 296	2 686	3 232	3 604	4 026
<b>Together</b>	<b>2 081</b>	<b>1 233</b>	<b>1 556</b>	<b>2 779</b>	<b>3 284</b>	<b>3 850</b>	<b>4 492</b>	<b>4 985</b>	<b>5 513</b>
Other and unknown	573	507	548	836	509	608	572	606	622
<b>Total</b>	<b>138 101</b>	<b>110 028</b>	<b>142 153</b>	<b>206 909</b>	<b>143 361</b>	<b>141 357</b>	<b>140 536</b>	<b>145 968</b>	<b>156 606</b>

Table 4.5. People naturalised in Hungary by country of previous citizenship (1993-2015).

Country	1993	2000	2001	2005	2010	2011	2012	2013	2014	2015
<i>Europe</i>										
Austria	3	7	9	6	4	20	14	9	7	10
Greece	11	6	6	1	-	1	2	2	-	2
Germany	28	36	44	25	25	55	67	35	59	29
<b>EU-15</b>	<b>49</b>	<b>55</b>	<b>65</b>	<b>42</b>	<b>49</b>	<b>106</b>	<b>116</b>	<b>81</b>	<b>93</b>	<b>66</b>
Bulgaria	158	45	20	14	23	9	7	6	5	3
Czech Republic	7	41	53	142	76	16	9	7	17	7
Estonia	3	7	60	148	19	-	1	-	1	-
Croatia	27	100	45	50	26	61	50	22	27	15
Poland	27	38	41	26	9	27	18	11	45	15
Romania	7 381	2 988	5 644	6 890	3 939	15 658	14 392	6 999	6 200	2 605
Slovakia	39	135	158	161	97	414	307	202	310	208
<b>EU-28</b>	<b>7 695</b>	<b>3 410</b>	<b>6 089</b>	<b>7 474</b>	<b>4 238</b>	<b>16 296</b>	<b>14 903</b>	<b>7 333</b>	<b>6 708</b>	<b>2 925</b>
Russia	350	207	202	162	111	168	151	97	170	131
Switzerland	2	2	5	2	-	1	7	4	6	3
Serbia	223	1 079	1 254	949	721	1 678	1 330	647	410	158
Turkey	1	7	2	7	9	12	8	20	58	19
Ukraine	258	586	855	828	646	2 189	1 765	894	858	386
Other European	15	3	10	199	127	12	12	13	19	13
<b>Together</b>	<b>8 544</b>	<b>5 294</b>	<b>8 417</b>	<b>9 621</b>	<b>5 852</b>	<b>20 356</b>	<b>18 176</b>	<b>9 008</b>	<b>8 229</b>	<b>3 635</b>
<i>Asia</i>										
Afghanistan	2	6	5	5	24	4	5	2	5	13
Iraq	1	15	4	6	3	-	6	-	4	5
Iran	1	9	4	10	14	7	14	11	16	10
Yemen	3	4	2	4	4	3	8	7	10	5
Jordan	7	4	9	5	2	1	3	2	18	7
Kazakhstan	3	7	10	8	3	3	3	5	6	8
China	-	3	3	16	27	15	3	7	13	12
Lebanon	5	7	3	5	1	1	3	-	8	3
Mongolia	2	3	8	11	16	18	9	8	20	18
Syria	6	17	12	13	10	7	11	10	57	21
Vietnam	9	14	17	53	75	38	29	15	67	39
Other Asian	16	12	25	34	16	36	23	29	49	50
<b>Together</b>	<b>55</b>	<b>101</b>	<b>102</b>	<b>170</b>	<b>195</b>	<b>133</b>	<b>117</b>	<b>96</b>	<b>273</b>	<b>191</b>
<i>America</i>										
United States	7	1	1	3	2	17	13	9	25	13



Cuba	7	6	17	14	5	5	7	2	14	9
Other American	18	11	11	13	4	20	16	13	38	40
<b>Together</b>	<b>32</b>	<b>18</b>	<b>29</b>	<b>30</b>	<b>11</b>	<b>42</b>	<b>36</b>	<b>24</b>	<b>77</b>	<b>62</b>
<i>Africa</i>										
Algeria	14	7	15	11	12	1	5	1	19	11
Egypt	2	2	3	2	3	2	6	9	81	93
Libya	7	3	5	1	1	1	1	1	4	2
Nigeria	-	4	6	9	5	3	9	5	15	13
Sudan	9	1	-	2	-	1	4	2	2	3
Other African	9	15	13	24	7	13	24	31	43	36
<b>Together</b>	<b>41</b>	<b>32</b>	<b>42</b>	<b>49</b>	<b>28</b>	<b>21</b>	<b>49</b>	<b>49</b>	<b>164</b>	<b>158</b>
Other and unknown	185	1	-	-	-	2	1	1	2	2
<b>Total</b>	<b>8 857</b>	<b>5 446</b>	<b>8 590</b>	<b>9 870</b>	<b>6 086</b>	<b>20 554</b>	<b>18 379</b>	<b>9 178</b>	<b>8 745</b>	<b>4 048</b>

Source: Hungarian Central Statistics Office

Table 4.6. Asylum seekers arrived in Hungary by country of citizenship

Country	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>Europe</b>	<b>413</b>	<b>503</b>	<b>471</b>	<b>657</b>	<b>1 161</b>	<b>1 782</b>	<b>2 607</b>	<b>568</b>	<b>300</b>	<b>306</b>	<b>6 471</b>	<b>21 860</b>	<b>25 178</b>
Bosnia and Herzegovina	2	1	1	2	2	5	25	2	2	2	3	9	9
Kosovo	–	–	–	–	–	1 266	1 786	379	211	226	6 212	21 453	24 454
Macedonia	5	8	16	17	32	44	50	5	3	2	11	11	18
Moldavia	15	54	20	42	45	23	35	14	9	7	10	5	8
Russia	105	41	37	63	51	21	27	23	11	4	11	19	17
Serbia	112	180	243	384	911	327	536	67	27	20	88	145	89
Turkey	125	125	65	43	56	70	114	59	25	30	86	116	292
Ukraine	15	45	26	38	19	4	9	9	5	2	7	37	28
<b>Asia</b>	<b>1541</b>	<b>828</b>	<b>914</b>	<b>1156</b>	<b>1849</b>	<b>916</b>	<b>1750</b>	<b>1289</b>	<b>1070</b>	<b>1530</b>	<b>7594</b>	<b>1809 7</b>	<b>143 007</b>
Afghanistan	469	38	22	13	35	116	1 194	702	649	880	2 328	8 796	46 227
Bangladesh	31	29	90	15	10	35	26	4	3	15	679	252	4 059
Georgia	205	288	114	175	131	165	116	68	21	12	41	40	30
India	46	34	40	19	8	12	7	3	11	12	84	11	345
Iraq	348	36	18	68	136	125	57	48	54	28	63	497	9 279
Iran	170	46	25	20	14	10	87	62	33	45	61	268	1 792
China	67	64	173	275	417	55	45	12	10	6	5	11	8
Mongolia	4	12	4	46	79	21	19	4	2	5	–	5	102
Armenia	54	16	13	15	5	13	12	11	12	2	3	4	3
Pakistan	53	54	40	18	15	246	41	41	121	327	3 081	401	15 157
Occupied Palestinian Territory	23	63	24	37	52	41	23	225	29	19	136	875	1 036
Sri Lanka	–	–	1	–	10	12	28	6	4	10	9	19	115
Syria	11	10	18	32	48	16	19	23	91	145	977	6857	64 587
Vietnam	49	105	319	406	862	42	73	37	11	3	8	28	33
<b>America</b>	<b>3</b>	<b>9</b>	<b>5</b>	<b>9</b>	<b>31</b>	<b>22</b>	<b>7</b>	<b>5</b>	<b>1</b>	<b>4</b>	<b>32</b>	<b>215</b>	<b>228</b>
Cuba	1	6	3	6	30	18	7	2	1	2	32	209	181
<b>Africa</b>	<b>404</b>	<b>233</b>	<b>200</b>	<b>272</b>	<b>356</b>	<b>355</b>	<b>205</b>	<b>221</b>	<b>287</b>	<b>285</b>	<b>4767</b>	<b>1890</b>	<b>7205</b>
Algeria	79	57	19	22	48	19	11	35	56	59	1116	98	599
Egypt	22	3	13	20	41	50	19	14	20	8	105	23	92
Ethiopia	8	5	3	6	5	3	6	3	1	6	5	8	43
Ghana	2	2	4	2	4	3	5	–	2	1	269	177	337

Cameroon	7	8	10	13	6	4	8	6	6	3	54	94	642
Nigeria	74	73	89	109	86	56	66	37	22	27	455	257	1005
Sierra Leone	5	3	7	5	3	6	4	5	5	11	54	61	93
Somalia	113	18	7	42	99	185	75	51	61	69	191	194	352
Sudan	16	11	10	3	10	4	1	14	4	2	104	71	278
Tunisia	4	4	5	1	–	5	5	10	30	21	234	44	77
<i>Other and unknown</i>	40	27	19	23	22	43	103	21	35	32	36	715	1 517
<b>Total</b>	<b>2401</b>	<b>1600</b>	<b>1609</b>	<b>2117</b>	<b>3419</b>	<b>3118</b>	<b>4672</b>	<b>2104</b>	<b>1693</b>	<b>2157</b>	<b>1890</b>	<b>4277</b>	<b>177</b>
											<b>0</b>	<b>7</b>	<b>135</b>

Table 4.7. Refugees in Hungary by country of citizenship

Country	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>Europe</b>	<b>43</b>	<b>34</b>	<b>12</b>	<b>11</b>	<b>12</b>	<b>4</b>	<b>1</b>	<b>9</b>	<b>3</b>	<b>6</b>	<b>1</b>	<b>2</b>	<b>–</b>
Kosovo	–	–	–	–	–	–	–	7	3	5	–	–	–
Russia	9	1	–	4	1	2	–	–	–	–	1	–	–
Serbia	19	23	7	–	2	–	1	–	–	–	–	2	–
Turkey	9	8	5	5	5	–	–	2	–	1	–	–	–
Ukraine	3	–	–	2	–	1	–	–	–	–	–	–	–
<b>Asia</b>	<b>99</b>	<b>79</b>	<b>44</b>	<b>34</b>	<b>76</b>	<b>31</b>	<b>53</b>	<b>42</b>	<b>26</b>	<b>53</b>	<b>141</b>	<b>157</b>	<b>88</b>
Afghanistan	28	19	7	5	2	7	8	11	10	40	39	17	25
Georgia	14	1	4	–	–	1	2	2	1	–	15	6	2
Iraq	33	13	5	15	64	21	11	6	1	1	1	5	6
Iran	9	20	10	6	4	–	10	2	8	7	–	4	15
Armenia	8	3	1	–	–	–	–	–	–	–	1	–	1
Pakistan	1	6	12	–	–	1	2	–	–	1	–	1	5
Occupied Palestinian Territory	2	10	1	1	1	–	10	2	1	–	14	14	9
Sri Lanka	–	–	–	–	–	1	6	8	3	–	1	0	–
<b>America</b>	<b>1</b>	<b>2</b>	<b>–</b>	<b>3</b>	<b>28</b>	<b>7</b>	<b>3</b>	<b>1</b>	<b>–</b>	<b>–</b>	<b>2</b>	<b>8</b>	<b>–</b>
<b>Africa</b>	<b>21</b>	<b>18</b>	<b>29</b>	<b>39</b>	<b>42</b>	<b>109</b>	<b>109</b>	<b>21</b>	<b>10</b>	<b>15</b>	<b>26</b>	<b>54</b>	<b>42</b>
Algeria	2	2	–	–	1	–	–	–	–	–	–	–	–
Ethiopia	2	2	1	3	2	2	–	–	–	2	5	1	2
Cameroon	2	–	1	2	1	–	–	–	3	–	1	1	2
Nigeria	–	3	5	4	–	2	–	–	–	–	1	5	5
Somalia	–	–	–	–	–	104	100	19	4	11	9	18	18
Sudan	9	1	5	–	1	–	2	–	–	–	2	3	3
<i>Other and unknown</i>	14	16	12	12	11	9	11	10	13	13	28	19	16
<b>Total</b>	<b>178</b>	<b>149</b>	<b>97</b>	<b>99</b>	<b>169</b>	<b>160</b>	<b>177</b>	<b>83</b>	<b>52</b>	<b>87</b>	<b>198</b>	<b>240</b>	<b>146</b>

# Chapter 5

## Norway

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Norway is a somewhat special country in the European context. Historically a nation of peasants and fishermen ruled by neighbouring countries Denmark and Sweden, Norway rose in the post-war years to become one of the most prosperous nations in the world. This rise in economic status is to a large extent the effect of natural resources, such as oil and gas, as well as a well-executed welfare state based on an enduring compromise between labour and capital. Norway ranks highly on human development indices and is regularly rated as a stable nation where trust is high in political and legal institutions.

In political terms, Norway is also a quite exceptional country in Europe. It is one of the few European countries that are not members of the European Union (EU). Rather, it has structured its connections with European institutions and organisations through the membership in the European Economic Area (EEA) and a host of other agreements and accessions to EU policies. Moreover, Norway has a long-standing tradition for active internationalism through the United Nations (UN) and its many organisations, as well as being a forerunner in state-led foreign aid programs for developing countries. There has been considerable consensus in Norwegian

society and politics on this line of policy which also has been an integral part of the country's foreign policy.

It is in this context that this chapter addresses Norway's migration policies from the vantage point of the GLOBUS project's three conceptions of global justice. The time period for definitional analysis is recent developments, with a main focus on 2009 to 2016, as this has been conceived by the GLOBUS project. In terms of sources, the chapter relies on primary sources such as legislation, official reports from the Norwegian government, and some secondary literature. The method is qualitative and interpretive, taking operational definitions to task in search for developments, changes, and possibly inertia in concepts related to Norwegian migration law and policy.

The chapter proceeds in the following manner. First, it starts out with a brief historical overview of migration to Norway and related policies. Second, it reports on analyses of relevant definitions of concepts related to migration and global justice. Third, and building on these definitions, the chapter gives a first, preliminary analysis of how Norwegian migration policy adheres to the three conceptions of justice that the GLOBUS project investigates. Finally, I offer some concluding remarks.

## **Migration to Norway: A brief historical overview of waves, policies, and legislation**

Norway is not known as a country of migration, say, in the vein of the United States, France, the United Kingdom, or Germany. Until the 1960s, Norway was not marked by any significant flows of migrants. This does, of course, not mean that there has been no immigration to Norway in a historical perspective. Kjeldstadli and others (Kjeldstadli 2003) argue in a multi-volume series on Norwegian migration history that Norway has been a country of immigration for thousands of years, influenced by tribal movements and displacement of peoples throughout history. Yet, I argue that, for the purposes of understanding contemporary migration and the near history, Norway was not a country of migration until the 1960s, except for some mobility between the Nordic countries, especially Denmark and Sweden. From then on, however, there was a significant shift in the numbers of migrants that entered Norway. Moreover, over the next five decades, the character of migration has changed quite dramatically. Due to this, I will in this part focus mainly on the last 50 years of Norwegian



migration history, yet first give a brief overview of migration flows before the last decades. In giving an overview of the post-1945 period, I will mainly focus on policies and legislative developments.

The end of World War II ushered in a new sense of urgency in the creation of an inclusive Norwegian society. In 1928, the Labour Party formed its first government and thus the Norwegian political system had its first taste of political rule outside the original political class of the bourgeoisie. In the first decades after the 1945 settlement, a specific form of government emerged in Norway. This would become a historical compromise between labour and capital where the different interests agreed to cooperate pragmatically for the sake of both state-driven economic progress and socio-economic inclusion of all classes in society. This form of government was prevalent also in the other Nordic countries, thus giving rise to the so-called Nordic Model.

The issue of migration was not high on the agenda in the first two decades of this period of post-war politics and institution-building. Norway had been a country of war-time refugees and most of these would return to the country. The troubles and power transfer to Soviet-friendly actors in Hungary in 1956 led to some refugees entering Norway. This was a major event in European post-war history, yet the flow of migrants was not especially strong and was viewed by many as a political and legal obligation in the political climate of the time (Joppke 1999).

In institutional terms, Norway was a signatory to both the UN Declaration on Human Rights (1948) and the Refugee Convention (1951). In this sense, Norway institutionalised basic principles, such as the right to apply for asylum and *non-refoulement*, which is the right not to be returned to the country of origin in cases of serious threats to life or freedom. Moreover, the regulation of foreigners and access to Norwegian territory was part of a budding Nordic cooperation in the 1950s. By signing the Nordic Passport Union (1952) with the other Nordic partners (Denmark, Finland, Iceland, and Sweden), Norway instituted passport-free travel in the region. In other words, Norwegian migration politics at this time did distinguish not only between citizens and non-citizens, but also accorded a special status to Nordic citizens through free movement across regional borders.

Toward the end of the 1960s, Norway started to experience an increase in migration. This happened conjunctively with a larger European trend of increased labour migration both internally within Europe, as well as from countries outside Europe (Messina 2007). This new wave of migrants was almost exclusively labour migration for low-skilled jobs. The main countries of origin of migrants coming to Norway were Pakistan, Turkey, Yugoslavia, and other countries in Southern Europe (Kjelstadli et al. 2003). This wave of migrants was welcomed, as there was a surplus of jobs in Norway's growing oil economy. Nevertheless, after some years, labour unions and political actors argued for the need to curtail and regulate labour migration to protect the labour market for Norwegians. Thus, in 1975 Norway instituted a halt to open labour migration ('*innvandringsstopp*').

In the 1980s and 1990s, migration to Norway was mainly by refugees through the UN refugee quotas and asylum seekers. Most notably, a main tipping point in Norwegian migration history was the arrival of refugees fleeing the wars and conflicts of the former Yugoslavia. In the period from 1991 to 1994, more than 22,000 individuals were granted asylum and residence in Norway. These were mainly from Bosnia and Hercegovina and Kosovo (Kjelstadli, et al. 2003).

The latest wave of migration to Norway has occurred in the last decade. First, there was an increase in refugees and asylum seekers during and in the aftermath of the wars in Afghanistan and Iraq. Second, in the period from 2014 to 2016, Norway also received its share of the increased migration to Europe on the back of the Syrian civil war and increased geopolitical tensions in the Middle East. This latest development led to extensive debates on asylum policies, reception of asylum seekers, and the future of integration policies.

Another important development has been Norway's participation in the European integration system. Though not an EU Member State, Norway is still part of the internal market through the EEA agreement. With this follows the adherence to the basic principles of free movement of persons and non-discrimination based on nationality, which are at the core of European integration. As a consequence, EU citizens have the right to move freely to Norway in order to work or study. This has created a new concept of migration, with a distinction between intra- and extra-EU migrants. In the wake of this, there has been a considerable increase in labour migration from the EU to

Norway, most notably from countries in Central and Eastern Europe (Norwegian Ministry of Children and Equality 2011: 164). After the EU's Eastern enlargement, migration from Poland and Lithuania has surpassed that of Sweden as the country with most migrants to Norway annually. Moreover, Norway entered an association agreement to the Schengen Area in 1996 and was operatively integrated from 2001. Equally important, Norway became part of the Dublin System in 2001, with the latest Dublin Regulation (the so-called Dublin III) transposed as Norwegian law from 2014. In this sense, Norway is fully committed to the main principles of EU asylum law and politics as they have been developed since the Maastricht Treaty (1992). Foremost, this means that Norway adheres to the principle of 'first country' and is committed to return asylum seekers to the European country where they were first registered for the handling of their asylum applications. We can, therefore, say that Norway's migration policies as well as concept of the 'migrant' have become Europeanised in the last two decades (Norwegian Ministry of Foreign Affairs 2012).

In this period, there has also been significant discursive and policy changes on migration in general. The most significant turn occurred in 2001, when the Norwegian Parliament decided to overhaul the migration policy, especially in terms of how applications and appeals are handled in cases of asylum and family reunification. The Norwegian Directorate of Immigration (UDI)<sup>30</sup> retained the role of first instance decisions on such applications. A new, independent government body called The Immigration Appeals Board (UNE)<sup>31</sup> was formed to serve as a body for appeals. In this sense, Norway 'depoliticised' decision-making on individual cases in the migration field. Previously, the Ministry in charge could overturn decisions made by the UDI. The decision process on applications on asylum and family reunification is now handled by these government agencies based on existing laws. Changes in practices need first to be decided on in the political process and cannot be instituted on a case-to-case basis by political authorities.

The latest turn of events in migration, and Norwegian society and politics more generally, came with the so-called refugee crisis. In the autumn and winter of 2014-2015, there was a marked increase in the

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<sup>30</sup> 'Utlendingsdirektoratet' in Norwegian.

<sup>31</sup> 'Utlendingsnemnda' in Norwegian.

number of refugees and asylum seekers that entered Norwegian territory. In 2014, the authorities registered 11,480 asylum applications, with a very significant increase to 31,145 in 2015. This development led to an overburdening of the migration apparatus and extraordinary measures had to be taken to register and accommodate the increased number of refugees. Moreover, the influx came from new areas in the Middle East as well as through new refugee routes, such as the one through Russia to the Northern Norwegian border crossing, called *Storskog*. Part of the government's response was to temporarily suspend the free border regime of the Schengen agreement by reinstating border controls. This decision by the government was taken after similar decisions by the Danish and Swedish governments, hence highlighting the strong interconnectedness and transnational character of migration issues in contemporary Norway. At the time of writing (December 2016) the statistics show, however, a very sharp decrease in the number of applications to only 3,051 for the first eleven months of 2016. This is in accordance with the overall trend of migration flows to Europe.

In the last two decades, the main thrust of Norwegian migration policy since 1975 has been strengthened, that is, the notion of no open borders in terms of economic migration has been bolstered. It has been reinforced through a new regime for handling migrants who arrive in Norway and the processing of their applications for asylum, residence permits, or family reunification. In the latest development from November 2015, the majority of the Parliament reached a compromise on Norwegian asylum policy to achieve the aim of tightening the rules for asylum and family reunification. At the same time, cases involving children are to be treated more leniently according to the parties of the compromise. The migration issue is high on the political agenda and often debated with relation both to the integration of immigrants and the 'sustainability' of the expansive Norwegian welfare system. One prominent example has been the extensive debate in the aftermath of the so-called Brochmann Commission.<sup>32</sup> This was a public inquiry commission with experts and stakeholders which described and discussed the future of the Norwegian welfare system in light of migration, from Europe and beyond. Its conclusions were by and large that stronger integration of migrants to the labour market is pivotal for the future of the

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<sup>32</sup> For the Commission's report, see Norwegian Ministry of Children and Equality (2011).

Norwegian model. The commission took the global and European context of migration into context, yet also subscribed in some sense to a container view of society, with a notion of gatekeeping access to membership as central for political control over the future welfare society.

## Analysis of relevant definitions<sup>33</sup>

The GLOBUS project seeks to study the EU's contribution to global justice. Migration is at the core of issues of internationalisation, globalisation, and justice across national borders. In assessing how the EU contributes to notions of global justice, first, there is a need for to understand how different categories imbricated in such questions are defined in national political and legal contexts. In this part of the chapter, the definition of different such concepts in Norwegian law and policymaking is highlighted and analysed.<sup>34</sup> This part is divided in two sections. The first is on general issues and concepts of migration law and policy. The second is on the field of asylum and refugees.

## Migration

Norwegian law on migrants is regulated through different legislative arrangements. 'Utlendingsloven' ('Immigration Act') (Norwegian Ministry for Justice and Public Security 2008) is the main piece of legislation which regulates the entry to national territory of foreigners and their eventual residence there. There are also certain regulations<sup>35</sup> that the Government and its Ministries can issue, which do not need to go through the legislative process, but need to be in accordance with existing law – such as the Regulations of 15 October 2009 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Regulations) (Norwegian Ministry for Justice and Public Security 2009). Finally, Norwegian migration law exists in a context of European law, as well as human rights conventions and other international treaties. As an EEA member, Norway is bound by the EU treaties where these apply. In the case of migration, this has specific consequences for labour and economic

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<sup>33</sup> The main source used is the Immigration Act. Where there is only a citation of a paragraph, it is this law that is cited. Other laws will be written out continuously when cited.

<sup>34</sup> It should be noted here that 'analysis' is not theoretical, rather an interpretation of how the concepts are understood in law and politics. It is in this sense a descriptive analysis of concepts.

<sup>35</sup> 'Forskrift' in Norwegian.



migration to Norway due to the rights attached to free movement. Moreover, Norway has decided to take part in the Schengen system of passport-free travel in Europe, as well as the Dublin system on asylum applications. The European Convention on Human Rights and other more specific human rights codes have also been part of Norwegian law since 1999. The domestic laws and principles on migration are, then, bound by these pieces and principles of international and supranational legislation.

The Norwegian word for migrant is *'innvandrere'*. The term is commonly used to designate the broader tenets of migration developments and policies, including those of asylum seekers and refugees. In this sense, migrant in Norway means different kinds of migrants, that is, persons who relocate, settle, and reside in Norway, both for short-term and long-term purposes. The term 'migrant' is not clearly defined in the Immigration Act (in fact, *'utlendingsloven'* literally means 'Alien/Foreigner Act', but on the English version of the Ministry's official website it is translated as 'Immigration Act') (Norwegian Ministry for Justice and Public Security 2008). Yet the law regulates a host of different aspects of migration to Norway, and defines a foreigner as anyone who is *not* a Norwegian citizen. The law stipulates to give the grounds for regulation and controlling access and exit from Norwegian territory and the stay of foreigners. Crucially, the law states that this should be in accordance with Norwegian migration policy and international obligations. In other words, the law is not standing on its own: it needs to be seen in accordance with broader policymaking. Moreover, the law clearly states that it aims to facilitate *legal* movement across national borders. In this sense, the law defines a migrant as someone who enters Norwegian territory legally.

From this follows that Norwegian migration law is focused on legal migrants and legal migration. There is no self-standing law on 'illegals'. Rather, the main law on migrants and foreigners gives the rules and regulations under which different categories of migrants can have access to Norwegian territory and then take up residence, first temporary and then possibly permanent.

In terms of rights, the law stipulates that if it does not follow from other legal rules or principles, foreigners who reside legally on Norwegian territory shall enjoy the same rights and duties as

Norwegian citizens. One example of such rules or principles can be that only those who hold Norwegian citizenship can vote in national elections (Norwegian Ministry for Justice and Public Security 1814, §50) or hold certain kinds of public office (*ibid.*, §94). This is in line with how most democratic states based on the rule of law defines the rights of legally resident non-citizens (Cohen 2009). For asylum seekers and refugees there is a set of rights that follow from this status. Asylum seekers can take up an occupation in the period where his or her application is processed, yet with the caveat that an asylum interview has been conducted and there are no doubts on the identity of the person (Norwegian Ministry for Justice and Public Security 1814, §94).

The status of economic migrant in Norway is determined through two co-existing legal sources. The first is the Immigration Act already addressed in previous definitions, and the second is European legal principles and policies that have been transposed as Norwegian law as a result of the EEA agreement.<sup>36</sup> In fact, part of this EU jurisprudence was included in the new Immigration Act. This is important as there is no general right to economic migration to Norway from non-EEA countries, following the ‘halt in labour migration’ that has been in place since 1975. For an economic migrant to have a right to residence, the person needs to be at least 18 years of age, to not have taken up an occupation on terms below those settled by collective agreements, to have received an offer of contract, and to be an EU or EEA citizen. For non-EU/EEA citizens, there can be exceptions based on other international agreements or eligibility in cases where there is no Norwegian workforce available to perform a specific task. The government can also give specific reasons for why in some areas there may be a need to import workforce from abroad. As such, economic migration to Norway is limited. The economic migrant is increasingly to be equated with the status of holding EU citizenship or citizenship of one of the three EFTA states that are signatories to the EEA agreement.

Chapter 6 of the Immigration Act regulates the rights of migrants with residence to be granted family reunification. An important definition of this chapter is the reference person, who is already a

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<sup>36</sup> For a broader overview of the impact of EU law on Norwegian law and politics, see for instance Eriksen and Fossum (2015).

resident of Norway, and who applies to be reunited with a foreign person. As a general rule, there are certain criteria that need to be fulfilled both by the reference person and the foreigner seeking family reunification. The residents can be Norwegian citizens, migrants with permanent residence or a future right thereof, or migrants with residence based on a decision on collective need for protection (after §34). The remit of this part of the law is therefore relatively broad, and citizens and migrants alike need to fulfil the criteria the law stipulates. In this sense, the definition of family reunification has a strong territorial aspect to it as the principles and criteria are set up to regulate access for individuals who currently reside outside of Norwegian soil but still have a connection to a resident in Norway. An important caveat to the right to family reunification is that the right can be revoked on suspicion that the main purpose is access to residence, and not reunification on family grounds.

A recent development in the legal parameters of family reunification has added further criteria that the resident in Norway has to fulfil. Firstly, if the reference person is a migrant, there is a general rule that he/she should have held an occupation or been under education for at least the four years preceding the application for family reunification. Secondly, there is a subsistence requirement on the reference person. This should be equal to or above an annual income at the pay rate 24 of the state pay scale in the tax year before applying (Norwegian Ministry of Justice and Public Security 2016). This was changed in May 2016 and now amounts to an annual income of 319,000 NOK or approximately 32,000 euro. Clearly, these criteria have over time become more demanding on the reference person (Staver 2014). The main defining feature of the right to family reunification is that the applicant as a migrant has become integrated into society in terms of being part of the labour market or education system.

In recent years, the status of non-accompanied minors has received increased attention in Norway. In legal terms, the basis for a policy on non-accompanied minors is to be found in chapter 11a of the Immigration Act, which was added in 2012. The definition of non-accompanied minors in this chapter determines that they are in need of some form of guardianship. This guardianship is mainly constructed in terms of representation. As soon as a non-accompanied minor is

confirmed to be under-aged, the County Governor<sup>37</sup> is obliged to start the process of securing a representative for the minor. This holds both in cases of applications for asylum and in cases where more limited residence is required. Any minor in Norway, citizen or non-citizen, is entitled to a legal representative and guardian. This representative relationship is, however, not defined merely in a 'top-down' manner. The minor has after the age of 7 or if he or she is capable of voicing their own opinion even at an earlier age, the right to be heard by the representative. This right relates to decisions that have an effect on the minor. While a non-accompanied minor has extensive rights in this regard, there are also rules in place to determine the age of the minor. In cases where there are doubts concerning the person's age, specifically whether the person is an adult or not, an age verification process can be instituted. This consists of a medical examination to determine the age of a person based on certain physical characteristics and attributes. Moreover, there is a delineation in the handling of minors between under-15s and over-15s. Asylum seekers between the ages of 15 and 18 should as a basic rule reside in an asylum centre, while those under the age of 15 should be placed in care through The Child Welfare Service.<sup>38</sup>

## Asylum and refugees

The Immigration Act is also an important piece of legislation in the field of asylum and refugees. Different from economic or labour migration, asylum seekers and refugees make claims to special circumstances of the need for protection as the main grounds for immigration to a new country. In legal terms, there are three main categories of reasons for protection according to the Norwegian Immigration Act (chapter 4, §28):

1. Well-founded fear of persecution based on ethnicity, origins, skin colour, religion, nationality, membership of a particular social group, or political beliefs;
2. Not being able to seek protection in home state;
3. Where the above two are not applicable, but there is a danger of death penalty, torture, or persecution upon return to home state.

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<sup>37</sup> 'Fylkesmann' in Norwegian.

<sup>38</sup> 'Barnevernet' in Norwegian.

The category of persons that fall under point 1 above are refugees that should be accorded asylum in Norway. In §§29-30 of the Immigration Act, different reasons are outlined for what may count as persecution and is expanded on, so that no 'general' right to asylum exists following some notion of persecution. The need for protection needs to be scrutinised and corroborated by the government for asylum to be accorded.

### **Asylum seekers and refugees**

There are three main ways to migrate to Norway as a refugee or asylum seeker. The first, and by far the most important group, is comprised of those migrants and refugees that lodge an application for asylum in Norway. The second group is comprised of persons who belong to groups that are given the status of collective protection in cases of 'mass migration' from a specific conflict area (§34 Immigration Act). This collective protection is temporary and renewable every year. Two well-known cases of this were refugees from Bosnia in the Balkan War (1991-1995) and refugees from Kosovo when there were increased tensions with the Yugoslav government (1999). The third group are those that are granted the status of refugees after a request from international organisations, most notably the UN High Commissioner for Refugees. The main thrust of this section focuses on the first group of asylum seekers as this is the largest and most notable group.

The asylum application process is comprised of a two-tier system: 1) Processing of asylum application, 2) Appeals on decisions of the initial asylum application. In the first tier of the processing, the main government bodies involved are the National Police Immigration Service (PU)<sup>39</sup> and The Norwegian Directorate of Immigration (UDI).<sup>40</sup> Any asylum seeker should visit the police on arrival to Norway and register his/her personal data and documentation (such as a passport) with the PU. Moreover fingerprints should be taken, registered, and stored by the PU in accordance with the EURODAC regulation under the Dublin System (European Parliament and the Council 2013).

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<sup>39</sup> 'Politiets utlendingsenhet' in Norwegian.

<sup>40</sup> 'Utlendingsdirektoretat' in Norwegian.



After this 'police part' of the first tier, the application process continues with the UDI. The application is designated with a case officer that follows the case until a decision is made. The asylum seeker is interviewed by the UDI case officer with an interpreter of the applicant's vernacular present. The interview is extensive and aims to probe the extent to which the claim of persecution is within the boundaries of the Immigration Act and Norwegian asylum policy in order to be granted asylum. Moreover, the interview can be used to assess and scrutinise the veracity of the applicant's documents. After the interview, the case officer reviews the case. In this part of the process the case officer can utilise information on the country of origin from LANDINFO. This independent unit within the foreigner administration has as its main task to provide information that can be used by the other agencies and units of the administration that deal with case decisions.

The second tier of the application process is the legal possibility of an appeal in cases where asylum is denied. Appeals are handled by the UNE, which is an independent agency under the Ministry of Justice and Public Security which serves as an appeals board on decision made by the UDI. The decision on appeals are made by so called appeals boards.<sup>41</sup> There are different methods on how the appeals boards work. A so-called board leader decides in each case on the method of decision-making. In exceptional circumstances without any questions of doubt, the decision can be made without an appeals board hearing, either by a so-called board leader or the legal secretariat of UNE. In cases with some doubts, a hearing will be held. In most cases, the appellant (the asylum seeker) will be present at the hearing. In cases where the appellant and the UDI are in agreement about the facts of the case, the appeals board can hold a hearing and decide the case without the appellant. This is for instance the case if the appellant's explanation has already been taken into account before the case was transferred to UNE. The appeals board hearings are held behind closed doors and led by a board leader with additional attendance by two lay board members. The legal secretariat of UNE prepares the case work to be handled by the appeals board. Crucially, decisions made in individual cases cannot be reviewed or changed by the Ministry, Government, or UNE's administration. This is to avoid politicisation of individual case

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<sup>41</sup> 'Nemnder' in Norwegian.

decisions in the migration field. UNE decisions can, however, be appealed further in the regular judicial system, and there are examples of cases that have been decided finally by the Supreme Court.

In legal terms, Norway claims to have an asylum process that is within the parameters of both the national constitution and international legal obligations. Clearly, the tendency in recent years has gone towards a more restrictive practice in terms of granting protection. This policy change started with the former centre-left government and has been continued by the current right-wing government. It is not within the remits of this exploration to make a legal assessment of the justifiability of this policy change seen against existing international legal frameworks. A view at the statistics shows that from 2010 to 2015 the percentage of applications granted increased from 51% to 75% (Larsen, Fjørtoft and Lydersen 2015). One explanation for this may be that the more restrictive policy has resulted in less so-called 'groundless' applications in Norway than before. In the Immigration Act, the main international obligations that are referred to are the principle of *non-refoulement*, taken from the 1951 Geneva Convention, and the extensive impact that the transposition of the Dublin Regulation into national law has on rules regarding asylum seekers and the processing of applications.

The reception system for asylum seekers and refugees is tightly linked with the processing of their asylum applications. Part of the reception system was therefore described in the previous section on processing of applications. Yet, there is more to reception of asylum seekers and refugees than the actual legal and administrative process of their individual applications. What kind of programmes are in place to welcome newcomers to Norway? What are their rights, entitlements, and duties? There is no one legal document or political decision on the reception system. It is devised through different legal measures (primarily the Immigration Act and the Introduction Act (Norwegian Ministry of Justice and Public Security 2008, 2003), government regulations, and guidelines from different government agencies for different areas, such as for instance health care. As highlighted, registration with the PU and the lodging of an asylum application should be done as soon as possible upon arrival to Norwegian territory. After the registration with the police, the asylum applicant is transferred to a reception facility. There are currently three reception facilities, one in Finnmark County, one in

Østfold County, and the third for non-accompanied minors at Refstad in Oslo Municipality. At the reception facility, there is a health check, with an obligatory test for tuberculosis. There are also tests for other venerable diseases, but these are voluntary. Moreover, there is an information service provided by the Norwegian Organisation for Asylum Seekers (NOAS).<sup>42</sup> After this initial processing, the asylum seeker is then transmitted to a transit facility or an on ordinary asylum facility, again with additional information on rights and duties. Rights of asylum seekers are partly linked to due process in the application process, but also include rights to health services, some activities at the facility, and a small cash allowance to cover living basics. A basic duty of asylum seekers is according to The Introduction Act (§§ 17-20) to attend both Norwegian language classes and an Introductory Programme on Norwegian civics, culture, and society. When placed in the asylum facility, the asylum applicant will then be interviewed by the UDI. This interview is thorough and demanding in order to corroborate the basis for the application and the veracity of the documentation that the applicant has lodged. There is an absolute right to an interpreter in the vernacular of the applicant in this asylum interview. In the waiting period for the application to be decided by the UDI, the asylum seeker has a right to stay in an asylum facility, but no duty to do so. Yet, financial aid is waived if the choice is made to stay in private accommodation. There is no time limit on the processing of the applications by the UDI. In times of high 'demand', there may be delays in the process.

The Immigration Act (§66) states clearly that any migrant who has not received a residence permit or asylum must leave Norwegian territory. An important caveat here is the clause on *non-refoulement* (§73), which according to the law gives an absolute protection against return in cases of danger to the migrant's integrity through, for instance, persecution, torture, or death penalty. This is, however, a legal principle which will always be subject to scrutiny based on evidence given by the migrant as well as on verifiable facts about the state of affairs in the country of origin. One example here is recent debates in Norway on whether countries such as Somalia and Afghanistan can be deemed 'safe countries'. At the time of writing

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<sup>42</sup> 'Norsk organisasjon for asylsøkere' in Norwegian.

(December 2016) both these countries are considered as safe countries, with Somalia as the latest country to be included on the list.

### **Smuggling and human trafficking**

Smuggling of persons with a view to access Norwegian territory is a field which has not received much legislative or political attention in Norway, although it does occasionally receive some media attention. In legal terms, it is again the Immigration Act which is the most important document. §108 highlights the so-called 'simple' human smuggling, which means to willingly aid a foreigner to illegally travel into the country. The maximum penalty for this is three years in prison. In the next section of the paragraph, more demanding accounts of smuggling of persons is defined and given a maximum of six years' imprisonment. This builds on the definition of 'simple' smuggling, but that it needs to be organised and/or for financial purposes. Here, it is only the intention for financial gains that matters, which provides extra protection to victims of human trafficking. These issues are, however, not only related to the asylum register of migration politics, but also to human trafficking as a 'common' crime. Indeed, we may say that smuggling is used in Norwegian legal documents to designate efforts of aiding the entry in order to achieve asylum or residence, while human trafficking designates those circumstances where humans are used and abused 'in trade'. These latter issues are dealt with by the General Civil Penal Code (Norwegian Ministry of Justice and Public Security 2005). In chapter 24 of the General Civil Penal Code, human trafficking sorts under the heading of 'protection of personal freedom and peace.' In other words, safeguards against human trafficking can be seen as something akin to a human right, a universal right of dignity, and protection of each person's sovereignty as an individual.

### **Analysis of adherence to the three conceptions of justice**

The concept of global justice implies that there are certain conceptions of justice that have a cross-border reach, that is, that they can be found to be at play in a polity's external relations. This is one of the main ideas behind the GLOBUS project. Eriksen (2016) has outlined three theoretical conceptions of justice that can be utilised to

study the EU's contributions to global justice.<sup>43</sup> The three are justice as non-domination, justice as mutual recognition, and justice as impartiality. In this chapter, there is no description or analysis of Norwegian foreign policy. Yet, conceptions of global justice are relevant to migration as it is about the trans-border and transnational relations involving individuals, political and legal institutions, states, and ultimately some notion of universal human rights. In short, the three conceptions of justice deal with all these relations, albeit in different ways. Justice as non-domination finds its core from classic notions of so-called 'negative freedom', that is, of justice as the absence of arbitrary domination of individuals on the part of political and legal institutions. Justice as impartiality imparts a notion of justice based on the idea that an individual's dignity is linked to their autonomy: in a 'Kantian' sense this means to be able to give themselves the laws they should obey. This 'self-legislation' implies a conception of justice which is not primarily bent on the idea of negative freedom, but of the equal rights and liberties of individuals. Justice as mutual recognition posits that there is more to rights than self-legislation in a bounded community. Justice is in this notion premised on the idea of deliberation as a 'wrong-correcting' mode of interaction between individuals, based on reason-giving. In this sense, justice is not pre-politically given or results from substantive considerations, but rather an inter-subjective category. Rights are, then, at the centre of justice. These should, however, not be seen as protections of private interests, but rather what equal rights-holders grant each other as they govern 'themselves' through law.

If we look at different regimes of migration policy law and policy, then, how can we assess these through the lens of the three conceptions of justice outlined here? In this first exploration of such issues, the definitions and outline of policies above will be utilised in a simple discussion of how different elements and developments fit with the conceptions. First, I go into the broader definitions in the migration field, second, I discuss how Norwegian asylum policies map onto notions of justice.

Norwegian migration policy is as those of most nation-states based on a strongly territorial logic. The admission and access of foreigners

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<sup>43</sup> This part builds, then, extensively on Eriksen's (2016) theoretical and conceptual discussions on the three conceptions of justice.



to state territory is premised on a notion of the state as a gatekeeper of membership. Walzer (1983: 32) gives a useful definition of access to membership and how this is regulated by nation-states in the system of states:

[...] we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of community we want to have. Membership as a social good is constituted by our understanding [...] and then we are in charge of its distribution

This is in some sense, then, based on a notion of membership and access to territory as something exclusive. In such a view, Norwegian migration policy is closer to justice as non-domination than the other two notions. The criteria for access to the territory and ultimately for accessing citizenship through membership are to be the same for any foreigner – hence including migrants. Moreover, there is a general ‘right to have rights’ also for foreigners under Norwegian law. This principle means that if it is not specified in law, *legal* resident migrants hold the same rights and have the same duties as Norwegian citizens. This is, then, not a relationship based on reciprocal rights between equals. It is rather law-based equality with the possibility of ‘reasoned’ or reasonable inequality based on an idea of citizenship as the only full access to the whole catalogue of rights given by domestic law. In other words, it can be said to adhere to an effort to avoid arbitrary uses of this inequality, as the differences in rights should be legitimate and law-based.

Given Norway’s increasingly strong interconnectedness with the EU and EU legal principles, one can argue that its migration law in part approximates a notion of justice as impartiality. Economic migrants in Norway are basically EU or EEA citizens who exercise their rights under EU law. Rights to free movement and the principle of non-discrimination based on nationality are part of the Norwegian migration regime. There is no ‘universal’ right to economic immigration to Norway: it is limited to EU and EEA citizens. In this sense, in terms of economic migrants, we cannot deem this too close to a notion of justice as mutual recognition in a *global* sense. It is a territorial extension of rights to the transnational realm, where the notion of national belonging is less prevalent for rights attribution. While transnational, it is, however, still limited only to citizens of

EU/EEA Member States. Arguably, this transnationality falls somewhere between the first two notions of justice as non-domination or impartiality. Clearly, the principle of non-discrimination based on nationality rests on an understanding of a negative freedom where, for instance, a worker should be exempt from arbitrary disadvantage in the labour market as a result of their nationality. Yet, it is also clear that this does not extend to a cosmopolitan law for all in a universal sense which would be a requirement to meet the basic precepts of justice as impartiality. The definition of economic migrants in Norway, through the 'EEA connection' is quasi-cosmopolitan in its extension of rights to non-citizens with EU citizenship or nationality in an EEA country, yet falls short of universality in a true cosmopolitan sense. Rights as economic migrants in this Europeanised setting are not human rights: they are transnational rights, which extend the territorial remit of rights considerably.

The issue of justice conceptions in the field of asylum seekers and refugees puts, arguably, the question of human rights at the forefront. The right to apply for asylum is indeed a human right that cannot be violated. Any individual can make a claim to be persecuted and lodge an application for political asylum in another country. This country, then, has to comply with this human right and make an assessment on the veracity of the claim and make a decision. Norway is a modern state based on democratic principles and the rule of law. All three conceptions have a notion of democratic rule of law at the core. But, which one fits better with Norwegian asylum and refugee policy? Asylum seekers and refugees are per definition in an asymmetrical relation with the receiving state and its citizens in terms of resources and rights. This is, however, the case for every territorial nation-state. Discussing the adherence of a country's asylum policy with the different conceptions of justice should, therefore, focus not only on the individual-state relationship, but on broader issues of legality, equality, and due process.

In this sense, it is obvious that Norwegian asylum policy as it has been defined in this chapter is at least close to the least demanding conception of justice, that is, justice as non-domination. A main principle in the legal definitions of asylum seekers and refugees is that the categories for protection should be clear. Moreover, there is clearly an effort in the legislation to avoid arbitrary decisions that may harm some individuals more than others. The more demanding

conceptions also fall by the wayside when we look at state to state relations in asylum affairs. This is for instance the case when Norway decides on so-called safe countries for returning migrants and failed asylum seekers. This is clearly not a system where mutual recognition or impartiality is of significance. Norway decides on safe countries based on information from LANDINFO which is an independent government agency. While the recommendations from LANDINFO rely on an array of sources, safe country decisions have been disputed, both by the UN High Commissioner for Refugees (Crouch 2016) and by official representatives of sending states such as Afghanistan (News in English 2016). In this sense, Norway seemingly does not adhere to the reciprocity which forms the core of the justice as mutual recognition. Additionally, it can be doubted whether Norway has sought to '[...] establish cooperative arrangements and active dialogues with affected parties in order to determine what would be the right or best thing to do in any given circumstance' (Eriksen 2016: 20). Such a conclusion on adherence with conceptions of justice should of course be read with the caveat that more in-depth research is needed for a more thorough scrutiny of the Norwegian asylum system. That being said, the definitional exercise of this report has provided a skeleton of descriptions on which further analysis and research can be developed.

## **Concluding remarks**

In this chapter, different definitions related to Norwegian migration, asylum, and refugee policy have been discussed. As a relatively recent historical phenomenon in Norway, migration is rapidly becoming an ever more important topic of political debate and policymaking. As any territorial state, Norway is part of the system of states, with effects of the logic of membership and gatekeeping on access to the territory and residence. This system has, however, become more 'porous' with supranational actors such as the EU, international legal obligations, and increased interconnectedness in cultural and economic terms transforming the nation-state. This is part of the background for the GLOBUS project which seeks to address the normativity of the external policies of the EU, and how different conceptions of justice are at play when the EU interacts with states and other international actors outside European integration.

A firm conclusion on the adherence of Norway's migration policy to the three conceptions of justice cannot be provided based on the

descriptive definitional work of this chapter. If anything, it has shown that there is arguably a tilt toward more adherence to justice as non-domination, which is the least 'demanding' of the three conceptions. Still, in terms of economic migration, there is a movement in the direction toward justice as impartiality in the equal treatment and non-discrimination principles for EU and EEA citizens. On the other hand, some parts of the asylum policy clearly stand in the way of realising the more demanding notion of reciprocity in justice as impartiality or mutual recognition. On these issues, however, much more comprehensive research will be required, based on multiple data streams.

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# Chapter 6

## United Kingdom

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The current legislative framework regulating migration to the United Kingdom is strongly conditioned by the country's incremental transition from a multi-continental supranational entity – the British Empire – to a relatively isolated sovereign nation state. The result is a composite regime shaped by the need to regulate the entry of – and give a legal status to – nationals from former colonies, as well as forced and economic migrants arriving from third states. Crucial in this regard was the Commonwealth Immigrant Act 1962 (Parliament of the UK 1962), later amended through the Immigration Act 1971 (Parliament of the UK 1971), and the British Nationality Act 1981 (Parliament of the UK 1981), which first established citizenship as the standard criterion for the political membership of the national political community.

The UK's distinctive 'flexible interpretation' of legal concepts and instruments also accounts for the lack of a clear-cut distinction between the rationales underlying legislation concerning migration and asylum. This is in line with the traditional pragmatic attitude of the British government, which has regularly conflated the two policies within an overarching strategy aimed at enhancing its control over the inflow of foreigners into the country (Joppke 1997).

Accordingly, the Immigration Act 2014 (Parliament of the UK 2014) and its 2016 updates (Parliament of the UK 2016) were explicitly designed to create a 'hostile environment' for migration.

This tale of distinctiveness, however, is tempered by the 'normalisation pressure' that the country has been subjected to as a member of the European Union (EU) and the European Convention of Human Rights (ECHR), especially in the area of asylum law. Regardless of the results in terms of policy orientations and actual practices, a number of significant elements of a continental-style human-rights protection have been progressively influencing the conceptual context, the content of law and the role of the judiciary in the UK asylum (and migration) policy area.

## Sources of law and relevant legal terms and definitions

British legislation regulating migration and asylum derives from a number of sources and has been amended at a fairly high rate over the last few decades.<sup>44</sup> The result is a complicated patchwork constituted on the one hand by a series of Acts of the Parliament, from the Immigration Act of 1971 up to the most recent major set of amendments set out by the Immigration Act 2016, and on the other hand by statutory instruments. These executive orders of subordinate legislations named Immigration Rules (IRs) clarify and expand on primary sources, when they do not take over from them. In strict legal terms, IRs are not delegated legislation; nevertheless, over the years, this ever-evolving corpus of regulations has increasingly taken up the function, if not the form, of a set of genuine mandatory requirements. The predominance of secondary sources and the executive is also made possible by the procedure to pass or change IRs: thorough and active scrutiny is *de facto* discouraged as, once a Statement of Changes to the Immigration Rules is laid before

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<sup>44</sup> 'UK law' and 'British law' are going to be used here as umbrella terms that encompass the three legal systems applied in England and Wales, Northern Ireland and Scotland respectively. Though inaccurate in strict legal terms, the phrases appear viable insofar as migration and asylum are 'reserved matters' - i.e. legislation can only be passed by the UK Parliament at Westminster given its nation-wide impact - and are therefore only marginally affected by the devolution of legislative power underway in a number of other policy areas in the UK.

Parliament, changes enter into law within forty days unless Parliament objects to them (Parliament of the UK 1971, Section 77).

### Nationality and citizenship

No clear and practicable definition of 'migrant' or 'immigrant' is offered by British law. This reflects the especially complex distinction between members and non-members of the UK's political community. Significantly, the concept of 'alien' – in other countries tantamount to 'non-national' – indicates a person who is not a British citizen, a citizen of Ireland, a Commonwealth citizen or a British protected person (Immigration Act 1971, Section 51). A crucial criterion in determining the degree and conditions of legal belonging to the British community is the entitlement to the 'right to abode' – i.e. the individual freedom from immigration control and the government's permission to live and work in the country without restriction (ibid. Section 1). Those with no such right are largely addressed in legal and administrative documents as 'Persons Subject to Immigration Control'. Although this right has been increasingly reserved to British citizens alone, there exists a range of intermediate conditions resulting from the complex notion of 'British nationality' and the presence of a class of non-British nationals – most notably the EU citizens – who are not subject to immigration control but neither have the right of abode.

Among the different existing types of British nationality, 'British citizenship' is the most common, and the only one that automatically grants the right of abode. However, the transition towards a more ordinary citizenship-based legal notion of national belonging has also entailed a stricter understanding of the principles underlying its obtainment. Accordingly, the *jus soli* principle – once the standard criterion to become a British subject – has been reinterpreted as a restrictive condition to the acquisition of citizenship by descent: a person born outside the UK is a British citizen only if at the time of birth his father or mother is a British citizen other than by descent – therefore ruling out the possibility that British citizenship be passed down from parents with no ties to the homeland (which represents another break from the imperial rationale of the past) (Parliament of the UK 1981, Section 2). On the other hand, since the coming into force of the British Nationality Act in 1983, the *jus sanguinis* has been established as a more central criterion to be entitled to citizenship by birth, as at least one parent of a United Kingdom-born child is required to be a British citizen or to be settled in the UK (Great



Britain, Northern Ireland and the Islands) or in a qualifying territory.<sup>45</sup> A 'settled status' is normally acknowledged to (children of) residents in the UK, i.e. holders of the right to abode or a similar status (including Irish citizens), holders of an Indefinite Leave to Remain or EEA citizens with permanent residence (ibid. Section 1). Settled status also provides the most usual route to acquire naturalisation or registration as a British citizen. Acquisition by 'registration' is now restricted to people belonging to other British nationality categories and a few Commonwealth citizens, while naturalisation has become the standard route to become a citizen. However, several exceptions remain, regarding for instance Irish citizens claiming British subject nationality or people from Gibraltar, who have rights similar to British citizens despite falling under other categories.

The other types of British nationality are designed for subjects of or people 'associated' with – by descent, residence, marriage or other ways – the erstwhile British Empire. In general, these statuses do not entail the right of abode, and their holders are not considered UK nationals by the EU. However, they do give the right to a British passport, as well as consular assistance and protection by UK diplomatic posts. People born in or connected with British Overseas Territories – or who were Citizens of the United Kingdom and Colonies (CUKCs) – and those who are connected to them through (own or parental) registration or naturalisation are British Overseas Territories Citizens (BOTC). People belonging to this category can access a facilitated procedure to obtain British citizenship and keep both statuses simultaneously (as has come to be the vast majority of cases with the coming into force of the British Overseas Act 2002).

The other types of nationality are residual in nature, since they are designed to regulate the exceptional status of a limited number of former CUKCs and/or subjects of the British Empire, and expected to become extinct, as they can only in exceptional circumstances be passed on to children – e.g. to prevent them from being stateless. The first is the British Overseas citizenship, granted to those who retained their CUKC status in spite of the independence of their countries, without becoming British citizens nor BOTCs. The second 'residual'

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<sup>45</sup> The qualifying territories are: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; Saint Helena, Ascension and Tristan da Cunha; South Georgia and the South Sandwich Islands; Turks and Caicos Islands.

category is that of 'British Subject' – not to be confused with the pre-1949 imperial status or the pre-1983 Commonwealth-related one – and refers to British subjects who after 1948 did not become CUKCs, nor citizens of a Commonwealth country, Pakistan or the Republic of Ireland. In addition, this status can be given to citizens of the Republic of Ireland, officials in Crown service for the UK government and sometimes stateless persons (*ibid.*, Section 30). Third, British Nationals (Overseas) is the nationality held by the former British citizens of the Dependent territory of Hong Kong who applied for registration before the 1997 transfer of sovereignty. All the British nationals belonging to the previous five categories (British citizens included), together with the nationals of the member states of the Commonwealth, are considered 'Commonwealth citizens' (Parliament of the UK 1981, Schedule 3). Finally, the 'British protected person' category is designed for people associated with former protectorates of the late British empire (e.g. Uganda or Brunei) and who were therefore not subjects of the Crown or British nationals, and who are not currently Commonwealth citizens.

### Regular and irregular migrants

The complexity of immigration and employment laws and the wide range of possible restrictions attached to different immigration statuses have resulted in a number of grey zones which blur the boundaries between regular and irregular entry and stay. Moreover, the concept of labour immigrant is *de facto* differentiated as a result of the implementation of the 5 Tier Points Based System (see below), which restricts and selects labour, education and investment immigration through a set of target-specific visas.

Non-nationals who are not entitled to reside in the UK, either because they have never had a legal residence permit or because they have overstayed their time-limited permit, or who are legally resident but breaching the conditions attached to their immigration status, are often referred to as 'illegal immigrants'. Still in use in the British public debate and by the UK Government, the expression is increasingly denounced for criminalising/dehumanising the person in breach of law. On the other hand, the association with criminality is consistent with the ongoing shift of migration-related offences from the civil and administrative domain to the criminal one (Institute for Public Policy Research (IPPR) 2006). Immigration and asylum legislation defines immigration offences through provisions assigning civil

or criminal sanctions – including imprisonment – to breaches of immigration rules (which can be committed by British citizens and non-citizens) (Aliverti 2016). The terminology including ‘irregular (im)migrant’ and ‘migrant in an irregular situation’ has come into use because it better covers the diversity of deviations from the law whilst avoiding any problematic moral statement (Düvell 2014). ‘Undocumented migrants’ also occurs quite frequently in the media and the public discourse, but it is uncommon in official documents. ‘Clandestine entrant’ is also in use (Parliament of the UK 1999, Part II).

‘Illegal entry’ is defined as the offence of knowingly entering the United Kingdom in breach of a deportation order or without leave (Parliament of the UK 1971, Section 24(1)(a)). By contrast, a person is an illegal entrant (for removal purposes) if he/she unlawfully enters – knowingly or not – or seeks to enter in breach of a deportation order or of the immigration laws. The ‘irregular immigration’ status can involve clandestine border passing or (assistance in) overt entry through means of deception; it can also arise from legal entry and illegal overstaying of a time-limited (tourist, student or work) visa or from violations of restrictions attached to a legal residence permit.

‘Labour migration’ involves people whose primary reason for migrating or whose legal permission to enter the UK is for employment. In the UK’s public discourse, the term ‘economic migrant’ refers to a person who has left his own country and entered the UK by lawful or unlawful means for ‘personal convenience’, possibly at the expenses of local workers (Althaus 2016). Whereas the latter concept often alludes to unskilled and semi-skilled individuals from impoverished countries in the global South, or from outside the European Economic Area (EEA), more desirable migrants are identified as ‘expatriates’ (‘expats’). The British Government also makes use of the term ‘migrant worker’, as formulated in the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Family, to designate a person engaged in a remunerated activity in a state of which he/she is not a national (Office of the High Commissioner for Human Rights 1990). Under the Immigration Act 2016, ‘illegal working’ has even become an offence in its own right: illegal workers are those who are subject to immigration control and either do not have leave to enter or remain in the UK, or who are in breach of a condition preventing them from taking up the work in question (Parliament of the UK 2016, Section 34). The Immigration

Act 2016 amends the *mens rea* of the criminal offence as devised in 2014, so as to include employers who have reasonable cause to believe that they are employing an individual who lacks permission to work in the UK – i.e. an adult subject to immigration control where a) he/she has not been granted leave to enter (LTE) or leave to remain (LTR) in the UK, or b) her/his LTE or LTR is invalid, has ceased to have effect or is subject to a condition preventing him/her from accepting the employment (Parliament of the UK 2006, Section 21). Moreover, since 2016, landlords have the obligation to check the immigration status of potential tenants, and are prohibited from renting accommodation to irregular migrants (Parliament of the UK 2016, Section 33A).

### **Asylum seekers, refugees and other protected categories**

The Immigration Act 1971 defines ‘asylum seeker’ as a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom’s obligations under the 1951 Refugee Convention, or the 1950 Human Rights Convention. Remarkably, the quite ‘incidental’ definition is provided in a section establishing the offence of ‘helping asylum seeker to enter UK’ (Parliament of the UK 1971, Section 25A). In practical terms, Immigration Rules define an ‘asylum applicant’ as a person who has made an application for asylum – or international protection – to the Home Office (HO) and is waiting for a decision (Home Office 2016a, Para. 327).

In legal terms, a ‘refugee’ is defined as ‘a person who falls within Article 1(A) of the Geneva Convention’ (Home Office 2006, Regulation 2). An asylum applicant who has received a positive decision on her/his asylum claim from the HO, or has had a successful appeal, is issued with the documents confirming their status as a refugee (Home Office 2016a, Para. 334). If an asylum seeker is recognised as a refugee, he/she will be granted an initial 5 years limited leave to enter or remain in the UK. After five years, there will be an opportunity for the person to apply for indefinite leave to remain subject to review by the HO. Successful claimants gain support not only for themselves but also for their ‘dependents’ – a spouse or civil partner, an unmarried companion (if living together for more than 2 of the last 3 years), a child under 18, or a member of the household who is over 18 and is in need of care and attention due to disability – regardless of their immigration status.

A person that does not qualify for asylum, but is still in need of international protection from 'serious harm', may be granted 'humanitarian protection'. Serious harm, according to IRs, include: death penalty or execution; unlawful killing; torture or inhuman or degrading treatment or punishment of a person in the country of return; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Home Office 2016a, 339C). While remaining party to the Common European Asylum System in its original version, the UK has opted out of the 2013 asylum recast package, i.e. the Refugee Qualification Directive (European Parliament and Council 2013a), the Asylum Reception Conditions Directive (European Parliament and Council 2013b), the Asylum Procedures Directive (European Parliament and Council 2013c) and the Dublin III Regulation (European Parliament and Council 2013d). As a consequence, the UK only partly conforms to the goal of ensuring that common criteria for identifying people in need of international protection are applied, and that a minimum level of benefits should be available for those granted that status in EU Member States, in accordance with the directives adopted in 2003/2004 as part of the first phase of the Common European Asylum System (Goodwill 2016).

A person unsuitable for asylum or humanitarian protection may be granted 'discretionary leave' to stay based on exceptional compassionate circumstances outside of IRs (Parliament of the UK 1971, Section 3). It is considered a form of leave to remain rather than a 'protection status'. It may be granted, for instance, to a person suffering from a severe medical condition, or a child seeking asylum will be granted discretionary leave if the HO considers there are no favourable conditions, family or other reception arrangements to be returned to, and often under Article 8 of the Human Rights Act 1998. Another category of relevance is that of 'resettled refugees', given the prominence of the Syrian Vulnerable Persons Resettlement Scheme when it was launched in September 2015 (see below). Asylum claimants who are unsuccessful and eventually leave but will live in the UK for some time as they await a decision, as well as those whose applications have been rejected but who still remain without legal permission are classified as 'long term international migrants'.



## Institutional and conceptual framework underlying key procedures

### Institutions

The main institutional actor in charge of the policy area is the HO, which in 2013 retrieved full responsibility for all aspects of control of UK borders and the entry and stay of foreign nationals, after the Border Agency was abolished due to poor performances, controversies and complaints filed with the Parliamentary and Health Service Ombudsman (Gower 2014). Any decision to grant or refuse leave to enter, entry clearance or leave to remain is made by the HO on behalf of the Secretary of State for the Home Department. The HO also considers applications for British citizenship, and has the power to lay Immigration Rules, regulating the entry into, and the stay in the UK of persons requiring leave (permission), including categories of stay and the duration and conditions of permission in those categories. The HO's immigration control is carried out through:

- the UK Border Force: a law enforcement command accountable directly to ministers, which manages applications for leave to enter at the border and customs functions. Border Force officers have the power of arrest and detention conferred on them by the Immigration Act 1971 and subsequent Immigration Acts
- the UK Visas and Immigration (UKVI), a division dealing with applications for entry clearance and leave to remain (including the visa service) of virtually all non-EU nationals seeking to visit, study, work, join family, invest, or establish a business in the UK, with the exception of some short-term visitors. The UKVI also runs the UK's asylum service, manages appeals from unsuccessful applicants and is in charge of the Point Based System (see below) (Gower 2016). Being in charge of scrutinising applications, the UKVI also participates in national anti-terrorism activities;
- the Immigration Enforcement (IE), a directorate responsible for investigating immigration offences, detention, administrative removal and deportation, and preventing abuse of the immigration system. It collaborates with other police bodies to ensure compliance with the immigration rules among

employers, landlords, the voluntary sector and others. IE officers conduct 'visits' to residential and business premises to question individuals about their immigration status and arrest anyone found to be in breach of immigration law; when a court warrant has been issued, forced entry may be used if necessary in order to apprehend immigration offenders. However, in the vast majority of cases, a person who has been arrested will be simply notified with an Administrative Removal ordering their imminent removal from the UK, without any court involvement.

Some immigration control functions are the responsibility of the police, such as the registration of foreign nationals. Employers and educational institutions that are registered as sponsors of the Point-Based System (PBS) are also required to report to the HO certain specified circumstances in relation to the migrant they are sponsoring, e.g. if they suspect that the migrant has breached a condition of their stay.

The Independent Chief Inspector of Borders and Immigration keeps the effectiveness and efficiency of the border and immigration functions under review.

## Permits

Those who are not subject to immigration control require leave to enter or remain in the UK, unless: 1) they fall within a limited number of exempt categories—including diplomats and crew members of ships, trains and Channel Tunnel trains; 2) they are a national of another EEA state or Switzerland, or the third country national family member of such a person, with a right of entry and residence under EU free movement law, or 3) they have valid leave in another part of the Common Travel Area (CTA) from which they are arriving in the UK—although this is not the case in all circumstances and there are additional restrictions on persons arriving from Ireland.<sup>46</sup>

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<sup>46</sup> The CTA consist of the UK, the Channel Islands, the Isle of Man, and the Republic of Ireland. The CTA territories each have their own immigration laws although those of the Channel Islands are very closely connected to those of the UK. They are not, however, identical and, along with Ireland, can be excluded from the immigration regime operating within the CTA if their immigration laws differ significantly from those of the UK.

Some categories of non-EEA nationals are required to obtain 'permission before travelling' to the UK and, generally, all non-EEA nationals who require leave and are coming to the UK for more than 6 months require prior permission.

All persons who are not nationals of the EEA or Switzerland generally require permission to enter and remain in the UK (Immigration Act 1971, Section 3(1)). The term 'visa nationals' refers to foreigners (non-UK and non-EEA nationals) who need an entry clearance to gain access to the UK for any purpose - unlike 'non-visa nationals', who only need clearance for specific reasons (for example, to live in the UK as the spouse of a British Citizen) (Home Office 2016d). 'Entry clearance' is the formal term to describe the application process for 'visa nationals' who wish to travel to the UK and for 'non-visa nationals' who intend to stay longer than six months or to settle in the UK or enter for a purpose for which prior entry clearance is specified as a requirement. Entry clearance generally operates as leave to enter the UK although it does not guarantee admission to the UK.

'Non-EEA nationals' entry is mainly regulated by a Point-Based Immigration System (PBS) that selects migrants on the basis of having certain valued attributes, such as qualifications, occupations and language skills. Most applications under one of Tiers 2 through 5 require a licensed sponsor (an employer, government, or educational establishment). Sponsorship in the PBS is based on two fundamental principles: a) that those who benefit most directly from migration (that is, employers and educational establishments) should play their part in ensuring that the system is not abused; and b) that those applying to come to the UK to work or study are eligible to do so and that a reputable employer or educational establishment genuinely wishes to take them on (Gower 2016). Each tier requires to score a sufficient number of points to gain entry clearance or leave to remain in the UK. Points are awarded for various criteria specific to each tier - e.g. qualifications and earnings; the ability to fund initial stay in the UK and ability to speak English plays an important role in most cases. The tier-specific visas are the following:

- Tier 1 Visas, which includes a) 'entrepreneur visas', allowing international businesspeople to enter the UK in order to establish or take over a UK business; b) 'exceptional talent visas', enabling a limited number of people - 1000 per year -

deemed to be (emerging) leaders in a small number of fields (e.g. science, humanities, engineering, medicine, digital technology, the arts) to enter the country, contingent on the HO's endorsement; c) 'graduate entrepreneur visas', granting entry to an annually HO-set quota of international graduates with a viable business plan to set up a business, dependent on the endorsement by a UK higher education institution or the UK Trade and Investment department, and, finally, d) 'investor visas' allowing people with at least £2,000,000 in funds available for investment to enter the UK.

- Tier 2 Visas, allowing skilled workers to enter the UK on a long-term basis to fill a skilled job vacancy included in a Tier 2 List or a Shortage Occupations List. Tier 2 jobs must usually be advertised to workers from within the EEA before they can be offered to non-EEA immigrants, unless the job is on the Tier 2 Shortage Occupations List.
- Tier 3 Visas, envisaged for unskilled migrants to replace existing low-skilled immigration programmes. This kind of Visa has never been implemented, and since 2008 effectively discontinued as the UK government established there was no need for any unskilled immigration from outside the EEA.
- Tier 4 Visas, allowing non-EEA foreigners to enter the UK as students, provided they are able to meet the cost of the course, maintenance and accommodation without working. Since 2015, Tier 4 students can no longer switch to another UK visa category from inside the UK when their studies finish.
- Tier 5 Visas, designed for youth mobility and temporary workers - e.g. charity workers, entertainers, diplomatic staff, and sportspeople.

Work-related qualifying periods constitute the common route leading to the granting of an 'indefinite leave to remain' (ILR), or 'permanent residence'. Conditional on the continuous permanence in the territory of the UK and the existence of significant ties with the country, this (revocable) immigration status removes any time limit on the foreigner's stay, as well as immigration-related restrictions on employment or study. In turn, ILR is a requirement to 'naturalisation', by marriage with a British citizen or based on a five-year legal residence.

'Dependents' or 'family members' are allowed to come to the UK in most cases through a specific stay and work permit.

### **Rights and benefits**

'No recourse to public funds' is a condition imposed by the HO on many categories of persons who are subject to immigration control, giving them no entitlement to welfare benefits or public housing (Home Office 2014). Those without valid leave to remain in the UK have no recourse to public funds and are also not permitted to work. However, as financial support from a local authority under community care and children's legislation is not a 'public fund', destitute and/or homeless persons may be entitled to support for accommodation and subsistence from the local authority.

### **Asylum procedures**

Since 2007, asylum claims are processed through the New Asylum Model. Each application is assigned to a specific member of the UK Border Agency staff (known as a 'case owner') who is responsible for the case and for all decisions taken on it, until the person is granted permission to stay or is removed from the UK. Decision-making is much faster than it was in the past (usually a few weeks). In order to become an asylum applicant and be recognised as a refugee, migrants need to be on UK territory (so, strictly speaking the migrants in Calais are neither refugees or asylum seekers from a UK legal perspective - at least as long as they remain in French territory). Once a person has passed through immigration control and is inside the UK, he/she must claim asylum at the offices of the UK Border Agency in Croydon (in south London). Convictions for using false passports or travel documents can adversely affect their credibility when their asylum claim is considered. The Secretary of State may revoke a person's refugee status if the individual has misrepresented or omitted facts, or used false documents, which were decisive in the granting of refugee status.

#### ***Regular procedure***

The processing of asylum claims is the UKVI's responsibility. There is no enforceable time limit for deciding asylum applications, but the IRs say that the decision must be taken 'as soon as possible'. If a decision on an application cannot be made within six months of the date it was filed, the Secretary of State shall either inform the applicant of the delay; or if the applicant has made a specific written



request for it, provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to make a decision within the stipulated time-frame (Home Office 2016a, Para 333A). There is no established system in the UK for prioritising the cases of people who are particularly vulnerable or whose cases are apparently well-founded. In fact, the scrutiny of asylum applications can be affected by the power of British immigration officers to discriminate on grounds of nationality in accordance with the authorisation of a minister (Parliament of the UK 2010, Section 29). Asylum seekers are entitled to a personal interview, preceded by an initial screening interview (Home Office 2016a, Para 339NA).

Applicants have the right to appeal against an initial asylum decision made under the regular procedure. Appeals are made to the Immigration and Asylum Chamber of the First Tier Tribunal, a judicial body composed of immigration judges and sometimes non-legal members. Given the complexity of the law and the procedure, legal representation is virtually always necessary, although asylum seekers give evidence in person. Free legal assistance is available to asylum seekers as part of the state-funded scheme of free legal aid in restricted areas of legal practice for people who do not have sufficient resources. Conditional on the First Tier Tribunal's permission, an onward appeal can be made to the Asylum Chamber of the Upper Tribunal solely on point of law. Unless the case is certified as 'clearly unfounded', lodging an appeal suspends removal. Many decisions affecting asylum seekers - e.g. a decision to detain, directions for removal, the refusal to treat further submissions as a fresh claim ('subsequent asylum application'), and a decision to remove to a safe third country - cannot be appealed. Against these decisions, the only recourse is judicial review, which does not examine the merits of the complaint but only the procedures' correctness.

Subsequent applications can be submitted and treated as 'fresh claims' if they provide content that has not been previously considered and have a realistic prospect of success (Home Office 2016b, Para 353). There is no limit to the number of subsequent applications that can be made. Decisions are taken on the basis of written submissions, which must be delivered in person to the HO in Liverpool.

First asylum applications made from inside the UK (i.e. not from a foreign country or at the port/airport of entry) must be registered by appointment at the Asylum Intake Unit (AIU) unless the asylum seeker is in detention, or cannot reasonably be expected to travel - in which exceptional case the application can be submitted to a Local Enforcement Office. Around 90% of asylum applications in the UK are not registered at the port of entry (Clayton 2016: 16).

### ***Border procedure***

Physical presence in the UK does not mean that a person has entered the UK in the legal sense. British law does not provide for asylum decisions to be taken at the border, since all claims, irrespective of where they take place, have to be referred to UK Visas and Immigration. Temporary admissions are granted to enable applications to be submitted. Asylum seekers entering the UK by plane are held in short-term holding facilities under different rules from actual immigration detention. The same procedure applies to asylum seekers entering through the port of Calais, although juxtaposed border controls allow the UK to limit their access to its territory and hand them over to the French police.

The only proper accelerated procedure in the British legal system was the Detained Fast Track (DFT) procedure, which was applied when the HO, based on the information gained through the screening interview, deemed the claim capable of being decided upon quickly. Since June 2015, as a consequence of a series of legal challenges to its safety and fairness, the procedure has been *de facto* suspended.

Similar to the DFT in practical terms, but legally distinct as it formally implies no decision on merit, is the Non-Suspensive Appeal (NSA) procedure, applied to claims certified by the HO as clearly unfounded - mainly because applicants are from a safe country of origin, but also for individual reasons. Applicants may often be detained. Appeals to the NSA decisions are non-suspensive, and consequently they can only be made from outside the UK.

Apart from regular cases, the IRs establish that asylum applications are to be declared inadmissible in any of the following cases: if applicants have been granted refugee status in another EU Member State (leading to the application of the Dublin procedure); if they come from a First Country of Asylum; if they come from a Safe Third

Country; if they have been granted a status equivalent to refugee status in the UK; or if applicants are protected from *refoulement* pending the outcome of a safe third country procedure (Home Office 2016a, Para 345A).

### ***Safe country concepts***

The 'safe countries of origin' concept is identified in UK law through Section 94 of the Nationality Immigration and Asylum Act 2002 (Parliament of the UK 2002). The Home Secretary designates a country of origin as safe once it is ascertained that 'there is in general in that State or part no serious risk of persecution of persons entitled to reside' there, and that removal there 'will not in general contravene' the ECHR. In making the order, the statute requires the Home Secretary to regard information 'from any appropriate source (including other Member States and international organisations)'.

A 'safe third country' is defined in the IRs (Home Office 2016a, Para 345) as a country to which the person seeking asylum has access and a 'sufficient degree of connection' on the basis of which it would be reasonable for them to go there; where the applicant's life and liberty is not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; where the principle of *non-refoulement* is respected in accordance with the Refugee Convention; and, finally, where it is possible to request refugee status and actually receive protection in accordance with the Refugee Convention.

Schedule three of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 provides a 'First List of Safe Countries' – that is, safe third countries according to UK law – consisting of all EU Member States (except Croatia), as well as Norway, Iceland and Switzerland. In cases of asylum seekers entering the UK from one of the listed countries, the Dublin procedure and subsequent removal is applied (Parliament of the UK 2004, Schedule 3 Part 2).

Finally, the 'first country of asylum' is one where an applicant either has been recognised as a refugee and may still enjoy that protection, or enjoys sufficient protection, *non-refoulement* included. In both cases, according to IRs, the applicant is to be readmitted to that country (Home Office 2016a, Para 354B).

### ***Dublin procedure***

The Dublin Regulation is applied to people who can be removed to an EU member state, Iceland, Norway and Switzerland – ‘First List of Safe Countries’ – once it has been determined that they have travelled to the UK through them. The screening processes includes checks in the EURODAC asylum fingerprint database. Once the EU member state or Schengen Associated State takes or is deemed to take responsibility for examining the asylum application on the basis of the Dublin Regulation, the claim is refused as inadmissible on third country grounds without its substance being considered in the UK. Consequently, no personal interview takes place. The only possible challenge is by judicial review, generally based on the Dublin Regulation not being properly applied because, for instance, the person has family in the UK, or that human rights will be breached and the humanitarian clause should be applied. In general, applicants are detained when the proposed receiving state has accepted, or by default are deemed to have accepted, the UK’s request. Detention lasts until removal, which usually happens under escort. Besides judicial review, a Dublin removal can only be appealed on the ground that it would be in breach of the asylum seeker’s rights under the ECHR or the Refugee Convention in the receiving country (Parliament of the UK 2004, Schedule 3, Part 2). Although challenges to Dublin removals are very infrequent and highly unlikely to be successful, as this would require a court to refute the Secretary of State’s certificate that the claim is unfounded, transfers to safe countries have been effectively suspended. For example, asylum seekers are no longer sent back to Greece following the European Court on Human Rights judgment in *M.S.S. v. Belgium and Greece* (ECHR 2011). Transfers based on the discretionary clause of the Dublin Regulation are also rarely applied (usually only if the applicant has family members in the UK).

### ***Safe Third Country procedure***

This procedure applies to applications of non-nationals coming from countries to which they can be returned without a breach of the Refugee Convention, or the risk of being sent elsewhere (Parliament of the UK 2002, Schedule 3, Part 3). The law provides for a ‘Second List’ itemising all the (non-EEA) third countries the HO deems safe, but the list is currently still blank and decisions are made on a case-by-case basis. As there is a presumption that human rights-based claims against removal to these countries are unfounded, decisions

tend to be taken rather quickly. No personal interview is provided. Appeals can only be made on human rights grounds, based on alleged direct or indirect *refoulement*, contingent upon the HO certifying that these claims are not unfounded. Once the removal decision is made, only a judicial review is possible, although courts tend to look more closely at the substance of the decision when a breach of human rights is involved (Clayton 2016: 34). As with the Dublin procedure, asylum seekers are entitled to free legal assistance, but in practice this is hard to obtain.

## Reception

In all procedures for determining a first claim, where they are not detained, destitute asylum seekers are entitled to accommodation and/or a weekly sum of money. While the assessment of their eligibility for support is going on, they may receive support on a temporary basis – the ‘s.98 support’ (Parliament of the UK 1999, Section 98). This can only be received once the claim is registered and provides mainly in-kind assistance. Once the assessment is complete, an asylum seeker who is accepted to be destitute receives what is commonly referred as ‘section 95 (s.95) support’ (Asylum Support Appeals Project 2016). An asylum seeker is considered destitute if he/she does not have adequate accommodation or any means of obtaining it; he/she does have adequate accommodation but no means of meeting their other essential needs; or he/she will be in this position within 14 calendar days (ibid. Section 95). S.95 cash support amounts to £160.12 (184.80 euro) per month per person. Once an asylum claim is refused and appeal rights exhausted, s.95 support stops, except for families with children. Refused asylum seekers (a minority thereof) can qualify for no-choice accommodation and a form of non-cash support from the HO called an Azure card (s.4 support) if they can show either that they are not fit to travel, have a pending judicial review, there is no safe and viable route of return, they are taking all reasonable steps to return to their home country, or that it would be a breach of their human rights not to give this support (Home Office 2005). S.4 support can only be provided as a package including accommodation, in a location determined by the HO, and ‘facilities for accommodation’. Consequently, the recipient cannot choose to receive financial support only (as they can with s.95) and continue to live with family members who are not included in the support application. All schemes provide additional payments



and non-cash allowances to parents with dependent children and pregnant women.

Support can be withdrawn if the HO has reasonable grounds to believe that the supported person or his dependant has:

- committed a serious breach of the rules of their collective accommodation; an act of seriously violent behaviour whether at the accommodation provided or elsewhere, or an offence relating to obtaining support;
- abandoned the authorised address without first informing the HO;
- not complied with requests for information relating to their eligibility for asylum support;
- failed, without reasonable cause, to attend an interview relating to their eligibility for asylum support;
- not complied within a reasonable period, with a request for information relating to their claim for asylum;
- concealed financial resources and therefore unduly benefited from the receipt of asylum support;
- not complied with a reporting requirement;
- made or sought to make a further different claim for asylum before their first claim was determined, in the same or a different name; or
- failed without reasonable cause to comply with a relevant condition of support.

Movement of asylum seekers is not restricted to defined areas, but temporary admission, which is the usual status of asylum seekers, is usually conditional on residence at a particular address, and there is a requirement to keep the HO informed of any change of address. Asylum seekers accommodated by the HO are not permitted to stay away from their accommodation. The most common form of accommodation is the initial accommodation centres and then privately owned flats and houses. These centres are the usual first accommodation for any asylum seeker who asks for support and is not immediately detained, apart from unaccompanied children. The average stay is intended to be 19 days' maximum. If asylum seekers qualify for support, they are moved into smaller units, mainly flats and shared houses, in the same region. Asylum seekers have no choice of location, which is provided in the North, Midlands and South West of England and in Wales and Scotland, not in the South

or in London. Moreover, families may be separated if they are not claiming asylum together. Since 2012, accommodation for asylum seekers is managed by private companies under contract to the HO. The assessment process for eligibility for the accommodation remains with the HO, which is ultimately responsible in law for the provision of accommodation. Families are to be housed in self-contained accommodations.

### **Employment, education and health care**

Asylum seekers are not generally allowed to do paid work. Exceptionally, those whose claim (or further submission) has been outstanding for a year may apply to the HO to obtain permission to enter employment (Home Office 2016c, Para 360). If permission is granted, it is limited to applying for vacancies in listed shortage occupations in the UK and are defined very specifically (e.g. consultant in neuro-physiology, electrical engineer). Self-employment is prohibited (*ibid.* para 360D).

Education is compulsory for all children from 5 to 16 – children seeking asylum included. There are not generally preparatory classes to facilitate access. If children seeking asylum have special educational needs these may be assessed and met as for other children. However, destitution may affect access to education since, for instance, children on s.4 support are not entitled to free school meals or other benefits. No explicit legal provision bars asylum seekers from entering into higher or further education (though high fees and lack of access make it very unlikely).

In England, free hospital treatment is only guaranteed to asylum seekers with a current claim, those whose submission has been refused but who are receiving s.95 or s.4 support, and unaccompanied asylum seeking children (Department of Health 2015, Section 15). Asylum seekers are also entitled to register with a general doctor, while access to mental health services is not guaranteed. English hospitals provide urgent treatment, but they are required to charge for them. On the other hand, accident and emergency services (but not follow-up in-patient care) and treatment for listed diseases are free to all – including refused asylum seekers who are not on asylum support. In general, in the rest of the UK, all asylum seekers are entitled to full free health care.

## Detention

Asylum seekers may be detained for administrative purposes – apart from criminal procedures – on the same legal basis that applies to all those subject to immigration control. According to regulation (Home Office 2013, Chapter 55), foreign nationals can be detained if, based on past experience, criminal record, and personal ties in the UK, authorities consider them at risk of absconding; if there is not enough reliable information to decide whether to release them; if their removal from the UK is imminent; and if there is need for a provisional arrangement while looking for alternative solutions for their care and release is not considered conducive to the public good. On the other hand, foreign nationals – asylum seekers included – can no longer be detained only because their application is expected to be decided on quickly using the fast track procedures.

British law sets no maximum period for detention; however, foreign nationals can only be kept in custody if they have not already been detained for an unreasonable length of time. Guidelines say that detention should only be used as an option of last resort, and that all reasonable alternatives must be considered – e.g. electronic tagging, regular reporting, bail with surety and residence restriction (*ibid.* para 55.20). Authorities have to decide on detention cases with a presumption in favour of release. Special consideration must be given to families and unaccompanied children.

Border officials in the UK may detain migrants on arrival; upon presentation to an immigration office within the country; during a check-in with immigration officials; once a decision to remove has been issued; after a prison sentence; or following arrest by a police officer. Most detainees are housed in one of the ten Immigration Removal Centres (IRCs) or Residential and Non-Residential Short Term Holding Facilities and Holding Rooms at or near ports of entry and reporting centres (Silverman 2017).

According to regulation, vulnerable people are unsuitable for detention, which should only be used as an exceptional measure, or when their care can be satisfactorily managed. Pregnant women may only be detained provided that they will shortly be removed and there are exceptional circumstances justifying the measure (Parliament of the UK 2016, Section 60). Minors cannot be detained, nor can seriously ill persons if their condition cannot be satisfactorily

managed in detention (*ibid.* para 55.10). Asylum seekers are normally detained in IRCs built on prison designs – although in England and Wales asylum seekers have also been lodged in prisons based on an agreement between the National Offender Management Service and the HO. A medical team has to be available in each detention centre; each detainee must be medically examined within 24 hours of arrival, and can report that her/his health is injuriously affected by detention. Other than the family units, there are no special facilities for vulnerable people.

Detainees have a right to be informed of the reason for their detention and can apply for bail. Each case must be considered on its merits, including consideration of the duty to safeguard and promote the welfare of any children involved. To be lawful, detention must be based on one of the statutory powers and be in accordance with HO policy and with the limitations implied by domestic and human rights case law. There is no automatic independent judicial consideration of the lawfulness of detention, but the HO is obliged to review the reasons for continued detention monthly.

### **Family reunification and unaccompanied minors**

The UK has not opted into the Family Reunification Directive.

There is no waiting period for the members of the family of a beneficiary of refugee status or humanitarian protection (the sponsor) to apply for the status, nor is there a maximum time limit after which the beneficiaries are no longer entitled. There is no charge for the application or requirement for the sponsor to have an income to support their family members. As far as family reunification is concerned, there is no distinction between refugees and those with humanitarian protection.

Eligibility is restricted to the immediate family as it existed prior to the sponsor's flight and the only people automatically eligible to join the refugee in the UK are: 1) the spouse/same sex partner; 2) dependent children under the age of 18.

Refugee children are not eligible to sponsor their parents or siblings. Family members do not receive the same status as their sponsor. They receive 'leave in line' i.e. leave to remain which expires at the same time as their sponsor's refugee status/humanitarian protection. Section 55 of the Borders, Citizenship and Immigration Act 2009

requires the Home Office to ensure that immigration and nationality functions safeguard and promote the welfare of children in the UK (Parliament of the UK 2009). This applies to children who claim asylum in their own right and to those who are dependants on their parents' claim.

In the UK migration system, an 'unaccompanied asylum seeking child' is anyone who has not yet reached their 18th birthday who is applying for asylum in his/her own right, is separated from both parents and is not being cared for by an adult who in law or by custom has the responsibility to do so.

A 'trafficked child' is a minor who is a victim, or for whom there is reason to believe they may be a victim, of trafficking in human beings according to the Council of Europe Convention on Action against Human Trafficking in Human Beings.

A 'looked after child' is a child who is looked after by a local authority by reason of a care order, or being accommodated under section 20 of the Children Act 1989.

Finally, a 'care leaver' is an eligible, relevant or former relevant child between 16-18 who have previously been in care, but is no longer legally 'looked after' by the Local Authority Children's Services (Department of Education 2014)

## **Resettlement and relocation**

The UK's resettlement programme is referred to as the Gateway Protection Programme (GPP) (Parliament of the UK 2002, Section 59). Submissions are made exclusively by the UNHCR, while the final decision is made by the HO. Resettlement is also organised under the separate Mandate Refugee Scheme (MRS), under which the UNHCR refers to the HO an unspecified number of refugees in need of resettlement who have connections to the UK through family or historical links. Mandate refugees do not benefit from the GPP integration programme but do receive the same benefits as other refugees in the UK. Finally, refugees are also resettled in the UK via the Syrian Vulnerable Person Resettlement (VPR) Programme, based on the UNHCR's assessment of individual cases and visa checks by the HO.

The UK has not opted into the EU relocation scheme, despite a recommendation from the House of Lords to do so (Clayton 2016, 53).



However, pursuant of the 'Dubs Amendment', the Government has also taken steps to relocate unaccompanied refugee children from Greece and Italy, as well as France (Parliament of the UK 2016, Section 67).

## Rejection of demands and return of migrants

Since 2014, there are four (as opposed to the previous seventeen) immigration decisions on rejection that can give rise to appeals: 1) refusal of a human rights or protection claim and revocation of protection status (Parliament of the UK 2002, Section 5); 2) refusal of entry clearance and refusal to vary leave to remain, in some situations, where the application was made before the Immigration Act 2014 was in force; 3) refusal to issue an EEA family permit as well as certain other EEA decisions; 4) deprivation of citizenship (Home Office 2016a).

The 2016 Act empowers the Secretary of State to certify that the temporary removal of an individual subject to immigration control, who has raised a human rights claim would not breach the UK's human rights obligations or cause that individual irreversible harm. This results in an extension of the UK's 'deport first, appeal later' policy beyond cases where individuals are liable to deportation, to all immigration cases where human rights-based claims are raised. This measure leaves only asylum cases and human rights cases where removal would pose a risk of serious irreversible harm or a breach of the UK's human rights obligations as appealable, so as to remove the opportunity for individuals to extend their stay by exploiting the in-country appeals process (Devine 2016).

The British migration system provides for five distinct processes of removal – four forceful, one voluntary – which can be potentially applied to asylum seekers among other non-nationals.

- 'Port removal' applies to people who are 'refused entry' at their arrival at a point of legal entry in the UK, including seaports, airports and the channel rail terminal. The term is not technical, but has been generally used to refer to a removal process solely based on the competent authority's decision that the individual does not qualify for leave to enter the country, which results in the foreigner being effectively removed without having legally entered the country. The

measure entails limited rights to appeal and may be enforced after the applicant has been granted temporary admission, or after a detention period until removal (Home Office 2015). Port procedures constitute a relatively small part of all removals from the UK, yet a majority of the removed asylum seekers returns.

- ‘Administrative removal’ has since October 2000 been applied when a foreign national is in breach of UK immigration law. This can apply in the case of a foreign national who has breached the conditions of his leave to enter or remain in the country, or who has obtained permission to stay through deception. Once outside the UK, the person can apply for re-entry under the Immigration Rules. An administrative removal is a direction and not an order to be removed and has no time period attached to the implementation of the removal (Parliament of the UK 2014, Section 10).
- ‘Deportation’ is the process whereby non-UK nationals are removed from the UK provided that a) the Home Secretary deems the measure to be ‘conducive to the public good’; b) the person is the spouse, civil partner or child under 18 years of a person ordered to be deported; c) a court recommends it in the case of a foreign national over the age of 17 that has been convicted of an offence punishable by imprisonment (Parliament of the UK 1971 Section 5). Any foreign national can be deported, although there are stricter criteria for deporting an EEA national or a refugee.
- ‘Voluntary departures’ involve non-UK nationals against whom enforced removal has been initiated – with the adjective ‘voluntary’ describing the method of departure rather than the foreigner’s choice to depart. There are three kinds of voluntary departures. Some people depart by official Assisted Voluntary Return schemes, which are tracked separately in HO data. Others make their own travel arrangements and tell the authorities, or approach them for help with the arrangements. HO data group these departures with enforced removals. Finally, some people leave without notifying the government.

British nationals, with the exception of children under age 18 whose parents are subject to removal, cannot be deported or administratively removed.

## Residence-related criminal offences: Trafficking and smuggling of foreigners

The Modern Slavery Act 2015 consolidates existing offences of human trafficking and slavery and encompasses trafficking for all forms of exploitation (Parliament of the UK 2015). The act defines the offence of holding a person in slavery, servitude and/or requiring this person to perform forced or compulsory labour, in accordance with article 4 of the Human Rights Convention, irrespective of the consent of the victim and in light of all relevant circumstances (e.g. the person being a child, a family member, or mentally ill) (ibid. Section 1). Accordingly, the law establishes the offence of knowingly arranging or facilitating the travel of another person in the UK or abroad with a view of being exploited – i.e. being held in slavery, being sexually exploited, undergoing the removal of organs, securing services under duress – in order to pursue ‘benefits’ – i.e. any advantage derived by the trafficker, which could include financial gain, profit, personal benefit or privilege as well as state financial assistance (ibid. Section 2, 3). Aiding, abetting, counselling and supplying false documents are identified as offences committed with the intention to commit an offence of human trafficking (ibid. Section 4).

Smuggling, on the other hand, is defined as an act which facilitates the breach of immigration law by an individual who is not a citizen of the European Union, with the culprit being aware of the consequences of her/his act and that the individual is not an EU citizen (Parliament of the UK 1971, Section 25, modified by Parliament of the UK 2002, Section 143). Whether the law breached falls into an entitlement to enter, transit or be in the UK or is merely regulatory or administrative in nature has to be determined on a case-by-case basis, in consultation with Immigration authorities (Crown Prosecution Service 2017).

Facilitating the arrival in or the entry into the United Kingdom – being aware of doing so – of an individual that can be reasonably believed to be an asylum seeker, in order to obtain a gain, is also an offence (Parliament of the UK 1971, Section 25A, modified by Parliament of the UK 2002, Section 143). The offence covers any actions

done whether inside or outside the UK, regardless of the nationality of the perpetrator. No element of smuggling is required to make out the offence; the asylum seekers do not need to be illegal entrants. Assisting entry to the UK in breach of a deportation or exclusion order is likewise an offence (*ibid.* Section 25B).

## Adherence to the three conceptions of justice

The 'pragmatic' rationale informing the UK legal framework of migration policy does not rule out *per se* its compliance with conceptions of global justice, as a certain space for the discretionary power of governmental authority is to be expected in any national system. What makes the British case remarkable is the central, far-reaching position of Immigration Rules (IRs), which are the junction between the – somewhat inevitably – ambiguous relationship between the general scope and abstract-ness of (migration) law on the one hand, and the administrative and political discretion of (migration) policy on the other. While being squarely grounded in the country's legal order as statutory instruments, IRs are in fact so diverse in formats and content, and subject to so loose a scrutiny by the Parliament that they resemble more non-formal rules largely free from the constraints of the hierarchy of sources – much like 'bureaucratic rules' and soft laws (Harlow 2012) – than regular secondary legislation. The vast delegation of law-making powers from the parliamentary majority to the executive in the matters of migration grants the Home Office virtually complete control over the issue, as the HO and its executive machinery are more empowered than bound by IRs. Hence, ordinary immigration policy in Britain has been reckoned to have entered a post-statutory phase, dominated by regulative rules that have proved highly versatile tools for 'loophole-closing' and 'fine-tuning' (Cerna and Wietholtz 2011: 204). The civil service's latitude in the day-to-day implementation of IRs, while circumscribing to some degree the Home Secretary's political discretion, does not improve the legal certainty and accountability of the legal framework as a whole. Expediency might not necessarily prove detrimental to the ultimate normative adequacy of national and European migration policy – indeed it might compensate for overly formal approaches to the 'rights' of migrants. At the same time, as far as the sole legislative framework is involved, the pre-eminence of rules of practice does generate a tension with principles such as the respect for the rule of law, which usually serves as the yardstick of a legal system's adequacy.

## Justice as non-domination

In the UK's relations with international actors, this normative principle manifests itself as a view of international politics in which the States are the fundamental ethical units over the claim of any individual. Hence, global institutions remain central in advancing justice *only* so far as they promote not substantial values (such as protection of immigrant rights), but common global reasons and foster deliberation rather than legally sanctioning non-compliance on the international level (Eriksen 2016). In this sense, the non-domination orientation of the UK's normative approach to migration and asylum is evidenced in the country's attitude towards EU rules and institutions, where traditional opt-outs aimed at protecting 'sovereignty' in these fields (e.g. the Schengen Area, the Refugee Relocation System) are now being capped by a great deal of post-Brexit legislative proposals aimed, among other things, at reducing/removing free movement of people in the UK. Also in line with this conception on non-domination is the British aversion to judicial supranational authorities, currently manifesting in the debate over how and to what degree the country will be able to be emancipated from the jurisdiction of the Court of Justice of the EU (CJEU), especially on migration and residence matters. Also significant is that UK law 'conditions' the purview of art. 8 of the ECHR (right to respect for private and family life) and the entry into the country on the pursuit and maintenance of effective immigration control and the economic interests of the United Kingdom (Parliament of the UK 2014, Section 19), which are regarded as overriding public interests.

The concept of safe country of origin is also at variance with the notion that, in evaluating asylum applications, personal conditions should not be trumped by considerations concerning nationality. In fact, norms and practices connected to the concept of safe country of origin - i.e. the accelerated return procedure - are also in breach of the non-domination principle, at least insofar as the list of countries falling under this category is the result a selection process where sheer security and national interests override even the comparatively 'thin' normative concerns based on justice as non-domination. Moreover, The Equality Act 2010 permits immigration officers to discriminate on grounds of nationality if they do so in accordance with the authorisation of a minister. This discrimination may include subjecting certain groups of passengers to a more rigorous examination. Ministerial authorisations are made on the basis of statistical



information of a higher number of breaches of immigration law or of adverse decisions in relation to people of certain nationalities. The statistical basis is not published. Immigration officers have the power to refuse entry at the border unless the passenger has a valid entry clearance or claims asylum.

Britain's legislative framework concerning migration and asylum appears predominantly informed by a 'traditional' concept of state sovereignty, focused on control over borders and incoming human flows, in order to ensure the protection of present demographic and economic balances and public order. Whereas upholding this prerogative is, to varying extent, a goal common to most national legal orders, the British framework seems to pursue it in a somewhat more straightforward manner.

Migration and asylum-related legislation in the UK has been greatly affected by the doctrine of Parliament supremacy, according to which courts cannot generally overrule legislation, and there is no law that future Parliaments cannot change. This constitutional set-up, characterised by the lack of a written constitution and the common-law tradition, has resulted in a rule-making system and a legislative framework extremely flexible and comparatively very 'sensitive' to public opinion's orientations towards immigrants. It is also largely impervious to the direct application within the national legal order of internationally sanctioned principles of protection – ensured in other countries by judicial review of national legislation against international law. Combined with the majoritarian nature of the British political system, these constitutional features have resulted in a predominance of the executive, and in particular the Home Office, not only with regard to migration and asylum policy in general, but also in terms of legislation alone. As a result, migration control could be set as a clear priority over the protection of foreigners' human rights and the compliance with related international regimes.

### **Justice as impartiality**

Although justice as impartiality is challenged by the emphasis on control many aspects of the Britain's legislative framework concerning migration issues, several British laws do prevent authorities from dominating individuals. This conforms to a universal criterion of justice, as opposed to mere instrumental considerations and ensures that the individual freedom of incoming foreigners is only

restricted for the sake of their own freedom, rather than the pursuit of any superior authority's goals. Among the most conspicuous manifestations of the UK's adherence to the universal scope of this normative principle is its engagement in supranational regimes promoting cosmopolitan law and institutions. With the 2000 entry into force of the Human Rights Act 1998, for instance, the rights contained in the European Convention on Human Rights (ECHR) – to which the UK has been a signatory since 1950 – have been incorporated into UK law. Thus, they are made directly actionable in UK courts, with the rulings of the European Court of Human Rights being directly enforceable in the country and every public authority (political and administrative) being liable for infringements of the Convention (Parliament of the UK 1998). Partaking in these legal and institutional frameworks is particularly relevant in the UK, where the judiciary's lack of constitutional review powers has prevented it from playing the same role as in other countries in establishing and developing a domestic system of protection of the rights of foreigners. Also, the pressure exerted by the ECHR and the CJEU case law may also be regarded as a main factor in the process that has led the UK's protection of asylum seekers' rights to progressively conform to international and European standards. In addition, the passing of the Asylum and Immigration Appeals Act 1993 effectively created a regime dedicated to asylum, until then regulated through the Immigration Act 1971 and IRs. This process has eventually resulted in the adoption of inter-institutional settings – e.g. a more 'confrontational' relation between the executive and the judicial – and legal arrangements – e.g. the judicial review of migration laws and regulations – relatively unfamiliar to the British tradition. The number of the British High Courts' rulings reaffirming the subordinated rank of IRs to primary legislation and toiling to limit the Home Office's discretionary powers are evidence of these changes (Harlow 2012).

At the same time, transformations of the actual conditions of asylum seekers and immigrants brought about by compliance with the impartiality principle should not to be overstated. Remarkably, former Prime Minister David Cameron proposed to replace the Human Rights Act 1998 with a British Bill of Rights that, without repealing the ECHR, would avoid the direct effects of the Convention and the Court's jurisprudence, so that rights in the UK legal order would be solely set forth by British legislative assemblies.

Analogously, 'public good' is frequently referred to as a prime concern in law making and implementing, which does not always sit well with considerations based on the absolute autonomy of individuals as such. As an example, there is a general presumption in British law that a deportation or removal order is in the interests of the public good and that this consideration will outweigh all other factors, while the respect for human rights – e.g. as established under the 1951 Convention on refugees – is considered inadmissible. Impartiality can be identified as the normative rationale behind the explicit limitations on the otherwise prevailing public interest of maintaining effective immigration control (Parliament of the UK 2014, Section 117B). These limitations allow irregular immigrants, rejected asylum seekers whose removal is barred by legal or practical obstacles, as well as persons who have appealed a return decision, to remain in the host country based on their right to private and family life as deportation or removal would be unlawful under Article 8 of the ECHR (*ibid.* Section 19). However, the provisions envisaging these exceptions have been amended to give effect to the primacy of effective immigration control and of deportation, and to restrict what critics would regard as unduly liberal interpretations of the scope of Article 8 by the judiciary. Article 8.2 permits interference with that right in accordance with the law and as necessary in a democratic society in the interests of national security, the prevention of disorder or crime and similar reasons of public benefit (for trends in immigration offences, see also Aliverti 2016).

### Justice as mutual recognition

The 'incremental' and 'pragmatic' character of the UK's legal framework can also be regarded as conducive to practices that address migration and asylum issues based on the specific life circumstances of migrants and foreigners rather than a general notion of their rights. The mentioned point against international legal sources replacing/outranking national documents and the direct effect of supranational judicial bodies' pronouncements is frequently made drawing attention to international regimes' scarce sensitivity to the concrete circumstances of migrants, whatever their rights (Wittes 2012).

For Britain's legislative framework to be just in terms of mutual recognition, it should include rules and institutional arrangements creating actual opportunities for nationals and immigrants to enter into meaningful relationships, within which the rights of the latter

can be (re)defined through argumentation, and the interests and values they rest on can be inter-subjectively interpreted. In fact, the UK conceptual and legal framework offers hardly any opportunity to revise in-built bias and misrecognition about migrants (and the British people themselves) through deliberation. In circumstances like these, it is less than likely that the native population and the immigrants commit to the open, demanding dialogue that is essential to understand what is actually 'just' for the other. To the extent that opportunities for some sort of dialogue actually arise - i.e. during screening interviews - they hardly guarantee the degree of in-depthness and, most of all, reciprocity needed to be conducive to mutual recognition and the corresponding form of justice. Even judicial appeals, which may possibly reconstruct the identity of individuals in a more accurate and culturally (or other personal feature) sensitive manner, are still primarily aimed at pigeonholing people in their correct - *just* - categories, ultimately considering them abstract subjects equipped with universal rights.

Moreover, even supposing that devices such as the 'safe country of origin' concept or the fast-track procedures are designed to prioritise the needs of 'real' asylum seekers and not just their legal abstraction (or to prune applications), their application is very unlikely to identify and contest via deliberation all the inequities concealed or just embedded in seemingly reasonable rules, together with assumptions, stereotypes and structural biases that perpetuate *de facto* injustice amounting to dominance. Although safe third country removals take place on an individual basis to other countries, there is no obligation to review the lists, and - contrary to the idea of dialogic decision making - there is no appeal against the inclusion of a country on the list. A significant instance of a legalistic logic trumping 'sensible' considerations is that of asylum-seeking children being deprived of their support once they turn eighteen. Unlike other care leavers, the law does not provide for them being prepared for adult life in the UK, but only to protect and support them until they can decide to apply to have their leave to remain extended. Here, they also risk seeing the request turned down and being sent to a 'country of origin' which the applicant may have very little connection with, having spent her/his childhood in the UK.

## Conclusions

This analysis puts into perspective the peculiarities of the British legal framework, possibly delineating a less eccentric system than conveyed by its formal aspects, and one more in line and deeply integrated with an EU-wide standard than it seems at first glance. However, despite the conceivable eventual 'normalisation to the EU standard', the 'pragmatic' approach underlying British legislation and regulation remains a noticeable feature as it sheds light on the (problematic) part played by the UK in the EU migration system, both in terms of policy development and normative coherence.



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# Conclusion

## National frameworks and the EU's contribution to global justice

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This final chapter provides an overall view of the normative orientations that has emerged from the different national, conceptual, and legal frameworks selected for this report, in order to identify significant convergences and contrasts among them. In doing so, we outline the general impact of these frameworks, which govern the Member States' (MSs') migration policies and their position within the European Union Migration System of Governance (EUMSG), on the Union's efforts to live up to its role as a community of values and, relatedly, a normatively committed international actor.

Yet, before doing so, it is worth emphasising the advantages of the analysis offered in this report on state-level contributions to the EUMSG political processes. As pointed out in the introduction, issues of migration extend across the Union's already complex domestic and international divide. This includes, on the one hand, a radical recasting of traditional conditions for human movements among MSs and, on the other hand, a more ambivalent approach to immigration from third countries. That, in turn, fluctuates between the establishment on a supranational level of state-like schemes of control and in- or exclusion, and more revisionist approaches to notions and practices of border. The transversal quality of the issue, combined

with an elaborate distribution of competences among levels of governance, makes the normative implications of EU immigration policies particularly complex. This is especially the case if they are compared with popular views of the Union as an entity informed by a liberalising ethos, being frequently frustrated by MSs' obstinate protection of their prerogatives. Indeed, states may well prove to serve as 'preservations' of the Westphalian logic, with the national scale being the (only) one at which genuine social cohesion is possible and acceptable. If that is the case, protection against arbitrary intrusions, such as by other countries, international regimes or the EU itself, does appear a moral prime concern specific of the state-level of the governance system.

Yet, this does not imply that the supranational level is necessarily the sole locus of justice as impartiality, designed to compensate for national norms and policy measures which are 'unsuitable' to protect the rights of immigrants *qua* human beings rather than in their capacity as members of their national political community. The assumption behind this perspective is that only a perfectly supra-national government, built at the expense of nation states, would be able to really act in accordance with a genuine cosmopolitan notion of justice. The Union would then be acting as the herald of a universalist conception of cosmopolitanism, which is the first real step towards a universalist form of government. However, the proposition that the EU is 'the first international model which begins to resemble the cosmopolitan model' (Archibughi 1998: 219) does not necessarily imply such a universalist perspective. Indeed, the notion of the European integration process as a local experiment of cosmopolitanism admits of more critical approaches to the issue in its descriptive and normative aspects (Rumford 2008). The problematic cosmopolitanism as carried out by the EU (sometimes very inconsistently so) may include both universalism and particularism, though 'combined in the form of an outright normativism with a tendency to essentialize and exclude' (Krossa 2012: 11). This ambiguous compresence of universalism and particularism accounts both for the multilevel nature of the European polity, and the EU's migration system of governance in particular. It also explains the EU's attempt to combine a transformative foreign policy agenda with strategies aimed at acting effectively and being accepted as a 'normal' actor within the current international system. This is also, but not only, due to its normative agenda (Sjursen 2017).

Hence, based on the assumption that the normative issues connected to EU politics, and the EU migration policy in particular, are not completely crystallised into traditional categories of normative debates, we can now single out some significant features of the relationships between national normative frameworks and conceptions of global justice in the field of immigration policy.

### Justice as non-domination

The notion of non-domination emerges as the most significant normative criterion underlying the legal frameworks on migration issues in all the examined countries. National rules about immigration are not necessarily restrictive of migrants' rights or oblivious of their needs and desires; nevertheless, benevolent as they may be, the pre-eminent ultimate rationale of national migration laws appears to be to safeguard the freedom of states from arbitrary interference, or even control, by external actors. Correspondingly, the Westphalian order remains by large the default model for the political organisation of the international system, because it serves as the external guarantee of this freedom. However, the convergence generated by the shared conception of justice should not be overstated, as non-domination is embodied in an array of very different relationships with international migration regimes and the EUMSG. Non-domination proves to be a major normative standard in countries like Germany and Norway, whose migration laws tend to be more structurally compliant with the priorities of the international community. This also applies to a varying extent to countries with a more self-assertive approach to migration issues, such as France or the UK.

An array of different aspects is ultimately predicated by the normative pre-eminence of national authorities' freedom from external intrusion in their area of responsibility. This includes Britain's opt-outs from a number of elements of the EUMSG and France's ability to influence the EU rule-making process so that common laws and policies are consistent with its national priority. It is also illustrated by the subordination of Germany's migration and asylum policy rules to domestic macroeconomic and demographic interest, and even by the Norwegian practice of granting rights equal to those of nationals to legal residents only. This, however, does not mean that any measure taken in order to protect their integrity and sovereign prerogatives is warranted by the notion of non-domination. This is also pointed out by the case of Hungary's laws limiting access to

international protection. Despite being often at variance with more 'progressive' and demanding conceptions of justice, which are more centred on individual and collective rights of migrants, non-domination does not just amount to the realist imperative for states to self-preserve, regardless of the consequences for other actors. In a Westphalian international order grounded on justice as non-domination, states continue to be the only relevant group of actors, and to exist in the absence of any higher-level authority. This order also sanctions inter-state relationships that conform to accepted standard of rationality, openness to the reasons of fellow states, and reciprocal benevolence. Consequently, measures like the resettlement of refugees are allowed, as long as their country of origin agrees with it.

The condition for a decent inter-national co-existence is that it be not premised on, and much less aimed at the promotion of, substantive notions of justice. However, this report confirms that, while MSs subscribe in principle to a just Westphalian order as a desirable basic condition of international relationships, MSs unjustly interfere with weaker actors, such as countries of origin or transit of migration flows. Albeit in a variety of degrees and manners, all examined countries have been found guilty of imposing their own agendas on third parties. Injustices occur via bilateral relations or unilateral decisions, in order to gain a firmer control on irregular human movements and govern mobility to advance national economic priorities. The only exception is Greece, who seems to follow global justice principles, however rather due to its lack of political leverage than its uprightness.

Asylum affairs prove to be a most delicate juncture for all countries in terms of observance of criteria of justice. Even the relatively less demanding criterion of non-domination is easily put under strain. This is caused by the identification of so-called safe countries of origin or transit, which is regularly carried out with little or no involvement of the affected countries, and equally poor consideration for the potentially severe interference these decisions may generate on them. The involvement of independent governmental agencies, as for instance in the case of Norway, may have an impact on the actual consequences of these decisions, but it does not change that unjust character of the decision. Justice as non-domination poses an analytical and political conundrum when attention is drawn to the position of the MSs within the EUMSG. As said, in a principled

Westphalian order, all states have a say on equal basis concerning common issues, unbounded by higher authorities or substantive notions about what is right or wrong in the international sphere. Yet, the degree of institutionalisation achieved through the European integration process between MSs and the supranational levels of government is somewhat at odds with this archetype, and generate tensions within and across conceptions of justice. The EU is both an extremely sophisticated community of sovereign states, and a post-national polity in its own right, with its own unique domestic sphere and set of foreign relations. A remarkable manifestation of such intra-EUMSG normative clashes are the cases of alleged arbitrary interference by the Union in the affairs of Hungary and Greece. Tensions are caused by the (perceived) breach of the non-domination rule by the EU to the detriment of its own MSs due to overstepping a critical threshold, and governments' heightened sensitivity when it comes to the command over the criteria of accession and belonging to the national community. The tensions intrinsic to a multilevel system of governance give way to a full-blown conflict between the irreducible normative reasons of the two parties. The different circumstances of countries with an external border, which are partly the designed destination or laying across migration routes, and partly those less directly affected by human movements (besides reallocation schemes) makes this a very pressing issue.

More obvious, but no less consequential difficulties in terms of compliance with justice as non-domination arise when the MSs' external relations or foreign policy decisions do not overlap with those of the EU as such. One example is the 2015 decision by the German government to suspend the application of the Dublin Treaty to refugees from Syria, and the Hungarian government's disgruntled reaction to that move. This leads to the question of the actual ownership of external actions of the EU, which are actually the result of a strong sponsorship by one or more MSs and the possible encroachment on other components of the EUMSG. An example is the EU-Turkey deal, which is widely regarded as a German diplomatic achievement, which affected the Union as a whole, particularly the reception system of Greece.

The Westphalian notion of justice also surfaces in the legal arrangements through which France and the UK have put in place effective restrictions to third country nationals' movement across their shared



borders. Even when they are implemented through trans-border police operations, regulative systems like that in place in Calais are premised on the MSs' overriding prerogative to ensure their integrity and national sovereignty. Principles of Westphalian justice can be all the more rightfully pursued when countries are exposed to a situation perceived or construed as an emergency. Such circumstances, and in accordance with current Dublin regulations, allow for the restriction of the liberties of movement, which otherwise are guaranteed within the Schengen Area. Intra-EU border controls reproduce and complement the regimes in force at the external borders of the Union and include the processes of securitisation that might underpin them. A similar trend, based on the same moral rationale, is to be found in the expansion of transit areas in international airports, which are known for being favoured point of arrival of humanitarian and non-humanitarian migration flows. Another example is the increase in the number of decisions that border authorities take at these points of entry, with all the limitations to the migrants' personal rights that the extraordinary territorial status entails (Nieswand 2018).

### Justice as impartiality

All the examined legislative frameworks abide by justice as impartiality in so far as they subscribe, via constitutional and international laws, to the notion that each person holds human rights. This notion includes immigrants and the understanding that human rights do not have to be earned and cannot be alienated, but only not impinged upon. In this sense, compliance with impartiality is most evidently proved by the fact that all the countries are signatories to the main conventions on human rights protections as well as those particularly dedicated to migrants and refugees. Moreover, all the national legislations are designed to serve as means of neutral arbitration among their subjects. In this regard, they are in line with impartiality to the extent that they prevent and equitably adjudicate on situations, in which the migrants' rights are violated by national or foreign individuals, (inter-/super-)national governmental authorities, transnational private bodies, and other types of actors.

As with all the conceptions of justice under consideration, the report has singled out a number of incongruences with the notion of impartiality in the examined frameworks. As expected, violations of impartiality appear to be more frequent compared to non-domi-

nation, as the former sets a more demanding moral standard, and is less in tune with current institutional and legal structures. First, we have failures to comply with international conventions and regimes that, while informed by cosmopolitan principles, are for the most part the result of a classic international law-making process, based on inter-governmental bargaining and voluntary limitation of sovereign prerogatives. Some national legislations are testimony to a relatively high commitment to international protection regimes such as the German, the Norwegian and the French legislation. Hungary's problematic relations with EU law in asylum affairs and the UK's reconsideration of its status within the European Convention on Human Rights are evidence of substantial limitations with potentially major impacts on the EUMSG.

A second kind of violation is related to the conception of justice as impartiality as a 'neutral standard' for dealing with colliding interests, values and norms (Eriksen 2016: 17). For all their emphasis on human rights protection, national legislations seem to disregard the most fundamental tenet of justice as impartiality. An example is that every human being, in this case every migrant, has to be able to make choices without deference to the opinions or wants of others, either individuals or institutions. Accordingly, the migrants' freedom to set their own ends ought to constrain the actions of political institutions, whose intervention is only fair if they aim to secure the mutual independence of all interacting parties. For the other two conceptions of justice, freedom is to some extent contingent on the norms and policy measures. Difficulties in abiding by this principle come as no surprise, considering that current global politics are primarily grounded on a state-centred rationale, which allows national laws to correspond only so much to the cosmopolitan order that impartiality would entail. In the current circumstances, human dignity, autonomy, and freedom have to strike a balance with other concerns, mostly rooted in the alternative normative conception of non-domination. Although finding the middle ground is widely regarded as the very core of politics, in this case, the compromise is self-contradictory, because justice as impartiality is premised on the idea that human dignity and freedom are pre-eminent, context-transcending imperatives.

As a result, national norms cannot but impinge on the autonomy of migrants, in so far as they are affected by contingent factors, such as

the interests and values of particular groups, the political convenience of national governments, or the constraints posed by the international system. Moreover, the good intentions towards migrants that may inform national legislation make them no less of a violation of justice as impartiality. As a result, even legal distinctions based on internationally agreed-upon criteria, such as that between refugees and the recipients of other forms of protection, are unjust. This is caused by the fact that they are influenced by reasons other than the equitable protection of the liberties of migrants, and all those affected by their presence.

France, Germany, and the UK have all adopted legislative measures that set their respective national economic demand for foreign labour as a criterion for entry. As a result, foreigners can only obtain work permits, if they have determined professional skills or money to invest, such as it is the case in the Britain's Point Based System. This is also the regulation in France, provided they come from a list of eligible countries. Regulative measures conditioning the entry of migrants to the protection of the receiving community's economic and social stability may be in line with the notion of non-domination. The fulfilment of non-domination is possible as these conditions may have no constraining purpose, and might even prove beneficial to immigrant workers in the long run. Nevertheless, rules like these do not sit well with the strong emphasis that justice as impartiality puts on each individual's freedom and dignity, which are regarded as intrinsic, unconditional values rather than the desirable result of the efforts of (inter-)national authorities. According to this conception of justice, human beings are the ultimate units of moral concerns, which override any conflicting normative argument based on the rights of a political community, no matter how well-intentioned. Rules imposing limits and special controls on the enjoyment of the migration rights of family members and dependents of citizens and settled residents provide compelling evidence of the relative influence that impartiality actually has over national legislation on migration (Gibney 2004: 14).

### **Justice as mutual recognition**

The report was only able to single out a few instances of national laws providing for migrants to be recognised in their unique and multifaceted identities. The results suggest that national legislations do not seem particularly able to identify migrants in any other way

than by associating them with a single state (of origin, transit or destination), or, insofar as they embody cosmopolitan values, to regard them as holders of universal rights. To comply with this normative criterion, national legal frameworks would have to admit and react to structural forms of injustice. Consequently, injustices persist even though a formally equitable order is already in place that is underpinned by unbiased procedures and possibly even premised on good intentions. In fact, the practices and the conceptual premises underpinning the MSs' legal frameworks make them scarcely receptive to a notion of justice aimed at remedying the distortions of the migrants' actual identities and conditions. These distortions are caused by the influence of national interests, pragmatic concerns, as well as prejudices and misrecognition. National, cultural, and ethnic generalisations affect migration rules, often in accordance with alternative conceptions of justice. In particular, current migration laws tend to emphasise the preventions and the punishment of 'wrongs', rather than their constant correction through the establishment of opportunities for deliberation among the parties involved. Conversely, in exchanging their respective moral reasons based on the criterion of mutual recognition, migrants and locals ought not only to make an effort to reach concrete reciprocal knowledge and substantial agreements on how to coexist. In fact, they should also generate the inter-subjective context from which rights emerge, neither as legal titles necessarily guaranteed by (the international system of) states, nor as pre-political claims, but rather as entitlements granted to each other by the autochthonous and immigrant subjects of the law.

Germany's migration system approximates to some limited extent this conception of justice by assigning a significant share of power in the immigration policy area to the '*Länder*'-level (province level) entities. The assumption is that their lower scale of operation makes them more sensitive to the actual priorities and distinctive features of the people involved in the processes of migration. Legislative measures designed to provide extra care to 'vulnerable groups' and 'specific social groups' (see Greece and Germany, respectively) among asylum seekers also go in the direction of mutual recognition. This is at least the case to the extent that they imply an effort to make concrete acquaintance with these people, and constitute the regulative basis for an inter-subjective, recursive approach to reviewing and setting right

the inequities that inevitably 'slip through' the institutional arrangements resting on state-centred and cosmopolitan notions of justice.

However, providing the opportunity for a genuinely meaningful exchange proves to be extremely challenging. Laws promoting integration through to a pre-ordained path leading to the adherence to national values, cultural standards, and the socio-economic structure of the receiving country effectively negate the personal and collective identity of the immigrant, as it happens in France and Greece. The effects are essentially the same even without the nationalist connotation, as it happens in Germany, where rules and practice inspired by a 'compulsive universalism' give equally little attention to the point of view of the recipients of the integration measures. Consequently, the concrete needs and values of immigrants are only minded as a result of the pressure of international obligations towards the international community and cosmopolitan-inspired protection regimes. A sustained engagement with the concrete circumstances of the people is less involved. Even the procedures through which the mentioned special groups are identified may turn out to be incompatible with justice as mutual recognition. The need of national administrations to streamline asylum policy procedures and clear the backlog of pending case is regularly a formidable obstruction of the necessarily lengthy process through which recognition is accomplished and inequities lurking in the folds of formal justice spotted. In general, all the examined cases confirm that application procedures for obtaining international protection are extremely prone to the influence of considerations that have little or nothing to do with the migrants' priorities. In addition, these procedures also provide a very poor context for extirpating structural injustice due to their very formal nature. The case of judicial appeals is significant, assuming that the right amount of resources is made available. They may serve as opportunities to reconstruct the identity of individuals in a more accurate way than standard administrative and judiciary procedures, and at least lay the foundations of a contest where justice as mutual recognition may be consistently complied with. Yet, as the British case has shown, hearings are primarily aimed at categorising people, based on a conception of them as subjects endowed with universal rights. Finally, Hungarian laws show how a critical approach by political authorities to formal conceptions of justice can easily lead to strongly exclusionary practices, and the potential weakening of the very EUMSG. This critique entails a



deliberate shift on historic and ethnic ties as pre-eminent and sole informal criteria to obtain entry.

### Law, migration and the EUMSG

Even though legal mechanisms of states to keep frontiers under surveillance have been in place for centuries, prior to the twentieth century, migration before the twentieth century usually occurred with little restraint. Comparatively looser criteria of political belonging, and the presence of multinational empires and 'empty spaces' suitable for colonisation also made human movement across boundaries a much less critical issue at that time. As long as these domestic and international conditions were in place, migration flows were tantamount to legally irrelevant and mostly lawful. They were managed through a *de facto* regulatory system which allowed migration to be dealt with almost as if it were a 'natural' phenomenon. Conversely, when border crossing started to become an object of control and regulation through law, immigration was progressively turned from an almost 'natural' phenomenon into a potentially (if not presumably) illegal conduct, to be punished if irregular. This process of legalisation may be regarded as the result of the states' pursuit of a firmer jurisdiction on national demographics and macroeconomics. It also represents a progressive consolidation of the international system as a set of territorially bounded units that are adjoined one to the other, and virtually cover the whole land surface of the Earth. The process has been further enhanced since the outset of the twentieth century, when a system of passports and visas was fully established on a virtually global scale, enabling national authorities to effectively regulate border crossing by nationals and foreigners (Dauvergne 2008).

The EU's governance of migration through law can be regarded as a singular instance of a process of legalisation that has involved the entire field of Justice and Home Affairs, embedded in a legal framework that comprises a considerable body of hard and soft law (Slominski 2012, Monar 2007). The EU has established a strategy of externalisation of migration control consisting of a legal approach. The EU also adopted measures to grapple with migration issues, such as the codifications of migrants' rights, the creation of the regulative apparatus underlying the Common European Asylum System, and the conclusion of agreements with neighbouring countries (Lavenex 2006, Chetail 2016, Badalič 2018). However, given that the nexus

between migration and law has traditionally been in the hands of states, the partial shift towards a multi-level and multi-national polity like the EU was bound to prove challenging, both conceptually and practically. In fact, despite the EU's transformative agenda, the Union has constantly come to terms with an international order premised on the assumption that states are the standard form of political organisation. The EU's special effort to fit as well as possible into this 'world of states' can be ensued from the engagement in a complex process of constitutionalisation (Christiansen 2005). This also applies for the attainment of proper international actorness as part of the effective pursuit of strategic goals, while protecting the values at the base of the Union's (self-)perception (Niemann and Bretheron 2013). Even the securitisation process permeating the EU immigration policies may be regarded as evidence of the Union's adjustment to the rest of the world's approach to the 'problem' posed by human movements.

Law has not only served the purpose of integrating the national dimension of policies, such as in the field of migration. In fact, it has also provided MSs with opportunities to maintain their autonomy (i.e. self-regulation) within the EUMSG. An example is to secure exclusive competences in specific areas, such as labour migration, which is only subject to intergovernmental coordination. Hence, while striving to operate as a single actor within the international system, the EU has also kept serving as an integration process for its MSs and other European countries (Lucarelli 2017). The integration process and the Union's political endeavour have affected fundamental aspects of the European and even the global international system. The Union has also served as a highly institutionalised forum for promoting cooperation and regulating conflict among national governments. As a cooperation forum, the Union has also been upholding the state-centred structure of the inter-governmental relationships among MSs, so much so that states have been found to act as 'gatekeepers' even of the formally communitarised EU asylum policy (Zaun 2018, Lavenex 2018). The EUMSG was designed to address the EU's twofold nature, as an actor and an integration process. In this capacity, the EUMSG includes regulative prerogatives, distinctive circumstances, and practices of states in the assessment of the Union's performance as a normative actor.

## National legal frameworks and the normative international role of the EU

One of the points this report helps to show is how the EUMSG is partially formed by the normative premises that underly national legislative frameworks. The global normative standing of the EU on migration originates from these most basic and deeply ingrained foundations. Admittedly, beside the diverging implementation strategies, also national legislations are at variance. Expectedly, this is particularly true in the field of labour migration and connected areas, like citizenship and social policy, where only a mild harmonisation among MSs has taken place. Somewhat less obvious are the discrepancies across states in the communitarised domain of asylum, where, apart from odd cases like the UK, secondary regulations can be at the basis of very distinct practices in the handling of asylum seekers. Though at times considerable, these variations do not seem extreme enough to invalidate the hypothesis of a single – albeit acutely varied – migration system of governance. A system that contains the MSs' sovereign 'prerogatives' concerning the control of the entry and stay of foreigners within their boundaries.

This extensive 'tolerance' can be argued to be a congruous feature of the EU's general system of governance. Considering the current legal distinction between asylum seekers and labour migrants, as questionable as this may be, the distribution of authority in the realm of economic migration at the national level dovetails with the comparatively loose European coordination and harmonisation concerning social and fiscal policies. Moreover, the regulatory policies implemented by the EU in the field of asylum and border control seem consistent with a 'securitisation trend' that is common, to varying degrees, to virtually all MSs' migration systems. These aspects are problematic in regard to the EU's contribution to global justice, since they imply potential breaches of principles of global justice. At the same time, though, they corroborate the idea of an EUMSG that includes the agency of the EU alongside that of the MSs. The case studies included in the report have indeed shown a range of backgrounds and outcomes. These relate to the greater or lesser adherence of national legislations to the common European framework, depending on a number of circumstances, which include the country's legal tradition, its relationship with the EU (e.g. full membership, close association within the greater EU system of governance), the long-term footprint of the evolution of its migration

policy on its legislative framework, the ethnic makeup of its population, and its exposure to migration flows.

As far as the 'border control imperative' makes its way not only into European public debates, but also into the EUMSG, and start to inform EU and national policymaking processes, a number of delicate and inter-connected issues arise. As a consequence, the scope of the so-called 'existential crisis' that has been undermining the very *raison d'être* of the Union since the outbreak of the global financial crisis might be fuelled and expanded. The exclusionary logic underlying the more restrictive external dimension of migration policy is at variance with the idea of an EU as a champion and model of an alternative kind of international order. This idea is based on institutionalised cooperation, law and shared values, along with the example set by the Union itself. However, this is not the only 'piece of soul' that the EU risks to lose as an effect of the new emphasis on the divide between the insiders of the EU as a political community in its own right and the outsiders. Given the multi-level nature of the EUMSG, the 'normalisation' of the external dimension of the EU's domestic security policy is very likely to be coupled with the parallel re-activation of intra-EU borders. The 'existential' blow, in this sense, is always twofold because the crucial role of the Union as an 'agent of civilisation' of international relations is also accompanied by the crisis of the area of free movement. This is commonly considered the biggest single political accomplishment of the integration project and, more importantly, one of the main 'internal' realisations of those values. The EU's self-representation as a community of values and a principled international actor is shaped by values such as human dignity, freedom, justice, rule of law, and equality (Lucarelli and Manners 2006).

As a final remark, we argue that the complicated connection between levels of governance within the EUMSG should not overshadow another significantly tense relationship emerging from the analysis. The tensions cut across the ambit defined by the only apparently residual conception of justice as mutual recognition. The discussed relationship between the 'communitarian' and the 'cosmopolitan' dimension of the integration process partly overlaps with the two different sides of individuals. On one hand, individuals are essentially and pre-eminently subjects of national laws, and on the other hand, individuals are holders of universal, inalienable, context-

independent human rights. Underlying this difference is the relationship of partial mutual exclusion of justice as non-domination and justice as impartiality. Although not very consequential in terms of national laws actually informed, the notion of justice as mutual recognition is not to be overlooked, as it posits a conceptual question that is definitely relevant for the normative purpose of the EU as such.

As already noticed in the report, mutual recognition demands to zero in on all the concrete features of the migrant as an actual person, including the cultural, ethnical, linguistic, religious or whatever other background he/she considers relevant to his/her identity and conditions of life. The identity of every migrant includes a number of facets, including: (former) citizens of their country of origin, (prospect) members of their community of destination, part of religious groups, product of specific cultures, people with their own specific aspirations, troubles, demands, and views of the world. Yet, among the facets of the 'concrete other' represented by the migrant, there is also the characteristic of being a migrant. In this sense, connections to the countries of origin and arrival are not (not necessarily at least) higher-ranking criteria of identification for people that leave a place to move to another. On the contrary, moving abroad can also be regarded as the conceptual premise to a 'liminal', intrinsically boundary-related identity of the migrant. Accordingly, being a migrant does not have to be a mere 'provisional' or 'transitional' status of a potential new (or failed) member of the community of destination. Instead, the migrant can be thought of as a person that has a right not necessarily to be welcome, but to be heard while making a point as a migrant with values, needs and interest qua migrant, and not as a 'former alien' or a citizen of the world 'unjustly displaced' in a world of states.

The issue has clearly to do with the vulnerability of a specific class of people, but also with their dignity and capacity to deliberate and present their concrete reasons for themselves. Clearly, mutual recognition implies that this delicate, distinctive identity can exist if it is inter-subjectively sanctioned by an interlocutor. The challenge for the EU, through its multilevel system of migration governance, is not only to manage the tension between the propensity to replicate the centralising logic typical of states at a supranational level and the accomplishment of its experiment of 'local cosmopolitanism'. On top of that, the EU will have to decide whether and to what extent



migration may be approached. Migration not only as a burden that the EU has to grapple with, but also as a concrete, compelling opportunity to come up with new conceptual and legal frameworks to experiment with paths of political organisation. In that context, justice can really be an alternative to the sovereign as well as the cosmopolitan rationale.

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Over the last few years, the EU and its Member States have found a formidable challenge in the unprecedented amount of people that have been moving across the Mediterranean and through Southeast Europe in search for a safe a haven from danger in their home country or better life opportunities. The EU's ambition to protect the rights of people – inside, outside and across its borders – has often clashed with other priorities and principles, such as the traditional prerogative of states to decide who to let in. In fact, different notions of the just way to deal with migration combines with the multilevel nature of the EU migration policy, which relies heavily on the Member States in terms of political commitment and administrative resources.

Accordingly, this report provides an account of the conceptual and legal frameworks underlying the immigration policies of six Schengen countries – France, Germany, Greece, Hungary, Norway and the United Kingdom – in order to grasp how different traditions, practices and priorities cooperate and diverge within the emerging EU Migration System of Governance (EUMSG).

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