International Perspectives on Migration 18

Sergio Carrera Nunez
Eleni Karageorgiou
Gamze Ovacik
Nikolas Feith Tan *Editors*

Global Asylum Governance and the European Union's Role

Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees

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Volume 18

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Sergio Carrera Nunez • Eleni Karageorgiou
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Editors

Global Asylum Governance and the European Union's Role

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ADHR	American Declaration on the Rights and Duties of Man
AIP	Atlantic Immigration Program
AMIF	Asylum, Migration and Integration Fund
APBE	Action Pour le Bien Être
ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ATPA	Act on Asylum and Temporary Protection
BVOR	Blended Visa Office-Referred
CiCs	Camps-in-Charge
CJEU	Court of Justice of the European Union
CNE	National Eligibility Committee
CoE	Council of Europe
COI	County of Origin Information
CONARE	National Council of Refugees
CONRE	National Committee for Refugees
CPT	Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment
CRPD	UN Convention on the Rights of Persons with Disabilities
CTPS	Work and Social Security Card
DG ECHO	Directorate General for Humanitarian Aid and Civil Protection
EBCGA	European Border and Coast Guard Agency
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EMPP	The Economic Mobility Pathways Pilot
ENI	European Neighbourhood Instrument
ENNHRI	European Network of National Human Rights Institutions
ESSN	Emergency Social Safety Net Programme
ETM	Emergency Transit Mechanism

EU	European Union
EUAA	European Union Agency for Asylum
EUCAP	European Union Capacity Building Mission in Somalia
EUCFR	Charter of Fundamental Rights of the European Union
EUTF	Emergency Trust Fund for Africa
FDMN	Forcibly Displaced Myanmar Nationals
FrC	Forum refugiés-Cosi
FRIT	Facility for Refugees in Turkey
FRONTEX	The European Border and Coast Guard Agency
GCR	Global Compact for Refugees
GPSRIL	Guiding Principles on Shared Responsibility in International Law
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
GRSI	Global Refugee Sponsorship Initiative
HDI	Human Development Index
IACHR	The Inter-American Commission on Human Rights
IBM	Integrated Border Management
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
INGOs	International non-governmental organizations
INLTP	National Body for Combating Trafficking in Persons
INPT	The National Body for the Prevention of Torture
IOM	International Organization for Migration
IOs	International Organizations
IPA	Instrument for Pre-accession Assistance
ISMariS	Integrated System for Maritime Surveillance
JAP	Joint Assistance Program
KIRS	Serbian Commissariat for Refugees and Migration
LATP	Law on Asylum and Temporary Protection
LFIP	Law on Foreigners and International Protection
LOF	Law on Foreigners
MADAD	EU Trust Fund in Response to the Syrian Crisis
MFA	Minister of Foreign Affairs
MoU	Memorandum of Understanding
MRRM	Migrant response and resource mechanism
NATO	North Atlantic Treaty Organization
NGOs	Non-governmental organizations
NSM	National Strategy for Migration
OAS Charter	Organization of American States Charter
PAGS	G5 Support Programme for Sahel Security
PMM	Presidency of Migration Management
PSR	Private Sponsorship of Refugees
RAM	Mercosur Residence Agreement
REVA	Refugee Influx Emergency Vulnerability Assessment

RNIP	Rural and Northern Immigration Pilot
RRRC	Office of the Refugee Relief and Repatriation
RSD	Refugee status determination
SAR	Search And Rescue
SNA	Social Network Analysis
TEU	The Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
TPR	Temporary Protection Regulation
UEMOA	West African Economic and Monetary Union
UN	United Nations
UNCAT	United Nations Committee Against Torture
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNRWA	United Nations Relief and Works Agency
VAF	Vulnerability Assessment Framework
WASH	Water, sanitation and hygiene
WFP	World Food Programme

Chapter 1
Introduction

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1.1 The Global Compact on Refugees and Asylum Governance

The United Nations Global Compact for Refugees (GCR) is the most significant attempt at global responsibility sharing reform since the failed 1977 Conference on Territorial Asylum. Although there are no substantive obligations on states to share responsibilities in relation to refugees in the text of the 1951 Convention relating to the Status of Refugees (Refugee Convention), cooperation, solidarity, and responsibility sharing are core principles of the refugee regime (Karageorgiou, 2019).[1] The preamble to the Refugee Convention stipulates that, given the pressures refugee

[1] See, for example, UNHCR Executive Committee (ExCom) conclusions on international protection, including nos 52, 100, 112; General Assembly resolutions (including Declaration on Territorial Asylum, Millennium Declaration); regional instruments (OAU Convention art II(4), TFEU arts 67(2), 80.

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movements put on certain countries, displacement cannot be resolved without international cooperation.[2] The concept of responsibility sharing is understood to entail a type of cooperation and joint action, the main goal of which is to alleviate pressure on states that are hosting large numbers of refugees, through measures such as resettlement and relocation, financial assistance, and capacity building with the view to ensuring effective protection to refugees (Dowd & McAdam, 2017).

The lack of a binding or detailed international responsibility sharing mechanism for the protection of refugees has been largely acknowledged. The GCR seeks to operationalize the principle of responsibility sharing to ensure more equitable and predictable protection arrangements. Acknowledging that the provision of protection to those in need is a collective responsibility, the UN Member States committed to four key objectives in the GCR: to (a) ease pressure on host countries; (b) enhance refugee self-reliance; (c) expand access to third country solutions; and (d) support conditions in countries of origin for return in safety and dignity (UNHCR, 2020). Despite the GCR's potential importance in shaping global, regional and national asylum systems, there remain significant unanswered questions on its policy impact and implementation. There has been also criticism with regard to the GCR's 'blindness' towards recent state practice, including policies and practices of externalisation that shift responsibility to countries in the Global South and which are hard to reconcile with the Compact's objectives (Chimni, 2018).

Forced displacement of refugees and others seeking international protection is a reality across all regions globally. The largest refugee hosting countries in the Americas, Africa, Asia and Europe have developed asylum governance instruments in response to forced displacement which address issues such as access to their territory, protection statuses and rights afforded refugees and other displaced persons. At regional level, there are binding instruments and asylum governance systems in Africa, the Americas and Europe. These systems raise a number of fundamental questions related to fair responsibility sharing for refugee protection, as well as their practical impacts, effectiveness and compatibility with human rights and refugee law standards. Moreover, the interaction between these asylum governance regimes and the GCR has remained under-examined in the scholarly literature.

The GCR constitutes the international framework of multilateral cooperation aimed at facilitating more equitable and effective responsibility sharing arrangements for hosting and supporting refugees. Existing academic literature has studied the scope and effects of the GCR, noting its non-binding nature and broad set of actors (Costello, 2018; Doyle, 2018; Aleinikoff, 2018; Hathaway, 2018; Gammeltoft-Hansen, 2018). However, academic engagement with the GCR has so far lacked an in-depth qualitative and country-specific comparative examination of the national and regional governance dynamics surrounding asylum governance across various world regions in light of the commitments enshrined in the GCR. This Volume advances a working notion of 'governance' through the lens of the intended public goals and effects of legal, political and financial asylum *instruments*, as well as the

[2] 1951 Convention relating to the Status of Refugees (preamble recital 4).

roles played by the multiplicity of *actors*, and their interactions, relations and networking, involved in their conception, design, operationalization and practical implementation. In such a manner, 'governance', for the purposes of this Volume, relates to the multi-instrument and multi-actor policy universes which aim at regulating and managing asylum (Carrera et al., 2018a).

Against this backdrop, this Volume explores the emerging international, regional and national asylum governance mechanisms through the prism of the GCR. 'Asylum' is used, in this Volume, as an umbrella term that includes the protection granted by States to various categories of persons, including those who do not qualify as refugees under the Refugee Convention definition but benefit from other forms of protection (Guild & Gil-Bazo, 2021). Asylum thus extends to those legal procedures and standards closely connected to the grant and content of protection, including access to territory, asylum procedures, scope of protection and content of protection (See Chap. 14 in this volume).

The overarching research question that the Volume seeks to answer is the following: What are the characteristics and impacts of emerging international and regional asylum governance regimes, and what are their implications on the GCR's implementation, which calls for more equitable and effective arrangements for responsibility sharing? This is an especially pressing question considering the complexity that the GCR adds to an already complicated landscape of norms and actors. Its lack of legal 'bindingness' and its open-textured nature makes a comparison of implementation dynamics across different regions, in light of current and future asylum and international protection regimes, necessary and timely.

The contributions to the Volume address the nature, scope, and impact of existing and emerging asylum governance instruments and their implementation in selected countries hosting large communities of refugees around the world. Particular focus is given to the cases of Bangladesh, Brazil, Canada, Jordan, South Africa and Türkiye. Some of these countries are not signatories of the 1951 Refugee Convention and its 1967 Protocol (Jordan and Bangladesh) or have important reservations to their full application (Türkiye). Others are parties to the 1951 Refugee Convention and members of specific regional refugee protection frameworks (Brazil and the 1984 Cartagena Declaration on Refugees and South Africa and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa).

Member States of the European Union (EU) are all constitutionally bound by the 1951 Refugee Convention[3] and the core human rights treaties. Having developed a sophisticated asylum system since the 1990s, the EU has been a key actor in the management of migration, borders and asylum not only in the region but also beyond, exporting a highly sophisticated policy framework comprising legal,

[3] According to Article 78.1 of the Treaty on the Functioning of the European Union (TFEU), EU asylum policy "must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties" (Emphasis added). Article 18 of the EU Charter of Fundamental Rights enshrines the right to asylum which "shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees".

political and financial instruments to non-EU countries (See Part III of this Volume). Applying this global view to the role of the EU in implementing the GCR, the Volume also interrogates the impacts of emerging EU asylum governance systems, using the poles of *containment* and *mobility*, explored below. This includes an examination of the EU's role in the implementation of the GCR international commitments and legal principles, both *internally*—in the scope of application of the Common European Asylum System (CEAS) and its reform following the adoption of the EU Pact on Migration and Asylum; as well as *externally*, in the framework of EU cooperation arrangements with third states examined in detail here, namely Niger, Serbia, Tunisia and Türkiye.

The Volume provides a better understanding of the implementation of the GCR through a qualitative interdisciplinary assessment of the constitution and implementation of asylum systems around the world and in the EU. The contributions in the Volume evaluate existing regional and country-specific asylum governance systems from the perspective of their effectiveness, fairness and consistency with refugee protection and human rights standards, as well as the GCR commitments. In doing so, the Volume identifies key lessons learned and provides a critical view on policies often framed as 'good or promising practices' to inform future steps in the GCR implementation in the context of the Global Refugee Forum (GRF) and its next meeting scheduled to take place in 2027. It does so by an examination of asylum governance regimes' inclusionary and exclusionary components on protection and rights of refugees, and questions related to responsibility attribution for state and non-state actors in cases of violations of refugee and human rights law, as well as the responsibility of these actors triggered by cooperation in the field of asylum governance.

This Volume presents the overall results and synthesizes the most important scientific outputs and findings resulting from 4 years of work in the scope of the Horizon 2020 Project Global Asylum Governance and the European Union's role (ASILE). The ASILE project ran between 2019 and 2024, and comprised an international, interdisciplinary network of universities and national researchers, and civil society organisations across all relevant regions and countries under investigation.

1.2 Containment, Mobility and Vulnerability

The key concepts informing the contributions in this Volume are "containment" and "mobility", and their interaction through the lens of the notion of "contained mobility" (Carrera & Cortinovis, 2019).[4] Containment policies have been approached under different guises in the academic literature. These have included concepts such as non-entrée, non-admission, non-arrival, deterrence and deflection, as well as

[4] Carrera and Cortinovis (2019) have argued that "Such an approach combines aspects on containment—e.g. safe third country rules, border surveillance and interception at sea—with others on mobility, yet a kind of mobility that presents highly selective and restrictive features".

source control policies directed to the countries of origin and transit of asylum seekers and aimed at removing the so-called 'root causes' of refugee mobility (Aleinikoff, 1992; Shacknove, 1993; Gammeltoft-Hansen & Hathaway, 2014; Gammeltoft-Hansen & Tan, 2017; Hathaway, 1992; Mariagiulia & Moreno-Lax, 2019; Nicholson, 2011; Noll & Vedsted-Hansen, 1999; Spijkerboer, 2018). The term 'containment' is used in this Volume to refer to instruments, policies and practices aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers and refugees to countries of transit or origin. These include restrictive visa requirements, carrier sanctions, the use of the 'safe third country' and 'safe country of origin' concepts, readmission agreements and arrangements, and interdictions at sea.

The concept of "mobility" is also interrogated in this Volume, including the ways in which it is articulated into legal and policy instruments framed as "protection" and—in the language of the UN GCR—"third country solutions" via 'resettlement and complementary pathways to admission'.[5] The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees. Several countries examined have adopted policies reframing refugees as 'temporary protection status beneficiaries' or 'temporary forcibly displaced migrants', or providing facilitated—yet temporary, conditional and highly selective—access to their labour markets (e.g. Türkiye and Jordan) or in some cases to regularization status (e.g. South Africa).

Conceptually, instruments presented under the label of 'mobility' may serve as a counterpoint to containment practices, offering protective regular pathways of admission and recognizing refugee agency. However, beyond this overarching dichotomy, these asylum governance arrangements of protection and mobility may in fact present exclusionary features or implementation dynamics with various effects and impacts on individuals' rights. As regards 'mobility' or 'inclusion' instruments, crucial issues may relate to guaranteeing non-discrimination at times of accessing and enjoying refugee status and rights and making sure that these instruments are in fact not used as 'containment in disguise' or 'highly sophisticated forms of containment' giving priority to a migration management or utilitarian rationale.

Accordingly, the Volume studies the extent to which such mobility instruments comply with the principle of additionality—so that they are additional to access to territorial asylum in cases of spontaneous arrivals, and employ a refugee and human rights protection driven approach. Some "mobility" instruments, such as Canada's private sponsorship model or the Operation Welcome and Interiorization Programme in Brazil, have uncritically been portrayed in debates around the GCR as "good practices" to be transferred and implemented internationally. The Volume engages

[5] Complementary pathways have been defined by UNHCR as 'safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.' UNHCR. (2019). Complementary Pathways for Admission of Refugees to Third Countries: Key considerations. The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees. Compact on Refugees paras 7 and 95.

with an investigation of these practices and their qualitative outputs before labelling them as 'promising practices', or calling for their transferability across other jurisdictions in the context of the GCR.

Additionally, the Volume moves beyond existing academic literature by providing a better understanding of the implementation issues related to the concept of vulnerability in asylum policies (Clark, 2007; Costello & Freedland, 2014; Costello & Hancox, 2016; Fineman, 2008; Turner, 2016). Various country case studies assess the extent to which this notion captures the structural conditions determining or co-creating the precarity of asylum seekers and refugees at times of having access to asylum and rights, in particular as regards access to refugee status determination (RSD), resettlement and 'complementary pathways', and the right to decent work and non-discrimination.

Methodologically, the research included traditional legal methodologies providing a comprehensive examination and typology of asylum governance instruments and applicable asylum and human rights standards, along with political science approaches consisting of an actor-centered mapping covering the governance networks on asylum across various world regions and countries. This was combined with qualitative research consisting of a multitude of semi-structured interviews, e-surveys and focus groups with UN GCR implementing actors including national policy makers, international organizations and civil society representatives, the private sector and refugees in each of the countries under study. Substantial engagement of local researchers in the methodology provided deeper insight of the regions studied including normative perspectives of the countries under focus.

1.3 The Role of the EU in Implementing the GCR

During the last decades, the EU has developed a complex and diversified matrix of policy, legal and financial instruments constituting cooperation with third countries in the management of migration, borders and asylum. The literature has identified a shift from emphasizing 'formal' cooperation through channels provided by legal instruments and international agreements, towards stimulating and allowing for more informal channels and non-legally binding/technical arrangements of cooperation with third countries (Carrera et al., 2018a, 2019). Starting out with the EU Global Approach to Migration (GAM) of 2005, later relabelled the EU Global Approach to Migration and Mobility (GAMM) of 18 November 2011, the EU has been adjusting its migration, border and asylum policy through various third country cooperation instruments. Following the so-called 2015/16 refugee crisis, the GAMM was paralleled by the European Agenda on Migration of 13 May 2015 and the Migration Partnership Framework (MPF) of 7 June 2016. The external dimensions of EU asylum governance policy is currently at a crossroads with new 'flexible' and 'non-legally binding' frameworks and hybrid legal-political-financial instruments, some of which have been introduced in the name of 'crisis'. Many are proclaimed 'non-EU legal acts' (e.g. the EU-Türkiye Statement, Western Balkans Statement, the Jordan Compact), but also mobility and 'talent' partnerships, Frontex

working arrangements, joint declarations, High Level Dialogues, Common Agendas on Migration and Mobility (CAMMs), and several emergency-driven financial frameworks—e.g. EU Trust Funds—covering capacity building measures in non-EU countries including advanced surveillance equipment and training of third country border and coast guard authorities (Carrera et al., 2018b).

This Volume provides crucial insights into the implementation dynamics of these instruments and EU and national actors involved in their operationalisation in light of GCR. Contributions to the volume thus focus on the roles of state and non-state actors in the implementation of the GCR, particularly relevant given the GCR's multi-stakeholder approach encompassing a wide range of humanitarian, development and migration management actors. The Volume reveals the dominant EU containment agenda where even asylum capacity building and narrow or highly selective forms of mobility serve the larger purpose of containment (e.g. Emergency Transit Mechanisms (ETM) in Niger and Rwanda, or the Mobility Partnership with Tunisia). The key role played by national researchers in this Volume provides a unique insight to non-EU country actors perceptions, the lack of which is considered as one of the reasons why EU policies often fail to create sustainable change in the asylum systems of these countries.

Contributions thus provide a comprehensive interdisciplinary study that encompasses both the containment and mobility elements of EU legal instruments and arrangements with third countries, and the ways in which some of these policy instruments are linked to status recognition and vulnerability assessments by relevant actors, including international organisations. This is accompanied by an examination of the EU's role in the implementation of the GCR and GRF international commitments and legal principles, both internally and externally, in the context of EU cooperation and arrangements with Niger, Serbia, Tunisia and Türkiye.

Finally, contributions to the Volume zoom in on the consistency of EU asylum governance practices within EU territory and in third states with international human rights and refugee law. These contributions include a doctrinal approach to the law of international responsibility and attribution, as well as more normative calls for responsibility allocation and attribution through the concept of 'portable justice' (Carrera & Stefan, 2020). According to this concept, justice can be expected to follow and catch up with those seeking to evade it. The law of international responsibility has developed over the past decade to better capture multi-actor conduct and shared responsibility.

1.4 Structure of the Volume

Part I addresses *Actors, Instruments and Standards*, opening with a chapter from Andrew Geddes, Leiza Brumat and Andrea Pettrachin. The chapter analyses the differential incorporation at domestic level of global norms and standards of asylum governance in Bangladesh, Brazil, Canada, Jordan, South Africa and Türkiye, identifying four potential domestic-level responses to global norms and standards:

adoption, adaptation, resistance and rejection. Through a network analysis of elite actors in each state, the Chapter shows sources of variation in asylum/refugee governance, encompassing variation in the meaning of protection; the role played by international organisations in mediating the relationship between the domestic and the international levels; scope for contestation of global norms; how contestation can lead both to watering-down of global norms and standards; and, in the case of Brazil, for protection standards to be upgraded at national level through use of regional norms and standards that are seen as more progressive than those at the global level.

Nikolas Feith Tan, in the subsequent chapter, maps and analyses EU arrangements with selected third countries, with a focus on the role of instruments and actors in the implementation of EU arrangements with Niger, Serbia, Tunisia and Türkiye. The chapter provides a country-by-country overview and inventory of relevant political, legal and financial instruments, as well as a typology of EU arrangements in terms of containment and mobility. Finally, a number of trends are presented in conclusion, namely the informalisation in EU third country arrangements; the dominance of containment in EU third country arrangements; and limited uptake of the GCR in such arrangements.

In the following chapter, Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, interrogate the compatibility of the global and EU arrangements with international and regional standards. The chapter highlights trends in global asylum regimes giving rise to legal compatibility issues, notably the tension between paradigms of deterrence and containment and admission to territory; the use of 'safe third country' mechanisms; crisis derogations and perceived 'instrumentalisation' of asylum; externalisation of asylum responsibilities; and the use of third country solutions to moderate containment approaches. The chapter also addresses a set of tendencies related to the temporariness of protection, encompassing differential treatment between groups of protection seekers and refugees; issues of exploitation due to limitations on the right to work; and the concept of 'vulnerability' as a protection issue.

Part II is focused on *Refugee Recognition, Self-reliance and Labour Rights*, beginning with Sanjeeb Hossain and Lewis Turner's chapter comparing refugee status, vulnerability and rights in Jordan and Bangladesh. Their chapter examines how refugee protection is allocated in these two states, both of which host large numbers or refugees, face deeply protracted refugee situations and are not party to the 1951 Convention or its 1967 Protocol. In both contexts, the rights of refugees are often unclear, and remain perpetually uncertain. The assigning of various labels to them is a politicised process, which varies over time and by nationality, leading to a precarious status for protection seekers. The chapter identifies key lessons that can be taken from each case study, particularly in terms of expanding labour market access for protection seekers.

In the following chapter, Natalia Araujo and Patrícia Ramos Barros examine Brazil's response to the Venezuela displacement crisis and the way in which the implementation of certain migration and asylum instruments have affected status determination, vulnerability, and rights, including the right to work. "Operation

Welcome", despite its name, led to the militarization of borders and the delay of asylum processing for Venezuelans seeking protection. Despite *prima facie* recognition of Venezuelan asylum seekers, protraction in recognizing refugee status has put pressure on applicants to opt for residency. With respect to access to employment, although formally recognized, asylum seekers and refugees face obstacles in finding formal work and in accessing decent work. The chapter concludes that structural vulnerabilities which disproportionately affect certain groups—racial, ethnic or gender based—may be reinforced by the same migration governance instruments that are supposed to deal with them.

Roberto Cortinovis and Andrew Fallone provide critical insights on the implementation of two Canadian refugee policy instruments, the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Project (EMPP), according to these instruments' selection and eligibility criteria, approaches to vulnerability, and their provision of decent work. Both of these migration policy instruments present examples of the "complementary pathways" accentuated by the GCR, and receive international attention as policies that other nations could potentially replicate. Their chapter reveals a tension inherent to complementary pathways between the discretion of states and private actors. The high level of discretion involved in complementary pathways also risks creating 'preferred' categories of refugees and migrants. Exploring these implementation dynamics exposes important considerations for policies that seek to promote durable solutions for refugees and enhance refugee agency, while simultaneously seeking to reduce state governments' involvement by encouraging more autonomous policy operation through a reliance on high levels of community and employer support.

In her chapter on South Africa, Fatima Khan traces the impacts of South Africa's decision to provide temporary residence permits to Zimbabwean nationals in 2010 via the Zimbabwean Dispensation Permit. Since September 2010, qualifying Zimbabwean nationals have been permitted by the Minister of Home Affairs to live, work and study in South Africa and in reliance on these permits, ZDP holders have established lives, families, and careers. More recently, however, these rights have been placed in jeopardy because of a proposed expiration date, placing ZDP holders in a precarious position. While the dispensation at first glance appears to fall within the complementary pathway framework as envisaged by the GCR, the chapter begs the question of whether the dispensation was simply a pathway to get undocumented Zimbabweans out of an irregular status and therefore not meeting the core objectives of the GCR.

İlke Şanlıer's chapter, in turn, explores the work rights and conditions of asylum seekers and refugees in Türkiye, as well as the role of EU instruments in shaping their access to employment. While Türkiye's legislation allows international protection applicants and conditional refugees to apply for a work permit 6 months after their application, and Syrians under temporary protection to work formally, the reality is that most refugees work informally in precarious conditions. These conditions are described as hyper-precarity, further exacerbating refugees' vulnerabilities. The chapter also examines the role of EU instruments, such as the 2016 EU-Türkiye Statement and the financial aid provided to Türkiye for migration management, in

shaping the working rights of refugees and asylum seekers. The chapter concludes by calling for an overhaul of the work permit scheme to better suit refugees' needs, address informality and precarious work, and promote their economic integration, in line with the GCR principles.

Part III of the Volume turns to the theme of *EU Third Country Arrangements*. Thomas Spijkerboer, in his chapter 'Asylum for Containment', provides a critical overview of European policy interventions to support the development and implementation of asylum systems in Niger, Serbia, Tunisia and Türkiye, with the aim of allowing Europe to contain refugees and asylum seekers in these countries. Spijkerboer frames the subsequent country-specific interventions, explaining that while from a European perspective it is entirely logical to support asylum in third countries for the containment of asylum seekers and refugees there, from the perspective of the third countries concerned this is illegitimate. The chapter explains that in all four countries various forms of non-cooperation occur, as a response of these four countries to what they consider to be an illegitimate European policy. Spijkerboer concludes that if the EU seeks more successful cooperation with third countries, addressing these substantive legitimacy issues need to be addressed, rather than reinforcing the current carrot-and-stick approach.

Bachirou Ayouba Tinni and Abdoulaye Hamadou's chapter on Niger analyses the legal, institutional and operational mechanisms through which the EU and its Member States outsource the fight against irregular migration and asylum to Niger. The analysis revolves around the issues of accountability, transparency and compatibility, explaining why Niger has, until recently, been a reliable partner in the fight against irregular migration and the promotion of the right of asylum. In addition to the application of Law 2015–36 on the Smuggling of Migrants, the country is innovating with the Emergency Transit Mechanism (ETM) for the transfer of asylum seekers and refugees from Libya to Niger before resettlement in Europe and Canada.

In the subsequent chapter, Olga Djurovic and Rados Djurovic assess EU political, legal and financial instruments with Serbia, in terms of transparency, accountability, compatibility with international law, their general results, their effects on migration containment/mobility and their compliance with the GCR. The chapter addresses EU difficulties to develop sustainable Serbian asylum and reception systems and an efficient system of border control. Struck with continuous refugee influx and pushbacks from neighbouring EU countries, the authors conclude that Serbia is struggling to cope with migration challenges, trying to avoid becoming a new migration buffer zone in the Western Balkans.

Fatma Raach and Hiba Sha'ath examine select political, legal, and financial instruments regarding asylum, protection, and mobility between Tunisia and the EU. The chapter outlines the limited alignment of these instruments with the GCR, given their predominant containment focus on border protection programs and readmission agreements, with pressure exerted on Tunisia to host a growing number of third country nationals and prevent their onward movement to Europe and few initiatives aimed at easing this burden. Raach and Sha'ath conclude that while some of the instruments have been effective at achieving their stated results of building the Tunisian state's capacity to host refugees, they have been lacking in transparency,

accountability mechanisms, and compatibility with international and regional human rights law. While the continued absence of asylum legislation has been a barrier to upholding refugees' rights in the country, they argue that Tunisian officials' refusal to pass national asylum legislation has been their way of resisting EU pressure to become a safe third country.

In the following chapter, Orçun Ulusoy, Özgenur Yiğit-Aksu, Meltem Ineli-Ciger and Gamze Ovacik address EU arrangements with Türkiye. Their chapter analyses the political, legal and financial instruments through which the EU and Türkiye cooperated in the field of migration and asylum between 2015 and 2021. The analysis focuses on three main instruments: the EU-Türkiye Statement of March 2016; the EU-Türkiye Readmission Agreement; and the Facility for Refugees in Türkiye. These instruments are analysed in terms of transparency, accountability, conformity with international law, results, promoting containment or mobility and finally, alignment with the GCR.

Finally, in their chapter on asylum governance in Serbia and Tunisia, Julian Lehmann and Angeliki Dimitriadi explore the role of actors and factors in the implementation of the GCR. Utilising a lens of "political responsibility", the chapter examines how responsibility for policy outcomes on asylum seekers and refugees in the two countries is distributed between domestic and international political factors. The chapter highlights how in both cases the GCR is overshadowed by competing constraints and priorities. In both cases, domestic and foreign policy considerations, influenced heavily by the EU as an entity, are key factors shaping migration policy-making. For Tunisia, a politics of 'non attribution' on asylum is made feasible as a result of the institutional setup that allows for the "outsourcing" of responsibility to non-governmental and international organizations, while maintaining the central role of state institutions on issues of border management. In Serbia, there is clear ownership of most policies by the State and respective ministries. The result, however, is similar.

Part IV of the Volume encompasses *Responsibility Allocation and Attribution.* Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen identify specific forms of EU cooperation with third countries that give rise to questions of responsibility attribution with binding norms of international, European and EU law. The chapter applies principles of responsibility attribution under international and European human rights law to often complex multi-actor migration management contexts. In particular, the chapter identifies four types of EU arrangements with third countries that raise particular rights compatibility or responsibility attribution questions: the use of safe third country concepts, including the EU-Türkiye Statement; return and readmission agreements, in particular the readmission of third country nationals from Italy to Tunisia; funding, equipment and training of border control and migration management in third states; and the deployment of Frontex officers in third states, most notably joint operations undertaken by Frontex in Serbia.

Gregor Noll, Gamze Ovacik and Eleni Karageorgiou continue in the vein of responsibility attribution, building on two dominant trends defining the current scene of migration and asylum cooperation at international level, complicating the attribution of legal responsibility. First, *hypercomplexity* in legal relations, resulting

from a distribution of agency across actors with different organizational characteristics: states, governing structures within states, authorities, international organizations and private companies. Second, the phenomenon of *informality* signified by arrangements that may not be formally binding as a matter of international law, yet they are made in a manner stabilizing expectations. They argue that hypercomplex and informal arrangements serve the circumvention of the law with the purpose of evasion of legal responsibility by the involved actors. The chapter proposes a model of legal responsibility that the authors call *systemic responsibility* to be understood as responsibility for current inequitable outcomes to the extent these exploit historically shaped imbalances of power inscribed into international law. To showcase the analytical framework of *systemic responsibility*, the chapter builds on empirical research in EU cooperation with Türkiye, Tunisia, Serbia and Niger and discuss how cooperation with a purpose of containment of asylum seekers in the countries in question may trigger systemic responsibility even when the specific actions seem to improve refugee protection standards in these countries.

Finally, the Volume closes with a concluding chapter from the editors bringing together cross-cutting findings from across the contributions. The concluding chapter highlights ongoing dynamics of contained mobility across asylum governance instruments globally, as practices officially framed as 'mobility' feature *sophisticated forms of containment* in their design, practical implementation and effects. The chapter further unpacks the relativisation of refugeehood, as concepts of 'refugee' and 'protection' remain contested across many jurisdictions around the world. Emerging asylum governance actors and instruments tend to relabel and reconstrue people on the move, particularly those engaging in spontaneous unauthorised arrival, in ways that are incompatible with the right to asylum. These dynamics are underscored by the content of the GCR—while it is expressly anchored in the international protection regime, the GCR is silent on issues such as access to territory, the right to asylum, containment and externalisation initiatives. In addition, policy-driven concepts such as vulnerability, self-reliance and solidarity further complicate and challenge the compatibility of asylum governance approaches with the right to asylum. Finally, the chapter reflects on the implications for international legal responsibility of the emergence of complex multi-instrument and multi-actor settings in asylum governance. While this hyper-complexity may render arguments of causation and attribution difficult to hold, a more comprehensive understanding of the rules of international responsibility is possible, based on the concept of portable justice.

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Part I
Actors, Instruments and Standards

Chapter 2
Actors and Their Networks: Scope for Adaptation to and Contestation of Global Norms for Refugee Protection

Leiza Brumat, Andrew Geddes, and Andrea Pettrachin

2.1 Introduction

This Chapter is based on research conducted during the ASILE project analyses the extent to which there is differential incorporation at domestic level of global norms and standards for asylum-seekers and refugees in Bangladesh, Brazil, Canada, Jordan, South Africa and Türkiye. Our specific analytical focus is on the composition of and the effects of variation in governance systems on the ways in which global norms and standards are incorporated (or not) in the six case countries, with particular reference to the impact of the Global Compact on Refugees (GCR). We take governance systems as the independent variable in our analysis and assess how variation affects the impact of international norms and standards. This reverses the usual analytical focus of much migration research where governance responses are analysed as an ex-post reaction to asylum/refugee migration. In contrast, we identify the key, *a priori*, role played by governance systems in giving legal, political and socio-economic meaning to protection norms and standards. At a conceptual level, the Chapter identifies potential pathways by which global norms and standards could become present in the domestic contexts in the case countries and specifies potential outcomes ranging from straightforward adoption to outright rejection, with adaptation and resistance in between. A particular contribution offered by this

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Chapter is to show how governance systems of various types mediate the relationship between 'the global' and 'the domestic' and also how global norms and standards are powerfully dependent on 'local' contexts and actors.

2.2 Methodology

The six case countries that are used for the analysis in this Chapter constitute a most-different-system design given that there is significant variation in their governance systems and in their adherence to international norms and standards, such as the Geneva Convention. Of the six case countries and as a broad, initial characterization, Brazil and Canada have refugee protection systems that draw from global and regional standards; Bangladesh and Jordan can be characterised as 'forced migration management models'; South Africa has a model of 'local integration' while Türkiye operates a system for non-European refugees that can be labelled as a 'temporary protection' system (Brumat, 2022; Brito & Borges, 2020; Cintra & Cabral, 2020; Atak, 2018; Macklin, 2013; Ahmed, 2009; Alam, 2018; Lenner & Turner, 2019; Achilli, 2016; Addaney & Quan, 2015; Ineli-Ciger & Ulusoy, 2021; Adam, 2016). The majority of the cases are countries where international norms and standards are often not incorporated into domestic law and, even when they are, they can be poorly implemented. Our research also highlights the negative effects of persistent structural inequalities in the global system and our interview data suggests the perceived double standards of high-income countries that can be a barrier to the diffusion of norms and standards for refugee protection in lower income countries.

We used two main methods. First, Social Network Analysis (SNA) allows us to map the field of refugee governance to identify the key actors that take part in the design and implementation of those instruments, programmes and arrangements, as well as the relationships between these actors (Hafner-Burton et al., 2009). We can also understand more about interactions and various kinds of flows within the network (of, e.g., ideas and resources). These interactions are developed and occur within governance networks that intersect and interact at different levels (subnational national, regional, international) and can also involve a range of public and private actors. We administered a structured survey instrument in all six case countries. The survey focused on four issues:

- identifying the key actors in the field.
- measuring the most frequent contacts between the actors.
- evaluating of the perceived usefulness of these contacts; and
- understanding which are the key sources of information.

Second, we used semi-structured interviews, which are essential for deepening the findings of the SNA and of our knowledge about the content and effects of flows of information, ideas and resources within refugee and asylum governance networks that lead to inclusionary and/or exclusionary visions of mobility policies. The

semi-structured interviews targeted elite actors in the five categories specified above. The questions focused on the significance of network relationships to understand more about the flows of information, ideas and resources and also addressed key implementation issues, such as the meaning of 'protection' in practice and the difference between the categories of 'migrant' and 'refugee' when implementing policies.

Between December 2020 and March 2022, we interviewed 99 key asylum and refugee governance actors in the six case countries (Bangladesh n = 16, Brazil n = 26, Canada n = 16, Jordan n = 11, South Africa N = 12, Türkiye n = 18) and also collected 64 surveys that helped to map the refugee and asylum governance network in three of those countries (Bangladesh, Brazil and Türkiye).

2.3 'Globalising' and 'Localising' Processes

The intuition informing our analysis of the organisation of asylum and refugee protection in the six case countries was that these systems would play an important intervening role in mediating the relationship between 'the global' and 'the local' with significant scope for variation. This is consistent with the ASILE project's aim to examine the characteristics and impacts of international norms and standards on domestic regimes and, in particular, the implementation of the GCR. More specifically, the ASILE project's first objective is to facilitate a better understanding of the constitution of the refugee/asylum systems in the six case-countries.

To do this, we mapped the actors that are involved in international protection and asylum governance, the relationship between them and the flows of ideas, information and resources within these governance networks. Our focus is thus on the location, actions and interactions of 'actors' within asylum/refugee governance systems. Our interest in how these actors relate to each other and through their inter-relations can be constitutive of asylum/refugee governance systems. This does not mean that we privilege actors over structures, but, rather, that we seek to develop an actor-centred perspective to assess the scope for diffusion of global norms and standards. This is because the allocation of material resources (money, technical support etc) as well as the ideas that animate actions and interactions are likely to shape actors' roles and thus play an important role in asylum/refugee governance. This means that objectively similar structural factors—conflict, inequality, disasters—can and do play out very differently in terms of their effects because of variation in governance systems.

International norms and standards can powerfully shape asylum-seeking and refugee migration and also shape the behaviours of governing organisations and configuration of governance actors in these areas. This is because they can influence the behaviour of states and other relevant actors. At the same time, a significant literature in the international relations literature points to the role played by various types of governance actor in shaping the impact of these norms and standards in national and regional settings (Acharya, 2004; Pincock et al., 2021; Brumat et al.,

2021). As the GCR acknowledges, the implementation of these international norms and standards, heavily relies on various levels of governance, including the regional, subregional, national, subnational and local levels (see Sects. 2.2 and 2.3 of the GCR). The domestic incorporation of global norms and standards has been at the centre of academic debates (see Brumat et al., 2021; Betts & Orchard, 2014). This literature has assessed the effects of 'globalisation' which refers to the process, which we understand as meaning the extent to which international norms and standards can become present at (typically, but certainly not exclusively) the national level. We also distinguish between three ways in which these global norms and standards can have an effect. The first is through creation of binding rules. The second is through activities that focus on capacity-building. The third is the 'softest' form and centres on persuasion (Betts & Orchard, 2014; Cortell & Davis Jr., 2000). Our research suggests that the analysis of specific governance processes tends to have a strong focus on technical cooperation occurring in specific issue areas and can be strongly focused on building capacity and on persuasion. This technical cooperation can also have the effect of increasing the level and depth of interactions between officials. Through these interactions, ideas and resources can be exchanged and eventually, could potentially lead to the development of shared understandings and ideas, at least at this technical level (Koser, 2010; Newland, 2010). This means that technical cooperation can potentially help to build trust by creating 'participatory spaces' (Rother, 2019). This 'functionalist' perspective—where form in the shape of rules follows functions—identifies the potential that can be inherent in these bottom-up technical processes that can build trust and lead to shared understanding (Haas, 2008). At the same time, it is also clear that states continue to play a central role, there is significant 'local' at state and regional levels and a continued attachment to 'sovereignty' (Brumat et al., 2021).

The domestic incorporation of global norms and standards has been at the centre of academic debates (see Brumat et al., 2021; Betts & Orchard, 2014). Acceptance and incorporation of global norms and standards into domestic settings varies with scope for variation depends on governance actors operating in specific organisational settings who interpret the norms to make them 'fit'—or not—with 'local' norms and the wider institutional setting. We seek to illustrate how this process is mediated by exchanges of various kinds—of ideas, resources and information—that can shape the interpretation and effects of international norms for protection of asylum-seekers and refugees. We identify four potential outcomes:

- direct adoption of global norms and standards that would reflect isomorphic, globalising tendencies in the international system albeit with scope for variation in the depth of transformation that is induced.
- adaptation of these standards that could be seen as a form of adoption but with 'national colours'.
- resistance where key actors could seek to undermine global norms and standards or, as is the case for Brazil (see later) when global standards are actually viewed as less developed than those that have emerged at national and regional levels.
- rejection where global norms and standards are flatly disregarded.

2.4 Actors and Networks

This analysis moves beyond the use of the word 'network' as a metaphor and, instead, show how, why and with what effects the constitution of policy networks can play a crucial role in migration and asylum governance. Policy networks are relevant because they are the key venues where governance actors develop and exchange ideas, information and resources on migration and asylum and their causes and their consequences.

To identify and understand the structure and dynamics within each network of the case countries we used SNA to identify patterns of relationships because those patterns have an effect on the actions of individual agents (Hafner-Burton et al., 2009, p. 561). Network approaches challenge mainstream, material conceptions of power because power is inherently relational, and highly dependent on the intensity and structure of social relationships that can generate asymmetries.

Following this approach, power is dependent on the position of a node/actor in a network because it derives from patterns of association (or ties) that link actors within these networks (Hafner-Burton et al., 2009, p. 570). The intensity, degree, content, and characteristics of those ties as well as an actor's structural position in a network determine her influence over other members of the network, and thus, her power. Network structures can be defined as the 'emergent properties of persistent patterns of relations among agents that can define, enable, and constrain those agents' (ibid, p. 561) and as 'any set or sets of ties between any set or sets of nodes' (ibid, p. 562). 'Nodes' constitute the governance actors operating within the policy network. 'Ties' are the relationships between the nodes. SNA basically maps all the relevant ties between all the nodes studied. These nodes and ties can be visually represented by 'webs' which are helpful for understanding the data. SNA studies the ways in which the structure of ties affects relationships between nodes and resulting outcomes (Taylor et al., 2013, p. 27).

A social network is composed of nodes which are organisations (IOs, government organisations and some non-state actors) that are tied (connected) by the relationships and interactions established for the implementation of refugee and asylum domestic and international legislation and policies. There can be many types of ties between the nodes. We analyse the exchange of resources and information and the development of interorganisational dependencies aimed at the achievement of policy outcomes (implementation). SNA helps to understand which are the key actors that play a crucial role in determining ways of solving problems, managing relationships and the degree to which goals are achieved (Taylor et al., 2013, 27).

The empirical section, below, presents visualisations and an analysis based on the idea of 'network centrality' that provides a measure of power and, consequently, of the network's structure. Network centrality assesses the extent to which an actor is involved in more relationships with other actors, which gives more potential to coerce other actors, set agendas and manipulate the flow of ideas and resources. We then couple SNA with data derived from the interviews to examine the politics of the interorganisational coordination in asylum and refugee governance. This allows us to question the assumption that an actor's power is associated with a central position in a network and to put these actors into their relational context and in the

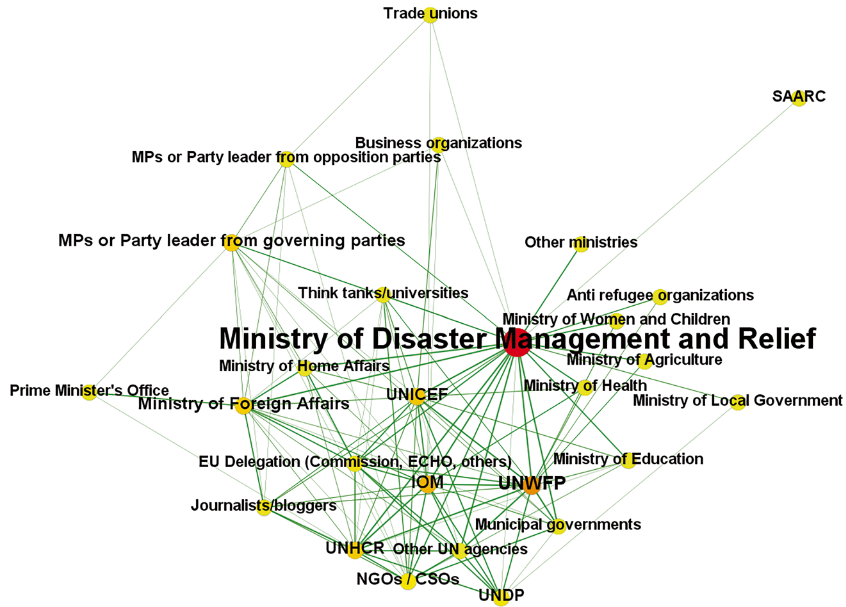
environment in which the network operates. The environment heavily influences the network's composition, activities, ideas and, as argued below, the outcomes of 'localisation' processes. This is because networks provide venues for organisations to gather information, learn, manage, resist or reject pressures from outside the network, such as international norms and standards (see Brandes & Erlebach, 2005).

2.5 Mapping of Actors

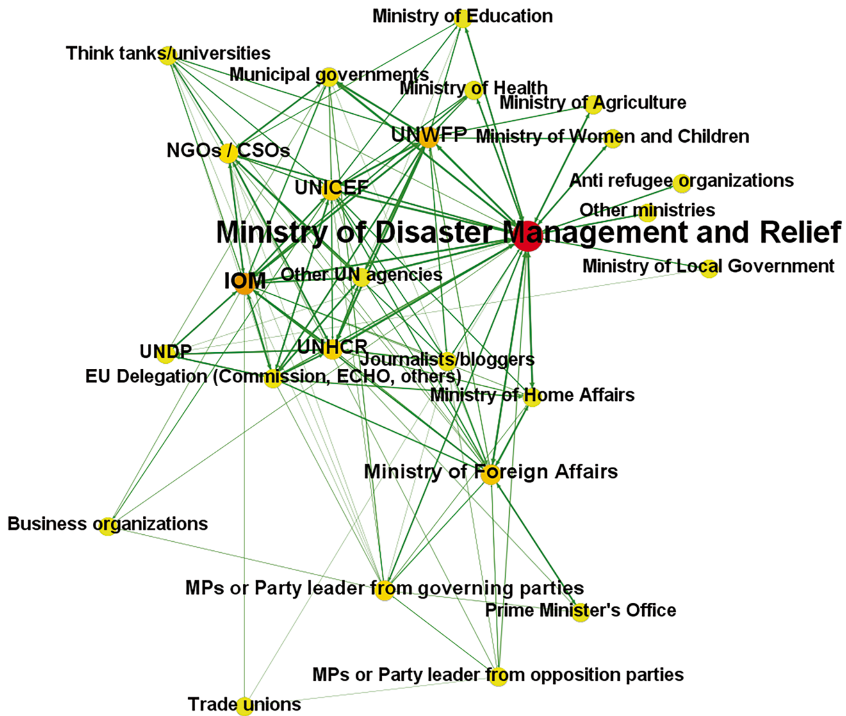
This section maps and visualizes the asylum and refugee governance networks in three ASILE case countries: Bangladesh, Brazil and Türkiye. For each of these countries, we provide two visualizations. Both of these visualizations assess network centrality. The bigger nodes indicate the actors with higher 'betweenness centrality'. The degree of betweenness centrality measures an actor's brokerage power, that is, the power to link together nodes or even networks that have few ties between them. Nodes with a high degree of betweenness centrality can serve as a bridge between actors that lack other connections, or that have fewer ties to the rest of the network, or they can also give benefits in the flow of resources to actors in one group and not the other (Hafner-Burton et al., 2009). In each subsection we look at each country individually and we later complement and amplify this analysis with selected interview material to shed light on the dynamics that can lead to enhanced or limited capacities for policy implementation, and which influence the outcomes of localisation processes.

Our SNA shows that ministries of the interior/home affairs tend to be central to governance networks, which has strong effects on policy implementation because the ideas and understandings of such ministries are the ones that permeate and travel across the network of policy implementers. International organisations also have a strong presence in the networks, but this presence is different in each country. For example, UNHCR is more central in Türkiye than in Bangladesh and Brazil. This could be because Türkiye is a large recipient of international funding for refugee protection and asylum and UNHCR plays a key role in management of the protection system. In Brazil, IOs have a stronger role as information providers. The SNA also shows that subnational governments and municipalities play a crucial role in the implementation of refugee protection and asylum policies and in the local adaptation or localisation of such policies. The strong presence of these actors may explain the differences in understandings and meanings of the main concepts in global refugee and asylum governance. Our claim is not that we 'discover' the importance of local actors and local variation, but that we try to be more systematic in our assessment of patterns and effects because the causes and effects of localisation vary between the six case countries.

For Bangladesh, the SNA charts below show the power and presence of the Ministry of Disaster Management and Relief that can be explained both the absence of formal commitment to international standards and by the specific characteristics of Bangladesh's exposure to environmental and climate risks.

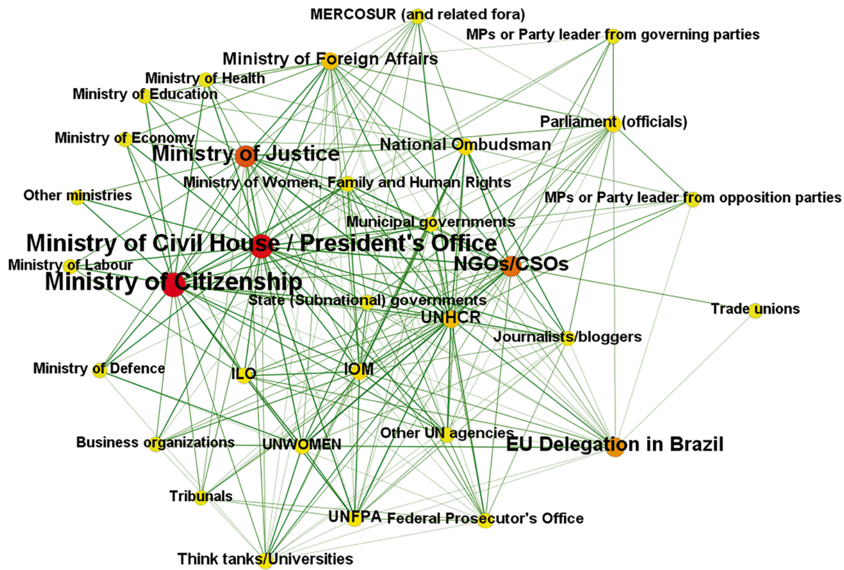


Visualization 1. Bangladesh undirected network

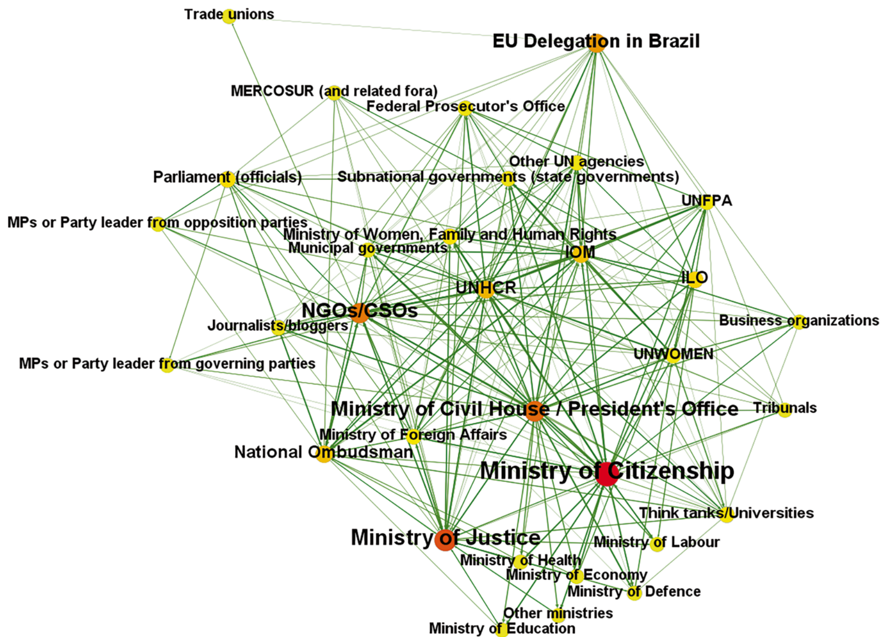


Visualization 2. Bangladesh directed network

For Brazil, the network diagrams below present a very different picture to that evident in Bangladesh. There is a much more central role for the executive branch of government, focussed on the president as well as the presence of both regional (MERCOSUR, EU) and international organisation (such as UNHCR). Aa a federal system, there is also a significant presence within the networks of sub-national authorities.

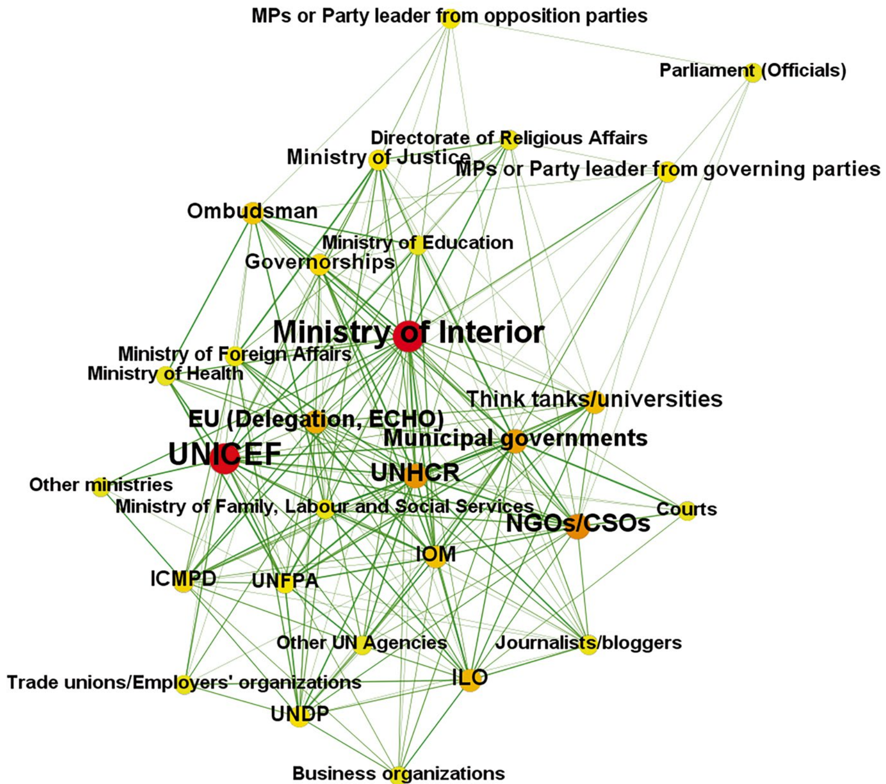


Visualization 3. Brazil undirected network

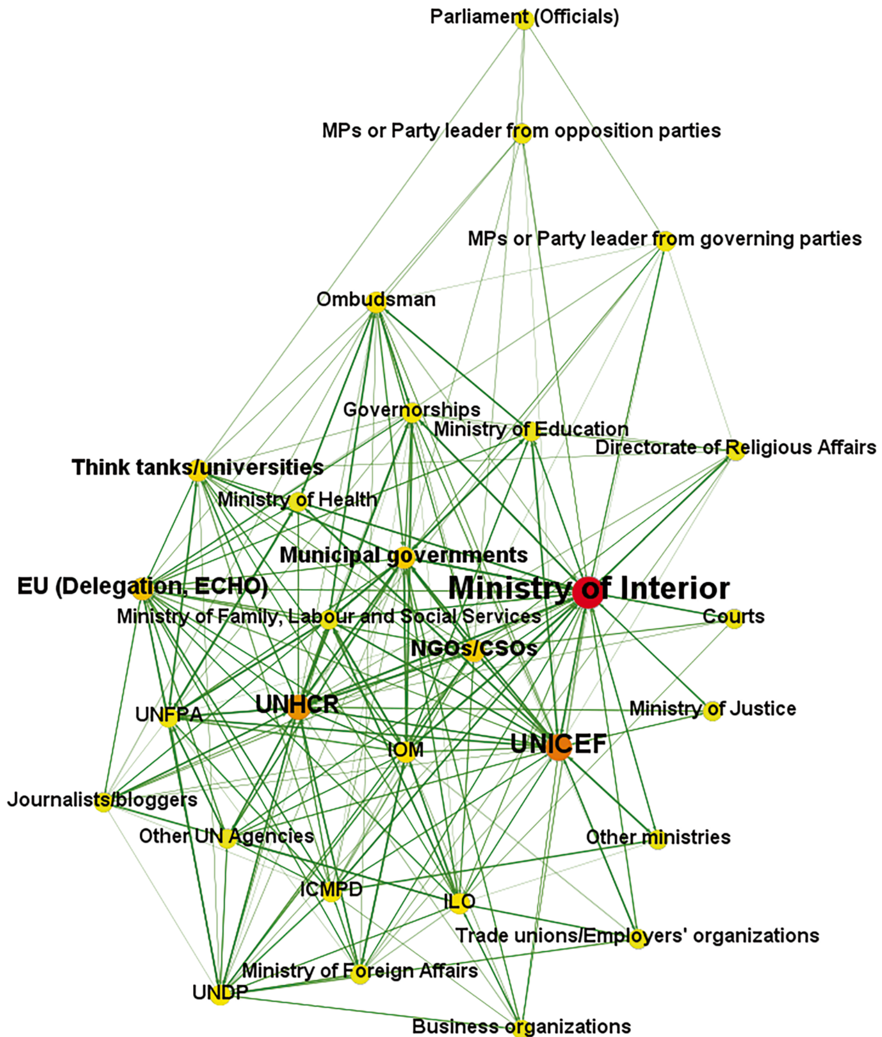


Visualization 4. Brazil directed network

For Türkiye, the network diagrams reinforce the point that we have already made about the importance of specifying the composition of the network in order to highlight variation in governance systems and the scope for this variation to then affect protection outcomes. In Türkiye, we can see the central role of the Interior Ministry, but also a prominent role for the EU delegation and the UNHCR as a key implementer of protection standards. The situation in Tukey is, of course, mediated by the relationship with the EU that dates back more than 50 years and found its most recent expression in the EU- Türkiye Statement of March 2016.



Visualization 5. Türkiye undirected network



Visualization 6. Türkiye directed network

Across all three cases, the visualisations show some common patterns. In all three cases, the core strategic network is dominated by the Ministries of Interior or functionally similar or equivalent ministries, such as the Ministry of Disaster Management and Relief in Bangladesh, the Ministries of Justice and Citizenship in the case of Brazil. Accompanying this strategic core there are other ministries, such as Health, Women, Foreign Affairs, Education and UN agencies, particularly UNHCR, IOM and UNICEF. All these organisations are functionally key for the localisation and implementation of asylum policies.

In Brazil and Türkiye, subnational and municipal governments have a relatively central position in the network. This is not surprising in the case of Brazil because it is a strongly federal country in which subnational governments have high degrees of autonomy. Türkiye instead is a unitary country. These findings are particularly relevant because they shed light on informal governance dynamics that can empower subnational governments.

SNA also shows that the EU delegations in each country have a high frequency of interactions. This means that the EU is in close contact with national actors, particularly with the government. In Bangladesh and especially in Türkiye, the EU is a key donor in the area of asylum and refugee policy. This explains the EU's higher centrality in the network in these two case countries.

The interview material allows us to expand and contextualise these findings by, first, analysing the meaning that key concepts in the area of asylum and refuge international legislation and standards acquire in each national setting in practice and their convergence of divergence with international norms and standards. To do this, we analysed the meaning the 'refugee', 'migrant' and 'protection' in each national setting. Second, assessing the role played by IOs in the national adaptation of these key concepts, legislation and standards. Third, asking key actors about the challenges associated with GCR diffusion and implementation.

Our interviews revealed high variation in the meaning of the concepts 'refugee', 'migrant' and 'protection' in practice. We find that this variance is mediated by localising processes, i.e., adaptation, resistance and sometimes rejection of international standards. This has important implications for individuals' access to rights and opportunities for international mobility and to enable their agency.

The main sources of variation in the differentiation between 'migrant' and 'refugee' are nationality (meaning that individuals have access to refugee status depending on their nationality, such as Syrians in Jordan and Türkiye), the perceived voluntariness or not of international mobility, and access to rights. The Brazilian case is particularly interesting because there is no difference between 'refugee' and 'migrant' and their access to rights in practice (Brumat and Geddes, 2022).

Our interviews with elite actors found that 'protection' has a wide array of meanings in each national setting. The prevailing understandings of 'protection' are:

- equal rights between the 'protected' population and nationals of the receiving country
- non-refoulement
- Integration into the local society
- Access to regularisation
- Access to social services
- Addressing the needs of vulnerable groups
- Life and safety and living in a safe environment (physical security)
- access to labour permits
- Protection is a temporary status

In Bangladesh, for example, protection means access to basic social services:

> Protection should include ensuring basic needs such as food, shelter and healthcare, and freedom of movement and the right to return to their country of origin under safe conditions with assurance of protection of their human dignity (MP, opposition party, March 2021).

However, it is IOs that play a key role in the provision of basic social services and protection in the absence of a legal protection framework:

> The UNHCR provides all the logistics, the WFP delivers the foods, and the UNICEF provides education. The UNFP and the WHO are also involved. Other NGOs and INGOs work as helping partners with these UN organizations. When the UN organizations need manpower to perform their tasks, they outsource other reliable NGOs and INGOs. Whatever they do, they take permission from the RRRC as this agency is the representative of the government (Senior Bangladesh government official, May 2021).

In contrast, protection is Brazil is seen to refer to non-discrimination as a constitutional principle. This leads to a progressive understanding of 'protection' as social integration and access to social services. In Brazil, IOs play a key role in providing information which is crucial for making decisions on whether to grant or not refugee status:

> We do a lot of research with the County of Origin Information (COI), which helps us to be sure of the well-founded fear of persecution. Because in Brazil, the methodology of the CONARE (National Council of Refugees), we make a link between internal credibility (what the migrant says, to know if it a coherent discourse or if there are any contradictions), and external credibility (which is having a discourse, a narrative and see if it corresponds to the situation in the country of origin). For this external credibility to work we rely a lot of reports by international organizations. (Senior Brazilian government official, January 2021).

Canada is renowned for its private sponsorship programme as a potential template for responses in other destination countries for refugees. The logic behind Canada's refugee sponsorship initiative is to create new pathways for protection:

> This is really working. I'd say would be the work through the Global Compact for Refugees and there are many component pieces to that. And I think it's a really important piece in being able to extend Canadas' leadership in certain spaces to encourage other states. We will create new pathways. If there is reticence, unwillingness, reluctance to create, dedicated refugee resettlement pathways. Then looking at how to leverage other nontraditional pathways, complementary pathways. If that's a way to create more spaces. And that is absolutely the most meaningful thing. I think that we could do, and we are continuing to do more work in that space as well, so we have our private sponsorship stream. (Senior Canadian government official, October 2021).

In Jordan we found contestation of a 'Western' definition of refugee while highlighting that Jordan does not have the same reception capacities as developed countries:

> we start attending their meetings and it is another world … But this is not the core of the problem, these people need to go back to their country, and you should prepare them for them by building the security infrastructure so that people can go back. Telling us, integrate them, no we have already enough, and it is sufficient … The US, UK what did they take from Syria? Only German really took Syrians and what did they take: professionals and left the others to us … We took them all, and we had to deal with them, they selected who they wanted. Where is the logic, and they have the water and they have the capacity to employ them? We have no water, no jobs and food for them. (Jordanian MP, June 2021).

In South Africa, we see further evidence of the 'localisation' of global norms and standards:

> The spirit of the Global Compact for Migration. Remember, we say that it is aspirational when the whole conversation around the Global Compact was going on, we said it is enshrined in international law, which the countries are all signatory to, so there was no need to invent anything new … We say that it is… it's nonbinding, first and foremost, and then it needs a common understanding. The common understanding is about shared responsibility. So, that means that a country will determine what it prioritises (International organisation official in South Africa, February 221)

Further elements of variation come into view when we consider the Turkish case where there is a widespread understanding of 'protection' as access to work and social services, which is regarded as one of the main successes of Türkiye's refugee governance:

> Access to the work permit has been successful because that's very much important to the refugee community. I think the social service centres in Türkiye, that are currently around 350 in number in total, are also help refugees to access to protection services, social services. Under these centres, the ministry of family is providing psychosocial support, socio-economic aid (International organisation official in Türkiye, May 2021).

Importantly, in Türkiye, this understanding of protection is that it is strictly temporary:

> So they (Syrian refugees) have been put under this kind of blankets, international protection entitling them to access several policies and the rights. This was quite important, because when you look at the Turkish legislation, the rights that are granted to international protections and temporary protection are quite comprehensive.

Our interview data show that IOs play a key role in the localisation of international norms and standards. As shown by the SNA diagrams, above, UNHCR and IOM are at the centre of governance networks with high numbers of interactions with all the levels of the government and with non-governmental and local actors. We would expect IOs to be more active in the globalisation of international norms and standards, however, the GCR makes frequent reference to implementation as a process that is necessarily local (sub-national, national and regional) and as involving a range of actors. This highlights that global norms and standards acquire meaning in more specific sub-national, national and regional settings.

A basic challenge for GCR implementation is awareness. Our interview research showed that a significant number of national actors do not know much about the GCR, its content and its implementation in their country. The actors that are more informed about the GCR are the ministries of foreign affairs (because typically they negotiated it) and, of course, international organisations. When there was awareness, most domestic actors saw the GCR's importance as relative and that it provides 'guidelines' which they adapt to domestic policies. In Brazil, policymakers regard Brazilian legislation as more advanced than global protection standards (Brumat & Geddes, 2022). A more restrictive form of contestation was found in Bangladesh where policymakers regard protection as an imposition of developed countries that have more resources and less densely populated countries. For

refugee protection, 'distinctiveness' is linked to global inequalities but, in effect, can also justify practices such as detention or unlawful restrictions on the freedom of movement of Rohingya by national authorities in Bangladesh (Char, 2022).

Contestation can thus have variable effects and range from more restrictive and containment-oriented policies and discourses to more expansive and mobility-oriented policies and discourses. Interestingly, these practices of contestation tend to have one thing in common: criticism of the imposition of 'Western' ideas, policies and approaches through international norms and standards. Contestation and resistance clearly also need to be linked to criticism of the structural inequality of resources for asylum and refugee governance between global north and global south countries, which could be exacerbated as countries in the global north retreat from their commitment to international standards. Structural inequality can thus be a key factor explaining adherence (or not) to global norms.

2.6 Conclusions

This Chapter has shown how governance systems at various levels mediate the effects and impacts of international norms and standards such as the GCR. We also distinguished between various ways in which global norms and standards could have an effect at national level in our six case countries: adoption, adaptation, resistance and rejection. By doing so, we emphasised the role that contention can play in the relationship between international norms and standards and their adoption at national level. A contribution of our research has been to show that this contestation can lead to rejection of or resistance to international norms and standards that are seen as an unwelcome and/or costly imposition by richer countries that are seeking to offload responsibility onto poorer countries. In contrast, in Brazil we saw another effect of contestation which was to actively embrace progressive regional standards that go beyond international commitments, as was seen by the Brazilian government decision to grant refugee status to displaced Venezuelans. Our research has also shown that at a conceptual level, some of the most basic terms and ideas associated with global refugee governance, such as 'refugee' and 'protection' are contested in 'global south' countries. This contestation at a conceptual level has material foundations because it can be linked to criticism of the structural inequality of resources for asylum and refugee governance. Many asylum governance actors pointed out that international protection and human rights standards are ideas formulated by Western developed countries. To a large extent, these protection standards are a response to the problems generated by global inequality. So, from the perspective of several global south countries, it is double standards by countries in the global north when they ask global south countries to implement international norms that are supposed to tackle the effects of structural inequality. Following this reasoning, it is strategically rational that they are unwilling to make significant investments in the implementation of norms and standards, unless these are followed by resources.

Our findings also highlight the stratification of and inequality in access to mobility policies. The different understandings and the meaning in practice, in the implementation of refugee and protection policies lead to differentiated access to rights and protection. In our case countries, the most expansive country in terms of mobility policies is Brazil, which makes almost no difference in the rights awarded to migrants and refugees and in access to both statuses. In that sense, the most restrictive and containment-oriented countries are, first, Bangladesh, which rejects the international definition of refugee altogether. Bangladesh is followed by Jordan and Türkiye, which provide differential access to protection and rights depending on nationality, and this interpretation is very restrictive because it is limited to few nationalities, first and foremost, Syria. The mobility aspects of the refugee policies of Türkiye and Jordan are strongly linked to access to labour permits.

Our analysis shows that global concepts tend to be localised and can acquire different legal, political and socio-economic meanings with wide variance in the legislation, in the set of rights that is given to forcibly displaced persons and, especially, in the real, on-the-ground, access to protection. These understandings and meanings range from expansive, mobility-enhancing like in the case of Brazil, to more restrictive and containment-oriented, as in the case of Bangladesh and Jordan. Our findings show that containment-oriented policies are linked to rejection and contestation of international norms and standards and that this is closely related structural inequalities at the global level.

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Chapter 3
Inventory and Typology of EU Arrangements with Third Countries: Instruments and Actors

Nikolas Feith Tan

3.1 Introduction

This chapter maps and analyses EU arrangements with Türkiye, Serbia, Niger and Tunisia, with a focus on arrangements since the European migrant and refugee 'crisis' of 2015. The chapter provides a country-by-country overview and inventory of relevant political, legal and financial instruments and actors. The term 'arrangements' here is used to refer to a set of binding and non-binding cooperation modalities undertaken between the EU and third countries.

The chapter analyses the role of EU cooperation in providing for *access to international protection*, either within the third country or on the basis of mobility via 'resettlement and complementary pathways to admission', as conceived of in the Global Compact on Refugees (GCR), a non-binding agreement for equitable responsibility sharing for refugees among the UN member states.[1] The chapter further discusses how these arrangements form part of the EU's containment approach, by preventing onward movement from Türkiye, Serbia, Niger and Tunisia towards EU borders, identifying elements of migration control in such arrangements.

Given the increasing informalisation in EU arrangements with third countries (Carrera, 2018) the chapter is not limited to arrangements of a strictly legal

[1] Complementary pathways have been defined by UNHCR as 'safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.' UNHCR. (2019). Complementary Pathways for Admission of Refugees to Third Countries: Key considerations. The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees. GCR paras 7 and 95.

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character. Nevertheless, the chapter does limit its scope to those arrangements with the potential to impact the human rights and refugee law obligations of the EU, its member states or third countries. Indeed, it is important to note at the outset that the informal or non-binding form of particular arrangements does not mean such arrangements do not entail legal effects or consequences in their implementation (*case T-192/16 NF v. European Council,* para 71).[2]

As well as mapping EU arrangements with third countries the chapter presents a typology, demonstrating both the breadth of modalities in EU arrangements and the interplay of containment and mobility approaches with third countries (Carrera & Cortinovis, 2019a). This typology indicates that while EU efforts are primarily focused on containment of asylum seekers in third countries, selected mobility elements are embedded in such arrangements. This dynamic has been described as one of 'contained mobility'(Carrera & Cortinovis, 2019a). Finally, a number of trends are presented as conclusions: informalisation in EU third country arrangements; the dominance of containment in EU third country arrangements; and limited uptake of the GCR in such arrangements.

3.2 Mapping EU Arrangements with Third Countries

3.2.1 EU–Türkiye

Türkiye hosts the largest number of refugees globally with 3.8 million registered asylum seekers and refugees, including 3.2 million Syrians and 220,000 persons of other nationalities (UNHCR, 2024). Since 2011, Türkiye has formally maintained a conditional open-door policy to Syrians fleeing conflict, on the basis of temporary protection (Ineli-Ciger, 2017).

Türkiye is a party to the 1951 Refugee Convention and its 1967 Protocol but maintains a geographical limitation, circumscribing Türkiye's obligations to provide Convention status to refugees from Europe. Türkiye is a party to a number of key regional and international human rights treaties, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child.[3]

Türkiye's first dedicated asylum law, the 2013 Law on Foreigners and International Protection (LFIP) contains safeguards against *refoulement* and core rights for asylum seekers and refugees in Türkiye (Chap. 14 in this volume). The LFIP provides for three protection categories:

- refugee, granted to refugees coming from Europe under the 1951 Convention;

[2] The EU-Türkiye Statement is a prime example of this dynamic.

[3] Following a coup attempt in July 2016, Türkiye declared a state of emergency and derogated from certain provisions of the ECtHR and ICCPR until July 2018.

- conditional refugee, which applies the Convention definition to refugees who originate from outside Europe;
- subsidiary protection, which protects asylum seekers who do not meet the refugee or conditional refugee definition but would face the death penalty, torture or inhuman degrading treatment or punishment or a serious threat of indiscriminate violence arising from armed conflict.

The Law also provides for humanitarian residence status, which allows asylum seekers who do not qualify for protection on the above bases but who cannot be returned to temporary stay in Türkiye.

In October 2014, as a response to the increasing number of Syrians seeking protection in Türkiye, the Temporary Protection Regulation (TPR)[4] was implemented, introducing a further temporary protection status, affording access to health care, the labour market, education, social assistance and permission to stay until the TPR is terminated (Ineli-Ciger, 2018). The protection afforded under the TPR carves out an exception to the international protection statuses granted under the LFIP and is strictly temporary, without prospects for durable solution (TPR, 2014, Chapter 7(3)). The LFIP also established the Directorate General of Migration Management (DGMM), an authority under the Ministry of Interior, responsible for the coordination of asylum and migration issues in Türkiye (Ineli-Ciger, 2017).

EU Arrangements with Türkiye

The EU and Türkiye have a long history of cooperation on migration control stretching back to the early 1990s. As early as 1987, Türkiye was identified as a 'transit space' given its role as country of first asylum for refugees fleeing the Iranian Revolution, the Iran-Iraq War and the First Gulf War (Üstübici, 2019). Since then, Türkiye has emerged as both refugee-hosting country and a country of origin for asylum seekers in the EU. While this chapter focuses on EU–Türkiye arrangements since 2015, a brief historical account is vital to inform current cooperation.

Between 1963 and 1999, EU–Türkiye relations were governed by an Association Agreement, prior to Türkiye becoming a candidate country for EU membership. Since the 2001 Accession Partnership Agreement, a *legal instrument,* cooperation between the EU and Türkiye has accelerated in the field of migration control (Üstübici, 2019). In particular, EU efforts have focused on building up Türkiye's national asylum and protection system along the lines of the EU asylum *acquis.*

In March 2005, Türkiye adopted a National Action Plan for Asylum and Migration, as a result of a twinning exercise with Denmark and the United Kingdom, aiming to align Turkish asylum law with the EU asylum system (Ineli-Ciger, 2018). In October 2008, the Migration and Asylum Bureau and the Bureau for Border Management within the Ministry for Interior was established, with EU support. The LFIP, passed in 2013 and entering into force in April 2014, establishes a

[4] Temporary Protection Regulation, (Official Gazette No. 29153 of 22 October 2014).

comprehensive legal framework for the protection of asylum seekers and refugees 'that in many respects mirrors the EU asylum *acquis'* (Ineli-Ciger, 2018).

In December 2013, following years of negotiation, the EU and Türkiye signed a Readmission Agreement, a *legal instrument* providing for the reciprocal return of Turkish and third country nationals who 'entered into, or stayed on, the territory of either sides directly arriving from the territory of the other side'.[5] The EU–Turkey Readmission Agreement buttressed the extant Greece-Türkiye Readmission Protocol from 2002.

Against this backdrop, Türkiye's importance to the EU in migration control was heightened in 2015. In October of that year, as the EU grappled with the influx of approximately one million asylum seekers, the majority of whom were fleeing the Syrian conflict via the Aegean Sea between Türkiye and Greece, the EU-Turkey Joint Action Plan was released. The plan, a *political instrument,* was activated on 29 November 2015.

With respect to *financial instruments*, In November 2015, the European Commission established the Facility for Refugees in Turkey (FRIT),[6] a mechanism focused on humanitarian assistance, education, migration management, health, municipal infrastructure, and socio-economic support to refugees and host communities in Türkiye. Operational since February 2016, the total budget coordinated by the Facility is EUR 6 billion (European Commission, 2020).

'Humanitarian assistance', focused on refugees' basic protection, education, and health needs in Türkiye, accounts for 59% of FRIT funding (European Commission, 2020). The European Commission reports that 64 humanitarian assistance projects have been implemented through 19 partners under the Facility (European Commission, 2020). 'Development assistance' accounts for 41 per cent of the FRIT budget, focused on the longer-term health, education and socio-economic development of refugees in Türkiye. Under the first tranche of FRIT funding, 26 projects were granted, with more to follow under the second tranche (European Commission, 2020). Notably, however, included under the rubric of 'development assistance' are projects related to migration management, including International Organization for Migration (IOM) support to the Turkish Coast Guard.[7] For example, in 2016 the EU provided EUR 14 million for 'the procurement of fast response boats and mobile radar systems' (European Commission, 2018).

In addition to funding under the FRIT, the EU funds activities in Türkiye via the EU Regional Trust Fund in Response to the Syrian Crisis ('Madad Fund'), a

[5] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation. May 7, 2014. http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507(01).

[6] Commission Decision of 24 November 2015, amended on 10 February 2016, and again on 14 March and 24 July 2018 (COM(2020) 162 final.

[7] EU Facility for Refugees in Türkiye List of projects committed/decided, contracted, disbursed. September 28, 2020. Retrieved June 12, 2024, from https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility_table.pdf

financial instrument which has a total budget of EUR 1.8 billion.[8] As with the FRIT, the EU contracts both Turkish government agencies and local and international non-governmental organisations (NGOs) to support refugees residing in Türkiye.

Finally, the EU also provides funding to Türkiye under the Instrument for Pre-accession Assistance (IPA) with the aim of aligning Turkish legislation and standards with those of the EU.[9] However, funding for migration management under the IPA has been folded into the FRIT. For example, IPA funding for migration management projects relating to reception centres and strengthening the operational capacities of the Turkish Coast Guard are listed as FRIT projects.[10] In addition, Frontex deploys a European Migration Liaison Officer to Türkiye.[11]

On 18 March 2016 the European Council issued the EU-Turkey Statement, a *political agreement* in the form of a press release, following a meeting between representatives of the European Union and of the Turkish government that had taken place in Brussels on the same day.[12] This was the third meeting between the two parties since November 2015, officially 'dedicated to deepening Türkiye-EU relations as well as addressing the migration crisis'.

According to the press release, Türkiye and the EU had reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. Moreover, the EU had begun disbursing the EUR 3 billion of the FRIT for concrete projects and work had advanced on visa liberalisation and in the accession talks, including the opening of Chap. 17 in December 2015.

On 7 March 2016, Türkiye had furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Türkiye into Greece and to take back all irregular migrants intercepted in Turkish waters. Türkiye and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the

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[8] Commission Decision C(2014) 9615 of 10 December 2014 on the establishment of a European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund".

[9] Delegation of the European Union to Turkey. Instrument for Pre-Accession Assistance (IPA) Retrieved June 12, 2024, from https://www.avrupa.info.tr/en/instrument-pre-accession-assistance-ipa-880

[10] EU Facility for Refugees in Türkiye List of projects committed/decided, contracted, disbursed, September 28, 2020. Retrieved June 12, 2024, from https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/facility_table.pdf

[11] Frontex. Frontex Liaison Officers to non-EU countries. Retrieved June 12, 2024, from https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/liaison-officers/#:~:text=The%20Frontex%20liaison%20officers%20are,offices%20of%20other%20EU%20agencies

[12] In the wording of Press release 144/16 of 18 March 2016, the meeting was held between 'Members of the European Council' and 'their Turkish counterpart'. While the PDF version of the press release bears the heading 'International Summit', this term does not appear in the press release published on the website of the European Council and the Council of the European Union, indicating the European Council as the source of the press release. March 18, 2016. Retrieved June 12, 2024, from https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-Türkiye-statement/. This difference was pointed out when the legal nature of the EU representation at the meeting was disputed before the CJEU, cf. order of the General Court of 28 February 2017, case T-192/16 NF v. European Council, para. 55.

same time Türkiye and the EU recognised that 'further, swift and determined efforts are needed'.[13]

The EU-Turkey Statement provides for the return of irregular migrants who reach the Greek Aegean islands back to Türkiye, on the basis of safe third country or first country of asylum concepts.[14] In exchange, the EU agreed to resettle from Türkiye one Syrian refugee for every Syrian returned from the Greek islands, provide EUR 6 billion in funding via the FRIT, grant visa-free travel to Turkish nationals, and to reopen negotiations for Türkiye's accession to the EU (EU–Turkey statement, 2016; European Commission, 2018).

The European Commission claims the EU-Türkiye Statement has been effective in drastically reducing the number of asylum seekers crossing from Türkiye to Greece, via the Aegean Sea (Spijkerboer, 2016). According to European Border and Coast Guard Agency (EBCGA or Frontex) statistics, for example, arrivals from Türkiye to the EU reached 885,386 in 2015 and dropped to 60,151 in 2019, in fact representing an increase from intervening years.[15] Between April 2016 and April 2020, 2140 people were returned under the arrangement, before returns were *de facto* suspended by the Turkish government (UNHCR, 2020).

3.2.2 EU–Serbia

Serbia, one of five EU candidate countries making up the Western Balkans region,[16] is a key transit country for asylum seekers to the EU moving north from Türkiye and North Macedonia (Krstić, 2018). Serbia is flanked by EU member states Bulgaria, Romania, Hungary and Croatia to its east and north.

Yugoslavia became a party to the Refugee Convention in 1959, a ratification status that Serbia inherited upon independence. The 1992 Law on Refugees provided for technical reception, such as accommodation and refugee support, rather than protection status (Mitrovic, 2019). While the Serbian constitution includes a right to seek asylum, Serbia did not introduce its far more substantive Law on Asylum until 2008, setting out protection statuses broadly reflecting the EU asylum *acquis* (Mitrovic, 2019).[17] In March 2018, a new Act on Asylum and Temporary

[13] Press release 144/16 of 18 March 2016.

[14] The safe third country concept allows for the return of an asylum seeker to a particular country on the basis that they can access a fair and efficient asylum procedure and receive international protection in accordance with the 1951 Refugee Convention there. The first country of asylum concept allows for the return of a person to a country where they have already been recognised as a refugee, or otherwise enjoys international protection there, including freedom from refoulement.

[15] Frontex. Migratory Map. https://frontex.europa.eu/along-eu-borders/migratory-map/

[16] Namely Albania, Bosnia and Herzegovina, Kosovo, Montenegro and North Macedonia.

[17] Official Gazette of the Republic of Serbia no. 109/2007.

Protection (ATPA) introduced a number of reforms to Serbia's asylum system further closely aligned to EU standards.[18]

Notwithstanding a fairly robust legal framework, Serbia's asylum infrastructure has been widely criticised for reliance on the safe third country concept in determining the admissibility of protection claims (chap. 12 in this volume; Krstić, 2018).[19] One author summarises Serbia's transit profile as 'a significant number of stranded refugees have expressed their intention to apply for asylum, but the vast majority does not perceive Serbia as a country of permanent destination' (Bobić & Šantić, 2020).

EU Arrangements with Serbia

In 2015, Serbia became a key transit country on the 'Balkan route' to the EU, with the European Parliament estimating 596,000 people entered Serbia irregularly in that year (Greider, 2017). The drastic increase of asylum flows in 2015 strained Serbia's fairly new asylum system (Bobić & Šantić, 2020).

Following the peak of arrivals in October 2015, when 180,307 people entered the country, a cascade of border closures in the Western Balkans rapidly decreased the number of asylum seekers transiting in Serbia (Bobić & Šantić, 2020). Subsequently, Hungary began the blanket application of the safe third country concept vis-à-vis Serbia (Greider, 2017). Since the events of 2015, the EU has pursued cooperation with Serbia in the area of migration control, including as regards Serbian accession to the EU.

In June 2015, as Serbia's pivotal role on the Balkan Route crystallised, the Working Group on Mixed Migration Flows was formed with five Serbian ministries, the Commissariat for Refugees and Migration and the EU Delegation in Serbia as members (Bobić & Šantić, 2020).[20] The working group remains in place today.

In October 2015, the Western Balkans Route Statement was released following a heads of government meeting convened by the EU with Albania, Austria, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Romania, Serbia, Slovenia and UNHCR (European Commission, 2015). The Statement, a *political instrument*, comprised a 17-point plan of action encompassing the following elements: permanent exchange of information; limiting secondary movements; supporting refugees and providing adequate reception conditions;

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[18] European Commission Staff Working Document. (2019). Serbia 2019 Report Accompanying Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy {COM(2019) 260 final 39.

[19] For applications challenging Serbia's application for the safe third country concept, see A.K. v Serbia, application no. 57188/16 (communicated 19 November 2018) and M.H. v Serbia, application no 62410/17 (communicated 26 October 2018).

[20] The Ministries of labour, employment, veteran and social affairs; interior; and EU integration.

managing migration flows; border management; tackling smuggling and trafficking; and information on the rights and obligations of refugees and migrants.[21]

In terms of *financial instruments,* since 2016, EU funding has flowed to Frontex, EUAA, IOM and UNHCR under the second Instrument for Pre-accession Assistance (IPA II) (Frontex, 2009) A further Special Measure on Strengthening the Response Capacity of the Republic of Serbia to Manage Effectively Mixed Migration Flows was passed by the European Commission in September 2019, granting EUR 27.45 million.[22]

In addition to funding under IPA II, the EU funds activities in Serbia via the Madad Fund, a *financial instrument* which has funded four projects in Serbia since 2015, primarily focused on strengthening the migration management capacity of Serbian authorities and food assistance in government-run reception centres.[23] Funded bodies include Serbian national authorities, IOM and a range of international NGOs.

Perhaps most notably, EU agencies have played an active role on Serbian territory, in cooperation with their Serbian counterparts. As well as deploying a European Liaison Officer to Serbia, Frontex carries out migration management on Serbian territory under a Status Agreement, a *legal instrument* signed in 2019 and approved by the European Parliament in January 2020 (See further Chap. 16 in this volume).[24] Under the Agreement, Frontex officers 'assist Serbia in border management, carry out joint operations and deploy teams in the regions of Serbia that border the EU'.[25]

Under the auspices of IPA II, EUAA provides training and technical assistance to Serbian asylum officers, policymakers and judges to 'to support the establishment or further development of asylum and reception systems in line with EU standards'(Belgrade Centre for Human Rights, 2020).

3.2.3 EU–Niger

The Republic of Niger, which became independent from France in 1960, is located on the edge of the Sahara Desert in West Africa. With Mali to the west, Nigeria to the south and Libya to the north-east, Niger is a transit country for asylum seekers

[21] European Commission, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action.

[22] Commission Implementing Decision of 30.9.2019 adopting a Special Measure as regards Strengthening the Response Capacity of the Republic of Serbia to Manage Effectively Mixed Migration Flows.

[23] European Commission. EU Trust Fund for Syria. https://eutf-syria.akvoapp.org/

[24] Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia.

[25] European Commission. Border management: EU signs agreement with Serbia on European Border and Coast Guard cooperation. https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6303

en route to the EU via the Central Mediterranean, with the Saharan city of Agadez the main transit point for West African migrants and refugees (Van Dessel, 2019; Chap. 11 in this volume).

Niger is a party to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, and the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa. Niger‘s 1997 Refugee Law forbids *refoulement* and created the National Eligibility Commission responsible for national asylum procedures. The Refugee Law grants refugees the same rights as nationals regarding physical security, freedom of movement, health services, education, and identity documents (United States Committee for Refugees and Immigrants, 2009). Niger is also part of the Economic Community of West African States (ECOWAS) and a party to the ECOWAS Treaty and its Free Movement Protocol (Chap. 11 in this volume).[26]

The poorest country in Africa, Niger places last on Human Development Index (HDI) reports on health, education and income (Jahan, 2018). Niger placed last overall for HDI value in 2018.[27] Niger hosts 371,000 refugees, of which 239,000 originate from Nigeria and 130,000 from Mali.[28] A further 407,400 internally displaced persons reside in the country.[29] Since 2017, 4242 asylum seekers and refugees have been evacuated from Libya to Niger via UNHCR's Emergency Transit Mechanism (ETM) (UNHCR, 2024).

Mapping EU Arrangements with Niger

Since 2000, EU relations with Niger have been regulated by the Cotonou Agreement, a *legal instrument* encompassing EU cooperation with 79 African, Caribbean and Pacific countries until the end of 2020.[30]

Since the fall of Gaddafi in 2011 and Libya's subsequent descent into instability, the EU has stepped up cooperation with Niger, as part of the EU's security-development-migration concerns in the Sahel region (Brachet, 2018; Davitti & Ursu, 2018; Molenaar, 2017; Van Dessel, 2019). The EU's Sahel Regional Action Plan 2015–2020, for example, calls for a focus on the development-migration nexus, including the promotion of international protection and mobility (Council of the European Union, 2015).

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[26] Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993; The Economic Community of West African States Protocol A/P.1/5/79 Relating To Free Movement of Persons, Residence and Establishment. Dakar, 29 May 1979.

[27] UNHCR, Emergency Transit Mechanism June 2020 update.

[28] UNHCR, Operational Data Portal. https://data2.unhcr.org/en/country/ner

[29] UNHCR, Operational Data Portal. https://data2.unhcr.org/en/country/ner

[30] Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, pp. 3–353).

The arrival of approximately one million asylum seekers to the EU in 2015, however, accelerated the EU's cooperation with Niger in the field of migration control. Following decline in movement across the Eastern Mediterranean, from October 2015, the Central Mediterranean emerged as the primary route for asylum seekers to Europe. Cooperation between the EU and Niger became a priority to control movement to Libya, the primary point of departure for Europe (Bøås, 2020; Moretti, 2020).

In May 2015, the European Commission's European Agenda on Migration proposed the establishment of a 'pilot multi-purpose centre' to provide information, local protection and resettlement opportunities, with support from UNHCR and IOM.[31] However, the pilot centre never materialised.

In terms of *legal instruments,* in May 2015, the EU supported the passage of the Law Against the Illicit Smuggling of Migrants, which criminalises smuggling migrants north of Agadez up to the southern Libyan border (Spijkerboer, 2019).[32] According to one author, the Law 'de facto criminalized the movement of third-country nationals north of Niger.'[33] Another scholar has characterised controls under the Law as 'internal carrier sanctions' (Spijkerboer, 2019). Under the Law, movement of asylum seekers from Agadez to Libya became more expensive, more dangerous and numbers declined significantly (Van Dessel, 2019). According to the European Commission, for example, travel from Agadez dropped from 70,000 departures in May 2016 to 6524 in January 2017.[34] Following a coup in July 2023, the Law was repealed in November 2023 (BBC News, 2023).

In November 2015, the Valletta Summit Declaration and the Joint Valletta Action Plan emerged from a summit between European and African leaders of government. These *political instruments* emphasised the following five pillars: development benefits of migration and addressing root causes of irregular migration and forced displacement; legal migration and mobility; protection and asylum; and prevention of irregular migration, migrant smuggling and trafficking; and return, readmission and reintegration.[35]

With respect to *financial instruments*, further EU-Niger cooperation was flagged at the November 2015 Valletta Summit, where the Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTF) was launched with an overall aim of addressing 'the crises in the regions of the Sahel and the Lake Chad, the Horn of Africa, and the North of Africa'

[31] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration. Brussels, 13.5.2015, COM(2015) 240 final 5.

[32] Loi 2015–36 Relative au Trafic Illicite de Migrants.

[33] European Commission. EU cooperation with Niger. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5234

[34] European Commission. Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

[35] Political Declaration. Valletta Summit, 11–12 November 2015; Action Plan. Valletta Summit, 11–12 November 2015.

(Spijkerboer & Steyger, 2019).[36] Niger is the EUTF's biggest recipient overall (Spijkerboer, 2019).

Furthermore, in 2016, a migration control pillar was added to EUCAP Sahel, a civilian mission under EU Common Security and Defence Policy launched in 2012 (Davitti & Ursu, 2018). The European Council extended the mission's mandate to support Nigerian security forces' capability to 'better control migration flows and to combat irregular migration and associated criminal activity more effectively,' (EUAA, 2016) with a focus on the transit hub of Agadez. In 2017, for example, EUCAP Sahel donated five vehicles to Nigerian authorities for the purposes of migration control (Spijkerboer, 2019). Frontex has one European Liaison Officer stationed in Niamey.[37] According to Spijkerboer, the EUTF and EUCAP Sahel are the 'two main instruments which the EU currently uses to promote good governance' in Africa in general, and Niger in particular (Spijkerboer, 2019).

In 2016, the EU Partnership Framework on Migration identified Niger as one of five priority countries, enhancing the role of migration diplomacy in EU–Niger relations (Abebe, 2019).[38] The stated short-term objectives of the Migration Partnership Framework, a *political instrument*, are:

- save lives at sea and in the desert;
- fight traffickers and smugglers' networks that benefit from people's despair;
- increasing returns of those who do not have the right to stay; and enable migrants and refugees to stay closer to home rather than embark on dangerous journeys; and
- open up legal ways to Europe for those in need, in particular resettlement.[39]

At the same time, EUR 500 million was transferred from the European Development Fund to support African partnerships through the EUTF (Kipp, 2018).

The EU's migration control efforts have hitherto largely focused on the north-eastern administrative unit of Agadez, located at a key point along the migration route between the Sahel and Maghreb (Abebe, 2019). According to one study, 20% of all migrants who transit through Agadez travelled to Europe by boat in 2017 (Molenaar & El-Kamouni-Janssen, 2017).

The EU also funds multiple migration-related projects in Niger. In general, EUTF funding for migration management projects outweigh projects related to national protection and reception. IOM has played a key role in the implementation of the EU's containment and return priorities. For example, the EUTF funds IOM

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[36] Commission Decision C(2015)7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa.

[37] Frontex. Frontex Liaison Officers to non-EU countries. https://frontex.europa.eu/partners/liaison-officers-network/

[38] The other priority countries are Ethiopia, Mali, Nigeria and Senegal.

[39] European Commission. Migration Partnership Framework: A new approach to better manage migration. https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf

projects promote alternatives to irregular migration and focused on migration management and return.[40]

According to Van Dessel, these projects amount to IOM participation in 'the externalization process of EU borders by undertaking the relocation of migration control in Niger in order to keep unwelcome individuals away from the EU territory' (Van Dessel, 2019). EU funding has also played a vital role in implementing border controls, for example contracting IOM to support the construction of border posts (Spijkerboer, 2019). IOM has further been involved in training Nigerian police in investigating document fraud (Spijkerboer, 2019).

EU funding is also focused on national protection, evacuation and resettlement. The EUR 4.2 million AMIF-funded Regional Development and Protection Programme aims to improve the quality of national asylum procedures undertaken by Niger's National Eligibility Commission.[41] One EUTF project worth EUR ten million is focused on protection of refugees in the Diffa region.[42]

UNHCR has led the EUTF-funded Emergency Transit Mechanism (ETM) for the evacuation of asylum seekers and refugees from detention in Libya to Niger since November 2017. Under a memorandum of understanding between UNHCR and the Nigerian government,[43] UNHCR evacuates likely refugees from Libya to the ETM site, located outside Niamey for refugee status determination and, for vulnerable refugees, referral for resettlement in *inter alia* Canada, EU member states, Norway and the United States (UNHCR, 2020).

3.2.4 EU–Tunisia

Sharing a land border with Libya to the east, Tunisia was historically a relatively minor transit country and point of departure for irregular migrants to Europe. This is changing, however, as Tunisia has recently emerged as a significant source country for irregular migration on the central Mediterranean (Chap. 13 in this volume).

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[40] EUTF. Response and Resource Mechanism for Migrants. https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/mecanisme-de-reponse-et-de-ressources-pour-les-migrants.; EUTF. Strengthening the management and governance of migration and sustainable return to Niger (Sustainable Return from Niger—SURENI). https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/renforcement-de-la-gestion-et-de-la-gouvernance-des-migrations-et-le_en

[41] European Commission. Regional Development and Protection Programme for North Africa (RDPP NA) in Niger. https://ec.europa.eu/home-affairs/publications/regional-development-and-protection-programme-north-africa-rdpp-na-niger_en

[42] EUTF. Integrated project to support the resilience of vulnerable refugee, displaced, returnee and host populations in the Diffa region, Niger. https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables_en

[43] UNHCR. (2020). Emergency Transit Mechanism. June 2020 update. https://reliefweb.int/sites/reliefweb.int/files/resources/77083.pdf.The MoU is available via https://www.asgi.it/wp-content/uploads/2019/05/memorandum_Niger_UNHCR.pdf

Tunisia is both a transit and origin country for irregular migration to the EU. Since the 2011 Tunisian revolution that ended the Ban Ali regime and launched the Arab Spring, Tunisians and other nationalities have sought protection in Europe in increasing numbers via the central Mediterranean.

Tunisia is a party to the 1951 Convention and its 1967 Protocol and the 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[44] Chapter 26 of the post-revolutionary constitution, from January 2014, includes a right to political asylum as prescribed by law, however no national asylum legislation has yet been introduced (Chap. 13 in this volume; Badalič, 2018).

Since 1992, UNHCR has conducted refugee status determination and resettlement procedures in-country under an agreement with the Tunisian government. In 2011, following the arrival of one million asylum seekers arrived in Tunisia fleeing conflict in neighbouring Libya, this agreement was renewed (Carrera et al., 2018).

At the end of 2019, UNHCR reported 17,177 persons of concern in Tunisia, comprising 13,450 asylum seekers and 3727 refugees.[45] While these numbers are fairly modest, they represent a significant increase from previous years. UNHCR conducts small-scale resettlement from Tunisia.[46]

EU Arrangements with Tunisia

Since the early 2000s, Tunisia has been an EU partner in the field of migration control (Cassarino, 2014). Until the Tunisian Revolution of 2011, the EU and its member states entered into a number of *ad hoc* arrangements with the Ben Ali regime, primarily focused on combating people smuggling, border control and readmission from the EU to Tunisia. In February 2004, notably, the Ben Ali regime passed the Law 2004–6 which criminalised people smuggling and associated assistance to irregular migrants, with encouragement from the EU (Badalič, 2018).

Since the 2011 Revolution, broader EU-Tunisia cooperation has intensified through the adoption of three *political instruments* (Roman, 2019). In 2012, the EU and Tunisia's post-revolution government established a Privileged Partnership, which was followed by a 2013–17 action plan.[47] In March 2014, the EU and Tunisia formed a Mobility Partnership, 'providing a comprehensive framework for policy dialogue and cooperation with Tunisia in all aspects of migration management'(European Commission, 2016; Reslow, 2018).

[44] UNHCR. UNHCR Tunisia Special Update. https://reporting.unhcr.org/sites/default/files/UNHCR%20Tunisia%20Special%20Update%20-%2016JUL20.pdf

[45] UNHCR. UNHCR Tunisia Operational Update. April 2024. https://reporting.unhcr.org/tunisia-operational-update-8433

[46] UNHCR. UNHCR Tunisia Operational Update. June 2020. https://reliefweb.int/sites/reliefweb.int/files/resources/77816.pdf

[47] European Commission. Relations between the EU and Tunisia. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1263

In particular the following elements are identified as key priorities: mobility, legal migration and integration; the fight against illegal immigration and human trafficking; return and readmission; border management; migration and development; and asylum and international protection (European Commission, 2016). Notwithstanding this broad set of priorities, Tunisian civil society organisations have identified border control and readmission as the EU's primary focuses (Roman, 2019). Since 2014, the EU has supported Tunisia's National Strategy on Migration, funding the implementation of the Strategy through four partners to the amount of EUR 12.8 million.[48]

Most recently, on 16 July 2023, the EU and Tunisia signed a non-binding Memorandum of Understanding (MoU) "on a strategic and global partnership" (Andrade, 2024), including a strong focus on Tunisian prevention of departures by sea, efforts to combat migrant smuggling and trafficking as well as the return of foreigners from Tunisia to their countries of origin. In turn, the EU undertook to enhance Tunisian citizens' mobility to the Member States.

In terms of *financial instruments*, the EUTF funds Tunisian migration management and mobilisation of diaspora to the sum of EUR 89 million (European Union, 2020). The EUTF has granted the International Centre for Migration Policy Development EUR 24.5 million aimed at 'strengthening technical capacities of the Tunisian Coast Guard'.[49] In 2017, a EUR 23 million security sector reform project provided capacity building support in the area of border management (European Commission, 2016).

In 2016, a draft National Asylum Law was put forward to the Tunisian parliament but remains stalled, possibly reflecting the relatively low priority afforded migration in Tunisian politics (Roman, 2019). The European Commission's 2016 Communication on Strengthening EU support for Tunisia included migration management as a pillar for cooperation (European Commission, 2016).

In pursuing intensified cooperation with Tunisia, the EU has included key civil society organisations in dialogue (Roman, 2019). While migration policy under the Ben Ali regime was previously controlled by the Ministry for Interior, three civil society organisations have been party to 'tripartite' EU-Tunisia dialogues since 2016 (Geddes & Lixi, 2018). In addition, Frontex has deployed a European Migration Liaison Officer to the EU Delegation to Tunisia (European Commission, 2017). The 2023 EU-Tunisia MoU includes a tranche of EUR 105 million to curb irregular migration.[50]

Tunisia is becoming an increasingly important partner in the EU's migration control approach. Historically a fairly minor transit country, Tunisia is today a key departure country on the central Mediterranean route. EU arrangements with Tunisia

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[48] EUTF. Promote the implementation of Tunisia's national migration strategy. https://ec.europa.eu/trustfundforafrica/region/north-africa/tunisia/favoriser-la-mise-en-oeuvre-de-la-strategie-nationale-migratoire-de-la_en

[49] EU Emergency Trust Fund for Africa—North of Africa window.

[50] European Commission. EU comprehensive partnership package with Tunisia, June 2023. https://ec.europa.eu/commission/presscorner/detail/en/FS_23_3205

are focused on border control to prevent irregular departures, with no national protection or mobility arrangements for refugees to the EU in place.

3.3 Typology of EU Arrangements with Third Countries of Transit

This section shifts from the account of EU arrangements with third countries to provide a classification according to the content of such arrangements. The section puts forward a typology of EU approaches present in one or more arrangements with Türkiye, Serbia, Niger and Tunisia in terms of containment and mobility (Carrera & Cortinovis, 2019a).

3.3.1 Funding, Equipping and Training for Border Control and Migration Management

EU funding, equipment and training is aimed at strengthening the border control capacity of third country partners, often with a focus containment by preventing irregular departure toward the EU. In the case of Niger, notably, the EU has contracted IOM to build border posts and train and equip police for the purposes of migration control. With respect to Tunisia, a number of EU-funded projects provided capacity building support in the area of border management, including EUR 24.5 million aimed at 'strengthening technical capacities of the Tunisian Coast Guard'.[51] In Türkiye, an explicit element of the EU–Turkey Statement is cooperation on the prevention of departures from Türkiye, including through the enhancement of the Turkish Coast Guard's capacity in the Aegean Sea.[52] Similarly, in 2016, the EU granted EUR 28 million in sectoral budget support to strengthen Serbia's border control capacities.[53]

[51] European Commission. (2016). Strengthening EU support for Tunisia JOIN(2016) 47 final 14; EU Emergency Trust Fund for Africa—North of Africa window.

[52] European Commission. (2016). Second Report on the progress made in the implementation of the EU-Turkey Statement, Brussels, 15.6.2016 COM(2016) 349 final.

[53] European Union External Action. Serbia: EU increases support to migration and efficient border management. https://eeas.europa.eu/headquarters/headQuarters-homepage/39881/serbia-eu-increases-support-migration-and-efficient-border-management_hy

3.3.2 Funding Refugee Protection

EU funding is also directed at the protection needs of refugees present in third countries, notably in Türkiye where assistance under the FRIT is focused on refugees' basic protection, education, and health needs in Türkiye (European Commission, 2020). In Niger, one EUTF project worth EUR ten million is focused on protection of refugees in the Diffa region.[54] EU funding of protection needs in Serbia and Tunisia, primarily countries of transit, is less relevant, with both states hosting relatively small refugee populations.

3.3.3 Supporting National Asylum Systems

In some cases, the EU supports the development of national asylum and protection systems in third countries of transit, primarily through funding for UNHCR. In Niger, for example, the Asylum, Migration and Integration Fund (AMIF) has funded UNHCR's work on improving the timeliness and quality of national asylum procedures.[55] In Türkiye, the FRIT funds UNHCR's work on 'access to fair and efficient national asylum-procedures and promoting procedural standards and safeguards' for refugees in Türkiye.[56] In Serbia, the EUAA plays a direct role in strengthening Serbia's asylum system, through training and technical assistance.

3.3.4 Supporting Anti-smuggling Legislation and Policy

Containment-oriented arrangements with third countries feature active EU support for the introduction and enforcement of national legislation to combat people smuggling. In Tunisia, Law 2004–6 was passed by the Ben Ali regime with encouragement from the EU (Badalič, 2018). In Niger, the EU supported the passage of the Law Against the Illicit Smuggling of Migrants in 2015.[57]

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[54] EUTF. Integrated project to support the resilience of vulnerable refugee, displaced, returnee and host populations in the Diffa region, Niger. https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/projet-integre-dappui-la-resilience-des-populations-vulnerables_en

[55] European Commission. Regional Development and Protection Programme for North Africa (RDPP NA) in Niger.

[56] EU Facility for Refugees in Turkey, List of projects committed/decided, contracted, disbursed.

[57] Loi 2015–36 Relative au Trafic Illicite de Migrants.

3.3.5 Deployment of Frontex Liaison Officers

A common arrangement across all four countries is the deployment of Frontex Liaison Officers (FLO). Frontex has FLOs posted in Ankara (since 2016), Niamey (since 2017), Belgrade (since 2017) and Tunisia (since 2017).[58]

3.3.6 Use of Safe Third Country Concepts

With respect to two of the four transit countries analysed here, the EU or its member states rely on the safe third country or first country of asylum concepts as a containment mechanism. Under the EU-Türkiye Statement, as discussed at length above, the assignation of Türkiye as a safe third country under international and EU law for the purpose of asylum seekers being returned to Türkiye remains a contested legal issue.

Hungary's designation of Serbia as a safe third country has been the subject of recent litigation before both the CJEU and the ECtHR. As discussed above, the CJEU held in May 2020 that asylum seekers were both exposed to deprivation of liberty in the Röszke transit zone between Hungary and Serbia and faced a risk of indirect *refoulement* in breach of Chapter 33 of the Asylum Procedures Directive.[59] In *Ilias and Ahmed v. Hungary,* the ECtHR found Hungary in breach of its Chap. 3 ECHR obligations for failing to conduct an adequate assessment of the risks faced by the applicants upon return to Serbia, notwithstanding its designation as a safe third country.[60] The use of safe third country concepts in both Türkiye and Serbia highlight a clear tendency by the EU and its member states (in these cases, Greece and Hungary, respectively) to prevent access to substantive EU asylum procedures.

3.3.7 Evacuation Mechanisms

A form of mobility embedded in the broader containment approach, the EUTF entirely funds ETM in Niger.[61] The ETM evacuates highly vulnerable asylum seekers and refugees from detention in Libya to a transit site outside Niamey. This cohort

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[58] Frontex. Frontex Liaison Officers to non-EU countries. https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/liaison-officers/#:~:text=The%20Frontex%20liaison%20officers%20are,offices%20of%20other%20EU%20agencies

[59] CJEU. Judgment of 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU FMS and Others.

[60] Ilias and Ahmed v. Hungary, Application No. 47287/15, 21 November 2019.

[61] European Commission. Enhancing protection, live-saving assistance and solutions, including resettlement for persons of concern with international protection needs in Libya and West Africa (Niger and Burkina Faso. https://eutf.akvoapp.org/en/project/8022/#summary

are detained as a direct result of EU-supported pullback practices by the Libyan Coast Guard (Carrera & Cortinovis, 2019b; Pijnenburg, 2018). After arrival at the transit site, evacuees undergo an asylum procedure and UNHCR seeks to resettle refugees via its resettlement programme (UNHCR, 2019; ASGI, 2018).

The ETM in Niger is not unique. In September 2019, UNHCR announced a new ETM in Rwanda for the evacuation of 500 likely refugees from Libya.[62] The ETM Rwanda is funded by the EUTF to the sum of EUR 10.3 million.[63]

3.3.8 Resettlement and Complementary Pathways

Finally, some of the arrangements outlined above include mobility through resettlement and complementary pathways, as set out in the GCR. In the absence of a Union Resettlement Framework, two EU resettlement schemes have been undertaken since 2015. In the first, 19,452 refugees were resettled to the EU between 2015 and 2017. In the second, 43,827 refugees of pledged 50,000 have been resettled thus far.[64] In addition, EU-Türkiye arrangements have included some expansion of resettlement and complementary pathways—namely humanitarian admission—to the EU. EU member states resettled 25,560 refugees from Türkiye between April 2016 and December 2019.[65] Resettlement has further been scaled up from Niger, via the ETM, with 2454 refugees resettled since 2017 (UNHCR, 2020).

Beyond resettlement, a number of EU member states have admitted refugees in Türkiye under complementary pathways. Notably, following the EU-Türkiye Statement, Germany established HAP Türkiye. Under this programme, 13,694 places originally planned for EU relocation were reassigned to HAP Türkiye (de Oliveira, 2020).

[62] UNHCR. Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya. https://www.unhcr.org/news/press/2019/9/5d5d1c9a4/joint-statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html

[63] European Commission. Rwanda: the EU provides €10.3 million for life-saving refugee support measures'. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6301

[64] Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways 2–3.

[65] However, some of this resettlement has taken place under the resettlement schemes noted above. See Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways.

3.4 Conclusions

The 2015 European Agenda on Migration placed cooperation with third countries as a central element of the EU's approach to asylum and migration control (European Commission, 2015). The Pact on Migration and Asylum reiterates the central role of such cooperation in managing migration to the EU (European Commission, 2020). Between the Agenda and Pact, the passage in December 2018 of the Global Compact for Refugees was an attempt at a 'more equitable basis for predictable and equitable burden- and responsibility-sharing' among the UN member states (GCR, para 3). This final section thus briefly addresses informalisation in EU third country arrangements; the dominance of containment in EU policymaking; and the limited uptake of the GCR in such arrangements.

3.4.1 Informalisation of Instruments, Plurality of Actors

Of the EU instruments with third countries since 2015 mapped above, the only instrument of an explicitly legally binding nature is the Status Agreement between the EU and Serbia with respect to Frontex migration control operations on Serbian territory.[66] This is in keeping with the clear trend of informalisation in EU external relations more broadly, and asylum policy in particular. While it is beyond the scope of this chapter to assess the particular implications of such policy trajectories, a clear concern here is a tendency for EU policy to be conducted beyond the limits of binding law. The use of informal arrangements, such as the EU-Türkiye Statement, seem designed to avoid the triggering of substantive EU law, thus potentially placing EU activities beyond the pale of EU law. Such informality further weakens transparency and accountability within the EU legal order. Equally, such arrangements create parallel concerns under general international law, including in terms of attribution of conduct for internationally wrongful acts (International Law Commission, 2001).

Simultaneously, while EU instruments with third countries are increasingly informal, the actors implementing them are increasingly varied. While EU agencies EASO and Frontex are physically present in a number of third country arrangements, notably with Serbia, EU financial instruments also fund a broad range of international organisations (notably IOM and UNHCR) and international and national NGOs as implementing partners. While the involvement of multiple actors in this area is not new as such, the dizzying array of projects and actors under, notably, the EUTF and the Madad Fund, require further research in the relevant third countries (Geddes & Lixi, 2018).

[66] Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia.

3.4.2 *Containment as the Dominant Paradigm in EU Arrangements*

EU arrangements with Türkiye, Serbia, Niger and Tunisia in this field show a predominant focus on containment in EU policymaking. While mobility via the GCR's suite of third country solutions are present in certain EU arrangements, they remain relatively small-scale and often *ad hoc* in nature. Moreover, mobility policies are often embedded in broader containment approaches, notably in the case of the EU-Türkiye Statement's 'one-for-one' resettlement arrangement and the ETM in Niger as a corollary to EU policy in Libya. As a result, while containment remains the dominant paradigm in EU arrangements, a dynamic of 'contained mobility' can also be observed' (Carrera & Cortinovis, 2019a).

The containment-heavy focus of current EU arrangements make access to international protection in third states particularly crucial, with onward mobility options remaining rare. While further research is required to make definitive findings on access to asylum in third countries of transit, this chapter indicates that current EU arrangements sometimes fail to allow access to international protection. Whether Türkiye and Serbia, for example, can lawfully be considered a 'safe third country' under international and EU law remain an open question. In Niger, there appears to be little uptake of national protection, though UNHCR reports the country is turning into an 'alternative space for protection'.[67] In Tunisia, the current absence of a national asylum system forecloses the possibility of gaining national protection in the country.

Finally, a key area for further research relates to the legal limits of such containment arrangements. While this chapter has flagged a set of current and potential legal questions, further research is required to unpack the applicability of international human rights, refugee law and EU law standards to these EU arrangements.

3.4.3 *Limited Uptake of the GCR*

Thus far, EU arrangements do not reflect significant engagement with the objectives of the GCR. Indeed, the GCR remains a relatively new instrument and its implementation was been disrupted by the global COVID-19 pandemic (Danish Refugee Council, 2020; UNHCR, 2020). It is important to note here that while the GCR is a non-binding instrument, it is explicitly grounded in hard international law, in particular the 1951 Convention and its 1967 Protocol (GCR, para 3). In turn, these international instruments anchor the Treaty on the Functioning of the European Union and Charter of Fundamental Rights of the European Union as the foundations of the Common European Asylum System. Nevertheless, the non-binding

[67] UNHCR Niger, Factsheet Mixed Movements—November 2020. https://data2.unhcr.org/en/documents/details/83051

nature and generality of the GCR's objectives may have contributed, or facilitated, the political tendency limiting the Compact's impact on EU arrangements to date.

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Chapter 4
Refugee and Human Rights Law Standards Applicable to Asylum Governance and the Right of Asylum

Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen

4.1 Introduction

This chapter interrogates key instruments, standards and trends in global asylum governance, exploring the compatibility of emerging asylum regimes with international and regional instruments and standards in this area. The chapter takes a global view, while drawing on national and regional practice from the six countries central to the ASILE project—Bangladesh, Brazil, Canada, Jordan, South Africa and Türkiye—where relevant.

The chapter deals with those international and regional human rights and refugee law standards directly related to asylum governance. We define 'asylum governance' as the legal standards most closely connected to the grant and content of international protection, including access to asylum, asylum procedures, scope of international protection and content of international protection. We therefore do not focus on standards relating to reception conditions, including detention standards.

The chapter proceeds in four substantive sections. First, we briefly set out the most relevant international and regional human rights and refugee law instruments,

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as well as the relationship between human rights and refugee law in this area and the (potential) impact of the Global Compact on Refugees (GCR) on global asylum governance. Second, we provide an account of key binding international and regional standards governing access to asylum, asylum procedures, the scope of protection and content of protection.

Our final two sections are dedicated to trends in emerging global asylum regimes observed throughout the ASILE project. Section 4.4 is devoted to the tension between paradigms of deterrence and containment and admission to territory, including the emergence of pushbacks as a systematic global practice; the use of 'safe third country' mechanisms; crisis derogations and perceived 'instrumentalisation' of asylum; externalisation of asylum responsibilities; and the use of third country solutions (resettlement and complementary pathways) to moderate containment approaches. Finally, Sect. 4.5 addresses a set of tendencies related to the temporariness of protection, encompassing differential treatment between groups of protection seekers and refugees; issues of exploitation due to limitations on the right to work; and the concept of 'vulnerability' as a protection issue.

4.2 Legal Instruments on Asylum Governance

4.2.1 Universal and Regional Instruments

The heart of asylum governance at the international level remains the 1951 Convention on the Status of Refugees and its 1967 Protocol (Refugee Convention) (Hathaway, 2021b) which stipulates the inclusion, exclusion and cessation criteria, the cardinal principle of *non-refoulement,* the principle of non-penalisation, and the set of civil, political and socio-economic rights accruing to refugees as their attachment to the asylum state grows (Hathaway, 2021a).

The Refugee Convention, to which 147 states are party, is complemented by international human rights law instruments which provide an array of general human rights owed to all persons, including protection seekers and refugees. At the regional level, instruments in Europe, the Americas and Africa lay down binding standards on the rights of protection seekers and refugees, in some cases going beyond international law standards. No such binding regional instruments are present in Asia and the Middle East.

At Council of Europe level, standards of refugee protection derive from the regional human rights regime provided for in the European Convention on Human Rights (ECHR). The EU asylum acquis, resting on the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (EUCFR), provides an elaborated system of secondary legislation, with the Court of Justice of the European Union (CJEU) developing far-reaching jurisprudence in this area.

In the Americas, three regional human rights instruments are of relevance to asylum governance. The 1948 American Declaration on the Rights and Duties of Man (ADHR) sets out the first regional 'set of comprehensive international standards in relation to human rights and duties' (Cantor & Barichello, 2016). While the ADHR is formally non-binding, some authors consider the Declaration binding on Member States of the Organization of American States (OAS) as the codification of regional practice (Cantor & Barichello, 2016; Fischel de Andrade, 2021).

The Organization of American States Charter (OAS Charter) created the Inter-American Commission on Human Rights (IACHR). The IACHR is a source of non-binding guidance in the Inter-American human rights system. In turn, the 1969 American Convention on Human Rights (ACHR) created the IACtHR, which produces binding jurisprudence upon referral from the Commission. At the sub-regional level, the 1984 Cartagena Declaration on Refugees is an influential soft law framework that has increased the scope of protection for refugees through uptake in national legislation, complemented by subsequent initiatives every ten years (San José Declaration on Refugees and Displaced Persons 1994; Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America 2004; Brazil Declaration 2014).

The African regional protection system for refugees is based on the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), ratified by 51 of the 55 African Union Member States. The OAU Convention was the world's first regional refugee protection instrument. In addition, the African Charter on Human and Peoples' Rights[1] includes guarantees for refugees, while the Kampala Convention is concerned with the protection needs of internally displaced persons.[2]

4.2.2 *Refugee Law and Human Rights Law Instruments: Distinctions and Overlaps*

The Refugee Convention provides more robust protection standards than general human rights treaties with regard to a number of issues. However, some rights are only sporadically, or not at all, protected by the Refugee Convention. As a result, the comprehensive and effective protection of Convention refugees depends on supplementary provisions in general human rights treaties. In addition, persons in need of international protection beyond the scope of the Refugee Convention are covered by the general protection standards laid down in universal and regional human rights treaties and in regional refugee instruments.

[1] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter).

[2] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (Kampala Convention).

The relationship between the refugee and human rights law instruments is mutually complementary. Most notably, the principle of *non-refoulement* enshrined in Article 33 of the Refugee Convention is embedded in and expanded upon by international human rights law instruments, proscribing the return of any person to a real risk of torture, inhuman or degrading treatment or punishment. Beyond *non-refoulement,* human rights instruments at both universal and regional level contribute to asylum governance in areas including the right to family life, the right to leave, asylum procedures, reception conditions and the right to work.

Beyond the substantive complementary role played by human rights instruments, human rights treaty monitoring bodies play a crucial role in driving the normative development of asylum governance, as the Refugee Convention lacks a concomitant supervisory mechanism, notwithstanding the role of UNHCR's Handbook and guidelines on international protection.[3] As a result, regional human rights courts in Europe, Africa and the Americas have developed jurisprudence on key areas of protection, while the United Nations treaty bodies provide important asylum-related guidance through individual complaints mechanisms.

4.2.3 The Potential Impact of GCR

While a non-binding instrument, the GCR explicitly acknowledges its grounding in 'the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol'(Global Compact on Refugees para 5.). The GCR further acknowledges the key role of regional protection instruments to the international refugee regime (GCR, para 5).

As a global responsibility sharing instrument, the GCR in theory has the potential to develop legal standards on asylum governance in a number of ways, including the elucidation of the scope of existing binding obligations at international or regional level, evidence of state practice in support of or against emerging customary norms or as a building block toward binding forms of responsibility sharing, such as an additional protocol or framework convention (Türk & Garlick, 2016; Wall, 2017).

[3] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, April 2019.

4.3 Standards: Procedures, Scope and Content of Protection

Moving from an account of key asylum governance instruments to standards guiding the content of asylum, the following section sets out key binding international and regional standards governing access to asylum, asylum procedures, the scope of protection and content of protection.

4.3.1 Administrative Arrangements for Asylum Procedures

Contextualising the Right to Seek Asylum

Whereas the right to seek asylum is generally recognised in international law (Tan & Vedsted-Hansen, 2021), administrative arrangements for examining asylum requests play a crucial role in making this right a reality. The right to an asylum procedure is therefore a critical precondition for effective access to protection for those in need of international protection, just as the conduct of examination procedures is contingent on applicants getting access to the procedure in the first place. Following a brief account of the legal standards on asylum procedures, we illustrate how the regulatory context and administrative modalities at domestic level impact the implementation of these standards, thereby being decisive for the realisation of the right to seek asylum.

While some migration control measures aim—though not always successfully—to prevent protection seekers from coming within the jurisdictional responsibility of the state of prospective destination, the situations dealt with in this section presuppose the exercise of jurisdiction of the destination state, triggering that state's obligations under international refugee and human rights law. Indeed, the various measures resorted to by states to avoid examining the merits of asylum requests can be seen as a continuum of deterrence and containment practices that raise serious issues of compatibility with the relevant legal standards. The following will identify the legal standards relevant to situations where protection seekers attempt to enter the territory and examination procedure of such states.

Quality Standards for Asylum Procedures

Although neither the Refugee Convention nor international or regional human rights treaties provide specific standards on the examination of applications for asylum, the prohibition of *refoulement* explicitly or implicitly enshrined in these instruments (Tan & Vedsted-Hansen, 2021) imposes on states parties the obligation to conduct a fair and effective examination of requests for international protection if they consider removing an asylum seeker. Thus, in order to respect their *non-refoulement* obligations states are required to identify or, as the case may be, set up authorities

with the requisite competence and capacity to examine whether any non-citizen applying for asylum is in need of protection, unless they are prepared to accept the request for protection by granting residence and treating the non-citizen in accordance with refugee and human rights law standards.

Due to the absence of specific standards for asylum procedures in the Refugee Convention and the relevant human rights treaties, standards on the quality of such procedures have developed gradually through the interaction between soft law norms, primarily adopted in connection with the Refugee Convention, and norms adopted by the international and regional bodies created under human rights treaties to monitor states' compliance with their treaty obligations.

In the context of the Refugee Convention, the Executive Committee of the UN High Commissioner for Refugees—UNHCR's governing body—recommended in 1977 basic requirements for national procedures for the determination of refugee status. Among these were modalities to secure respect for the principle of *non-refoulement* such as clearly identifying an authority—wherever possible a single central authority as opposed to border officers—with responsibility for the examination, assistance of competent interpreters and the opportunity to contact a UNHCR representative, as well as the right to appeal and to remain in the country during the examination and the appeals procedure (UNHCR, 1977, section (e)). Additional standards have been adopted both by the Executive Committee and by UNHCR itself, including quality ambitions for asylum procedures and recommendations focusing on particularly vulnerable categories of protection seekers such as women and children (UNHCR, 2019; Tan & Vedsted-Hansen, 2021, pp. 28–30).

Although legally non-binding, these recommendations not only had significant influence on the asylum procedures established in many states and those implemented by UNHCR when determining refugee status, but also inspired standard setting at the regional level. Thus, both within the Inter-American, African and European human rights systems recommended standards on asylum procedures have been adopted for the purpose of securing effective protection of the rights enshrined in the respective human rights treaties when dealing with asylum applications (Botero & Vedsted-Hansen, 2021; Tan & Vedsted-Hansen, 2021, pp. 35–42).

Procedural Standards and Collective Expulsion

In addition to the principle of *non-refoulement* as set out above, the prohibition of collective expulsion requires an individual assessment concerning every affected person, aiming to secure that any circumstances warranting protection against removal are identified and adequately examined. Without such an assessment the decision to expel risks exposing the individual to persecution or violation of the prohibition of torture and other ill-treatment. The prohibition of collective expulsion is enshrined in various human rights instruments, most notably Article 4 ECHR Protocol 4 which states in absolute terms that '[c]ollective expulsion of aliens is prohibited' and thus does not allow states to introduce restrictions on the

prohibition.[4] Although the ICCPR does not include an explicit prohibition of collective expulsion, Article 13 ICCPR is considered to include an implicit prohibition as this provision entitles each alien to an individual decision in order to prevent arbitrary expulsions (HRC, 1986, para 10; Chetail, 2019). Given that Article 13 ICCPR applies only to aliens lawfully in the territory, it does not protect against collective expulsion of aliens in an irregular situation or of those seeking admission at the border, as opposed to Article 4 ECHR Protocol 4 which applies to non-admission of protection seekers at the border.

Expulsion is considered collective if measures compelling aliens, as a group, to leave a country are not taken on the basis of a 'reasonable and objective examination of the particular case of each individual alien of the group' (N.D. and N.T. v. Spain, 2020, para 193). Nonetheless, the concept of 'collective expulsion' has been narrowly interpreted so as to not include situations where the affected persons have not made use of existing procedures for gaining lawful entry into the territory. This interpretation is significantly qualified for protection seekers, as such conduct only excludes them from the prohibition of collective expulsion, if the state provided 'genuine and effective access to means of legal entry, in particular border procedures', and the persons affected by the return decision did not have 'cogent reasons' for not using these border procedures (N.D. and N.T. v. Spain, 2020, para 201, 210–11; Carrera, 2020).

Implementation and Conflation of Procedural Standards

Clear standards do not in themselves provide any guarantee that asylum procedures are properly conducted. Varying compliance with procedural standards may have diverse reasons, ranging from insufficient resources and capacity to outright violation of states' obligations under refugee and human rights law.

In some countries asylum cases become conflated with other migration channels and systems to the effect that protection seekers may be *de facto* protected from expulsion despite the lack of formal examination and recognition of their need for protection. For example, Brazil has offered two pathways to residence for people fleeing Venezuela, either the ordinary asylum procedure or the grant of residence under the MERCOSUR Residence Agreement (Cortinovis & Rorro, 2021; UN Working Group on Arbitrary Detention, 2014, paras 52, 57). In other cases, asylum seekers may be denied international protection because they are treated as irregular immigrants without regard to their condition as potential refugees. In Türkiye, for example, both protection seekers and Syrian refugees are subject to restrictions of freedom of movement that can be enforced by severe sanctions. Thus, the applications of protection seekers who without good reason fail to comply with reporting or residence requirements are considered withdrawn and the examination is terminated (Cortinovis, 2021b; Special Representative of the Secretary General of

[4] The prohibition is also included in Article 19 of the EUCFR.

the Council of Europe on migration and refugees, 2016, sections IV.5, X.2). These examples show that the quality of asylum procedures may be significantly influenced by their entanglement with other regulatory arrangements, including those concerning detention and other measures towards irregular migrants.

4.3.2 Scope and Content of Protection

The scope and content of protection for refugees and other persons in need of protection is defined by a rather complex regime of interacting and mutually complementary standards in the Refugee Convention and various international and regional human rights treaties.

Scope of Protection

Article 1A (2) of the Refugee Convention provides the internationally accepted definition of refugeehood as a person outside their country with a well-founded fear of persecution on a Convention ground. Article 1D carves out from Convention protection refugees who are receiving the protection or assistance of other United Nations agencies, most notably refugees under the protection or assistance of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (Akram, 2014). Article 1F of the Refugee Convention operates to exclude refugees where there are serious reasons to consider a person has committed war crimes, crimes against humanity, a serious non-political crime or 'acts contrary to the purposes and principles of the United Nations' (Refugee Convention, Article 1F(a)–(c)). Finally, Article 1C exhaustively sets out the circumstances in which an asylum state may consider refugee status to have ceased.

Drawing on international human rights law conceptions of *non-refoulement,* complementary or subsidiary protection statuses have proliferated to 45 states in recent decades (McAdam, 2021). As *non-refoulement* obligations under international human rights law protect any person against return to torture or other serious ill-treatment, this form of protection provides for the protection of people in refugee-like situations who do not meet the nexus requirement of the Refugee Convention (McAdam, 2007). The EU Qualification Directive, notably, grants 'subsidiary protection' to any person facing a real risk of the death penalty; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict (Directive 2011/95/EU, Article 15).

At the regional level, both the OAU Convention and the Cartagena Declaration system provide broader conceptions of refugeehood than the Refugee Convention. The definition of refugeehood contained in the OAU Convention, notably, provides protection from conflict and indiscriminate violence, an approach more suited to protecting people fleeing from generalised violence and war. Importantly, too, the

African regional system does not include use of the internal protection alternative concept, acknowledging that people may flee localised risks in one part of their country of origin by crossing an international border. The non-binding Cartagena Declaration expands the scope of protection by identifying five 'situational events' that give rise to refugeehood. These situations are based on objective and often generalised conditions in the country of origin, such as generalised violence, internal conflicts or massive violations of human rights.

Content of Protection

The protection standards or entitlements applying to refugees under the Refugee Convention increase gradually according to the factual and legal nature of the refugee's attachment to the country of asylum. Five attachment criteria are decisive for the acquisition of rights under the Convention system: (1) Refugees who are subject to a state's jurisdiction, yet with no additional connection to that state; (2) Refugees who are physically present in the territory of a state; (3) Refugees who are lawfully present in the territory; (4) Refugees who are lawfully resident in the country; and finally (5) Refugees who have durable residence or even formal domicile in the country (Hathaway, 2021a; Goodwin-Gill & McAdam, 2021).

Under the Refugee Convention, some of the protection standards are reflecting the specific predicament of refugees, such as the prohibition of *refoulement* (Article 33), the exemption from penalties for unlawful entry or presence (Article 31) and the issuance of travel documents (Article 28). Other Convention standards are based on reference to the rights accorded to either the citizens of the asylum country[5] or most-favoured foreign nationals[6] or the standards applicable to aliens in general in that country.[7]

[5] See, in particular, Articles 16 (access to courts), 20 (rationing), 22 (public education) and 23 (public relief and assistance).

[6] Articles 15 (right of association) and 17 (wage-earning employment).

[7] Articles 18 (self-employment), 19 (practice of liberal professions), 21 (housing) and 26 (freedom of movement).

4.4 Containment vs. Admission to Territory and Protection Against Removal

4.4.1 External and Extraterritorial Border Control: Pushbacks and Pullbacks

Pushbacks, pullbacks and other forms of summary forced returns are frequently used in long-standing "deterrence" (Gammeltoft-Hansen & Tan, 2017) and "containment" (Shacknove, 1993) approaches. These measures often require the cooperation with third countries to take back or prevent the departure of protection seekers. The common rationale behind this approach is to avoid responsibility for protection seekers (Chap. 3 in this volume). Where no immediate return is enforced, protection seekers are often held in detention during the asylum procedure or waiting for return. Hence, this approach has resulted in significant compatibility risks, with the potential to violate obligations related to the right to leave (Markard, 2016), *non-refoulement* and the right to life (Chap. 16 in this volume).

The EU has entered manifold agreements with countries of transit, including Türkiye (European Council, 2016), Libya, Morocco and Serbia and more recently Tunisia and Egypt, to prevent persons from leaving their territory and to readmit those who manage to leave. At the same time, the EU and its Member States are assisting these countries in controlling their borders with financial, technical and material assistance (Chap. 16 in this volume). Most notably, European support to the Libyan Coast Guard has resulted in the pullback and arbitrary detention of tens of thousands of protection seekers.

More direct forms of border control may be undertaken unilaterally. Hungary built border walls and transit centres for the detention of protection seekers at the border. Syrians receiving temporary protection in Türkiye who are found not to have obtained permission to leave the province in which they have registered have been subjected to prolonged detention and eventual deportation to Syria (Cortinovis, 2021b). Elsewhere, during the COVID-19 pandemic, the US systematically pushed back protection seekers to Mexico, justified under a public health protection exemption called 'Title 42' (Ghezelbash & Tan, 2020). Australia is known for its maritime pushback of boats to Indonesia, Malaysia and Vietnam (Klein, 2014). All of this indicates that pushbacks and pullbacks have become in some cases a systematic global practice (DRC, 2021, p. 22).

That such deterrence and containment approaches are not the necessary consequence of high numbers of asylum applicants has been shown by a new approach the EU took when implementing the *2001 Temporary Protection Directive* for the reception of displaced persons from Ukraine (Carrera & Ineli-Ciger, 2023). Equally, Brazil has shown that a different path is possible with its *prima facie* recognition based on the expanded definition of the *Cartagena Declaration* and guarantees against removal for Venezuelans (Cortinovis & Rorro, 2021; Medina & Barros, 2023).

4.4.2 *'Safe Third Country' and Other Summary Removal Practices*

A less drastic form of summary removal, many states have for several decades returned protection seekers to 'safe third countries' without conducting any substantive examination of their need for protection. While such practices are not *per se* incompatible with international refugee and human rights law, they may jeopardise applicants' access to asylum and even to any meaningful examination of their case.[8] This is so primarily because the underlying presumption of access to examination and, if relevant, protection in accordance with international legal standards in the 'safe third country' may be unfounded or insufficiently corroborated, or because it is in *de facto* impossible to rebut that presumption. Even if the third country can be considered generally 'safe' for the purpose of refugee protection, there may well be individual circumstances that bring 'safety' into question. In addition, the prospect of protection may be illusory for individuals lacking any previous connection to the third country to which they are being transferred. Therefore, 'safe third country' removals will often in practice be hard to reconcile with the right to an asylum procedure that is firmly protected under human rights law (Tan & Vedsted-Hansen, 2021).

In light of international and regional standards on collective expulsion explored above, various forms of collective expulsion have in all likelihood been practised more frequently in recent years, and some states seem to resort relatively more often to this kind of summary removal than to 'safe third country' practices. As prominent examples of the latter, both Canada and South Africa apply the 'safe third country' concept limiting access to their territory, in some cases reinforced by accelerated border procedures (Cortinovis, 2021a). Instances of collective expulsion, often with characteristics resembling of pushbacks, are reported to be taking place at Turkish borders (Cortinovis, 2021b) as well as at the external borders of certain 'frontline' EU Member States (Human Rights Watch, 2023).

4.4.3 *Crisis Derogations and Perceived 'Instrumentalisation' of Protection Seekers*

A new theme in deterrence and containment approaches arose in 2021. In response to the mass arrivals from the Belarusian border with Latvia, Lithuania and Poland, the European Commission proposed a decision on provisional emergency measures under Article 78 (3) TFEU.[9] This proposal was based on the perception that the respective EU Member States, and thus the EU itself, was facing a 'hybrid attack'

[8] See Sect. 4.3.1 above.

[9] European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland. COM (2021) 752 final.

from the Lukashenko regime, which actively assisted irregular migrants in travelling to the border and 'instrumentalizing' them to create pressure and disturbance in the EU.

Subsequently, the Commission further proposed a more general 'instrumentalisation regulation' based on this incident.[10] Recital (1) explains:

> A situation of instrumentalisation of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.

While it seems reasonable that the EU needs to safeguard its asylum system against abuse by hostile third states, both proposals have received well-founded criticism (Carrera, 2021).[11] Not only did the latter proposal establish a one-off case permanently, both proposals contained significant deviations from the current safeguards of the EU asylum *aquis* as well as from the reform proposals launched by the Commission in the 2020 New Pact on Migration and Asylum.[12] This is precisely what happened insofar as the proposed measures on 'instrumentalization' were integrated into the new Crisis and *force majeure* Regulation that was finally adopted in May 2024.[13]

In view of recent decades of asylum policy in the EU, such instruments introduced for exceptional cases risk becoming permanently applicable and frequently used. This would cause a serious decrease in the standards of protection for protection seekers, in particular in terms of access to territory and procedural safeguards against *refoulement*.

The 'instrumentalization' approach explained here is, however, not a standalone practice. It feeds into a trend of crisis asylum governance framing the arrival of protection seekers, in particular when arriving in large groups, as a threat to public security, public order or even as an emergency that justifies derogation from ordinary rules. For instance, since 2015 several European countries have tried to suspend asylum procedures in the face of specific events (Human Rights Watch, 2020; Barigazzi, 2024). Title 42 public health orders in the US, initially a crisis response to the COVID-19 pandemic, led to the summary expulsion of 1.6 million protection

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[10] European Commission, Proposal for a Regulation of the European Parliament and the Council addressing situations of instrumentalization in the field of migration and asylum. COM (2021) 890 final.

[11] European Council on Refugees and Exiles (ECRE). (2021). *Joint Statement: Call on the EU: Restore Rights and Values at Europe's Borders.*

[12] European Commission (2020). Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, including Communication on a New Pact on Migration and Asylum. COM(2020) 609 final.

[13] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and *force majeure* in the field of migration and asylum and amending Regulation (EU) 2021/1147.

seekers in 2020 and 2021 (United Nations Special Rapporteur on the rights of migrants, 2022, para. 41). Such large-scale exemptions, however, need to be viewed very critically, because *ordre public* derogations generally have to be interpreted narrowly and carefully justified on a case-by-case basis. Hence, the 'instrumentalization' approach presents a slippery slope for the EU asylum *acquis*.

4.4.4 Externalisation Arrangements

Externalisation is an umbrella concept that has recently been defined as 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory' (Refugee Law Initiative, 2022). Asylum externalisation arrangements thus involve a State externalising its own asylum system obligations towards refugees and protection seekers after they have arrived in its territory or jurisdiction to other States or entities outside its territory (Cantor et al., 2022).

Proposals to externalise asylum procedures or refugee protection are not new—as early as 1986 a draft United Nations General Assembly resolution was tabled for the establishment of regional processing centres. Nevertheless, both the United Kingdom and Denmark have recently proposed schemes to externalise asylum procedures as well as refugee protection to Rwanda, though neither proposal has been implemented as yet.[14] These plans follow more established examples of externalisation practices, including the United States' transfer of protection seekers intercepted on the high seas to Guantanamo Bay in Cuba (Dastyari, 2015) and two iterations of Australia's 'Pacific Solution' in Nauru and Papua New Guinea (Gleeson & Yacoub, 2021).

While externalisation is not, in and of itself, a breach of international law, such arrangements have historically resulted in serious breaches of international human rights and refugee law and are generally anathema to genuine responsibility sharing. As a result, recent proposals and practice in this direction highlight the extent to which deterrence and containment approaches have become the dominant paradigm in certain asylum states and the risks externalisation arrangements pose to the objectives of the GCR for a more equitable protection system based on principles of responsibility sharing (Carrera et al., 2018).

[14] Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, 13 April 2022; Danish Bill no L 226 (2021). Forslag til lov om andring af udlandingeloven og hjemrejseloven (Indforelse af mulighed for overforsel af asylansogere til asylsagsbehandling og eventuel efterfolgende beskyttelse i tredjelande), adopted 3 June 2021.

4.4.5 Third Country Solutions: Moderating Containment?

While silent on practices of extraterritorial migration control, safe third country arrangements and externalisation, the GCR promotes ‘third country solutions’ in the form of resettlement and complementary pathways. Resettlement is one of the three internationally recognised durable solutions allowing for responsibility-sharing brokered by UNHCR (UNHCR Statute Article 9; UNHCR, 2011, p. 3). The GCR also aims to develop an additional array of ‘complementary pathways’ to admission, comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees (GCR paras 7 and 95).

Notwithstanding the focus on third country solutions—a concept referring to countries other than the often overburdened current host countries—within the GCR framework, including the proliferation of Canada’s community/private sponsorship model in a number of new jurisdictions (Tan, 2021), there are presently no binding international or regional obligations to provide resettlement or complementary pathways (de Boer & Zieck, 2020). Instead, such approaches are currently discretionary policies undertaken through administrative or legal instruments at national level. Neither Africa nor the Americas currently have a dedicated regional resettlement and complementary pathways mechanism.[15] At EU level, while the 2016 Proposal for a Regulation on a Union Resettlement Framework seemed to be a distant novelty, it lead to the adoption in May 2024 of a Regulation on a Union framework for resettlement and humanitarian admission.[16]

As a result, while the GCR’s suite of third country solutions provide admission to a limited number of refugees globally, their overall impact on global asylum governance remains relatively small-scale and represent discretionary policy approaches, not legal obligations. Moreover, third country solutions are often embedded in broader containment approaches, notably in the case of the EU-Türkiye Statement’s ‘one-for-one’ resettlement arrangement and the Emergency Transit Mechanism in Niger as a corollary to EU policy in Libya (Carrera & Cortinovis, 2019).

[15] Cartagena states implemented a Solidarity Resettlement Programme between 2005 and 2014.

[16] Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union resettlement and humanitarian admission framework, and amending Regulation (EU) 2021/1147.

4.5 Temporariness of Protection

4.5.1 Differential Treatment/Discrimination of Certain Categories of Persons in Need of Protection

Temporality has various meanings and impacts in asylum governance, both when applying the requirement of a well-founded fear of persecution in the refugee definition and in the context of the duration of protection. The latter may depend on the cessation grounds in Article 1C of the Refugee Convention, just as the duration of residence permits under national law may influence the period of time in which a refugee can expect to be securely settled and enjoying protection in the country of asylum.

Many states have in mass influx situations resorted to measures of temporary protection, often combined with the suspension of examination of individual asylum requests. The most recent example of such temporary protection is the coordinated response by the EU Member States to the arrival of persons displaced by Russia's armed attack on Ukraine in February 2022 by way of activating the 2001 Temporary Protection Directive for the first time.[17]

This measure, combined with the pre-existing exemption of Ukrainian citizens from the visa requirement to enter EU Member States, created privileged access to protection for displaced people from Ukraine as compared with previous groups of protection seekers arriving in the EU, including the significant numbers who arrived in the European 'asylum crisis' of 2015–16. At the same time, however, the standards of protection under the Temporary Protection Directive are not fully on par with the legal entitlements for refugees according to Articles 3–34 of the Refugee Convention. To the extent displaced Ukrainians may fall within the Convention refugee definition, this raises questions of differential treatment that may ultimately be considered discriminatory in breach of international law. While on the one hand the Temporary Protection Directive provides for better standards than those offered to protection seekers, this relative advantage may on the other hand vanish over time insofar as the protected persons might be eligible for international protection if they were to be allowed access to examination and status under the ordinary arrangements for refugee protection (Kienast et al., 2023).

In addition, a number of states have in recent years either introduced subsidiary asylum categories for the express purpose of temporary protection, mostly for persons fleeing generalised risks, or limited the temporal duration of refugee protection in general across the various asylum categories. Whereas temporary protection

[17] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection; Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

arrangements were previously often introduced in order to maintain or increase states' asylum capacity by allowing for new groups of persons in need of protection over time, the more recent tendency towards temporariness may rather be seen as a measure of indirect deterrence. Here again, discrimination issues may arise in that various categories of refugees may be subjected to differential treatment in respect of entitlements that are protected by human rights treaties, hence triggering the accessory prohibition of discrimination in Article 2 ICCPR, Article 2 ICESCR and Article 14 ECHR.

4.5.2 Exploitation Due to Limitations on the Right to Work

Limiting protection seekers' right to work[18] is a widespread global practice (Costello & O'Cinnéide, 2021). Particularly in cases of mass influx, considerations of national labour markets additionally play a large role. Bangladesh, for instance, refuses to grant Rohingya refugees the right to work, because of the perception that job security would lead them to leave the camps and integrate into society instead of returning to Myanmar, thus undermining the temporariness of their reception (Hossain, 2023).

Such limitations create long waiting periods, diminish refugees' sense of self-worth and can make them vulnerable to exploitation, particularly in the 'informal sector' (Costello & O'Cinnéide, 2021). ASILE research has found that:

> Restrictions on the right to work may also contribute to violations of absolute rights, such as the prohibitions on inhuman and degrading treatment, or forced labour. This is particularly the case in relation to asylum seekers and refugees, who are often in a legally vulnerable position (Costello & O'Cinnéide, 2021; MSS v Belgium & Greece, 2011; Chowdury & Others v Greece, 2017).

Child labour, prevalent in some refugee situations, raises further human rights concerns (Costello & O'Cinnéide, 2021; Liebel, 2020). These tendencies undermine a key GCR objective, the enhancement of refugees' self-reliance (GCR para 7).

On some occasions, the need to grant access to the labour market in a mass influx situation has been recognised. This is important, since a temporary situation might easily expand for a long period. In the implementation of the EU's temporary protection scheme, access to work made it favourable for Ukrainians to seek protection under the umbrella of the Temporary Protection Directive instead of the ordinary asylum system, not least due to the immediate right to work.

Generally, such special regimes for refugees arriving in a mass influx, may be problematic in terms of differential treatment. The Jordanian Government and its donors concluded the *Jordan Compact* in 2016 to give specifically Syrian refugees, the largest group of refugees in Jordan, access to the labour market by issuing more

[18] Compare UDHR Article 23(1); ICESCR Articles 6 and 7; Refugee Convention Articles 17–19, 23 and 24.

than 200,000 work permits (Chap. 5 in this volume). The *Jordan Compact* is frequently referenced as a good practice example of GCR implementation, easing pressure on the host country and enhancing refugee self-reliance (Costello & O'Cinnéide, 2021). Yet, many professional sectors and refugees of other nationalities remain excluded and only few permits were issued to women (Chap. 5 in this volume).

The EU-Türkiye Statement includes provisions for the opening of Türkiye's labour market to Syrians with temporary protection status. However, access remains restricted in practice, with 1% of Syrians in Türkiye having actually obtained such a work permit, of whom only 10% are women. Again, these measures favour Syrian nationals and neglect other nationalities. All of this pushes people to seek work in the informal sector (Costello & O'Cinnéide, 2021).

Brazil provides an example of good practice giving protection seekers, refugees, regularized migrants and Haitians with humanitarian visas access to the labour market. In practice, however, employers are hesitant to rely on workers with a temporary residence status. Hence, many refugees resort to precarious jobs under their qualification and many find themselves in the 'informal sector' (Araújo & Barros, 2023).[19]

4.5.3 Vulnerability as a Protection Issue

A policy concept that can have significant impact on the temporal experiences of refugees is that of 'vulnerability'. The assessment of 'vulnerability' has become an important tool to discover individual or group-based protection needs in various parts of the world. States and humanitarian organisations increasingly target resources to the 'most vulnerable', including with respect to access to resettlement (Turner, 2021). The WFP has developed a tool called 'Refugee Influx Emergency Vulnerability Assessment' (REVA) for this purpose (World Food Programme Bangladesh, 2023). Also Jordan has developed a large-scale study called the 'Vulnerability Assessment Framework' (VAF) specifically for Syrians not living in camps (Chap. 5 in this volume).[20] It monitors vulnerability in the overall population, while enabling targeting for services and referral pathways by categorizing the interviewees into four levels of vulnerability (Chap. 5 in this volume).

However, the concept of 'vulnerability' has no single meaning and requires adequate definition and translation in order to communicate it to refugees. In addition, a socio-economic focus of vulnerability assessments might produce a conflation of vulnerability and poverty (Chap. 5 in this volume). In the Brazilian context the label is even considered stigmatizing and as having negative implications for protection seekers, because of the prejudices and victimization (Chap. 6 of this book). ASILE

[19] Also language barriers and the recognition of degrees form obstacles.

[20] Yet, it was expanded also to Syrians in camps and non-Syrian protection seekers.

research on Bangladesh further points out how the category of 'vulnerable' may be exploited by the humanitarian sector for financial gains and, thus, aggravate the difficult circumstances of the concerned individuals (Chap. 5).

4.6 Emerging Asylum Governance Regimes: Law and Policy in Interaction or Conflict with the GCR?

Some of the emerging trends in asylum governance are noteworthy in the light of the objectives of the GCR that was adopted seven years ago against the background of the 'asylum crisis' in 2015–16 which has, in a parallel process, been the driver of significant restrictions on access to and content of international protection in many jurisdictions.

First and foremost, we have identified tendencies towards containment and other measures preventing access to asylum, procedures and territory for people seeking international protection. At the EU level, these tendencies are reflected not only in informal arrangements with third countries (Chap. 3 in this volume) but also—and increasingly so—in the adoption of rules and standards formally authorising summary removal of protection seekers, as well as in the tacit approval of practices at variance with existing standards that are supposed to prevent pushbacks at external borders. In addition to physically hindering access to asylum, such standards and practices are designed to deter potential protection seekers from attempting to obtain asylum in the destination states implementing them.

As we have shown, containment and deterrence measures may be moderated through third country solutions that are promoted by the GCR with a view to enhance protection in other countries than the already overburdened host countries. However, at present, these pathways provide admission and protection for a limited number of refugees globally and, as a result, the overall impact of such pathways to protection on global asylum governance remains limited in both the quantitative and the qualitative sense.

Another tendency in global asylum governance is the resort by receiving states to temporariness as a protection approach which often entails limited self-reliance options for refugees. Remarkably, limitations on self-reliance was not part of the EU response to the arrival of displaced persons following Russia's armed attack on Ukraine in 2022, and there were hopes and proposals that experiences with this temporary protection response might be able to set new directions for the reform of the Common European Asylum System. In reality, this did not happen, however.

At the current stage of developments in the global asylum governance regime, it therefore seems reasonable to conclude that the success or failure of the GCR will largely depend on the extent to which deterrence and containment of protection seekers will continue, whether these tendencies will become modified by third country solutions, and whether the latter will work effectively or rather *de facto* hollow out GCR solutions and leave issues of vulnerability and exploitation unresolved.

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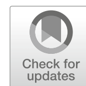
Part II
Refugee Recognition, Self-Reliance and Labour Rights

Chapter 5
Precarious Lives: Status, Vulnerability and the Right to Work for Protection Seekers in Bangladesh and Jordan



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5.1 Introduction

In this chapter, we explore refugee status, vulnerability and rights, and thereby how refugee protection is allocated, in two important states in the international refugee regime: Bangladesh and Jordan. The value of studying status, vulnerability and rights lies in the changing (but under-studied) processes of refugee recognition, the rise of vulnerability assessments within humanitarian work, and the Global Compact for Refugees' (GCR) emphasis on working rights and self-reliance. In line with that emphasis, we take the right to work as a key litmus test for protection.

Jordan and Bangladesh were chosen as the key case studies for multiple reasons. Firstly, both deal with deeply protracted refugee situations, and are among the world's top ten refugee-hosting countries. Secondly, neither is a signatory of the 1951 Refugee Convention or its 1967 Protocol, neither has a specific law addressing asylum seekers and refugees, and in neither context is there a strong regional framework for refugee protection. This means that in both contexts, the rights of protection seekers are often unclear and remain perpetually uncertain, and the (lack of) clarity around their rights is an important lens through which to understand the protection they can, in practice, receive. Furthermore, the recognition granted to them as 'asylum seekers,' 'refugees,' 'persons of concern', 'forcibly displaced […] nationals' or some other label is a politicised process, which varies over time and by nationality, leading to a precarious status.

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In this chapter, we explore this precarious status in both contexts. Furthermore, in analysing differential labour market access (often to informal work) for protection seekers, we examine how their labour market positions further shape their precarity. In doing so, we draw on a concept—precarity—that is increasingly used in studies of migration (Paret & Gleeson, 2016). While often defined and discussed in relation to insecure work and livelihoods (see Standing, 2011), others—notably Judith Butler (Butler, 2009, p. 25)—have taken a wider view, seeing precarity as "the politically induced condition in which certain populations suffer from failing social and economic networks of support." Following Paret and Gleeson (Paret & Gleeson, 2016, p. 280), despite the varied uses and interpretations of precarity as a concept, we see its value in the ways it "connects the micro and the macro, situating experiences of insecurity and vulnerability within historically and geographically specific contexts", which we find especially productive when conducting a comparative analysis between contexts.

Methodologically, this analysis is based on both desk-based research and extensive fieldwork, both online and in-person, over the course of 2021 and 2022. Overall, in Jordan 30 interviews were conducted with government officials, diplomats, UN agency workers, humanitarians, (I)NGO workers and civil society actors, along with two group interviews with (in total) 18 Syrian protection seekers. A total of 39 individuals were interviewed in Bangladesh, which included seven protection seekers (Rohingya refugees), as well as current or former employees of UN agencies, representatives of national and international humanitarian organisations, national NGO and (I)NGO workers, representatives of the Bangladesh government and a Bangladeshi security agency, Bangladeshi politicians, Bangladeshi lawyers and researchers specialising in refugee and security studies. The comparative analysis has been conducted through a joint exploration of the findings from the two country case studies, and the themes that emerged from them (Hossain, 2023; Turner, 2023).

In what follows, we firstly introduce each case study, relaying the key findings, and exploring how the themes of precarity and (in)formality emerged in the research. Subsequently, we undertake a comparative analysis of the two contexts, exploring contrasts and similarities between them, and the key lessons that can be taken from both. In line with the overarching approach of the ASILE Project, we examine what these key lessons mean in terms of the effectiveness, fairness, and consistency of asylum governance. In this chapter, while we follow UN practice in referring to Syrians in Jordan and the Rohingya people in Bangladesh as 'refugees,' we also use the term 'protection seekers' to encompass all those who seek international protection, who may be unregistered and 'invisible' to the protection system, may hold asylum seeker certificates, may be recognised as refugees, or who may hold a different status.

5.2 Jordan

5.2.1 Protection Seekers in Jordan

A key refugee hosting state, Jordan's population—as of 2022—includes more than two million Palestinian refugees registered with United Nations Relief and Works Agency (UNRWA), the vast majority of whom are also Jordanian citizens; 669,483 registered Syrian refugees; and notable populations of Yemeni, Sudanese and Iraqi protection seekers, the latter group numbering 63,033. These nationalities (excluding Palestinians) make up the vast majority of the total 752,753 registered persons of concern to UNHCR in the country (UNHCR, 2022b). Approximately 80% of registered Syrians live in host communities, with approximately 20% in camps (UNHCR, 2022b). In line with the focus of the ASILE project, this chapter focuses on the populations that are potentially of concern to UNHCR, and thus does not include discussion of the status of Palestinians in Jordan.

Despite Jordan's crucial role in hosting protection seekers, it is not a signatory to the 1951 Convention or its 1967 Protocol. Furthermore, there is in practice no regional refugee regime in the Middle East (Janmyr & Stevens, 2021), and domestic law regarding asylum seekers and refugees is "virtually non-existent" (Stevens, 2013, p. 2), leading to legal unclarity about the rights and status of those seeking international protection. UNHCR has a large-scale presence in the country, which is regulated by a 1998 Memorandum of Understanding (MoU) signed with the Jordanian government, amended in 2014. The MoU is formally a confidential document, although a version was released by the NGO Adaleh. The MoU essentially frames Jordan as a temporary host state (without using that explicit language), because it envisages asylum seekers staying for a time-limited period before return or resettlement, but in many ways, this bears little relation to practices on the ground.

In contrast to this vision, protection seekers have been subject to a range of different refugee recognition policies and practices. For Syrians, a de facto *prima facie* recognition system is in place (and UNHCR refers to Syrians as 'refugees'). In 2013, initially as part of the Syria response, UNHCR introduced biometric registration, which it credits for the rapid clearing of the registration backlog, but these practices raise important questions over privacy, data sharing and consent (Alsalem & Riller, 2013; Qumri & Turner, 2023). Other nationalities, most prominently Iraqis, have been subject to a wide range of refugee recognition systems (Stevens, 2013). The most recent key shift came in January 2019, when the government introduced Resolution 2713A, which "requested UNHCR to suspend registration" of those who had arrived in Jordan with a medical, work, tourism or study visa (UNHCR, 2019). This regulation particularly affected Sudanese and Yemenis protection seekers, who had been arriving in increasing numbers in 2017 and 2018, and for whom there are very few alternative routes to reach Jordan.

The needs of protection seekers vastly outstrip the resources available to humanitarian organisations, leading to an increase in the use and scope of vulnerability assessments for resource targeting. Since around 2013, these assessments have increasingly centred on large-scale population studies, most prominently the Vulnerability Assessment Framework (VAF). Centred on a predicted expenditure welfare model, VAF also includes factors such as food security, education, coping strategies, health, shelter and WASH (water, sanitation and hygiene), and the vulnerability 'scores' given to protection seekers determine (or influence) their eligibility for many humanitarian assistance programmes. In group interviews with Syrian refugees, several expressed dis-satisfaction with their experiences of vulnerability assessments, with many claiming that the criteria for receiving aid were unclear (Turner, 2023). For several years VAF focused only on Syrian refugees outside camps, although it now includes Syrians in camps, and other nationalities of protection seekers. The 2019 population study found that "78 per cent of the [Syrian] population are highly or severely vulnerable, living below the Jordanian poverty line" (Brown et al., 2019, p. 23), starkly illustrating the scale of needs among Syrians. Other research demonstrate that needs are at least as high among Yemenis, Sudanese, and Iraqis (e.g., see Johnston et al., 2019).

The right to work is one potential way to alleviate vulnerabilities. Prior to 2016, it was technically possible for protection seekers to get work permits, but in practice very rare. As part of a wider agenda to contain protection seekers in the Middle East and to limit their onward mobility (see Carrera, 2024), the European Union and other donors agreed a deal with the Government of Jordan in early 2016, known as the Jordan Compact. Under its auspices numerous reforms have taken place to enable Syrian refugees (but only Syrians) to get a work permit much more easily (for example without paying fees), which has helped to reduce Syrian unemployment (see Turner, 2023). Despite the initial challenges (in large part due to a lack of consultation of Syrians (Lenner & Turner, 2019) since 2016 over 320,000 work permits have been issued (UNHCR, 2022a). But this does not indicate that 320,000 people have received work permits, because most permits are for one year and renewable, and thus multiple permits given to the same person all count as separate permits in the statistics. Some work permits have been issued for shorter periods (3–6 months in Cash for Work Schemes), and one-year 'flexible' permits have allowed those holding them to move between employers. Against the backdrop of a worsening economic situation in Jordan since the COVID-19 pandemic—for protection seekers and Jordanians—these 'flexible' permits were welcomed by Syrians taking part in group interviews (Turner, 2023). However, the fact that the Jordan Compact only covers Syrians, and the low proportion of work permits issued to women (although this improved noticeably in 2022), are among the Compact's main drawbacks. An ASILE policy brief on Jordan (Turner, 2024) recommended that protection seekers of all nationalities should be given access to the same range of work permits as Syrians, under the same terms that they are available to Syrians, and that the focus on the number of work permits issued should be replaced by a focus on meaningful improvements to workers' rights and working conditions.

5.2.2 Precarity and (In)formality

Precarity for protection seekers in Jordan takes several forms. Firstly, for people from states such as Iraq, Somalia, Sudan and Yemen who are seeking protection in Jordan, the 2019 legal reforms have left many unable to register with UNHCR, and thus with a very precarious legal status. Furthermore, people of those nationalities who wish to and can afford to apply for a work permit are liable to be told that they must give up their asylum seeker certificate, thus forcing them to choose between legal work and their protection status. This can be understood as part of a governmental policy to ensure that—except if someone is Syrian—they are *either* an asylum seeker or fall into another category of non-citizen such as migrant worker, student, or health tourist, but not both (Turner, 2023). The ongoing and sensitive negotiations around these legal restrictions show how deeply politicised access to the asylum system and refugee recognition is in Jordan. These politicised processes, combined with the absence of a clear legal regime and the changing systems of refugee recognition, all demonstrate the underlying precarity of status for protection seekers.

At the same time, hundreds of thousands of people in Jordan formally remain asylum seekers. The status of an asylum seeker—in theory a temporary status leading to recognition as a refugee or a rejected asylum claim, has become a *de facto* permanent or at least long-term status for the vast majority of protection seekers in Jordan (not including Palestinians). Therefore, *registering* with UNHCR becomes a key protection metric, because registration and the concomitant acquisition of an asylum seeker certificate (rather than formal refugee status) grants access to the rights available to protection seekers in Jordan. Yet the rights that one receives with an asylum seeker certificate vary according to nationality. There has been some progress toward the goal of a ‘one refugee approach,’ which focuses on needs rather than nationality, but huge amounts remain to be done (Turner, 2024), and the nationality-specific circumstances of protection seekers of course must be recognised within such an approach. The numerous vulnerability assessments undertaken in Jordan furthermore demonstrate a second, crucial element of precarity for protection seekers: socio-economic precarity. As was noted above, the vast majority of Syrians in Jordan (78% in 2019) are living below the poverty line (Brown et al., 2019), and the COVID-19 pandemic led to significant increases in poverty among protection seekers in Jordan (as well as Jordanians).

(In)formality emerged as a key theme in the research on (working) rights and self-reliance, in a context in which perhaps half (or more) of private sector activity takes place informally (Lenner & Turner, 2019). Nevertheless, the interventions that have facilitated (Syrian) protection seekers’ access to the labour market have been overwhelmingly focused on integrating Syrians into formal labour market structures through the acquisition of work permits. This approach, which is not without its successes, has struggled in part because of a failure to recognise or respond to the informality of the labour market. Indeed, many of the reforms that have taken place have contributed to overall work permit numbers because they have—to an

extent—incorporated elements of work practices that were already taking place in the informal sector. While this might appear to constitute formalisation, as Jennifer Gordon (2019) has argued the fact that the worker is being formalised does not necessarily entail that the work itself is being formalised (see also Lenner & Turner, 2024).

Furthermore, vulnerability assessments demonstrate that, while working rights are certainly welcome, they do not necessarily translate to poverty alleviation or meaningful self-reliance (one of the key goals of the GCR). For example, in the 2019 VAF report, UNHCR notes that while "the presence of work permits increases expenditure per capita and income per capitaaverage income from employment falls below...the level of expenditure necessary in order to meet basic needs" (Brown et al., 2019, pp. 79–80) This was the case for "all sectors of the economy" (Brown et al., 2019, pp. 79–80). Therefore, the positive effects of the introduction of work permits for Syrians notwithstanding, access to the formal labour market has not equated to either *decent* work (see ILO, 2015), or access to sustainable livelihoods.

5.3 Bangladesh

5.3.1 Protection Seekers in Bangladesh

2024 marks the seventh year of a protracted refugee situation, where Bangladesh continues to host around one million Rohingya people who fled state-led persecution in Myanmar. Bangladesh is not a State Party to the 1951 Refugee Convention or its 1967 Protocol and does not have a dedicated national law that addresses refugee matters (Khan & Rahman, 2020). This does not mean that the Rohingya people in Bangladesh are governed without a framework that offers them some protection. Several Memorandums of Understanding (MOUs) between the UNHCR and the Bangladesh government, a bilateral agreement between the Governments of Bangladesh and Myanmar, the Bangladesh Constitution, the Foreigners Act 1946, the National Strategy on Myanmar Refugees and Undocumented Myanmar Nationals in Bangladesh 2013, and the system created by biometric 'smart cards' jointly issued to Rohingya refugees by the Bangladesh Government and UNHCR, make up the framework that extends a degree of protection towards Rohingya refugees. An important success of the Rohingya refugee response is the Bangladesh Government staying true to the principle of *non-refoulement* since 2017. This success can be attributed to Bangladesh's commitments on the international plane to uphold the principle, the impact of a judgment upholding the same by the Bangladesh Supreme Court in May 2017, Bangladesh's gradual economic rise, and the acquisition of necessary political will (Hossain, 2023).

In Bangladesh, the nearly one million Rohingya people who have arrived since 2017 do not have formal 'refugee status'. The Bangladesh Government addresses them as 'Forcibly Displaced Myanmar Nationals' (FDMN). The decision not to

grant 'refugee status' is grounded on the belief that giving such a status would result in Bangladesh taking on additional obligations towards the Rohingya, which it feels it does not have the ability to do (Hossain, 2023; Uddin, 2020, pp. 114–115), and would close the door to their voluntary repatriation to Myanmar. The refusal to grant refugee status further stems from the Government's intent to have the freedom to apply its own laws to the Rohingya people, and its belief that while they may be de facto 'stateless', the Rohingya are citizens of Myanmar (Hossain, 2023). Interestingly, while UN agencies do not appear to publicly campaign for Bangladesh to ratify the 1951 Refugee Convention, they, "in line with the relevant international framework," refer to the Rohingya as 'refugees' (ISCG, 2021, p. 2). These key partners work together to offer the Rohingya people a common set of rights and entitlements which are channeled through 'smart ID cards', which were issued by the Bangladesh Government and UNHCR in exchange for biometric data (similar to the case of Jordan). During fieldwork, interviewees expressed that having ID cards felt important, against the background of many having been left without citizenship in their homeland Myanmar through the Citizenship Law of 1982 (Hossain, 2023). Therefore, biometric refugee *registration* is a crucial protection metric (see Costello et al., 2022).

That Rohingya refugees in Bangladesh are very vulnerable is uncontested by humanitarian actors. Their vulnerabilities are identified through vulnerability assessments whose stated purpose is to understand vulnerability beyond "typical humanitarian categories" and thus assist humanitarian agencies in "providing a more nuanced response to needs [of refugees] based on evidence" (ACAPS, 2019, p. 2). Two such large-scale "representative assessments" are the Joint Multi-Sector Needs Assessment (J-MSNA) and the Refugee Influx Emergency Vulnerability Assessment (REVA) (ACAPS, 2022, p. 1). Consistent with stereotypical understandings of vulnerability, Rohingya women (particularly single mothers, pregnant and lactating women), children, elderly refugees and refugees with disabilities are frequently identified as "most vulnerable" in these assessments (Burton, 2019; Kotowski, 2021). In addition to Rohingya refugees, the findings of J-MSNA and REVA also demonstrate the host community's vulnerabilities. According to an analysis by ACAPS, which compared the findings of J-MSNA and REVA as well as other reports and studies, food consumption scores of the host community had gone down since 2018 (ACAPS, 2022, p. 2). Limited income opportunities meant that members of the host community, like Rohingya refugees, had become increasingly reliant on humanitarian aid (ACAPS, 2022, p. 2).

In Bangladesh, Rohingya refugees are not formally given the right to work. The Bangladesh government believes that ensuring this right will obstruct economic opportunities for Bangladeshi citizens. It believes this would not just add fuel to tensions between the refugee and host communities but also create conditions for the Rohingya people to leave refugee camps and integrate with the local population—in turn prolonging their stay in Bangladesh and shutting the door to the possibility of voluntary repatriation. This does not mean that the Rohingya people do not 'work' and, in turn, earn money for their labour and services. Their presence and interactions with the host community have reshaped the local economy through

informal business activities (Filipski et al., 2019). In addition, since 2018, a small portion of Rohingya refugees have been engaged by UN agencies, NGOs and INGOs as 'volunteers', for which they get paid (Hossain, 2023). This arrangement is permitted by the Bangladesh government and mirrors programmes run in Syrian camps in Jordan, even before the Jordan Compact. Despite the informal and insecure kind of work the Rohingya are permitted to do in Bangladesh, interviewees felt that the chance to earn 'loose cash' gave a degree of dignity to the lives of the Rohingya and reduced their vulnerabilities, albeit minimally. Several interviewees felt that these work opportunities empowered Rohingya women for the first time because doing a paid job outside the home meant being able to come out of their homes more regularly (ibid.). A development that came to the fore during fieldwork is that the government and politicians were slowly beginning to appreciate the need to formally grant the right to work to Rohingya refugees (Hossain, 2023). An ASILE policy brief on Bangladesh recommends that the Bangladesh Government should formally grant the right to work to Rohingya refugees based on the precedent set by and experiences gained from the Jordan Compact of 2016 (Hossain, 2024).

5.3.2 Precarity and (In)formality

Much like the Jordan experience, the themes of precarity and informality emerged when the Rohingya refugee situation in Bangladesh was explored through the lens of status, vulnerabilities, and the right to work. The formal disconnect between Bangladesh and the 1951 Refugee Convention, and the absence of a domestic law that deals with refugees in Bangladesh and grants them a set of judicially enforceable rights creates the conditions for the rights of the Rohingya to persistently remain unclear. The MoUs between UNHCR and the Government of Bangladesh which relate to voluntary returns of Rohingya refugees to Myanmar, data sharing, and Bhasan Char, are all confidential. Essentially, the core documents that shape the status of the Rohingya remain inaccessible to them. The Bangladesh Constitution guarantees several rights to all people living within its boundaries, yet many of these rights have been violated through the enforcement of the Foreigners Act 1946 against the Rohingya. During fieldwork, it was revealed that charging Rohingya refugees under the Foreigners Act is no longer preferred out of humanitarian considerations (Hossain, 2023). In 2017, the Supreme Court of Bangladesh aided the Rohingya people by upholding *non-refoulement*. Nevertheless, the fact remains that due to the limited economic means of the Rohingya and the restricted right to freedom of movement they have been given, Bangladeshi courts remain largely inaccessible to them. These realities have created a unique justice system within refugee camps where Camps-in-Charge (CiCs) representing the Office of the Refugee Relief and Repatriation (RRRC) of the Bangladesh Government dispense justice according to the gravity of crimes committed by and against refugees on an ad hoc basis and informal manner (Hossain, 2023).

While the biometric registration of the Rohingya people streamlined the allocation of essential aid through 'smart ID cards', their precarious status came to the fore when the registration process was initiated without their informed consent (Hossain et al., 2024). Ultimately, the Rohingya gave their data to the Bangladesh Government and UNHCR but were not even minimally involved in shaping how the process would roll out, what data would get shared and with whom, or how the risks of biometric registration could be minimised. Furthermore, it is highly probable that the biometric registration drive targeted the 'visible' Rohingya and did not comprehensively include the 'invisible' or 'unregistered' Rohingya refugees living beyond camp boundaries amidst host communities without any form of support or "formal legal status" (Azad, 2016, p. 60) and are shouldering amplified degrees of precarity.

Similar to Jordan's experience, vulnerability assessments undertaken in Bangladesh demonstrate the precarity of the Rohingya people. During fieldwork, interviewees shed light on some of the weaknesses of categories of vulnerability and the processes of assessing and responding to the multi-faceted vulnerabilities of Rohingya refugees (Hossain, 2023). Sometimes, categories of vulnerabilities created by aid providers may not be positively received by so-called beneficiaries. Furthermore, due to the limited availability of funds, real vulnerabilities are often not addressed because doing so does not satisfy "value for money" (Hossain, 2023). Limited funds also mean that it is extremely challenging to properly implement inclusive programming envisioned in project proposals (Hossain, 2023). Another significant drawback of the vulnerability assessments is the dearth of streamlined processes through which they are carried out, and their impact is stunted by limited follow-up (Hossain, 2023). Multiple (I)NGOs often conduct similar assessments and offer the same kind of support to Rohingya refugees living inside the same camps, resulting in unnecessary duplication of resources (Hossain, 2023). There is also a perception that some unscrupulous NGOs tend to 'package' vulnerable Rohingyas as 'products' to attract more donor money (Hossain, 2023).

As previously mentioned, in Bangladesh, the Rohingya people are denied the formal right to work but are allowed to earn 'loose cash' temporarily as 'volunteers' and authorities, in practice, turn a blind eye to them taking part in the informal labour market, even though technically this is not permitted. While this overarching arrangement has improved their standard of living at a minimal level and opened some doors allowing Rohingya women to work outside the home, it sustains a situation where the Rohingya people remain primarily and ultimately dependent on the 'benevolent' aid of donors to sustain themselves. An important unresolved issue is what kind of work Rohingya refugees would do if they were formally granted the right to work in Bangladesh. Decades of marginalisation and disenfranchisement in their home Myanmar have left a significant portion of the Rohingya population without access to comprehensive formal education, which leaves them in a precarious position where most of them find themselves engaged in informal labour.

5.4 Comparative Analysis of the Case Studies

The overarching reality that shapes—to a great extent—the lived experiences of protection seekers in Jordan and Bangladesh is the (absence of) legal frameworks for dealing with refugees. The lack of treaty signatures and dedicated legislation does not, however, necessarily mean that protection seekers in Jordan and Bangladesh are without any rights. States who have not signed the Refugee Convention are influenced by and "engage with...international refugee law" (Janmyr, 2021, p. 212). The lessons and experiences from Jordan and Bangladesh affirm Janmyr's findings. The MoU in Jordan is clearly influenced by the 1951 Convention, for example, in terms of the definition of a refugee that appears in the document. In Bangladesh, the Supreme Court considers *non-refoulement* to apply, even though it is not a signatory to the Convention, and Bangladesh has not implemented forced returns of Rohingya (Hossain, 2021). In Jordan there have been many instances of Syrians being forcibly returned, although for Syrians there have not been large-scale collective forced returns. Nevertheless, in December 2015, following a large protest at UNHCR's headquarters, Jordan deported over 800 Sudanese, in a move condemned as a violation of international law and Jordan's commitments under the Convention Against Torture (Human Rights Watch, 2015). In addition, in terms of rights, in both contexts, protection seekers have been granted access to formal/informal schools and health services, and Syrians have been granted the right to work through their access to work permits.

Yet there nevertheless remains a persistent and even at times pervasive unclarity regarding the laws and regulations that govern protection seekers. The use of biometrics to issue 'smart ID cards', a concept spearheaded by UNHCR, has arguably been effective in terms of alleviating registration backlogs and giving those holding them some form of protection through identity papers and access to rights, albeit in limited form. However, the people being registered were unable to meaningfully offer consent to having their biometric data used.

The precarious status of refugees in Jordan and Bangladesh is likely to continue. In Jordan, the 2019 reforms create clear inequalities and unfairness in terms of access to asylum, which reaffirms the importance of adopting an approach that centres needs rather than nationality (see Turner, 2024). Many with an asylum seeker certificate will *de facto* permanently (or at least for the long term) have this ostensibly temporary status, perhaps unless and until they voluntarily return to their home country. This is quite similar to Rohingya refugees in Bangladesh, the overwhelming majority of whom are identified as 'Forcibly Displaced Myanmar Nationals' by the Bangladesh Government or 'refugees' and/or 'persons of concern' by UNHCR. All these labels shy away from granting formal refugee status. The fact that the Rohingya refugees are referred to as 'refugees' in documents published by UN agencies (like Syrians in Jordan) displays the inconsistency surrounding these labels, and the gap between the legal and 'everyday' uses of the term 'refugee' (see also Carrera, 2024).

In both countries, UNHCR has used MoUs to attempt to improve the situation of protection seekers and the agency. While the contents of these MoUs cannot be fully analysed because they typically remain confidential—which is troubling from the perspective of refugee rights and protection—from the information available (e.g., in the Jordan case) one can say that they strive to incorporate some refugee protection principles, such as those found in the 1951 Convention. Nevertheless, while the MoUs have given UNHCR a firmer footing in both contexts, which enables the agency to support protection seekers, the MoUs have arguably not been effective in alleviating the legal precarity of protection seekers. In both contexts, the MoUs are legally unenforceable, and are arguably at least partially unimplemented (see Costello et al., 2022). This raises a wider question about whether UNHCR—the "UN refugee agency"—is continuing to prioritise ratification of the 1951 Refugee Convention in states where refugee status determination for the vast majority of those seeking protection is not conducted (see also Janmyr, 2016). The effectiveness of this strategy and its consistency with the norms of customary international law deserve further scrutiny, as does the question of the extent to which ratification itself shapes or improves refugee protection.

The 'informality' and selectivity of refugees' access to work also variously shape and interact with their precarity, and provide the basis for interesting comparisons. The time frame and context regarding the right to work in these countries is, however, different. Since the release of the Jordan Compact in 2016 (around 4 years after Syrians started arriving in large numbers) over 320,000 work permits were issued to Syrian refugees (UNHCR, 2022a), although typically wages remain low and work insecure. The Rohingya refugees in Bangladesh, who mostly arrived after the Jordan Compact was issued, are deprived of the formal right to work. While many work in minimal and informal capacities within camps and the surrounding informal markets, smaller numbers can earn loose cash as 'volunteers'. This work is similar to 'cash for work' programs run for Syrians in Jordanian refugee camps, even before the Jordan Compact (see Turner, 2018). It is important to note that the employment circumstances of the host community in south-eastern and other regions of Bangladesh, many of whom are "highly dependent on daily wage labour" (WFP, 2022, p. 5), are in important ways similar to that of Rohingya refugees, and that informal work is in many sectors—in Jordan and Bangladesh and more widely—the norm not the exception. The Jordan Compact, with its focus on formalisation, has failed to adequately recognise or respond to the informality of the Jordanian labour market, a long-term reality that must be incorporated into labour market interventions.

It could be argued that—in some key ways—the challenges facing Bangladesh mirror the ones that Jordan found itself dealing with several years ago. As our research has demonstrated, both have large populations of protection seekers, who live precariously, as do large sections of the host communities. Bangladesh, for example, is one of the world's most densely populated countries and is set to 'graduate' from 'least developed country' status in 2026 (UNGA, 2021). These challenging circumstances are exacerbated by an unjust global refugee regime that is shaped more by a culture of responsibility shifting (onto states in the 'Global South') as opposed to responsibility

sharing. Unsurprisingly, in Bangladesh and Jordan, there have been concerns about tensions between hosts and protection seekers, often around (perceptions of) competition for work and resources, which resulted in both governments insisting that a portion of donor funds must go to Jordanian and Bangladeshi communities. Both contexts also face extreme and protracted challenges in terms of funding and the donor environment. For instance, one of the key findings of REVA-5 was that the overall vulnerabilities of the host community in Bangladesh increased since the most recent mass displacement of the Rohingya people in 2017 (WFP, 2022, p. 5). These vulnerabilities were driven by limited economic opportunities and "market volatility during the COVID-19 lockdown" (WFP, 2022, p. 5).

In Bangladesh (like in Jordan previously), there appears to be a gradual but still private governmental acceptance of the need for protection seekers to earn a living and be more 'self-reliant.' Bangladesh also appears to be losing patience with the international community in light of shrinking funds and no visible progress on voluntary repatriation. Given the very tentative steps that it has taken to allow some access to work for the Rohingya, were it to take further such steps, Bangladesh may look to the 'Jordanian experience'. If it wished to have successful large-scale interventions to allow the Rohingya access to the labour market, it could attempt to ensure that, unlike in Jordan, refugees' voices and perspectives are included when framing future policies, including Rohingya women. More should also be done to take into account the informality of prevailing labour market dynamics in many sectors. Unless these actions are taken, the principle of fairness will be compromised in terms of process, and the effectiveness of the scheme reduced in terms of outcomes. Furthermore, while the Jordan Compact initially envisaged that the funding and policies would create many jobs for Jordanians, as well as Syrians, these jobs for Jordanians have not materialised (see Lenner & Turner, 2019, 2024). If the policy goal is to ensure that host communities see tangible benefits from allowing protection seekers *de jure* access to work, more will need to be done by the international community.

Nevertheless, while these lessons could be learned from Jordan, a key point that has run through our analysis has been the centrality of informality and precarity to protection seekers' lives. Ensuring—or at least moving toward—decent work standards as set out by the ILO should be the goal of such interventions (see ILO, n.d.). Yet attempts to bring about decent work must pay more attention to the informality of the labour markets in contexts like Jordan and Bangladesh, and the precarity of the lives of protection seekers and others within them; these fundamental dynamics cannot be ignored. Otherwise, there will only be minimal chances of such schemes being effective in achieving the ambitious goals they set out to accomplish.

5.5 Conclusion

This chapter has laid out the main findings from new research into two key states in the international refugee regime: Bangladesh and Jordan. Through exploring the themes of refugee status, vulnerability, and (working) rights in both contexts, this

research has shed light on asylum instruments and policies in both countries. It has demonstrated how formal refugee status is increasingly unattainable for the vast majority of protection seekers in Bangladesh and Jordan, the complexities of using vulnerability assessments to assess needs and allocate resources, and the challenges of creating work opportunities, even when the formal right to work has been granted. In examining these findings, this chapter has drawn out precarity and informality as structuring features of asylum governance and the lives of protection seekers in both contexts.

These key findings—on precarity and informality—were further explored in more depth through a comparative analysis of the two case studies. In terms of refugee status, this comparison highlighted the multiple structural similarities between the two contexts—for example in terms of refugee law and frameworks—and how political considerations shape the kinds of status accessible to protection seekers. Secondly, it analysed the comparisons and contrasts in terms of access to labour markets for protection seekers and the interconnecting socio-economic precarities protection seekers (and host communities) face. In particular, it drew out the parallels between the two contexts and identified ways in which Bangladesh may be able to incorporate the 'lessons learned' from the Jordanian experience of incorporating protection seekers into its labour market. While such interventions will not, on their own, solve the deeply structural challenges that shape the lives of protection seekers in Bangladesh and Jordan, they do have the potential—if executed well—to go some way to alleviating the precarities that so heavily shape protection seekers' lives in both contexts.

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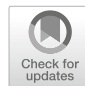
Chapter 6
Status, Vulnerability and Rights in Brazil: Operation Welcome and Its Impacts on Asylum and Social Inclusion of Refugees, Asylum Seekers and Immigrants



Natália Medina Araújo and Patrícia Ramos Barros

6.1 Introduction

This chapter studies selected migration and asylum governance instruments, and their implementation, and the ways in which they affect status determination, vulnerability, and the right to work in Brazil. It pays specific attention to one country-specific asylum governance instrument, "Welcome Operation" which was designed to deal with the most significant arrival of refugees in Brazil, caused by the humanitarian crisis in Venezuela. The examination considers the inclusionary and exclusionary components of this instrument. The chapter is based on research undertaken on Brazil as part of the ASILE Project, which comprises desk research on existing knowledge and state-of-the-art academic research, coupled with a set of 27 in depth interviews with relevant stakeholders—international organizations, civil society actors and Venezuelan migrants and refugees. The interviews were conducted between April/September 2021 and April/September 2022. The research investigated the question of how Operation Welcome, despite its official emphasis on humanitarianism, manages border control and impacts access to rights, reinforcing structural vulnerabilities. It also analyses the access of refugees, asylum seekers and immigrants to decent work and discusses Interiorization Program's impacts on labor inclusion.

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6.2 Refugee Recognition and Other Solutions

In Brazil, the concept of refugee is established by Law 9474/97 (Brazil, 1997), which besides the definition of the 1951 UN Convention, includes an expanded definition clause, which partially incorporates the expanded definition of Cartagena Declaration on Refugees of 1984. The expanded definition considers as refugees those who due to “serious and widespread violation of human rights” cannot return to his/her country. The clause allows for group-based recognition, but there has been resistance to applying it in the past years to the nationals of Haiti, which led to the creation of “humanitarian reception” as an alternative to asylum.

The arrival of Venezuelans in Brazil in search of international protection began to grow in 2015, while regularization through the unilateral extension of Mercosur Residence Agreement (RAM) was applied since 2017, the decision on the application of the expanded clause of Law 9474/97 only came in 2019, when the National Committee for Refugees (CONARE) recognized that Venezuela was in a situation of “serious and widespread violation of human rights” (Brazil & Ministério da Justiça, 2019), and approved a Normative Resolution that waived the need of individual interviews in the case of manifestly substantiated requests (Brazil et al., 2019). By that time there was a large number of pending asylum applications in CONARE, which would have contributed to the adoption of the *prima facie* solution “as a way of being more efficient”. Nevertheless, the speed of recognition slowed down since September 2020. The majority of 56 thousand decisions recognizing Venezuelan as refugees between 2019 and 2020 were made by means of four joint decisions, as stated on CONARE’s website (Brazil & Ministério da Justiça e Segurança, 2023). During 2021, only 3086 people were recognized as refugees and on 2022 the number of recognitions raised to 5795, including Venezuelans (Junger et al., 2022, 2023).

With the implementation of *prima facie* RSD, the possibility emerged to opt between asylum or residence, but as Brumat (2022) has argued, the freedom to choose was often limited by the cost of the latter. However, fieldwork has showed that the choice may be affected in the other direction by the delay in the decision by CONARE, since asylum seekers have been facing challenges in solving practical life issues with only the Provisional document. The main difficulty reported by Venezuelan asylum seekers was that they could not open a bank account.

Faced with the dual possibility, it is difficult to define whether Venezuelans are refugees or migrants. In practice there are not many differences between the two groups in terms of rights or national integration policies. According to our interviews, the Operation Welcome, as well as the partner entities working with both populations, generally refer to them by the broader term “migrants” (Araújo & Barros, 2023). As the refugee label is stretched by the expanded definition, the unilateral extension of RAM in view of the humanitarian crisis situation broadens the scope of residence, making the boundaries between the concepts blurred (Zetter, 2007). While this approach challenges dichotomous legal definitions it also raises new questions, as the possibility of endangering the meaning of protection (Brumat,

2022). As conceptual boundaries between refugees and migrants are blurred, the length of Refugee Status Determination (RSD) processes is pushing people in need of protection to be treated as migrants.

For instance, indigenous individuals seem to have protection needs that go beyond those of Venezuelan individuals in general. In 2019 The Inter-American Commission on Human Rights (IACHR) published an extensive report in which is stressed the obstacles to the use of traditional territories motivated by executive development projects (Interamerican Commission on Human Rights, 2019). In April 8, 2022, after four indigenous individuals were killed in Venezuela, IACHR highlighted the need to provide increased protection to indigenous peoples and stressed the high levels of violence—including sexual violence—in the area (Interamerican Commission on Human Rights, 2022).

In the case of nationals from Haiti—who until 2020 represented the second largest number of asylum seekers—migratory regularization through humanitarian reception is an alternative in view of their massive non-recognition as refugees (Junger et al., 2021). The granting of humanitarian residence, despite not giving access to the typical protections of international refugee law, is also justified on humanitarian concerns. Thus it seems that Haitian nationals in Brazil are neither refugees nor voluntarily displaced migrants, they are somewhere in-between, enabling a dual process of authorized permanence and precarious reception (Moulin & Thomaz, 2016).

6.3 Border Ordering

Operation Welcome plays an important role in the arrival of asylum seekers across the border with Venezuela. As its website explains, “The service begins with the structures set up to ensure reception, identification, sanitary inspection, immunization, migration regularization and screening of all those who come from the neighboring country” (Brazil, 2018). Thus, reception includes the creation of documentary and personal records, which allow for monitoring and control of the newly arrived.

As Moulin and Magalhães (2020) indicate, although formally described as a ‘large-scale humanitarian task force’, Operation Welcome has a major border security component, and its ‘humanitarian infrastructure’ is part of a larger effort to maintain border control and improve ‘border planning’. This becomes clear from the first federal actions in 2017, even before the beginning of the Task Force, when it prevailed the conception that Venezuelan migration was an emergency situation of exceptional character, and that the Armed Forces represented the state entity with the best logistical capacity to act in this scenario (Silva & Albuquerque, 2021). The discourse of a “migration crisis” helps to legitimize the exceptionalism of the institutional responses (Espinoza et al., 2021). In addition, Decree No. 9286, of February 2018, which first established the Task Force, did not incorporate any UN protocol regarding humanitarian actions to manage migratory flows (Silva & Albuquerque, 2021).

This does not mean that the UN agencies and the civil society were absent from the scene. Their presence was established even before the federal government took responsibility for handling the “crisis”. In 2017, the United Nations High Commissioner for Refugees (UNHCR) set up its first office in the region, when it began dialogues with the Federal Police, the local government and civil society institutions (UNHCR, 2022, p. 12). As these institutions became part of the Operation, they took the focus away from the fact that it was born militarized, soon after the overthrow of President Dilma Rousseff from the Presidency. During the government of Michel Temer (2016–2018) the armed forces began to gain prominence in politics, which was deepened with the ultra-right government of Bolsonaro (2018–2022), himself a career military man who appointed countless military personnel to assume political positions traditionally held by civilians. Taking this context into account, Gilberto Rodrigues (2022b) relates the “Welcome Operation” and its militarization to the Brazilian foreign policy of the period. In 2017, the Michel Temer government took on a policy contrary to the Venezuelan government, and supported its suspension from Mercosur. Next, Bolsonaro, from the beginning of his government in 2019, made Venezuela his rhetorical enemy (Rodrigues, 2022b, p. 104).

In this scenario, international agencies and other humanitarian agencies are fundamental to the Operation’s image, and “might be a form of avoiding resistance to militarization” (Moulin & Magalhães, 2020, p. 645). On the other hand, the Operation brought structural gains and resources that allowed the agencies to increase their service capacity, with the strengthening of ties in the face of mutual interests (Silva & de Albuquerque, 2021). As a consequence of this relationship, the agencies’ actions may lean toward the idea of migration management “aimed to deal with states’ sensibilities towards interference with their sovereignty” (Espinoza et al., 2021, p. 5). As Feldman and Ticktin (2010) observe, “humanitarian actors are entirely dependent on broader governing structures” and “often find themselves in the position of governing – managing, servicing – the populations they seek to aid”.

Cooperation between humanitarian agencies and the government is not without tensions. For instance, some interviewees perceived that civil society and international organizations share more complex reflections on the meaning of vulnerability, when compared with Operation Welcome’s Task Force, which is said to be more focused on pragmatically solving the issues that arise when managing the migratory inflow. Another interviewee criticized the “excessive role played by the Army”. This is an indicator that the ordering of borders may take precedence over humanitarian concerns by the military actors involved in the Operation.

The strong militarization of the Operation and its border control aspect became most evident during the covid-19 pandemic, due to the closure of land borders since April 2020.[1] First, an Interministerial Ordinance made a direct reference to the entry ban on Venezuelan nationals by land (Brazil et al., 2020). Then, it was harshly

[1] The land borders with Venezuela were reopened in July 2021, by Interministerial Ordinance n. 655 (Brazil et al., 2021).

criticized for being considered discriminatory (Ventura et al., 2021). Monthly, a new ordinance was issued. Land borders with Venezuela remained closed while asylum requests were considered "disqualified".[2] This had serious impairment on the principle of *non-refoulement*, as Venezuelans could not formalize their asylum claims and were subject to summary deportation. The disqualification may also be an example of a new label developed under the justification of the global health crisis as a policy to contain mobility, as containment policies are characterized under various labels (Carrera et al., 2021). In addition, people were barred to enter by land from Venezuela even in the case they were regular residents, many of whom may have opt for the RAM instead of applying for asylum. Such exclusionary measures are an central part of Operation "Welcome", resonating ASILE's overall findings about contained mobility, according to which instruments designed to facilitate mobility and protect human rights "also display exclusionary components and often form part of wider containment and migration management agendas" (Carrera, 2024). The restrictions on mobility in Brazil during the Covid-19 pandemic is a good example of how the protection paradigm can be quickly transformed into a 'contained mobility' paradigm (Carrera & Cortinovis, 2018).

6.4 Right to Work

Brazil is distinguished by a legal framework where migrants and refugees' social rights are fully recognized. Although access to the formal right to work does not mean having access to actual employment, this right is an essential pre-condition for achieving integration into society (Espinoza et al., 2021).

Law 9474/97 establishes that the refugee will be entitled to the issuance of the CTPS (Portuguese acronym for Work and Social Security Card) (Brazil, 1997). Equal right assists the asylum seeker, provisionally, however the provisional status of asylum seekers may be less attractive to employers (Costello & O'Cinnéide, 2021). The right to work is also guaranteed to beneficiaries of the Mercosur—RAM residence agreement and for beneficiaries of humanitarian reception. Law 13,445/2017 also guarantees freedom of association, including participation in trade unions, for all migrants (Brazil, 2017).

In the last decade, there has been a significant increase in the number of formal immigrant workers in the Brazilian labor market, accompanied by a socio-demographic change with an increase in the presence of nationals from the Global South (especially Haitians and Venezuelans, followed by other Latin American nationalities). In 2021, immigrants accounted for a total of 5% of those formally employed in Brazil, a presence eight times greater than in 2011 (Hallak Neto & Simões, 2022).

[2] This was done through successive Interministerial Ordinances, which renewed entry restrictions on a monthly basis. See Interministerial Ordinances n. 120, 152, 203, 255, 340, 419, 456, 470, 478, 518, 615, 630 and 648 of 2020 and Interministerial Ordinances n. 651, 652, 653, and 654 of 2021.

With the change in the socio-demographic profile, the migrant worker in Brazil has become less qualified, which has great impact in income rates. Moreover, skilled jobs were the most affected during the Covid-19 pandemic (Cavalcanti & de Oliveira, 2020). In addition, the fieldwork shows that barriers in recognizing degrees hinder access to highly qualified positions. This was mentioned by an international organization representative interviewed for the purposes of this research, who referred to the phenomenon of "underqualification", stating that in Brazil people "have accessed jobs below their qualification, generating income well below their potential".

As the most qualified jobs are inaccessible, asylum seekers and refugees have found opportunities of inclusion in some economic sectors, as the meat production chain. The sector was not affected by the economic crisis resulting from the pandemic, which explains why in 2020 and in 2021, there was still a positive balance in new admissions among migrant workers. On the other hand, "migrants working in service activities and those more qualified suffered more from the negative effects of the pandemic" (Cavalcanti & de Oliveira, 2020, p. 38). Despite the high rates of formalization, employment in slaughterhouses stands out for its high accident rates and risks to the health of workers, besides being underpaid (Fernandes et al., 2020, p. 58).

Most refugees and asylum seekers in Brazil work in the informal sector. As Costello and O'Cinnéide (2021, p. 8) argue, this is the reality of many States, especially in the absence of social support. Informal work is considered by all actors as more precarious, but given the shortage of formal jobs, they recognize informal work as a possible way out to generate income. Besides, the Venezuelan refugees and migrants themselves sometimes rather have an informal job than a formal employment, for two main reasons. First is that the low-skilled jobs to which migrants usually have access only pay the minimum wage, which is frequently considered by them insufficient to supply basic needs.[3] By accepting informal work, migrants and refugees sometimes exchange the social security and protection it provides for a somewhat higher income. The second reason is that informal jobs have more flexible hours, which is considered important especially between migrant women with children, since there is a lack of social support in childcare. Besides, in their case, formal work opportunities are fewer.

Another possibility of labor inclusion for refugees and applicants is entrepreneurship. During the covid-19 pandemic, UNHCR developed a platform called Entrepreneurial Refugees, which offers training, mentorship and even access to microcredit (UNHCR, n.d.). The Project has partnerships with private companies and civil society organizations. In Brazil, entrepreneurs with individual small businesses can be formally registered in the category of "individual micro-entrepreneurs". Among the Venezuelan migrants interviewed, some saw entrepreneurship as preferable to formal work. Nevertheless, it seems that this preference is motivated by the

[3] The minimum wage in Brazil in 2022 was R$ 1212, which was equal to approximately 234 Euros in October 15, 2022.

fact that the formal jobs available are low-paying and low-skilled ones which are below their training, due to the barriers to validate diplomas and previous experience acquired in Venezuela.

Finally, it should be noted that refugees in vulnerable contexts may be exposed to degrading work situations, and there are some cases of rescued workers from modern slavery. In 2021, 23 Venezuelan workers were rescued by the Public Ministry of Labor from modern slavery situation (El País, n.d.). However, there is still no statistical data on the number of immigrants and refugees among the more than 2000 workers rescued from modern slavery per year in Brazil (Brazil & Ministério Público do Trabalho, 2022).

6.5 The Interiorization Program

One of the cornerstones of Operation Welcome is the Interiorization Program for Venezuelans arriving in Roraima, conveyed as being the main strategy of the Federal Government to enable the integration of migrants into Brazilian society (Brazil, 2018). The program consists of relocating immigrants from the region of arrival, close to the Brazil-Venezuela border, corresponding to the state of Roraima, to other regions of Brazil, where they should find greater employability and achieve socioeconomic integration.

According to a UNHCR publication, the agency played a major role in the design of the Program, having contributed directly to the Government's know-how and the design of the Operation (UNHCR, 2022). A study commissioned by the UNHCR also showed the poor work conditions of most Venezuelans in the Region and the high risks of labor exploitation (UNHCR & REACH, 2019, p. 26).

The displacement is done in Brazilian Air Force planes, on charter flights or on commercial flights. The "interiorization" is always voluntary, and to be part of the Program it is necessary that the person is properly documented. There are four modalities of "interiorization", and multiple actors participate in this process. The modalities are: (i) social reunion—when a social network is mobilized to receive the asylum seeker/migrant, usually when they have friends that have come previously to Brazil and are able to offer support, but it also includes NGO's development of social networks to receive the "interiorized" person; (ii) family reunification—when the person is going to be reunited with close relatives that are already established in Brazil; (iii) Institutional—when the person leaves a shelter in Roraima to go to another shelter or temporary housing in another part of Brazil; (iv) Employment-based—when a previous contact is made with the future employer of the migrant/refugee worker.

According to the Interiorization Panel, Santa Catarina, Paraná, Rio Grande do Sul and São Paulo were the main destinations (UNHCR & IOM, 2024). Together, the three states in the southern region of the country had the highest positive balance of jobs when considering only asylum seekers, refugees and immigrants from countries recognized as eligible for the granting of temporary visas for humanitarian

assistance (Silva, 2020, p. 164), and are responsible for more than 70% of all formal employment of immigrants in Brazil (Cavalcanti et al., 2022).

Interiorization is voluntary, in the sense that a migrant or refugee is never forced to accept a proposal for relocation. Fieldwork reveals, however, that this does not mean that the person has control over the process: how, when, or where to he or she is going to be relocated. Once relocated the migrant is no longer under the responsibility of the Operation, although they may in some cases receive support by civil society partners who work in reception locality for a period of about three months, especially in the Institutional modality. After interiorization, integration relies entirely in local institutions, so it can be successful where there is experience and support of the municipal authorities and civil society organizations. The importance of cities in the inclusion has been noted by Jubilut and Silva (2021). But as some cities are better prepared than others, socio-economic inclusion is uneven. Interviewees have pointed out the need for strengthening the local municipalities and infrastructures to better monitor interiorization and labor market inclusion. UNHCR's Solidarity Cities initiative, born under the Mexico Plan of Action (2004) and recognized by the Brazilian Plan of Action (2014), highlights the role of local governments in implementing municipal public policies that promote protection and integration of refugees and stateless persons (UNHCR, 2022, p. 48).

Even in the most prepared cities, integration is a challenge. São Paulo was the first municipality to create a Municipal Plan for Policies for Immigrants. The State of Santa Catarina followed, approving a State Policy for the Migrant Population (Santa Catarina, 2020). Other local and regional governments are taking on the role of working towards the integration of refugees. Such policies, however, remain fragmented. The leading role in this effort to bring local governments in is mostly an accomplishment of UNHCR, which mobilizes the Solidarity Cities Program. Besides in the Refuge Law itself, local integration has insufficient regulation (Rodrigues, 2022a, p. 35).

As an interviewee representing an international organization stated, actions should be taken to strengthening the national public employment system, while making sure that refugees and migrants have access to it on equal footing with national workers. This is in line with Costello and O'Cinnéide (2021) who highlight that the International Covenant on Economic, Social and Cultural Rights (United Nations, 1966) requires States to secure 'accessibility' to the right to work, in the sense that States must prohibit discrimination in access to employment, and also implement national policies to promote equal access to the labor market. The importance of strengthening labor inspections was also stressed in the interviews, including on domestic workplaces, usually seen as private sphere. Women in domestic labor, both nationals and migrants, tend to be exposed to exploitation and violence.

It should be noted, nonetheless, that the Brazilian State has took important steps towards the guarantee of the right to work, starting from the regularization policy, a first fundamental measure to accomplishing labor integration and protection of labor rights. In accordance with the understanding of the bodies of the Inter-American System for the Protection of Human Rights, migrants, including undocumented ones, have the right to protection against labor exploitation. Furthermore,

migrant workers victims of human trafficking or rescued from modern slavery have the right to migratory regularization and permanent residence in Brazil (Brazil & Ministério da Justiça e Segurança Pública, 2020). This is a clear example of the recognition that legal protection against workplace exploitation is a 'civil right' enjoyed under the right to juridical personality (Costello & O'Cinnéide, 2021, p. 18).

6.6 Vulnerability's Transversal Categories: Race and Gender

Mostly, people working with asylum seekers/refugees understand vulnerability as a contextual situation. But there seems to be little discussion about the meaning of the term within organizations and between them. Organizations do not use the term "vulnerability" when talking to asylum seekers and refugees since the term is considered to be pejorative. The use of the term is supposed not to be necessary because it could bring the stigma of a vulnerable person, the prejudices related to the foreigner and, as some interviewees mentioned, a feeling of weakness, of inability to get out of this situation or even of victimization.

Although most respondents find it is impossible to access vulnerability without flaws in the needs of the beneficiaries, all feel they do it properly, and assessments are often discussed and reformulated based on experience. Most respondents understand that the evaluations need to be improved.

Gender is prominent in vulnerability assessments. Misconceptions of the meaning of 'gender' have contributed to difficulties in assessing gender claims, especially because gender issue is not limited by being a woman (Anderson & Foster, 2021, p. 5). Women are usually seen as a vulnerable group, regardless of other peculiarities. Women with children and single mothers are seen as more vulnerable. This is not due to the condition *per se* but results from the duties of care and responsibilities carried by them in relation to their parents, children, or other family members. When talking about the Venezuelan inflow towards Brazil, one interviewee exemplified the greater vulnerability of women even before leaving their country. While the first to migrate are men, women come latter and make the journey with other people under their care. It is clear, therefore, that the issue of gender is already manifested from the beginning of the mobility process, that is, it determines who will migrate, how and when.

Since 2015, there has been a process of feminization of migrations to Brazil, with a progressive increase in the proportion of women among immigrants and refugees in the country, although men continue to represent the majority. The participation of women in the formal labor market has also grown, but mainly in low-paid, unhealthy and extremely stressful occupations (Oliveira & Tonhati, 2022). In 2021, women represented 32,4% of immigrants in the formal labor market (Hallak Neto & Simões, 2022).

The processes of human mobility are marked by structuring gender relations, which act simultaneously with other aspects, such as social class and race, producing and reproducing forms of marginalization and exclusion of migrant women, due

to their condition as women and migrants, also by class belonging and their ethnic origin (Magliano, 2007, pp. 2–4).

In the Interiorization Program most job vacancies in the employment-based modality are offered to men. Several interviewees underlined that the access to the right to work is uneven and the labor integration of women is more difficult. The lack of a public or private support network tends to place women in the informal sector. Furthermore, women and girls are slightly more at risk of a forced labor situation, than men and boys, when they migrate crossing international borders (International Labor Organization, 2020; Comissão Interamericana de Direitos Humanos, 2021, 97).[4] In Brazil, women represent 5% of workers rescued from modern slavery.[5] However, in the city of São Paulo, this number reaches 30%. The discrepancy with the national average is explained by the high number of immigrant workers in the city of Sao Paulo who work in clandestine sewing workshops. Furthermore, in Sao Paulo, 93.1% of women rescued from modern slavery situations are migrants (Guagliano, 2020).

Finally, LGBTQIA+ people also face additional obstacles to find work. This is not surprising, since Brazil has high (and growing) rates of violence against the LGBTQIA+ population, which is directly related to discrimination against them (Brazil & Conselho Nacional de Justiça, 2022).

The experiences of refugees are also heavily mediated by race and ethnicity, but international legal scholarship has not paid sufficient attention to the significance of the topic (Achiume, 2021, pp. 1–2). This became clear during the fieldwork since interviewees virtually did not mention race as an overlooked factor in vulnerability assessments. This absence may indicate the need for greater problematization of the subject. An interviewee mentioned how difficult it is to access race data because they depend on self-declaration and involve self-perception, subjectivity, and socio-cultural construction about race, which varies from one country to another. This research finding probably demonstrates only one aspect of the problem. Race is not simply about physical attributes, but the idea of race is historically structural and intrinsically linked to the legal, social, political, and economic meaning of being categorized as Black, White, Brown, or any other racial designation (Achiume, 2021).

In the context of the latest migratory flows of refugees, Brazil has been encouraged to rethink myths such as the alleged Brazilian "racial democracy" and the idea that in the country "everyone is welcome" without any kind of distinction (Farah,

[4] The Inter-American Commission on Human Rights, in February 2021, "was told of complaints about exploitation and discrimination in the workplace, in which immigrants and refugees reported working longer hours, or receiving lower wages, than the other, Brazilian workers, apart from being subjected to degrading working conditions and exhausting hours."

[5] In Brazil, "labor analogous to slavery" is a crime, pursuant to art. 149 of the Criminal Code (Decree Law No. 2.848/1940). It is not only characterized by violations of labor legislation. Elements of the crime include forced labor, exhausting workday, debt bondage or working in degrading conditions.

2017, p. 13; do Valle, 2017).[6] The country's idealized self-image was clouded by the xenophobic waves against Venezuelan asylum' seekers and refugees in Amazonia (Instituto Humanitas UNISINOS, 2018). In this sense, migrants in Brazil were reported as a group at special risk by the Inter-American Commission on Human Rights, on visit made in February 2021 (Interamerican Comission on Human Rights, 2021). The experience of Venezuelan interviewees also reveals that being a Venezuelan man or woman in Roraima was dangerous, and they were afraid to go out on the streets for fear of violent attacks. After being relocated to other states in Brazil, xenophobia may take on less violent contours, but remains present. During our research two interviewees representing Venezuelan communities in Brazil reported having suffered verbal violence in the public health service, while under health care.

Additionally, racism is added to xenophobia and the aversion to the foreigner turns especially towards non-white migrants. The nationality *per se* is less relevant than the skin color, as "sometimes it's easier to hire a white Arab than a Congolese". For instance, a recent study indicates that the arrival of black migrants from Haiti or African countries are seen more negatively by Brazilians when compared to people of other nationalities, such as Latinos, Asians, Europeans, and North Americans (Mundim & dos Santos, 2022). As the researchers explain, "miscegenation and cultural syncretism, products of a long history of waves of migration since the colonial period, led to the construction of a popular imagination in which Brazil was a country that welcomed foreigners, regardless of their origin, and that racial tensions observed in other countries would be smaller, or even non-existent, in Brazil". Nevertheless, a more cautious overlook of Brazilian miscegenation history reveals the prevalence of eugenics migratory policies, especially in the first half of the twentieth century, still producing perverse effects.

6.7 Indigenous Peoples from Venezuela

The arrival of groups of migrants belonging to indigenous peoples from Venezuela (Warao, Eñepa, Kariña and Pemón people) have challenged the vulnerability assessments and the structuring of responses. The constant or frequent territorial displacement between countries of the region is a vital process for them. They constitute a pendular movement and then a field of migratory circulation between the two countries. A fieldwork conducted by IOM, for instance, shows that indigenous peoples are interested in continuing to circulate through Brazil and eventually return to

[6] The myth of racial democracy consists of the idea that there is a supposed full democracy in Brazil that would extend equally to people of all races, who are always welcome in the country. This idealized idea about Brazil is often attributed to the Brazilian sociologist Gilberto Freyre. He asserted, especially, in his book "The master and the salves", that the relationship between masters and slaves was peaceful, that the Indians accepted colonization peacefully and that this promoted a democratic relationship and miscegenation.

Venezuela (Moreira & Torelly, 2020, p. 21). In this sense, they do not realize what a border mean. As reported by one interviewee, they only understand what the border is when they come across the Federal Police. This cultural behavior certainly calls into question the effectiveness and legitimacy of imposing a state logic of containment.

Indigenous migrants are ethnic minorities not only in Brazil, but also in their country of origin, where they also suffer discrimination. They have their own way of life based on a worldview that is considerably different from that of others. They speak their own languages, although some also speak Spanish as a second language. On this basis, since the beginning of Operation Welcome, there has been a separation between indigenous and non-indigenous shelters.

In the fieldwork, two of the interviewees were indigenous leaders. The perceptions and experiences of these interviewees differ significantly from those of non-indigenous Venezuelans. For instance, they have a much more negative perception of Operation Welcome than their non-indigenous compatriots.

Indigenous individuals seem to find it more difficulty to adapt to the logic of shelter and body control, with the imposition of strict rules and, in particular, with food regulations. In addition, it should be noted that their time in shelters is much longer, and some remain for several years in spaces that, at the very least, were structured to be temporary shelters. It seems that one of the problems of life in shelters for the indigenous population lies in the lack of autonomy for decision-making.

Indigenous peoples also report having been excluded from the Interiorization Program, and face additional, often insurmountable, barriers in achieving labor inclusion. Among the reasons, the interviewees mention the existence of prejudice, racism, and xenophobia, as well as language barriers. Poverty leads many to beg on the streets and indigenous population's lack of access to formal education.

6.8 Conclusions

Brazil has been seen internationally with enthusiasm, whether for the progressive side of its Refugee Law, guaranteeing the right to work for asylum seekers and refugees, or for the recent adoption of its migration regularization policies and *prima facie* recognition of refugee status for Venezuelans.

Operation Welcome, as an institutional response, appears as a promising possibility for dealing with crisis situations and providing protection and integration for the refugee population. But research demonstrates that although it is advertised as a humanitarian operation, which aims to protect the rights of Venezuelan migrants and refugees and the fulfillment of international obligations by Brazil, such as the pledges made in the GCR, it is also true that the less vaunted side, the ordinance of borders and the solution of the "Roraima problem" are at least equally relevant. The political and strategic interests of Brazil in relation to Venezuela and the State of Roraima lead us to think about the concept of "muscular humanitarianism" (Chimni,

2009), that is, one that advances parochial interests while promoting an altruist self-image. The "muscular" side of Operation Welcome became evident in the context of the Covid-19 pandemic, since land borders remained closed during more than one year during which summary deportation and "disqualification" of refuge applications were applied. This shows how dynamic the 'changing relationship between containment and mobility' can be (Carrera et al., 2021).

Operation Welcome's securitization component is also present in the Interiorization Program. Its purpose seems to be restricted to the alleviation of the border by promoting the departure from Roraima, since "logistical support" is limited to the outbound flights. The responsibility for actual inclusion relies on local authorities, civil society, and migrants themselves, who must seek their self-reliance and build their way in Brazilian labor market and society. As ASILE research in other countries also demonstrate, the notions of self-reliance and labour market integration follow a utilitarian, selective and migration-management approach (Carrera, 2024).

Although Brazil has a legal framework that recognizes the social rights of migrants, refugees, and asylum seekers, access to formal and decent work is quite difficult. Labor inclusion occurs mainly in low-skilled jobs and informality rates are very high. Access to the formal labor market is particularly hard for women. Indigenous peoples have difficulty accessing any type of work, formal or informal. In addition, the risks of overexploitation in work relations is reinforced by the lack of monitoring of the Interiorization Program.

There are many perceptions about vulnerability and in some cases, they end up reinforcing the vulnerabilities themselves. When we conceive vulnerabilities not as inherent features, but as part of social, political, and cultural structures, we must reflect on the extent to which these structures are co-responsible for creating vulnerabilities. Fieldwork suggests, for example, that the Interiorization Program reinforces women's vulnerability, which can be seen from the feminization of shelters and the difficulty women find to be interiorized in the employment-based modality.

Additionally, it seems that the racialized relations inherited from colonialism remain alive in Brazilian society, challenging the myth of racial democracy. Black and indigenous migrants and refugees face additional barriers when arriving in Brazil. As for indigenous peoples, fieldwork has shown that the treatment promoted by Operation Welcome may be negatively impacting their life possibilities, hindering their socio-economic insertion and access to the right to education, besides reducing their autonomy, and impacting their collective identities as indigenous, thus configuring a type of coloniality (Mignolo, 2017). In this way, Operation Welcome may be contributing to creating vulnerabilities and reinforcing structural vulnerabilities linked to racism, xenophobia, and a five-century colonial history.

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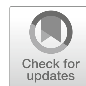
Chapter 7
Identifying Criteria for Complementary Pathways to Provide Sustainable Solutions for Refugees: Two Canadian Case Studies



Roberto Cortinovis and Andrew Fallone

7.1 Introduction

The United Nations Global Compact on Refugees (GCR) emphasises the objective of expanding the availability of "complementary pathways for admission of those with international protection needs" (United Nations, 2018, p. 37). In that context, international stakeholders identified a range of instruments adopted by Canada as 'promising practices' for other countries around the world to potentially replicate: these include the Private Sponsorship of Refugees (PSR) program, a long-standing and distinctive feature of Canada's refugee admission system, and the Economic Mobility Pathways Pilot (EMPP), a recently adopted instrument focusing on refugees' labour mobility.[1]

In particular, the establishment of the Global Refugee Sponsorship Initiative (GRSI)[2] in 2016 reflects the assumption that some of the key institutional and

[1] In the field of education pathways for refugees, the World University Service of Canada's (WUSC) Student Refugee Program, established in the late 1970s, also served as a model for other countries when developing programmes aimed at expanding access to educational opportunities for refugees. See UNHCR-WUSC (2017).

[2] The GCR refers to the objective of increasing the availability and predictability of complementary pathways to protection, including by establishing "private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative (GRSI, para 95).

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organisational features of Canada's PSR program can serve as an 'example' for countries in other regions (such as Europe, South America and Australia) willing to adopt their own initiatives in this field.[3]

Likewise, the Canadian government committed to sharing its experiences and lessons learned from the EMPP through its role as inaugural co-chair of the UNHCR Global Task Force on Refugee Labour Mobility, a GCR-linked initiative that aims to scale up labour mobility pathways for refugees (Government of Canada, 2022a). Launched in 2018 with the initial aim of admitting a small group of refugees through Canada's existing economic immigration channels, the EMPP steadily expanded in subsequent years, with a target of 2000 admissions over the following years set by the Canadian government in December 2022 (Government of Canada, 2022b).

Drawing from interviews with stakeholders and program participants, this chapter provides a description of key features and implementation dynamics of the PSR program and the EMPP. While acknowledging the diverse goals and implementation histories of these two instruments, the comparative approach followed by this analysis highlights a set of policy and legal issues cutting across the two case studies. We argue that the issues identified herein offer pertinent insights that are relevant both to understanding the evolution of Canada's approach to resettlement and complementary pathways, and to assessing the potential for the global policy transfer of similar instruments to other countries (Cortinovis & Fallone, 2023; Carrera et al., 2021; Carrera, 2024).

The analysis builds upon the expanding body of literature exploring the normative and policy questions raised by complementary pathways for refugees and seeks to contribute to the development of a normative framework for assessing those instruments' alignment with international refugee, human rights and labour law standards. In so doing, the chapter discusses which prerequisites should be embedded in the design of complementary pathways to live up to the GCR promise that those admission channels "are made available on a more systematic, organized, sustainable and gender-responsive basis, […] contain appropriate protection safeguards […]" and, in that way, "facilitate access to protection and solutions" (para 94).

7.2 Complementary Pathways: International Debates and Initiatives

While the GCR does not itself provide a definition of complementary pathways, UNHCR describes them as:

[3] The GRSI Guidebook states that Canada PSR program is "just one example of how government and civil society can collaborate to provide protection to refugees and support their settlement once they arrive in their new country. It is not the only way, but it is one strong example from which other countries and civil society actors may draw inspiration" (See GRSI, 2019, 2022).

> safe and regulated avenues for persons in need of international protection that provide for a lawful stay in a third country where the international protection needs of the beneficiaries are met […] Pathways include existing admission avenues that refugees may be eligible to apply to, but which may require administrative and operational adjustments to facilitate refugee access. They must be carefully designed and implemented to ensure the protection and rights of refugees (UNHCR, 2024a).[4]

The UNHCR further underlines that it is 'essential' that admission through complementary pathways is additional to places made available through UNHCR-referred resettlement, and that the availability of those instruments should not supplant states' obligations to provide international protection through access to asylum. This core concept underpinning complementary pathways is referred to as the 'additionality' principle (UNHCR, 2024a).

Complementary pathways' objective is to widen the scope of durable solutions for refugees (UNHCR, 2019a). Guidance provided by UNHCR in this regard clarifies that while they may initially provide temporary stay, complementary pathways should be part of a "progressive approach" ensuring access to rights and eventually achieving a "sustainable durable solution" (UNHCR, 2024a).

Existing research, however, indicates a lack of comprehensive data and evidence surrounding complementary pathways, including on the ways in which they are used by different states, the quality of protection and rights afforded to beneficiaries, as well as their linkages to durable solutions (Wagner, 2017).

In June 2022, UNHCR set a global target of 2.1 million admissions via complementary pathways between 2019 and 2030, building on the approach laid down in the 2019 'Three-year Strategy on Resettlement and complementary pathways' (UNHCR 2019b). At the same time, it acknowledged existing challenges in obtaining reliable and comprehensive data, adding that "implementing and measuring progress toward the complementary pathways target remains difficult and will be dependent on the continued development of a more robust reporting process" (UNHCR, 2022, p. 19).

A distinctive feature of complementary pathways is that they may pursue multiple objectives and goals simultaneously, both humanitarian and non-humanitarian. They may, therefore, combine a focus on protection needs with other priorities, such as the labour market or educational skills of beneficiaries, or beneficiaries' family ties in the country of destination. Such flexibility to pursue multiple policy objectives and adapt to the specificities of different legal frameworks presents both risks and opportunities in terms of expanding the scope and quality of protection offered to refugees (Carrera & Cortinovis, 2019; Tan, 2021; Wood, 2020).

Instruments falling under the umbrella of complementary pathways are usually associated with a high level of discretion for state authorities, and, in some cases,

[4] Following the most recent UNHCR classification, complementary pathways may include one or a combination of the following instruments: extended family reunification procedures (beyond nuclear family members); 'humanitarian' pathways (e.g., humanitarian admission programmes and humanitarian visas), private sponsorship pathways, as well as pathways based on labour or education channels.

private organisations, regarding the selection of candidates in line with their own criteria and priorities. This implies that actors other than asylum authorities, such as NGOs staff facilitating access to those pathways, may end up conducting *quasi* refugee status determination procedures, raising concerns about the quality of decision making, and the level of oversight applied throughout these procedures (Wood, 2020).

In addition, the lack of adequate procedural safeguards throughout the selection process and, notably, a lack of systemic acuity to individuals' potential vulnerabilities may substantially raise barriers to access for some categories of refugees (Farrow, 2014). The discretionary character of complementary pathways further implies that, in most of the cases, no effective remedies exist for applicants to contest rejection decisions they believe were incorrectly adjudicated.

A key benchmark to assess if increased access to complementary pathways holds the potential to expand durable solutions for refugees is the legal status and rights granted to beneficiaries upon arrival. Existing research warns against the risk that pathways providing access to regular channels (such as those related to labour migration) may not afford adequate level of rights to people in need of protection.

A focus on the right to decent work clearly illustrates this gap (ILO, 2016). Instruments designed to facilitate the admission of refugees using existing labour migration channels may be designed in a way that risk exacerbating what scholars refer to as 'structural vulnerability' (Morawa, 2003; Fineman, 2008; Peroni & Timmer, 2013; Mendola & Pera, 2022).[5] For example, pathways that only provide for refugee participants' temporary stay in the country of destination without prospect of obtaining permanent settlement, or that restrict the access of refugee workers and their family members to social security programs, may compound with numerous challenges displaced populations already face.

International organisations and civil society actors stress that for complementary pathways to qualify as additional durable solutions, the design and implementation of such pathways must grant refugees access to institutional justice mechanisms, fair employment practices, freedom from discrimination and exploitation, and protection from other risks associated with third-country mobility, irrespective of their legal status (UNHCR, 2019a; ECRE, 2017; ILO, 2016).

[5] Traditional understandings of 'vulnerability' in relation to human rights protection rely on the idea that certain individuals or subsets of the broader population are 'vulnerable', for example due to their age, gender or other diversity factors. Yet, labelling specific populations as 'vulnerable' can also lead to stigmatization of those groups of people, fixing their position in the eyes of the public and the state into one of perpetual victimhood. Contrasting with traditional understandings of vulnerability as attached to certain individuals or groups due to their unique or distinguishing characteristics, the notion of 'structural vulnerability' focuses on the social conditions that may exacerbate individuals' or groups' vulnerability. From this understanding of vulnerability derives that governments must reflexively analyse the ways in which vulnerability is impacted and engendered by migration laws and practices.

7.3 Private Sponsorship of Refugees (PSR) Program: A Complementary Pathway That Predates the Term

According to UNHCR, private sponsorship programs fall under the umbrella of complementary pathways because they provide individuals or organisations with the opportunity to directly engage with identifying, selecting, and supporting the entry and stay of people in need of international protection not previously referred by UNHCR for resettlement. Based on the above definition, UNHCR refers to Canada's Private Sponsorship (PSR) program as a "prime example of private sponsorship" (UNHCR, 2024b).[6]

It is important, however, to underline how private sponsorship practices in the Canadian context exhibit a long history that precedes the language of complementary pathways. While *ad hoc* initiatives involving private citizens supporting the admission of refugees through modalities similar to private sponsorship date back to the early 1920s, the PSR program was formally established into Canadian law by the 1976 Immigration Act (Labman, 2016).

Within that framework, private groups of Canadian citizens supported the admission of more than 300,000 refugees. Some key 'refugee movements', such the arrival of Vietnamese, Cambodian and Laotian refugees in the late 1970s and early 1980s, and the more recent arrival of Syrian refugees from 2015 onwards, produced a long-lasting impact on the scope and key dynamics of private sponsorship in Canada (Hyndman et al., 2017). Statistics show how annual resettlement numbers to Canada fluctuated significantly over time in line with the emergence of specific refugee situations, with the proportion of privately sponsored refugees matching or exceeding government assisted refugees during 'peak' periods (Macklin & Blum, 2021, p. 21).[7]

The PSR program developed in parallel with the government-assisted resettlement (GAR) program and as part of a single policy and legal framework (Government of Canada, 2024d; UNHCR, 2024c).[8] This implies that sponsored refugees, akin to government assisted refugees, receive permanent residence status upon their arrival in Canada. From a legal perspective, permanent residence status is a key step towards achieving a durable solution, as it is accompanied with the enjoyment of a wide set of social rights, together with the possibility to apply for Canadian citizenship (Government of Canada, 2024k).

[6] According to UNHCR, private sponsorship should be distinguished from community sponsorship, as in the latter sponsor organisations or individuals support the reception and integration of refugees previously referred by UNHCR or arriving through another pathway.

[7] Between January 2015 and April 2020, out of 154,510 refugees resettled to Canada, 84,520 persons came through private sponsorship, 61,320 were resettled as government assisted refugees, and 8670 through the blended public-private (BVOR) program.

[8] Under the GAR program, refugees are referred for resettlement to Canada by UNHCR or another partner with which Canada has an agreement.

The PSR program's success and continuous support by Canadian civil society over the last forty years relied strongly on the principle of 'naming', which creates the possibility for private organisations and groups of citizens to refer specific individuals for admission. 'Naming' goes hand in hand with a selection dynamic referred to in the Canadian context as 'echo effect', that is the demand from previously admitted refugees to sponsor extended family members who remain abroad. This dynamic profoundly impacted selection practices within the PSR program. As a result of this 'echo effect', the PSR program became a privileged channel for reuniting with extended family members or with individuals sharing the same ethnic or national background (Lehr & Dyck, 2020).

Ensuring reunification of sponsors with their (extended) family members in need of protection is a legitimate and important aim of a refugee admission program. As noted by Canadian refugee advocates, 'naming' is an important tool in the hands of private citizens to "responds to situations around the world and to refugees who have been forgotten or who do not fit the priorities of governments or the UN" (Canadian Council for Refugees, 2016). Crucially, family reunification plays a key role in achieving successful inclusion of newcomers within the Canadian society (Lehr & Dyck, 2020).

At the same time, the predominance of 'named' sponsorships based on family related considerations raises a set of concerns in terms of equitable access to private sponsorship in Canada. This is because the focus on family-related connections of the current system makes access to the program dependent on individuals' links with people in Canada and, crucially, on the availability by sponsors of substantial financial resources that are needed for undertaking a sponsorship commitment (Cortinovis & Fallone, 2023).

Additionally, a focus on 'named' admissions inevitably diverts the focus of the PSR program away from protection needs and vulnerability considerations. Over the years, the Canadian government has taken several initiatives to regain control over of the program's orientation, trying to incentivise sponsor groups to support UNHCR-referred refugees by launching a special program, the 'Blended Visa Office-Referred' program (BVOR), and other categories of highly vulnerable refugees through the Joint Assistance Program (JAP) (Labman, 2016). However, these programs only represent a limited share of the overall PSR intake, which remains largely composed of named sponsorships based on family or other personal links.

The launch of the above-mentioned governmental initiatives should be read against a shifting balance between the two main components of Canada's resettlement system. In the period 2017–2019 (before the Covid-19 pandemic and the ensuing travel restrictions substantially impacted on the volume and dynamics of arrivals), the number of privately sponsored refugees admitted in Canada almost doubled that of government assisted refugees (Macklin & Blum, 2021).[9] This circumstance led civil society organisations and academics to denounce the risk of a

[9] For an analysis of Canada's admission targets for the period 2023–2025 see (Cameron & Labman, 2022).

shift towards a model of privatised resettlement, recommending that privately sponsored admissions to Canada remain additional (i.e., above and beyond) to state-supported resettlement based on UNHCR referrals (Macklin & Blum, 2021; Canadian Council for Refugees, 2015).

Beside the issue of additionality, the prominence of private sponsorship within Canada's refugee admission system reignited concerns over the inadequate level of procedural fairness and access to justice in the context of overseas refugee admission (Cortinovis & Fallone, 2023). The *status quo* is based on the assumption that refugee admission practices fall squarely within the realm of state discretion and thus happen in a context where the rule of law is 'thin' (Thériault, 2021). From a legal perspective, this circumstance implies that the very same procedural rights considered essential in the context of in-country asylum procedures, such as the right to information, legal assistance and access to an effective remedy, are instead severely limited in the context of overseas admission procedures. As an example, rejected applicants under the PSR program do not have access to an appeal procedure on the merits. The only possibility for obtaining redress consists in lodging an appeal for judicial review at the Federal Court of Canada. Access to the Federal Court, however, is hampered by substantial legal barriers and strictly dependent on the availability on the part of applicants (or their sponsors) of financial resources to sustain litigation expenses in Canada (Thériault, 2021, p. 139).[10]

Working to ensure that complementary pathways offer a clear path to durable solutions implies focusing not only on the formal status granted to refugees upon arrival, but also on ensuring the latter receive adequate levels of support and effective access to rights. To that aim, the PSR assigns a key role to sponsoring groups to provide psychosocial support to refugees and help them navigating social services (such as healthcare or education).

A 2021 audit carried out by the Government of Canada pointed to a set of integrity concerns in the implementation of the PSR program, including cases of inadequate support by some sponsor groups (Government of Canada, 2021c). This evidence led practitioners involved in the program to underline the need for reinforce the existing monitoring framework to ensure better oversight of all the actors involved in the sponsoring process. It also pointed to the importance that state authorities put in place effective 'safety valves' in cases of 'sponsorship breakdowns' or when evidence exists that sponsors do not provide adequate levels of support to refugees (Cortinovis & Fallone, 2023).

Permanent residence status granted to sponsored refugees upon their arrival in Canada includes the right to work and move freely anywhere in the country. Formal access to the right to work alone, however, is not a guarantee that refugees arriving through the PSR program have access to decent work, understood in relation to the freedom, effective accessibility, and quality of work (Costello & O'Cinnéide, 2021). The PSR program relies strongly on the initiative of sponsors to support refugees in

[10] Judges at the Federal Court do not have the authority to overturn a decision on the merits; they can only quash the decision on a limited number of grounds, including breach of procedural fairness, and send the case back to the visa officer for redetermination.

accessing employment opportunities. It is however important to bear in mind that not all private sponsors may be able to provide adequate support and correct information to newcomers concerning their employment prospects, nor may they be all equally willing to duly consider the prerogatives of refugees to autonomously make employment decisions. This circumstance reinforces the call made by several stakeholders interviewed for this research to strengthen existing state-funded employment programs and establishing more structured connections between sponsor groups and state-funded organisations providing employment-related services (Cortinovis & Fallone, 2023; Allies for Refugee Integration, 2021).

7.4 Economic Mobility Pathways Pilot (EMPP): A Nascent Effort to Expand Refugee Admission Through Labour Migration

Offering an alternative form of complementary pathway, the EMPP enables refugees in third countries to circumvent existing barriers preventing them from accessing Canada's permanent resident labour migration programs (Cortinovis & Fallone, 2023; Government of Canada, 2021b; IRCC-UNHCR, 2019).[11]

The EMPP endeavours to bridge gaps between Canada's refugee and labour migration systems, which previously did not interact with each other. It begins by identifying local employers in participating regions of Canada who have specific labour market needs. It then relies on NGO partners—primarily Talent Beyond Boundaries and RefugePoint—to identify refugees in countries of first asylum with skill profiles that match employers' demonstrated needs (Government of Canada, 2023b). Rather than moving through Canada's resettlement system, the EMPP expands access to existing economic channels to refugees whose skillsets match the needs of local employers. In this way, the EMPP aims at avoiding the administrative hurdles required to create an entirely new migration channel targeted to refugee workers. Upon arrival, the vast majority of EMPP participants already have a job contract and share the same support and resources available to other categories of economic migrants with permanent residence in Canada.

Interviewees emphasised that the EMPP is perceived by involved stakeholders as "employer-focused". The EMPP aims at allowing employers to tap into the largely unexplored professional talent of refugees, by making "refugees talent pool visible to employers in a way it wasn't before" (Cortinovis & Fallone, 2023, p. 48). This approach results in employers viewing the EMPP as both a workforce development project and a humanitarian project. As a result, one interviewee explained that refugees participating in the EMPP "[...] don't go through a full vulnerability

[11] Such barriers may include lost or expired documentation, limited funds, difficulty in obtaining proof of previous professional experience and limited access to consultants or lawyers who may guide potential applicants through the immigration process.

assessment like they would do for resettlement" because the EMPP is understood as 'additional' to pre-existing state-led resettlement mechanisms that prioritise applicants considered to be the most vulnerable.

The reliance on NGO partners for the identification of refugees' skills in order to elicit EMPP participation remains an evolving aspect of the pilot, not least due to the limitations of existing databases gathering skills profiles of refugees as well as the lack of conclusive evidence on the most effective approaches to identify suitable candidates. Despite the demonstrated expertise of the NGO partners supporting the EMPP implementation, one interviewee noted that there were relevant disparities in the capacities and approaches of supporting NGOs in identifying refugee workers in different locations.

Operationally, the first stages of EMPP implementation functioned by connecting refugees with the following pre-existing Canadian permanent labour migration programs: the 'Express Entry' program,[12] the Atlantic Immigration Program (AIP),[13] the recently created Rural and Northern Immigration Pilot (RNIP),[14] and the numerous Provincial Nominee Programs (PNP).[15] Through the evolution over its initial years of implementation, the EMPP successfully engendered the adaptation of some of the eligibility requirements of these constituent pathways that specifically precluded refugees' access in an effort by the Canadian government to 'level the playing field' (Elgersma et al., 2020).

Exemplifying those changes, the requirement that applicants provide proof of refugee status recognition from UNHCR or a refugee-hosting state was adapted to allow applicants still awaiting formal refugee status decisions to apply to the EMPP with a "person of concern letter" issued by the UNHCR for the purposes of EMPP (Government of Canada, 2023e). The latter requirement was further eased through the identification of 'trusted partner' organisations' which are endowed with the power to directly refer and support EMPP candidates, along the lines of the 'Sponsorship Agreement Holder' model of the PSR program (Government of Canada, 2022b, 2024e).

Further exemptions were granted by removing the requirement for EMPP applicants to possess a valid travel document and by granting applicants access to loans

[12] Express Entry is an electronic system to manage the intake of applications for permanent residence lodged under the following Canadian economic immigration programs: Federal Skilled Worker Program; Federal Skilled Trades Class; Canadian Experience Class; Express Entry for the Provincial Nominee Program (Government of Canada, 2023c).

[13] The AIP is a special pathway tailored to encourage skilled and semi-skilled migration to the four Atlantic Canadian provinces of Newfoundland and Labrador, Prince Edward Island, Nova Scotia, and New Brunswick (Government of Canada, 2023a).

[14] The RNIP targets smaller and more remote communities facing labour shortages within 11 communities in Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. The RNIP aims at addressing labour shortages in key sectors, such as health care, hospitality, and food services, retail, manufacturing and transportation (Government of Canada, 2023f).

[15] PNP is a broad term for the skilled labour migration pathways adopted in eleven of Canada's provinces and territories, with Québec having a separate skilled migration pathway, and Nunavut lacking such a program (Government of Canada, 2023d).

already available to other categories of resettled refugees, as well as by removing the fees requested to EMPP participants when applying for permanent residence status and streamlining requirements for facilitating the admission of their family members (IRCC, 2020; Government of Canada, 2021a). Additional fee waivers introduced in 2023 removed costs associated with the application and collection of biometric data for both principal applicants and their dependents, as well as granting access to the Interim Federal Healthy Program that covers the cost of requisite medical exams (Government of Canada, 2024f, j).

The process of adaptation of the initial EMPP model, which was based on a linkage with pre-existing labour migration programs, culminated with the introduction of a separate Federal EMPP pathway in June 2023, designed to serve as a standalone policy instrument to complement the three regional EMPP pathways (the AIP, RNIP, and PNP) (Government of Canada, 2024g). The Federal EMPP comprises two streams: the Federal Job Offer Stream (JOS), which allows applicants to apply for admission to the EMPP independent of the specific requirements associated with the regional EMPP pathways; and the Federal No Job Offer Stream (NJOS), which expanded the pathway's accessibility by enabling up to 150 refugee workers who had not yet received a job offer to apply for admission each year (Government of Canada, 2024g).

The expansion of the EMPP's scope to facilitate the admission of refugees who do not have a job offer in hand marks a noteworthy milestone in expanding the scope of potential EMPP applicants. This change is expected to benefit refugees living outside of the limited geographic regions in which the EMPP's NGO partners carry out their job matching programs, enabling a broader range of refugees to apply for admission through the EMPP based on their qualifications and then receive job matching support when searching for a job upon arrival.

However, the specific requirements dictating who can access the NJOS indicates a continued preference towards specific profiles of refugee workers that may not encompass the majority of the global displaced population. Eligibility requirements between the JOS and NJOS include a number of key differences. In particular, individuals without job offers must work in highly skilled sectors that predominantly require a college diploma,[16] must score appreciably higher on English or French language exams (Wagner, 2023),[17] and must demonstrate work experience within a stricter timeframe than applicants who already have a job offer.[18] Finally, while

[16] Individuals whose professions fall under Canada's Training, Education, Experience and Responsibilities (TEER) categories 4 and 5 cannot apply for the NJOS (Government of Canada, 2024g).

[17] Individuals with a job offer must demonstrate a Canadian Language Benchmark (CLB)/Niveaux de Compétence Linguistique Canadiens (NCLC) score of 4 or 5, depending on the TEER category of their work. Individuals without a job offer must demonstrate a CLB/NCLC score of 7 (Government of Canada, 2024i). This higher requirement for applicants without job offers compounds with the challenges posed by the financial burden and inaccessible locations associated with completing such language exams for all EMPP candidates.

[18] Individuals with a job offer must demonstrate at least 1 year (1560 h) of work experience without any limitation on when this work experience was accrued, a limitation that is similarly waived for

there are not settlement funds requirements for the applicants with job offers in hand, those without job offers must demonstrate that they possess sufficient personal funds to establish themselves in Canada.[19]

In a context marked by the lack of a clearly defined commitment by Canadian authorities to ensure additionality between admissions through complementary pathways and state-led resettlement,[20] the potential future expansion of the EMPP may further contribute to shift Canada's overall perspective on which refugees to prioritise for admission, and lead to further delegation of responsibility for selecting and supporting beneficiaries to private actors (employers and contracted third-party recruitment organisations) (Cortinovis & Fallone, 2023; Labman & Zell, 2021).[21] In addition, selectively prioritizing the admission of highly skilled refugees risk exacerbating the structural disadvantages faced by refugees with lower skill levels, if suitable channels of admissions targeting those groups as well are not established (Smith & Wagner, 2021; Wagner, 2023). These structural obstacles based on skill level compound for refugees without socio-economic resources, given that within the Federal EMPP streams, proof of settlement funds is only required for applicants without a job offer. In contrast, no such settlement fund requirement exists for Federal EMPP applicants with job offers, and loans are extended to AIP and RNIP applicants to meet these pathways' settlement fund requirements (Government of Canada, 2024g, h). Likewise, applicants to the AIP, and RNIP, and to the Federal JOS are not required to demonstrate an Educational Credential Assessment issued within 5 years of application, which arbitrarily restricts access to the Federal Express Entry and NJOS pathways (Government of Canada, 2024b; Wagner, 2023).

While EMMP-linked labour admission programs present nuanced eligibility requirements, they all share preferential access to individuals with specific skill profiles and relatively inflexible criteria in relation to occupational categories outside of their remit. Interviewees pointed out that "there are more than 80 immigration programs in Canada, but out of these only the minority focus on lower human capital opportunities," such as some seasonal tourism labour migration programs.[22] This skill-based bifurcation is mirrored by the more restrictive eligibility requirements of permanent economic migration pathways upon which the EMPP relies,

AIP and RNIP applicants. Individuals without a job offer must demonstrate 1 year (1560 h) of work experience within the 3 years before they apply for the EMPP, a requirement that may be complicated by situations of protracted displacement (Government of Canada, 2024g).

[19] These settlement funds must constitute 50% of the low-income threshold for urban areas with a population over half a million people, commensurate to the number of dependent family members in the applicant's household, regardless if these family members are also resettling to Canada (Government of Canada, 2024h; Statistics Canada, 2023).

[20] See Sect. 7.3 above.

[21] While the EMPP provides accepted applicants with access to pre-departure services provided by the International Organization for Migration (IOM) and by Immigration, Refugees and Citizenship Canada (IRCC), the level of post-arrival support for EMPP largely depend on individuals' employers and local civil society organisations (Government of Canada, 2024a).

[22] Interviewees identified three main professional categories of EMPP participants to date: IT professionals, healthcare workers, and skilled tradespeople.

compared to those characterising temporary migration pathways (Lu & Hou, 2019; Lu, 2020; OECD, 2019).[23] This same pattern presents itself in the restriction of skill levels eligible to apply for the Federal EMPP pathway without a job offer in hand, with jobs facing critical shortages in Canada, such as in-home caregivers, precluded from applying.[24]

The EMPP's predominant focus on permanent pathways precludes the eligibility of a wide range of potential beneficiaries whose profiles would be competitive for employers, were entry through temporary permits allowed (Chen et al., 2021; Lu, 2020).[25] Ensuring access to the EMPP through temporary work permits would require granting those individuals a set of administrative waivers to existing requirements for obtaining temporary residence, most notably and exemption from the requirement to demonstrate an 'intent to leave', which would clearly be an unreasonable condition to apply in the case of refugees (Chen et al., 2021).[26] In addition, in order to provide a clear path to a durable solution, admission of refugees with temporary labour permits would need to be accompanied by a well-defined transition plan to permanent residence, possibly by means of an accelerated process (Cortinovis & Fallone, 2023; ASILE Regional Workshop, 2022).

Another option worth exploring to expand EMPP access to refugees with different skills profiles would be to expand permanent residence options for professional profiles not adequately covered by existing permanent residence streams.[27] As proposed by experts, a new permanent pathway specifically designed for agricultural workers could build on the EMPP model to allow for the entry and successful settlement of clusters of refugees as agricultural workers in rural areas (Alboim & Cohl, 2020).

The changes in the modalities and requirements for obtaining access to the EMPP illustrated in this section demonstrate promising results and could lead to a

[23] The role of temporary work permits in Canada's labour market grew greatly over the last two decades, especially in the areas of technicians and skilled trades workers. In 2017, 550,000 foreign workers were admitted to Canada, 214,000 of whom entered Canada on temporary pathways. This annual number increased in 2019 to 470,000 individuals receiving a temporary work permit to enter the country.

[24] Home care providers are classed as Training, Education, Experience and Responsibilities (TEER) category 4, and therefore refugee home care providers do not qualify for the Federal EMPP NJOS pathway (Government of Canada, 2024c). The Canadian Centre for Caregiving Excellence (2022) reports that Canada faces a 25% shortage in care providers, and heavily relies on migrant care workers.

[25] Among foreign workers who came to Canada through temporary migration pathways in 2017, 33% worked in combined crop production and animal production, and a further 10% worked in the domestic sector, both skill areas that permanent migration pathways struggle to adequately accommodate.

[26] To apply for a temporary residence visa foreign nationals must demonstrate their intent to leave Canada by the end of their authorized stay.

[27] This would include professional profiles falling under the categories of Canada's Training, Education, Experience and Responsibilities (TEER) categories 4 and 5 (formerly Canada's National Occupational Classification (NOC) categories C and D) (Government of Canada, 2021d, 2024c).

significant expansion in the scope of eligible participants. However, the potential for the EMPP to operate on a larger scale in the future will depends on Canadian authorities' readiness to explore additional reform options (Wagner, 2023). The creation of the Federal EMPP NJOS pathway makes progress in this direction, yet the low number of applicants allowed entry per year without a job offer curtails the potential of this pathway to significantly expand its scale. As highlighted by both interviewed stakeholders and experts, without a continued and intentional commitment to expand access to refugee populations still facing systemic barriers to accession, the risk is that the EMPP and other similar labour-based complementary pathways will function as a preferential tool of admission reserved for the 'best and the brightest'.

7.5 Criteria for Complementary Pathways to Serve as (Additional) Durable Solutions for Refugees

The analysis of the PSR program and the EMPP carried out in this chapter highlighted a set of challenges linked to the design and implementation of those complementary pathways. These issues are grounded in contrasting views among key policy actors on the meaning of additionality and in different understandings of the responsibilities of both public authorities and private actors for delivering support to admitted refugees.

In parallel, interviews with policy makers, stakeholders and refugees conducted in the framework of this research allowed the identification of normative and policy-related criteria against which to assess the expansion of these instruments as well as similar initiatives for the admission of refugees currently being developed in other contexts.

One of the key insights emerging from the discussion of Canadian instruments is the need to move beyond a narrow conceptualisation of the roles of the state, civil society and private citizens (such as sponsor groups or employers) that focuses merely on the number of admissions facilitated by each actor. Instead, achieving to the full the promise of 'complementarity' implies seeking an optimal division of responsibilities between public and private actors that guarantees the highest quality of protection for the largest number of people in need. It also implies that complementary pathways should be designed since their inception as envisaging a clear path towards a durable solution for refugees admitted through those channels.

A protection and solution-oriented approach to complementary pathways requires to depart from traditional understandings of the latter as purely discretionary practices on the side of states (Thériault, 2021). In both Canada and Europe, such a discretionary nature of refugee admission practices is often contrasted with the legal obligations undertaken by states towards refugees arriving spontaneously at their territories, which are anchored in the respect of the legally-binding principle of *non-refoulement*. In the Canadian context, this distinction is reflected in the

asymmetry between Canada's inland asylum determination system, which is based on a quasi-judicial framework, and the overseas admission system which operates as an administrative process (Labman, 2019).[28]

If complementary pathways are to become an established (additional) durable solution for refugees, questions on how to incorporate an adequate level of procedural fairness and access to justice within the design of those mechanisms are no longer avoidable. Evidence submitted by Canadian refugee advocates and NGOs over the years underlined how lengthy processing times, excessive discretion in decision-making by overseas visa offices, and lack of effective remedies in case of a negative decision enact damaging consequences for refugee protection needs (Thériault, 2021). The analysis of the Canadian case studies points to the need to gradually strengthen the level of procedural guarantees and access to justice of overseas admission procedures, using the key safeguards already incorporated into the processing of Canadian in-land asylum claims as a 'benchmark' (Thériault, 2021; Macklin, 2009).

Beyond procedural aspects, our analysis shows how the issue of equitable access cannot be comprehensively addressed without reflecting on the selection principles underpinning the two selected instruments. The envisaged expansion of the PSR and EMPP programs in Canada, and of similar complementary pathways globally, calls for widening the scope of potential beneficiaries and reducing differences in access that may result from the specificities of such instruments' selection logic.

Achieving the goal of equitably expanding global refugee resettlement through the use of complementary pathways requires, as a first step, 'unpacking' the relation between complementary pathways and other components of the immigration system, as shown by the identified overlap between private sponsorship and family reunification in the Canadian context. In this regard, some Canadian stakeholders recommended the establishment of a separate category for refugee family-related sponsorships—possibly grounded on an extended definition of family than the one established under Canadian law which only includes immediate family members (i.e. spouses and dependent children).[29] This move could contribute to reduce pressures on sponsor organisations to support extended family members of already admitted refugees, in this way opening up spaces for sponsoring refugees with specific vulnerabilities or protection needs (Labman, 2019; Ahmad Ali, 2021; Alboim & Cohl, 2022).

Finally, a focus on legal entitlements should be accompanied by efforts to establish the conditions for individuals to effectively enjoy the rights granted to them by law, a key requirement for complementary pathways to qualify as 'additional' durable solutions. The experience of the PSR program and the EMPP underlines the potential added value of moving towards a better integrated model of settlement

[28] Jurisprudence of the Federal Court of Canada confirmed the dichotomy between the two systems, positing that refugees lodging an application for resettlement at Canada's overseas offices are entitled to a lower level of procedural rights than refugee claimants within the country.

[29] As an example, extended family reunification opportunities may cover siblings, adult children, nephews and nieces of refugees previously selected for resettlement to Canada.

support that would allow complementing the benefits resulting from the personalised support provided by sponsors or other private actors (such as employers or civil society organisations) with the expertise and knowledge of professional settlement workers. Preventing potential cases of refugees' over-reliance on sponsors and employers while fostering their agency and ability to take autonomous decisions, e.g. regarding their educational or professional life, constitutes a key requirement for complementary pathways to qualify as 'sustainable solutions' and ensure balanced sharing of responsibility between public and private actors.

This chapter provided a discussion of the key legal and policy challenges that characterised the design and implementation of the PSR program and EMPP. The analysis was grounded in the identification of a set of criteria against which to assess those two Canadian complementary pathways, and potentially other similar complementary pathways developed elsewhere. Those criteria centred on the need to ensure that complementary pathways align with international protection and human rights standards, are 'additional' to resettlement and provide a clear path towards a durable solution for refugees.

Our analysis of the Canadian cases revealed how scaling up complementary pathways requires the readiness of relevant national authorities, civil society and private actors to explore creative policy approaches that leverage on refugee agency and autonomy, while preserving the protection-oriented nature of those programmes. The analysis pointed to the importance of a sustained and intentional commitment from key stakeholders to progressively address barriers (of a policy, administrative or logistical nature) that still prevent a large component of the refugee population from accessing those programmes. The criteria identified herein seek to posit parameters by which complementary pathways both in Canada and in other nations seeking to implement similar policy instruments can remove such barriers to access. The creation of new complementary pathways alone cannot suffice; instead, efforts must continue to maximize the potential of existing pathways to provide refugees access to durable solutions in an equitable way.

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Chapter 8
Challenging the Notion of *Temporary Protection* as a Viable Complementary Pathway to Protection: The Case of the Special Zimbabwean Dispensation

Fatima Khan

8.1 Introduction

This chapter will consider whether the temporary protection granted to Zimbabweans by South Africa in 2010 can be considered a complementary pathway to protection as envisaged in the Global Compact on Refugees (GCR) or whether it was in fact intended to be a form of migration management. It will do so by studying the position of over 178,000 holders of this temporary protection permit, the Zimbabwean Exemption Permits (ZEPs) (as the third and final version came to be known), as the withdrawal of this permit is imminent. These temporary permits were issued in 2010, renewed three times since, were due to expire on 31 December 2021 and were given a grace period and a final date for expiration of 30 June 2023 with no possibility of renewal.

Since September 2010, qualifying Zimbabwean nationals have been permitted by the Minister of Home Affairs to live, work and study in South Africa. In reliance on these permits, ZEP holders have established lives, families, and careers. All of which have now been placed in jeopardy because of the final expiration date, placing the holders in a precarious position. This chapter also explores the South African government's logic in the issuance and renewals of these permits with the view to understand whether it was intended to be a form of migration management or a humanitarian act.

This chapter is based on a qualitative research framework as well as a doctrinal review. The qualitative research relied on interviews conducted with refugee community leaders, civil society actors, and international organisations in South Africa, ZEP holders as well as Zimbabwean refugees and Holders of the special dispensation permit. The research, which was completed between 2021 and 2022, comprised

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two sets of interviews, one before the announcement of the termination of the special dispensation programme and the second round after the announcement of its termination by the Minister of Home Affairs in December 2021.[1]

8.2 A Brief Synopsis of the Zimbabwean Dispensation Programme

In or around 2005, as neighbouring Zimbabwe experienced a political and economic crisis, the kind of migration and asylum shifted to that of forced and permanent in nature (Crush et al., 2015) and many Zimbabweans (approximately 1.5 million) entered South Africa searching for more permanent options of stay. This was met with largescale deportations that not only outraged human rights activists (Human Rights Watch, 2009) but was a significant cost to South Africa both financially and reputationally (Gould, 2011). South Africa in turn decided on a special response to the Zimbabwean migrants in South Africa by the introduction of a special dispensation regime for Zimbabweans.

South Africa initially addressed the influx of Zimbabweans into the country by granting 3-month ministerial exemption permits, however several researchers and scholars claimed that South Africa's domestic, political, and economic considerations played an important role in the discontinuation of this 3-month visa that allowed all Zimbabweans who came to South Africa the right to work. To these scholars and researchers, it was apparent that the policy of allowing Zimbabweans free entry and the right to work (even though it was for short periods) without any limitations was unsustainable (Polzer, 2008). On the 2nd of September 2010, the South African government announced the Dispensation of Zimbabweans Project (ZDP) permit for a four-year period. This permit was extended for a further 4 years in August 2014, it was then renamed the Zimbabwean Special Permit (ZSP), and thereafter, the final extension, referred to as the Zimbabwean Exemption Permit (ZEP), was granted for another 3 years ending December 2021. A grace period for holders to seek alternate status in South Africa has been granted, initially until December 2022 and further extended until June 2023 because of litigation (see below) initiated on behalf of the holders of this permit. The litigation further shifted the final expiration rate and to date (May 2024) no Zimbabwean holder of such permit has been forcefully removed from South Africa.

According to the government, at the time, the objectives of the special dispensation permit were fourfold; to regularise the stay in South Africa of large numbers of undocumented Zimbabweans, to reduce pressure on the asylum and refugee system, to provide an amnesty to Zimbabweans who had obtained fraudulent South African identity documents and, to curb the deportation of illegal Zimbabwean migrants

[1] This included a total of 33 interviews (25 Zimbabwean refugees and asylum seekers and 8 Zimbabwean Exemption Permit (ZEP) holders, as well as an interview group of 5 ZEP holders.

(South African Government, 2014). The South African government saw the ZDP as a temporary solution to growing incidents of economic migrancy and, more importantly, an experimental model for the broader implementation of strategies used in similar cases from other countries. (Polzer, 2008; Crush et al., 2015). In the short term, the ZDP offered an alternative to a clogged asylum system, mainly because of reduced new asylum applications from Zimbabweans. Thus, the ZDP was consistent with South Africa's position that economic factors were the reason for the mass Zimbabwean migration to South Africa.

Zimbabwean migrants employed, attending school or running businesses in South Africa were given permits to do so. This extended to migrants who had already acquired fraudulent documentation and asylum seekers willing to give up their asylum claims. To qualify, applicants had to be domiciled in South Africa and be able to provide a host of documents: a valid Zimbabwean passport; proof of employment (usually an affidavit from an employer); proof of registration with an academic institution; or proof of entrepreneurship. Of the 294,511 applications, 242,731 were successful and 51,780 were either rejected or processed late. Statistics also show that approximately 13,000 fraudulent South African identity documents were surrendered voluntarily, while 49,255 individuals gave up their asylum claims (Parliamentary Monitoring Group, 2014). The process was a complex and haphazard one, in which migrants were made to spend days and nights waiting in long queues to have their documentation processed (Child & Ndaba, 2017).

The special dispensation permits however successfully relabelled a large number of asylum seekers as ZDP permit holders and placed them within the immigration system. It also managed to contain more than a million Zimbabwean migrants by either granting them temporary protection or by creating a legitimate avenue for their deportation if they remain undocumented. In the opinion of the South African government, because of the generous ZDP permit, they could not be accused by human rights activists of denying assistance to a neighbouring country or for failing to protect Zimbabweans.

8.3 Was the New Dispensation a Humanitarian Act or an Easy Way to Manage Migration?

With the increase in migration from Zimbabwe in the early '90s, coinciding with the economic decline of Zimbabwe, South Africa began to see the first of many inflated claims by the South African government of Zimbabweans "swarming" the country (Thebe, 2017). In 1996, South Africa introduced stricter visa requirements for Zimbabweans, such as the discontinuation of visas on arrival, which is contrasted to the more relaxed visa requirements for other Southern African Development Community (SADC) states who benefit from a 30-day visa on arrival. This was done to reduce the number of Zimbabweans crossing into South Africa. The policy reduced legal crossing while pushing migrants and asylum seekers further into irregular channels (Crush et al., 2015).

Between 2000 and 2004 it was estimated that around 300,000 people were victims of human rights violations in Zimbabwe, making politically motivated reasons for fleeing a major driver for migration and asylum for the first time (Crush et al., 2015). From 2005 onwards, which coincided with the economic collapse of Zimbabwe and the political crisis in the country, migration and asylum were characterised as *permanent*, with people seeking to start a new life in South Africa, as opposed to temporary economic relief (Crush et al., 2015). The reasons for the forced displacement in Zimbabwe were complex and there is no clear delineation of the types of migrants entering South Africa. Despite this, Zimbabwe was deemed the classic example of "mixed migration" by UNHCR and the South African state. However, it was a notion that oversimplified the complexities of protection and forced displacement. The use of this term in refugee law circles is used to express difficulty in differentiating between refugees and economic migrants in one migration stream (Crush et al., 2015; Polzer, 2008).

Many scholars and experts have rejected this mixed migrant classification of Zimbabweans and highlighted the complex nature of Zimbabwean migration during this time (Polzer, 2008; Crush et al., 2014). Furthermore, the term in South Africa should be used with caution as Crush and Chikanda (2014) noted that it is used by the state as a way of justification for not fulfilling duties to protect refugees and asylum seekers within streams of economic migrants. South Africa's response to migration from 2005 onwards was one of intensified efforts to arrest and deport undocumented Zimbabweans back to Zimbabwe. In 2007, around 200,000 Zimbabweans were deported. This was about two-thirds of all deportations for this year. The policy resulted in Zimbabweans dispersing across South Africa or turning to the asylum system to regularise their stay or seek protection (Nyakabawu, 2021).

It was only in 2009 when the South African government realised that the approach of deportation was not working that it decided on a new response. Granting a temporary right to stay to such a large number of migrants was considered innovative at the time. It was an alternate approach—and perhaps easier for the government to coordinate than the complex and multi-layered asylum system which Zimbabweans were turning to.

8.4 Did the ZDP Provide a Complementary Pathway to Protection?

The South African government saw the dispensation as a humanitarian act, a helping hand to a neighbouring country, however, it was not willing to describe the dispensation within the protection framework. The dispensation at first glance, from both context and language, appears to fall within the complementary pathway framework as a humanitarian/visa corridor, thus seemingly acting as a complementary pathway. However, ZEP holders rejected the classification of the dispensation as a complementary pathway to *protection*, stating that it was a complementary

pathway to the *regularisation* of Zimbabweans in South Africa. The interviewees highlighted the fact that the asylum system had come under pressure because it became the unofficial way for regularisation of stay: “they needed to regularise movement that was not going to stop…the government needed to manage Zimbabweans” (Khan et al., 2023). The response of the interviewees reveals a tension: does the dispensation qualify as a complementary pathway to protection (possibly a humanitarian corridor) or was the dispensation simply a pathway introduced by the South African Government to get large numbers of migrants out of irregular status?

The research also reflects that when ZEP permit holders were asked about the dispensation and its relationship to complementary pathways, the greatest criticism was the lack of durable solutions or protection overtones, leaving Zimbabweans on the temporary dispensation permit with an uncertain future and no option to naturalise. This relates to the core objective of providing a durable solution. Moyo (2020) argues that the humanitarian logic hid the draconian intentions of the management of unwanted migrants by placing conditions on the permit that exclude the renewal and applications for permanent residence. Without durable solutions for persons on the dispensations, it provided them with a patchwork of rights and belonging (Carciotto, 2018). Carciotto argues there is a moral argument to be made for Zimbabweans in that, regardless of a person’s immigration status, a migrant who has spent numerous years in a society should be included in the state. While the permit did allow for a person to sustain him- or herself through the right to work, it masked a failure to address the indefinite precarious situation in which these Zimbabweans found themselves. With the dispensation coming to an end, Zimbabweans who have lived and worked in South Africa, and built lives in the country for over 10 years, will have little option but to leave or turn to the asylum system once again to regularise their stay.

The division of refugee law and immigration law into two separate processes risks solidifying a distinction between the categories of ‘refugee’ and ‘migrant’ that has important consequences for refugee mobility and rights. This method of separating economic migrants from refugees has contributed to the crisis and the failure of the Department of Home Affairs to meet its mandate to protect refugees. Furthermore, the relabelling of refugees as ordinary migrants also speaks to the core objective of additionality when devising a complementary pathway. The additionality objective as described by Tamara Woods (2020) provides that the pathway must complement or supplement the refugee system, and not hamper access to their recognition. By framing the dispensation as a solution to the economic migrants flooding the asylum system, it cannot be said to be additional.

Our research and the literature quoted above reveal that the temporary pathway did not provide durable solutions, accessibility or additionality making it both an exclusive and exclusionary mobility pathway. Despite this, the circumstances in which the dispensation arose meant that it inadvertently operated as a pathway to protection. Zimbabwean refugees applied for the permit and gave up their claims for asylum, but this does not mean that the protection was either adequate or complementary to the asylum system in South Africa. It thus cannot be said to meet the

standards of a complementary pathway to refugee protection in South Africa. Rather, it met the bare minimum for protection—that is, regularisation.

Even though the main aim of the interviews conducted for the purposes of this research was to consider whether the dispensation can be considered a complementary pathway, it also revealed findings that spoke to issues of contained mobility, promotion of refugee self-reliance and access to rights. Overall, the research revealed the need for a comprehensive approach to migration. Participants, when interviewed, argued that a complementary pathway should avoid the strict delineation between economic migrants and refugees. The suggestion appears to link two issues. Firstly, if the dispensation was not classified as purely a solution to temporary economic migrants, it would have been able to integrate a protection mechanism for the complex nature of the migration and asylum streams from Zimbabwe. Secondly, abandoning strict categorisation as "either-or" (i.e., economic or refugee) within the asylum system may assist in understanding the complexities of migration and asylum streams (Khan et al., 2023).

Other suggestions by interviewees leaned towards a more pragmatic response, calling for the government to make a realistic choice that provides a way to manage people while acknowledging the natural movement of people. Interviewees mentioned the need for there to be an increase in categories of work permits in South Africa, like the Zimbabwean dispensation. A suggestion was also made for the introduction of an SADC visa. South Africa, as a member of SADC, has a duty to promote economic and social integration and encourage free movement of labour, goods, services, and people (Khan et al., 2023). An improved response should be motivated by South Africa's responsibility as a member of the SADC. SADC has proposed the Protocol on Free Movement of Persons, which would allow for the free movement of persons to work within the region under the protection of SADC. The proposal was strongly opposed by South Africa. The African Union has also proposed the Free Movement Protocol. South Africa has signed the protocol subject to very restrictive reservations—for example, the rejection of the African Union Passport and the retention of member states to control admissibility into the state. In essence, South Africa wishes to retain control of its borders, ironically while it is not in control of them.

Interviewees also saw the need for the utilisation of the dispensations to relieve the pressures on the asylum system. One participant noted the need for a more efficient and quicker way to identify individuals in need of protection and divert those who are not refugees away from the asylum system. While the authors agree the dispensation should be extended, or a new dispensation be created, the dispensation should meet the objective of additionality, as proposed by Wood (2020). The complementary pathway should be careful not to relabel migrants as purely economic migrants. Such rhetoric will undermine rather than support persons who are seeking protection. Their biggest critique of the dispensation as a complementary pathway however remains its lack of durable solutions. The implication of this is that dispensations would benefit from more permanent solutions, especially in situations where the beneficiaries of the permit are from a country facing a protracted humanitarian crisis. This could be solved by allowing for durable solutions, such as naturalisation after a 5- to 10-year period.

8.5 Impact of the Imminent Withdrawal of the Permits on the Lives of ZEP Holders

It is evident from the impact on the lives of Zimbabwean temporary permit holders that it was not a complementary pathway to protection. With the withdrawal of the permits imminent, Zimbabweans who participated in the ASILE meetings identified three options: return to Zimbabwe, remain undocumented in South Africa, or apply for asylum.

A suspicion that was commonly expressed was that if deportation is going to be a consequence of the withdrawal of the permit, there would be a spike in bribery of law enforcement. Further, it was added that this will cost affected dispensation holders a great deal of money. Throughout the interview process, various interviewees expressed the potential for illicit and or illegal activity that will take place. A further related consequence of the dispensation ending is dispensation holders will turn to fraudulent documents or illegal means for obtaining documents. The interviewees expressed that returning to Zimbabwe is such an undesirable and grave reality, that they feel many people would sooner turn to illegal means of securing and regularising their stay in South Africa.

Some interviewees honestly expressed that they were not sure or could not know what the potential consequences would be following the non-renewal of the dispensation. Interviewees shared that at present they do not know what will happen to them once the dispensation comes to an end. The sentiment expressed is indicative of the precarious nature of the circumstances before them. There is a measured level of uncertainty regarding the dispensation, with little information being shared with the public and dispensation holders that indicates what will happen when the dispensation comes to an end. In turn, dispensation holders cannot readily determine or predict what might happen to them once the dispensation ceases.

For some interviewees, the obvious consequence of the discontinuation of the dispensation is that they will have to voluntarily return to Zimbabwe. This is motivated by various factors including the desire to remain law-abiding and to avoid the outbreak of violence. This is a considerable number of interviewees from the sample size who have shared in this sentiment, possibly highlighting the general response that Zimbabweans have towards the circumstances before them. An uneasy acceptance and capitulation to circumstances, where the return to Zimbabwe serves as the path of least resistance.

In contrast to the above, interviewees shared that they would attempt to resettle elsewhere, neither in South Africa nor in Zimbabwe, but rather in neighbouring states or the Global North. This is spurred on by the reality that if they are unwanted in South Africa, and there is no intention to return to Zimbabwe, then they will find home and protection elsewhere. Interviewees also presented an outcome where Zimbabweans will return to Zimbabwe and once again will find themselves needing to flee the political turmoil prompting their return to South Africa, potentially under a fresh asylum application.

While temporary protection does have some benefits, the imminent withdrawal of the permits shows how South Africa's categorisation of the ZDP as temporary protection is irrational and discriminatory. South Africa failed to rationally consider what would happen at the expiration of the ZDP. Specifically, whether those with refugee claims will be able to apply for refugee status, whether they will be deported or whether their twelve-year stay in the country will be taken into account when they are processed for refugee status. Consideration was also not given to the possibility of a protracted refugee situation as the temporary discretionary permit was not geared towards providing protection from persecution.

The categorisation is also discriminatory due to its consequences on naturalisation. The asylum system creates a pathway to naturalisation as, at the time, refugees who had been continuously residing in South Africa for 5 years would have been granted permanent residence. Remaining in the asylum system, therefore, would have made these applicants eligible for permanent residence. Permanent residence could also be granted to any migrant with a five-year continuous work permit (Immigration Act 13 of 2002). However, Zimbabweans who had been employed, on a continuous basis, for more than 10 years and who had the discretionary permit were not allowed to apply for permanent residence. Further, the temporary nature of the ZDP's protection has placed Zimbabweans in a place of precarity.

8.6 Precarity and Humanitarian Logic

The theme of precarity and/or hyper-precarity emerged when the situation of Zimbabweans was investigated through the lens of their legal status in South Africa. Precarity was pronounced in all of the participants experiences whether they had abandoned their asylum claims to become holders of the ZDP permits or whether they used the dispensation to regularise their stay in South Africa. On the other hand, the study has also revealed that the reasoning employed by government to introduce the ZDP (a temporary protection approach) can be likened to the concept of a humanitarian logic (Moyo, 2020).

8.6.1 Precarity

Though the concept of precarity is generally associated with the labour market, Judith Butler's more recent conceptualisation of precariousness has inspired scholars to see precarity beyond conditions of labour and thus "precarity is henceforth interpreted as an existential condition that transcends work life and leads to ontological forms of insecurity and vulnerability" (Ertorer, 2019). Embracing this perspective, feminist scholars, in particular, have defined precarity as increased vulnerability in everyday lives, articulating that the economic and social 'are so interwoven that it is no longer possible to speak just about precarious labour, but

rather precarious life' (Casas-Cortés, 2014). According to this perspective, precarious lives are defined as lives characterised by uncertainty that constrain the full development of the person. Our research reveals that the temporary status granted to Zimbabweans with its promise of pseudo-protection status has several components and characteristics built in that speak to a containment logic which has increased vulnerability of the holders instead of providing the type of protection initially anticipated by the ZDP holders.

The ZDP status is a precarious legal status because of its time-bound nature and because this temporary legal status brings wider precarities in the economic and social spheres of the holders' lives, such as labour conditions, education and other everyday experiences. Though several ZDP holders described feeling empowered at first because of the opportunity of an alternate legal status to remain in South Africa, they described the extension of their legal status three times over an 11-year period and eventually the announcement of its removal as a form of hyper-precarity. Furthermore, because it became evident that the ZDP when compared to the refugee status or even an ordinary work permit in terms of immigration law did not provide for a durable solution that ZDP holders felt misled as it initially appeared to give them a sense of empowerment and stability.

The Zimbabwean permit holders as well as Zimbabwean refugees who chose not to switch to the temporary permit spoke of their experiences using their agency (whether to switch to the ZDP or not) while experiencing the phenomenon. They described the use of their agency in positive and negative ways, with the Zimbabwean migrants attributing meaning to their choices based on their interpretations of the event. In this manner, the interpretation of the experience either made them aware of their ability to exercise their agency or made them feel there was no agency to exercise. Although the context every participant experienced was different, all of them described their interpretation of the event and their own understanding of their ability to enforce their agency. This ability to enforce their agency was not a static experience, as they described both the actions they took in an empowering way and also feelings of powerlessness when faced with the phenomenon.

Some participants in the group and individual interviews described the phenomenon as a chaotic experience at first but empowering and less precarious than refugee or asylum seeker status that required renewal every 2–4 months as opposed to the ZDPs that were issued for a four-year period. All the participants understood the temporary permit to be time-bound and, recognising that a time-bound legal status is always precarious, some participants described the way they used their agency to survive an equally precarious status as unwanted and unwelcome refugees and resisted the switch to a temporary permit.

When the dispensation was extended—three times—increasing the initial period of 4 years to almost 12 years it confused the holders, and it muddled the initial reasoning of government. The extensions amounted to a promise which led to a situation of pseudo-protection, but its final withdrawal and the subsequent legal challenge of the withdrawal (*Consortium for Refugees and Migrant in South Africa & Helen Suzman Foundation v Minister of Home Affairs & Director General of the Department of Home Affairs* (32323/2022)) can only be described as a situation of hyper-precarity.

The vulnerabilities described by the ZDP holders go beyond the context of the labour market and surround their livelihoods with restricted rights and entitlements and financial hardships because there is no access to welfare. The sudden withdrawal after three rounds of extension affected the education rights of holders with schools and universities reluctant to enrol students for half a year. They risk deportation if they are not able to find an alternate way to stay which caused a total disruption of their daily lives. The ZDP has thus become a migration management system that generated an ongoing hyper-precarity track for this group. Similar narratives indicate that Zimbabwean holders of ZEP permits are not treated as agents with recognized rights and status. The inconsistency, irregularity, and reliance on the goodwill of government to renew the permit every 4 years and the current situation where ZDP holders are once again relying on government to lift the bar on renewal. This impermanence has evidently contributed overwhelmingly to their precarious lives.

8.7 Understanding the Government's Logic

8.7.1 Humanitarian Logic

As stated above, government's logic for introducing the ZEP was fourfold and all four of the reasons appear to be pragmatic rather than with a specific humanitarian reference attached to it. Nevertheless, some scholars automatically viewed the roll-out of the ZDP as a humanitarian act because of the instant and dramatic positive impact on a large number of migrants from Zimbabwe at the time. Approximately 250,000 Zimbabweans were granted the right to stay and work in South Africa for a four-year period (Polzer and Betts). Initially, some researchers bought into this approach because in the short term, there appeared to be a solution to the many thousands of irregular migrants—their stay was regularised and it appeared that the government stepped up with a plan. South African researchers, therefore argued that the ZDP was a positive step taken by the South African government to deal with the scale and magnitude of the migration of Zimbabweans to South Africa, and that it was a "rational, coherent and regionally beneficial migration management approach" (Betts, 2013). But very soon researchers realised that it was not. Amit and Kriger (2014) point to the contradictory logic of the ZDP as it was less benign than the South African government claimed. Holders felt misled after the initial euphoria of having their stay regularised, was over. These discretionary permits were, at all times, constant reminders to Zimbabweans of the temporary nature of the special dispensation.

The migration scholar, Innocent Moyo, was the first to invoke the concept of humanitarian logic in his description of the South African government's reasoning for introducing temporary protection for Zimbabweans. He stated that when considering the extent to which immigration laws and policies in South Africa demonstrate a humanitarian reason, it simply hides behind the draconian intentions of immigration legislation in the management of unwanted migrants (Moyo, 2018). According to Moyo (2018):

> [H]umanitarian logic as advanced by Fassin (2012), does not involve an innocent humanitarian act. States or governments use moral or humanitarian sentiments to actually implement policies that widen inequality. In other words, the language of humanitarianism is a smokescreen, which hides the true intentions of the policies, which, in some cases may increase repression or deportation of immigrants. Therefore, based on the sentiments of the Zimbabwean respondents, humanitarian logic is implied by the conditions that were attached to the DZPs and ZSPs, for instance. This means that it was more than just trying to assist the Zimbabweans, 'but also in the final analysis ensure that they return to their country of origin' (Interview with a ZSP holder, Johannesburg, 10 January 2015).

Since then, various scholars have extensively debated the use of the humanitarian logic which hides behind the 'draconian' intentions of immigration legislation (Benhabib, 2020). Accordingly, and viewed through the lens of humanitarian logic, it is evident that the underlying objective of the ZDP was to provide short-term protection, but the ultimate aim was to firstly manage migrants' stay in South Africa and then to ensure that there was a legitimate way that could lead to their exit, that is, leave South Africa and go back to Zimbabwe.

8.7.2 Containment Logic

In addition, it is submitted that the Zimbabwean dispensation project can be understood as a containment-in-disguise logic (Carrera et al., 2023). This is evident from the various comments made by Ministers upon the previous extensions of the ZDPs. In August 2014, the former Minister of Home Affairs, Mr. Gigaba, announced that the ZDP would be replaced by the ZSP. Applications were exclusively opened to ZDP-holders and had to be submitted via Visa Facilitation Services Global ("VFS"), at a fee of between R800 to R1350, together with the required documentation. Eventually, some 197,790 ZSP permits were issued to successful applicants which were valid until 31 December 2017.

Minister Gigaba made a public statement at the time in which he set out in detail the rationale behind his decision not to abruptly terminate the ZDP. Amongst others, he noted that "the approaching expiry date of the DP has caused anxiety for many permit holders, particularly those who are not ready to return to Zimbabwe, as they contemplate their next steps." He further acknowledged that Zimbabwe's recovery would be fraught with challenges. He stated that "we are aware that it will take time for her to fully stabilise." The ZSP was therefore part of South Africa's commitment to Pan-Africanism and its role in supporting "Africa's stability, security, unity and prosperity" (*Helen Suzman Foundation v Minister of Home Affairs & Director General of the Department of Home Affairs* (32323/2022)).

The current Minister's predecessor had noted the positive contribution that Zimbabweans had made to South Africa's economic and social life. In particular, he observed that "Zimbabweans have made notable contributions in our education and health sectors and also in many other sectors". He further acknowledged the need to "continue the productive engagement [with] stakeholder formations during the ZDP process four years ago" and expressed a willingness to "work with new stakeholders that have emerged since".

The ZSP era was followed by the ZEP programme. This was announced in September 2017, by the then Minister of Home Affairs, Ms. Mkhize. This programme was confined to holders of the ZSP who were again required to apply for exemptions through VFS, at a fee of R1090, together with the necessary proof of employment, study, or business The permits so obtained were granted for a further 4 years and were initially due to expire on 31 December 2021. Like her predecessor, Minister Mkhize made a public statement at the time in which she too set out in detail the rationale behind the decision to not terminate the exemption programme, but to create the ZEP instead. She framed the reasons for replacing the ZSP with the ZEP with reference to Oliver Tambo's concerns for "international solidarity, conscious of the political imperative to build peace and friendship in the continent and in the world as a whole."

Similarly, as with her predecessor, Minister Mkhize maintained "that migrants play an important role in respect of economic development and enriching South African social and cultural life". Moreover, she emphasized the importance of special dispensations as part of a well-functioning immigration system that serves South Africa's national security. She noted that "these dispensations have assisted in enhancing national security and the orderly management of migration". These exemption programmes provided Zimbabwean nationals with a streamlined application process to obtain permits, provided that they satisfied the requirements and paid the necessary fees. ZEPs were exclusively made available to those who held the original ZDP in 2009 (*Helen Suzman Foundation v Minister of Home Affairs & Director General of the Department of Home Affairs* (32323/2022)).

The 2017 White Paper on International Migration Policy (White Paper) framed the value of exemption programmes as follows, namely, to provide:

> National security and public safety depend on knowing the identity and civil status of every person within a country. In addition, the presence of communities and individuals who are not known to the state but for whom the state has to provide, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however, improves stability, reduces crime and improves conditions for economic growth for both countries.

Its justification for exemption programmes such as the ZEP—including reasons of national security, resource constraints, the protection of vulnerable groups, and economic growth—remains unchanged and it recognizes the importance of these exemption programmes as they advance national security, prevent corruption, and protect vulnerable migrants from exploitation and harassment.

Assessing the GCR, and its nexus with the Global Compact for Safe, Orderly and Regular Migration (GCM), through the lens of refugee containment literature (Costello, 2019), reminds us of the manner in which migration control practices suppress refugee mobility and bear down, particularly heavily, on refugees and would-be refugees. In Costello's view, "the bifurcation of the refugee law and the migration law into two separate processes risks solidifying a distinction between the categories of 'refugee' and 'migrant' that has important consequences for refugee mobility and rights" (Costello, 2019). In the case of Zimbabwean migrants, South

Africa has successfully and falsely relabelled Zimbabweans in search of international protection (refugees) as migrants and in this way, it has reneged on its human rights and refugee law commitments as it appears that South Africa had other alternatives to the ZDP.

8.8 Conclusion

This study demonstrated that the logic asserted by government as a humanitarian act by implementing a 'temporary protection' regime benefits the state and places the migrant in a precarious situation. The state can avoid their obligations under the international refugee regime and by crafting creative categories other than 'refugee', they avoid the legal obligations that are defined by the protective nature of the Refugee Convention. Hence, the states that had previously ratified the convention and agreed that the rights and protection of asylum seekers would be ensured can deny asylum seekers, deter their integration, provide them with limited protection, and/or facilitate their repatriation.

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Chapter 9
Navigating the Shadows: Syrians under Temporary Protection, Employment, and Hyper-Precarity in Türkiye

İlke Şanlıer

9.1 Introduction

> Every day, I slog through long hours of tough labour under the watchful eyes of both Turkish and Syrian bosses. It just goes to show that exploitation knows no borders. Turkish employers pay me a fraction of what they pay their own workers for the same back-breaking work. And it's no different with Syrian bosses—they exploit us just as much, even though they should understand our struggles. My daily wage barely covers my basic needs, let alone saving for the future or supporting my family back home.

The words above poignantly encapsulate the multifaceted and pervasive hardships that countless Syrian refugees endure daily in Türkiye. The interviewee's testimony highlights not only the gruelling labour conditions but also the deep-seated systemic exploitation that transcends cultural and national boundaries. The disparity in wages between Syrian refugees and their Turkish counterparts, coupled with the exploitation by both Turkish and Syrian employers, underscores the pervasive nature of economic inequality and social injustice. This chapter endeavours to conduct a thorough analysis of the legislative frameworks that regulate the employment of Syrian refugees in Türkiye, delineating the intricate legal landscapes and policies that shape their labour market participation. It aims to elucidate the socio-economic conditions and multifaceted challenges encountered by Syrian refugees within the Turkish labour market, thereby shedding light on the systemic barriers and adversities they face. Moreover, the chapter seeks to scrutinize the ramifications of the 2016 EU- Türkiye Statement, assessing its profound impact on the employment prospects and broader integration of refugees into Türkiye's society. Additionally, the concept of hyper-precarity will be meticulously examined, exploring its

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pertinence and manifestation within the lived experiences of Syrian refugees in Türkiye.

The research was part of the ASILE project and was conducted in two phases, involving a total of 34 participants in Adana, Türkiye. During the first phase, 15 in-depth interviews were conducted from April to July 2021. The participants included representatives from civil society organizations, government authorities, and other local, national, and international stakeholders. Due to Covid-19 restrictions, five interviews were conducted face-to-face, and the remaining ten were conducted online. The discussions predominantly centred around Syrian refugees under temporary protection due to their significant presence and relevance to the EU- Türkiye Statement. The second phase, conducted from March to September 2022, included 19 participants. This phase featured individual interviews with temporary protection status holders, civil society representatives, and a local authority representative, as well as a group interview with female temporary protection status holders in collaboration with a local NGO in Adana. The interviews aimed to explore participants' views on the asylum governance system, focusing on refugees' rights, status, and vulnerabilities.

9.2 Background and Context

Türkiye continues to host the largest number of refugees worldwide, as the number of people forcibly displaced across the world due to the Syrian revolution, conflict, violence and persecution hit record levels. In the last 30 years, the number of refugees and asylum seekers in the country has risen from 1.1 million to almost six million which makes up 7% of the total population.[1] Refugees and asylum seekers account for 65% of the total international migrant community (PMM, 2024).[2] Türkiye currently hosts more than 3.1 million registered Syrian refugees who are under 'temporary protection', along with close to 320,000 asylum seekers from other nationalities. Over 98% of Syrian refugees live across Türkiye in 81 provinces. Although temporary protection regime has closed the path to citizenship, 237,995 Syrian nationals have acquired 'exceptional' Turkish citizenship by November 2023.[3] Exceptional citizenship is a term used to describe a particular type of citizenship status granted to some Syrians in Türkiye. This status was introduced in 2016 and allows certain Syrians who have lived in Türkiye for a certain period of time and meet other eligibility criteria to apply for Turkish citizenship. This citizenship status is considered 'exceptional' because it is granted outside of the normal channels of acquiring Turkish citizenship, which typically requires a longer residency period and other requirements.

[1] https://worldmigrationreport.iom.int/wmr-2020-interactive/

[2] https://www.goc.gov.tr/guncel-veriler

[3] https://t24.com.tr/haber/icisleri-bakani-yerlikaya-turk-vatandasi-olan-suriyeli-sayisinin-238-bine-yaklastigini-acikladi,1137862

Afghans, Iraqis and Iranians are the major groups of asylum seekers after Syrian nationals. Since 2014, the implementation of the Law on Foreigners and International Protection (LFIP) has permitted access to protection, education and health care for persons holding international or temporary protection on equal grounds to Turkish citizens. This has improved access for asylum seekers to education and needed health services and medicines. Despite these positive developments, however, asylum seekers, including Syrians, continue to face challenges in securing the health and educational opportunities they need (Kaya et al., 2021).

9.3 Overview of Working Rights and Conditions of Syrians

The integration of Syrian refugees into Türkiye's labour market has been a topic of significant academic and policy-oriented discourse. This literature reveals a complex interplay of legal frameworks, economic realities, and social dynamics. There are primarily two fundamental approaches: the humanitarian approach and the integration approach.

The humanitarian approach emphasizes the immediate humanitarian needs of refugees, advocating for their right to access basic services such as healthcare, education, and employment. Studies adopting this approach argue that providing work permits and legal employment opportunities is essential to ensuring the dignity and self-sufficiency of refugees (İçduygu & Diker, 2017). The integration approach focuses on the long-term integration of refugees into the host society. It stresses the importance of economic integration through formal employment as a means to social inclusion and stability. Scholars argue that beyond humanitarian assistance, sustainable integration policies are crucial for both refugees and host communities (Kaymaz & Kadkoy, 2016).

Several themes consistently appear in the literature concerning Syrian refugees' labour market integration in Türkiye:

- Legislative Frameworks: The introduction of the Law on Foreigners and International Protection (LFIP) in 2013 and subsequent regulations, including the work permit scheme for temporary protection status holders, represent significant legislative efforts to integrate refugees into the labour market (İçduygu & Diker, 2017).
- Informal Employment: Despite legal provisions, a substantial number of Syrian refugees remain employed in the informal sector. This is due to barriers such as bureaucratic complexities, employer reluctance, and refugees' lack of awareness about their rights. Informal employment often entails lower wages, poor working conditions, and limited job security (İçduygu & Diker, 2017).
- Economic Contribution: Studies highlight the economic contributions of Syrian refugees, particularly in sectors like agriculture, construction, and small-scale entrepreneurship. These contributions are often underreported and overshadowed by negative public perceptions and political discourse (Kaymaz & Kadkoy, 2016).

- Social Tensions: The arrival of Syrian refugees has led to social tensions in certain areas, primarily due to competition for jobs and resources. The perceived and actual economic impact on local labour markets has been a point of contention, with studies showing mixed effects on wages and employment rates for local populations (İçduygu & Diker, 2017).

While there is consensus on many issues, the literature also presents some contradictory findings. Some studies argue that the presence of Syrian refugees has depressed wages and displaced local workers in the informal sector (Tumen, 2016). However, other research suggests that the impact on formal employment is minimal and that refugees may even contribute positively by filling labour shortages in certain industries (Ceritoğlu et al., 2017). There are divergent views on the effectiveness of work permit regulations. Some scholars argue that the regulations have facilitated better integration and protection for refugees (İçduygu & Diker, 2017), while others point out that bureaucratic hurdles and employer resistance have limited their impact (Kaymaz & Kadkoy, 2016).

The legal and economic contexts for Syrian refugees in Türkiye have evolved significantly since the beginning of the Syrian crisis. Türkiye's initial response to the Syrian crisis was characterized by an open-door policy, providing immediate humanitarian assistance without a long-term integration plan. This phase saw the establishment of temporary protection regulations but lacked comprehensive employment policies (İçduygu & Diker, 2017). Over time, there has been a shift towards more structured integration policies. The introduction of work permits for Syrians under temporary protection in 2016 marked a significant step towards formalizing their employment. However, the implementation has faced challenges, including restrictive quotas and provincial limitations (Kaymaz & Kadkoy, 2016). Recent policy discussions emphasize the need for revising the work permit scheme to better align with market dynamics and refugees' needs. Proposals include reducing bureaucratic barriers, offering incentives to employers, and improving vocational training programs to match labour market demands (İçduygu & Diker, 2017).

9.4 Overview of the 2016 EU- Türkiye Statement

A Joint Action Plan was declared in October 2015 and a Statement was signed between the EU and Türkiye on 18 March 2016, following the political crisis and the moral panic that began with the crossing of asylum seekers to Europe using the Mediterranean route in the summer of 2015.[4] The 2016 EU- Türkiye Statement, also known as the EU- Türkiye Deal, was a pivotal arrangement aimed at managing the flow of refugees and migrants into Europe. The Statement included several key provisions according to Baban et al. (2021): (1) All new irregular migrants crossing

[4] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

from Türkiye into Greek islands as of March 20, 2016, were to be returned to Türkiye. In exchange, for every Syrian returned to Türkiye, another Syrian would be resettled from Türkiye to the EU, under a "one-to-one" basis. (2) The EU pledged an initial €3 billion to support Türkiye in managing the refugee crisis, followed by an additional €3 billion contingent on the initial funds being used effectively. (3) The arrangement also included promises of visa liberalization for Turkish citizens and the acceleration of EU accession talks for Türkiye, although these promises have seen limited progress.

In particular, within the scope of the "financial assistance from the EU for Syrian refugees" article of the Statement, with the support of United Nations Agencies, EU member countries' development agencies and international donors, activities of civil society and public institutions are supported. The EU has committed to accelerating the payment of the EUR 3 billion originally allocated under FRiT and activating an additional EUR 3 billion by the end of 2018 when the resources are approaching full use. The EU Facility for Refugees in Turkey (FRIT) has initially financed essential services such as food distribution, temporary shelters, and healthcare facilities for refugees. Later, these supports ensure that the reforms implemented in cooperation with local authorities, chambers of industry and business institutions and which aim to alleviate the pressures of the Syrian crisis on local economies and labour market turn into action. It is aimed at supporting regional development with economic integration. Syrians and simultaneously Turkish citizens, very few other nationalities such as Iraqis over time are supported by strengthening the local economy, such as increasing the participation in the formal job market, supporting Syrian and Turkish companies and enterprises in areas such as entrepreneurship, innovation, production techniques, marketing, business development and business management within the scope of training and consultancy services, creating new rights-based job and livelihood opportunities for all.

However, the effectiveness of these financial aids has been a subject of debate (i.e. Peers & Roman, 2016; Carrera et al., 2017; GAR, 2021; İneli-Ciğer & Ulusoy, 2020; Ovacık, 2021) and labelled as 'experimental' (İçduygu & Millet, 2016). Critics argue that while the funds have provided immediate relief, they have not sufficiently addressed the systemic issues leading to the precarious conditions faced by many asylum seekers. These criticisms include the fact that the Statement becomes a means of ignoring the violations of externalisation policies that emerged by employing the rhetoric of responsibility-sharing. Researchers claim that it also serves as a model for possible instruments to be utilised in countries other than Türkiye to reduce the number of migrants arriving in the EU. The Statement is also criticised for not being accountable because it does not have the legally binding nature of an international agreement. Furthermore, as Ovacık (2020, p. 75) aptly puts it, "the question of whether Türkiye qualifies as a safe third country is not asked with genuine interest in the protection of refugees, but rather unilaterally by EU states seeking to externalise migration control." There is also concern that the aid has not significantly improved long-term employment prospects for refugees due to continued bureaucratic and legal barriers leading to hyper-precarity (Baban et al., 2021).

9.5 Understanding Hyper-Precarity in the Context of Syrian Refugees: The Intersection of Legal, Economic, and Social Insecurities

9.5.1 *Defining the Concept of Hyper-Pracarity*

Hyper-precarity is a theoretical concept used to describe the extreme and multifaceted forms of insecurity experienced by certain groups of workers, particularly those in informal and unstable employment situations. For Syrian refugees in Türkiye, hyper-precarity encapsulates the intersecting vulnerabilities arising from legal, economic, and social conditions that severely limit their access to stable employment, social services, and basic rights.

The concept of precarity broadly refers to conditions of existence without predictability or security, affecting material or psychological welfare. Precarity, defined as casual, flexible, subcontracted, temporary, contingent and part-time work, is produced by the structural characteristics of the neoliberal economic system (Standing, 2011). When precarity is combined with another structural vulnerability, such as legal barriers to the right to work, legal restrictions of movement, and debt bondage, it produces hyper-precariousness which is akin to forced labour.[5] The situation of individuals at the intersection of precarious employment and immigration status can be understood as one of hyper-precarity, hence producing forced labour (Lewis et al., 2015; Lewis & Waite, 2015).

Hyper-precarity extends this notion to capture extreme conditions of insecurity and marginalization, often experienced by refugees and migrants who are systematically excluded from legal protections and social safety nets (Baban et al., 2021, p. 201).

For Syrian refugees in Türkiye, hyper-precarity is manifested through:

- Legal Precarity: The Turkish government's temporary protection regime, introduced in 2014, provides limited legal status without a clear path to permanent residency. This regime restricts refugees' mobility and access to formal employment, embedding their existence in a legal limbo that fosters a continuous state of insecurity. The ambiguous nature of this protection often leads to arbitrary application of rules, further destabilizing refugees' lives (Baban et al., 2021).

[5] According to ILO, the main indicators of forced labour are abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime. As it is indicated in the booklet defining forced labour, "The presence of a single indicator in a given situation may in some cases imply the existence of forced labour. However, in other cases you may need to look for several indicators which, taken together, point to a forced labour case. Overall, the set of eleven indicators covers the main possible elements of a forced labour situation, and hence provides the basis to assess whether or not an individual worker is a victim of this crime" (https://www.ilo.org/wcmsp5/groups/public/%2D%2Ded_norm/%2D%2D-declaration/documents/publication/wcms_203832.pdf).

- Economic Precarity: Most Syrian refugees work in the informal economy, which lacks legal protections and exposes them to exploitation. Sectors like construction, textiles, and agriculture are known for poor working conditions and wage disparities compared to Turkish citizens. The economic precarity is compounded by the requirement for work permits, which are difficult to obtain and maintain, forcing many into informal work out of necessity (Baban et al., 2021).
- Social Precarity: Access to essential social services such as healthcare, education, and housing is limited for Syrian refugees. Bureaucratic challenges and inconsistent implementation of policies create significant barriers. Many refugees lack information about their rights and face discrimination, which exacerbates their precarious situation (Baban et al., 2021).

9.6 Legal Rights and Provisions for International Protection Applicants, Conditional Refugees and Temporary Protection Status Holders

Türkiye is a party to more than 50 conventions adopted by the International Labour Organization (ILO).[6] Turkish labour legislation framework reflects the standards and principles laid down in these conventions, including social security, occupational safety and health, child labour and labour inspection. The working rights of foreigners in Türkiye are regulated through a set of legislative documents, including the Law on the Work Permit for Foreigners (law no. 4817) dated 2003, Law on International Workforce (law no. 6735) dated August 2016, Work Permit Regulation on Applicants and International Protection Beneficiaries (April 2016) issued by the Ministry of Labour and Social Security, and Regulation Related to Work Permit of Syrians Who Are Under Temporary Protection (January 2016) issued by the Ministry of Labour and Social Security. This regulation requires employers to apply for work permits on behalf of refugees, who can then work in specific provinces and sectors. The number of Syrian employees in any given workplace cannot exceed 10% of the total number of Turkish employees (Baban et al., 2021, pp. 123–126). Despite these regulations, the actual number of work permits issued has been relatively low. As of March 2019, only 1.5% of the 2.2 million working-age Syrians in Türkiye had received official work permits (Demirguc-Kunt et al., 2019).

According to these legislations, an international protection applicant can apply for a work permit 6 months after the applying for international protection. Refugee or subsidiary protection status holders can work dependently or independently after obtaining their status. The ID to be given to an asylum seeker or a person with subsidiary protection status also replaces a work permit. However, this does not guarantee access to the labour market, as the government retains the right to impose restrictions based on labour market conditions. The jobs and occupations that

[6] https://www.ilo.org/ankara/conventions-ratified-by-turkey/lang%2D%2Dtr/index.htm

foreigners cannot work in are determined by various regulations. Thus, foreigners cannot work as dentists, nurses, pharmacists, veterinarians, lawyers, notaries, private security officers, customs consultants, tourist guides, and divers or captains in territorial waters. These professions are solely dedicated to Turkish citizens. In addition, according to Article 11 of the Law on the Work Permit for Foreigners, access to the labour market may be limited according to the situation in the job market and developments in working life, for a certain period, in agriculture, industry or service, when required by sectoral and economic conditions. This framing is quite vague and creates further administrative barriers to asylum seekers' enjoyment of their rights. However, these restrictions do not apply to asylum seekers and subsidiary protection status holders who have resided in Türkiye for 3 years or who are married to a Turkish citizen or have a Turkish citizen child.

Even though the forced movements of Syrians to Türkiye started in April 2011, they have only been able to enjoy work-related rights from January 2016 onwards. Many scholarly works (AI, 2016; İneli Ciğer, 2017, p. 561; Baban et al., 2017, 2021) list a series of barriers to obtaining a work permit. First, according to the Regulation Related to Work Permit of Syrians Who Are Under Temporary Protection, those who want to employ Syrians under temporary protection can apply for a work permit or work permit exemption 6 months after the temporary protection identity document is issued. Therefore, the work permit is employer-centric. Many employers are reluctant to navigate the bureaucratic processes involved, leading to a preference for hiring informally. Second, there must be at least 10 Turkish personnel for each Syrian who will work. The number of Syrians to be employed cannot exceed 10% of the total personnel. Third, the regulation imposes mobility restrictions, as Syrians can only get work permits in the provinces where they are registered. The geographic restriction that ties work permits to specific provinces further complicates the employment landscape for refugees. This limitation prevents refugees from seeking better opportunities elsewhere and contributes to the high rates of informal employment.

The only exception to these barriers is seasonal agriculture work and husbandry. Permission of the governorships must be obtained to remove the quota application for Syrian refugees who work as temporary agricultural workers or who will be dealing with agriculture and animal husbandry. So, all the working rights are top-down and centralised, agriculture work is localised according to the needs. In an analysis of the discrepancy between the work permit regulation and its implementation at the city level, Siviş (2021b, p. 195) emphasises the role of local actors and their cross-institutional collaboration:

> [T]he work permit regulation fails to address local socio-economic dynamics in terms of both Syrians' well-being and natives' concerns. From my standpoint, a lack of a labour market integration policy and coordination with the local authorities creates a context where local actors implement what I call "integration work" in line with their own institutional and/or organisational logics. A lack of overarching implementation and evaluation mechanisms allows the emergence of alternative policy frames at the local level. This integration work can be implemented by local actors in collaboration with external funders, NGOs and other public institutions.

Although the right to work on paper appears to be regulated, the actual implementation of the regulations is far from being inclusive. According to PMM data, almost 20% of the Syrian population is between 10 and 18 years of age. The schooling rate is very low, especially at the secondary education level, which is a marker that most of these youngsters are in the labour market, mainly in the informal labour market (Pinedo Caro, 2020). According to TURKSTAT data, in Türkiye, 720,000 children are working, and 30.8% of them work in the agriculture sector. In the labour market, asylum seekers are establishing their own businesses in very small numbers, some are working as independent craftsmen, though irregularly, but the majority of them are employees who do paid labour for others, mainly in the informal market. We observe a concentration in jobs that do not require qualification, high informality, depend on social aid, and very precarious conditions (Siviş, 2021a, b).

Just to clarify, although the temporary protection scheme has provided access to the labour market since 2016, as of April 2021, only 50,400 Syrians were granted work permission throughout Türkiye. This means all others depend on aid and informal precarious working conditions and live under extreme poverty. As was observed during the fieldwork, most of the refugees work in construction, shoe manufacturing, textile sectors and also in agricultural work. Regarding the part on non-inclusiveness of the right to work, the fact that work permits were regulated 5 years after the Syrians' mobility in 2011 meant that many Syrians had already entered the informal labour market, which could have made it difficult to formalise their work permit status. The low number of work permits issued for Syrians (around 50,000) compared to the total number of Syrians of working age (above 950,000 as per PMM data) supports this argument.

Another critical issue is the temporary nature of the protection status itself, which does not offer a pathway to permanent residency or citizenship. This uncertainty affects the willingness of both refugees and employers to invest in long-term employment relationships.

9.7 Prevalence of Informal Work Conditions and Economic Disparities

The informal labour market in Türkiye, which comprises around 35% of the total economy, absorbs a significant portion of Syrian refugees, exacerbating their vulnerability (İçduygu & Diker, 2017, p. 24). There are significant wage disparities between Syrian refugees and Turkish citizens. Refugees often earn substantially less than their Turkish counterparts for the same work. For instance, Syrian workers in the construction sector typically earn about 50% of the wages received by their Turkish counterparts for performing identical tasks (Baban et al., 2021, p. 144). This disparity extends across various sectors, with young Syrian workers earning approximately 79% of what their Turkish counterparts earn (Baban et al., 2021, p. 144).

Syrian refugees in Türkiye are heavily concentrated in several labour-intensive sectors. The construction sector employs a large number of Syrian refugees, often in informal and precarious conditions. Workers in this sector face significant exploitation, with long hours and minimal wages compared to Turkish workers (Dedeoğlu & Bayraktar, 2019, p. 14). Shoe manufacturing is another sector with a high concentration of Syrian labour. Refugees in this industry typically work in small workshops with poor working conditions and low wages. Child labour is also prevalent in this sector, with children working alongside adults to support their families (Fehr & Rijken, 2022). The textile industry in Türkiye has a significant presence of Syrian workers. These workers often face long hours, poor working conditions, and low pay. The sector's reliance on informal labour exacerbates these issues, with many refugees working without legal protections or benefits (Dedeoğlu & Bayraktar, 2019, p. 14). Agriculture is a major employer of Syrian refugees, particularly in seasonal work. Refugees in this sector face extremely harsh conditions, including long hours, low pay, and lack of access to basic services such as healthcare and education. The physical isolation of agricultural work sites further compounds these challenges (Baban et al., 2021, p. 145).

The regulation excludes certain sectors from work permit requirements, such as agriculture and seasonal work, which are often characterized by low wages and poor working conditions. This exclusion means that many refugees end up working in these sectors without formal protections or benefits. Seasonal agricultural work is already primarily informal, segmented and defined by high levels of precarity at both the social and the economic levels. One respondent referred to this migrant intensity as the "refugeeisation of the agricultural labour market". As mentioned in the interviews conducted with a regional NGO, in regions such as Çukurova, those agricultural workers live in plastic-covered makeshift tents on the periphery of the city, have very poor working conditions, work for 7 days, 11 h a day and a high rate of child labour is one of the realities faced.

So, the state's policy of no-policy on settlement turns into de facto settlements, not-regulated whatsoever. In most cases, even the basics of hygiene cannot be met in these conditions. Lack of water, soap and even proper toilets are just ordinary cases observed in the field. Children cannot attend school, and workers are paid informally and much lower than minimum wages. In addition, especially in these agricultural areas, given that intermediaries between employers and workers abuse the conditions of migrants, we face hyper-precarity. All participants interviewed in those remote areas came from rural areas of Syria; therefore, have no previous experience of urban life, further signifying 'residential segregation' in the spatiotemporal context.

> I was a farmer in Syria. When I first came to Türkiye from Idlib in 2012, I didn't speak any Turkish, so I relied on Turkish agricultural intermediaries called "elci" to find work. We go to Antep in summer and Adana in winter to work. We have no set working hours, sometimes we work 14 hours a day. When schools were closed during Covid, my two sons started working with me in citrus. Now schools are open, but they continue to work. At the end of each day, the agricultural intermediary gives us a wage card, which is proof of the work we did that day. When it is time to get paid, we give the wage cards to the broker.

Some of the interviewees who hold temporary protection status stated that they had previously held better positions/jobs in their home countries, indicating a clear downward occupational mobility. During the group interview, one respondent underlined that many Syrians' skills are not recognised, and they have to undergo vocational training provided through projects in Türkiye. A young female TPS holder, mentioned that students have no hope of finding jobs after graduation, both due to the lack of formal jobs and the high unemployment rate in Türkiye. Pursuing career opportunities in transnational companies such as export/import companies is a widespread practice for new graduates because of their language skills, as they can speak Arabic, Turkish and English.

One key finding is that younger temporary protection status holders, who are in their early 20s, complain not only about Turkish but also Syrian employers as they also lean on informality. This dual exploitation exacerbates hyper-precarity, highlighting the deep-seated class-based inequalities that permeate the labour market. One participant encapsulates this sentiment:

> No, not only Turkish employers, but Syrians also employ workers informally. You would think that they have had similar experiences and would understand. But unfortunately, this is not the case. All employers are trying to find a way to pay their workers less.

This exploitation is not limited to adult workers but extends to children, who are often forced into labour due to economic necessity. Child labour is a significant issue among Syrian refugee families in Türkiye. Economic necessity forces many children to work in various sectors, including textiles, agriculture, and shoe manufacturing. These children often work long hours for minimal pay, sacrificing their education and well-being to support their families. A participant, in his early 20s, reflects as:

> Due to my insufficient income, my younger siblings are also forced to contribute to our family's earnings. My 12-year-old sister works in a nearby shoe manufacturing factory. Her workdays are long, and her pay is minimal. The hazardous working conditions in the factory jeopardize her health and well-being, and the demands of her job prevent her from attending school regularly.

Studies indicate that many Syrian refugee children in Türkiye are engaged in child labour, with many working in hazardous conditions (Fehr & Rijken, 2022). The prevalence of child labour among Syrian refugees is driven by poverty and the lack of access to formal employment opportunities for their parents. This situation creates a cycle of poverty and exploitation that is difficult to break without significant policy interventions and support programs. Therefore, the intersection of class-based exploitation and child labour creates a profound state of hyper-precarity for Syrian families.

9.8 Impact of the Pandemic

The impact of the Covid-19 pandemic was one of the issues raised by both refugee interviewees and other stakeholders:

> Administrative procedures related to regular migration and international protection came to a halt, and the economy was badly hit. Consequently, migrants and refugees were put in a particularly vulnerable position. We observe loss of employment and income in the majority of migrant and refugee households (TR33).

During the second phase of the field research, which is considered to be the post-pandemic period, the discussion focused on the effects of the Covid-19 pandemic, specifically on Syrian agricultural workers, particularly in areas where the number of Syrians is significantly higher. Fieldwork shows that the pandemic negatively affected agricultural labour market conditions. Still, regarding its economic impact, there is no significant difference between a refugee and local agricultural workers. Also, the economic impact of the pandemic on refugees in the agricultural labour market was less than in the urban labour market (UNHCR, 2021). According to the interviews, the pandemic created more economic vulnerabilities for urban workers than agricultural workers.

Apart from the agriculture sector, participants who hold temporary protection status also provided insights on working conditions. Wage inequality, rising inflation and unemployment rates were key issues discussed during the collective interview. A key finding was about the practice of a cooperative based on social and solidarity economy. Although fair and equitable governance and practices are involved, women who hold temporary protection status stated during the group interview that they believe they are paid less than Turkish employees, even though they are not mistreated in other ways.

9.9 How Do EU Instruments Influence Refugee Working Rights and Conditions?

The influence of EU instruments on refugee working rights and conditions in Türkiye is multifaceted. The EU- Türkiye Statement reinforced the temporary protection regime in Türkiye. This status provides certain basic rights but also leaves refugees in a state of legal limbo without a clear path to permanent residency or citizenship. This uncertain legal status contributes to the hyper-precarity of refugees' lives, limiting their access to stable employment and social integration.

The statement has resulted in increased mobility restrictions for refugees, making it difficult for them to move freely within Türkiye or leave the country legally, referred as contained mobility by Carrera and Cortinovis (2019). This has further entrenched their reliance on informal and precarious work as they are often unable to seek better opportunities elsewhere. While the EU financial aid has supported integration programs, these initiatives have been hampered by the broader

socio-political environment in Türkiye. There is significant resistance within the local population to integrating refugees into the formal labour market, and many refugees continue to face discrimination and exploitation.

The EU- Türkiye Statement is an example of the EU's externalization policy, which aims to manage migration flows by outsourcing border control and refugee protection to non-EU countries. This approach has been criticized for shifting the burden onto countries like Türkiye, which already host large refugee populations, and for creating conditions that lead to the marginalization and exploitation of refugees.

9.10 Conclusion

This chapter has explored the complex realities of Syrian refugees' employment in Türkiye. The LFIP and the Temporary Protection Regulation provide the legal basis for refugee employment, but practical barriers remain significant. While a step forward, the work permit scheme has limitations that hinder the effective integration of refugees into the formal labour market. A significant number of Syrian refugees work informally due to bureaucratic hurdles and lack of employer incentives. This leads to precarious employment conditions characterized by low wages, poor working conditions, and lack of job security. There are notable wage disparities between Syrian refugees and Turkish citizens, with refugees often earning significantly less for the same work, exacerbating their economic vulnerability. Syrian refugees are heavily concentrated in labour-intensive sectors such as construction, shoe manufacturing, textiles, and agriculture, where they face exploitation and unsafe working conditions. Child labour is prevalent among Syrian refugees, driven by economic necessity and lack of access to formal employment for adults, leading to long-term negative impacts on children's education and well-being. The 2016 EU- Türkiye Statement and associated financial aid have had mixed impacts. While they have provided immediate humanitarian support, they have also reinforced temporary protection without addressing long-term integration needs, contributing to the hyper-precarity of refugees.

The concept of hyper-precarity is central to understanding the lived experiences of Syrian refugees in Türkiye. Hyper-precarity encompasses the extreme and intersecting forms of insecurity experienced by refugees due to their legal, economic, and social conditions. This chapter illustrates how the temporary protection status, restrictive work permit regulations, and informal labour market create a systemic cycle of vulnerability for refugees. From a theoretical perspective, hyper-precarity challenges traditional notions of labour market integration by highlighting the compounded disadvantages faced by refugees. It underscores the importance of not only addressing immediate economic needs but also providing a stable legal status and social protections that can mitigate long-term vulnerabilities. The intersectionality of legal ambiguity, economic exploitation, and social exclusion forms the crux of

hyper-precarity, making it a critical framework for analyzing refugee policies and practices.

The EU- Türkiye Statement falls short in addressing the hyper-precarity experienced by refugees. By focusing on containment and temporary measures, it perpetuates the cycle of insecurity and marginalization. In contrast, the GCR offers a more holistic approach that aligns with human rights standards and emphasizes sustainable solutions through international cooperation and responsibility-sharing.

Addressing the hyper-precarity of Syrian refugees in Türkiye requires a comprehensive overhaul of current policies and practices. Policymakers must prioritize reforms that simplify access to work permits, incentivize formal employment, and provide robust vocational training aligned with market needs. Additionally, there is a need for inclusive economic policies that recognize refugees' skills and facilitate their integration into the local economy. To break the cycle of hyper-precarity, it is imperative to adopt a multi-level governance approach involving central and local governments, civil society, and international organizations. This collaborative effort should focus on creating stable and supportive environments that uphold refugees' rights and promote their long-term social and economic integration.

Ultimately, the goal might be to transition from temporary and restrictive measures to inclusive and sustainable solutions that align with GCR principles. This approach not only benefits refugees by providing them with stability and dignity but also contributes to the social and economic well-being of host communities. It is a call to action for all stakeholders to work towards a future where refugees are not seen as a burden but as integral members of society, capable of contributing to their new homes in meaningful ways.

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Part III
EU Third Country Arrangements

Chapter 10
Asylum for Containment

Thomas Spijkerboer

10.1 Introduction

The European Union explicitly aims to prevent asylum seekers and refugees from reaching its borders and territories. In policy documents, third country nationals who try to reach EU borders in order to seek asylum are referred to as "irregular migrants", while preventing such "irregular migration" is seen as requiring cooperation with third countries of origin and transit in the fields of prevention of departure as well as the return of undocumented migrants. This non-entrée policy is inserted in discourses on saving migrant lives and the prevention of migrant smuggling (Commission, 2020). This policy aim will be referred to as containment.

At the same time that it seeks to contain refugees on territories outside the EU, the European Union undertakes action to support refugees in third countries. EU policy documents point to the Emergency Transit Mechanism, which evacuates people from Libya to Niger and Rwanda for onward resettlement; to the support for Syrian refugees in Türkiye, Lebanon, Jordan and Iraq; as well as to the funding provided by the EU and its member states to supporting refugees i.a. via UNHCR (Commission, 2020). Also, it is evident from fieldwork that in Niger, Serbia, Tunisia and Türkiye that the EU promotes the adoption of asylum legislation in third countries.[1]

[1] For further details see Chaps. 11, 12, 13 and 14 in this volume and Ayouba Tinni et al., (2023). I am grateful to Luca Scheid and Gamze Ovacik for their editorial assistance.

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The EU sees the policies aiming at containment and at improving the asylum systems in third countries as closely related. They are to be implemented as part of comprehensive Migration Partnerships so as to strengthen migration governance and management (Commission, 2020). From the perspective of the EU, asylum for containment is a logic; the two policy aims are entirely compatible. However, state and non-state actors in third countries also see the containment of refugees and the improvement of asylum systems in third counties as closely related, but they draw different conclusions from that connection than European countries do. The EU is perceived as working on the construction of asylum systems in third countries that will allow the EU to contain refugees there (Chaps. 11, 12, 13 and 14 in this volume). From the perspective of third countries, there is a tension between asylum and containment; they do want to improve their asylum system, but they do not want to be the place where refugees and asylum seekers are contained. While from a European perspective it is logical and legitimate to think that refugees can be contained in third countries if these countries have functioning asylum system, third countries themselves do not find this obvious and legitimate; they fail to see why they are better placed than European states to host refugees. This is not just a matter of calculation ("this is not in our advantage") which could be addressed through European stick-and-carrot policies (conditionality, issue linkage). It is also a normative position which cannot be influenced by increasing the benefits for third countries.

10.2 Cooperation

Third country governments are generally willing to cooperate with projects which reinforce their capacities in the field of policing and security. A notable example of this is that the EU provided 80 million EUR of direct budget support to the Nigerien government. The contribution was earmarked (15 million EUR for equipment of the Interior Security Forces), and specific conditions applied (sufficient progress in the implementation of the security component of a programme to combat migrant smuggling). Other EU projects also fund the Nigerien security apparatus (Chap. 11 in this volume). The Tunisian authorities readily cooperate when projects increasing governmental capacities in the field of policing (in particular border management) (Chap. 13 in this volume). In Türkiye, the EU assisted the Turkish migration management authorities in establishing a migrant detention centre and funding six Coast Guard vessels (Canga & Behrman, 2022; Chap. 14 in this volume).

However, when it comes to supporting the asylum infrastructure of third countries, one can observe hesitations to cooperate in the four countries. This hesitance to cooperate is contextual. For Serbia, gaining EU membership is a major policy aim which outweighs many other policy interests. As a consequence, Serbia aligns it asylum and migration policy with the EU acquis—over which it had no say and which is a given (Chap. 12 in this volume). Serbia accepted the Readmission Agreement (including an obligation to readmit third country nationals who transited

through Serbia). However, in particular the effects of the Dublin Regulation and the notion of safe third countries pose a risk for Serbia. If Serbia were to have an effective asylum procedure and a functioning system of reception for asylum seekers and refugees, EU member states could return asylum seekers to Serbia on the basis of the EU-Serbia Readmission Agreement. In practice, a number of practices in Serbia mitigate this risk. Serbia remains irresponsive to readmission requests for from EU member states; despite asylum legislation which is in line with EU standards, access to the Serbian asylum procedure is problematic, and for those who succeed in accessing it recognition rates are low; reception facilities are limited and often substandard. As a consequence of these shortcomings, the ECtHR ruled that removal of two asylum seekers to Serbia was a violation of Article 3 ECHR.[2] While it is difficult to establish whether or not the authorities concerned consciously sabotage the implementation of their obligations under these legal instruments, in any case there is little incentive for them to address the operational challenges they experience. Effective implementation of their legal obligations would result in considerably more migrants and refugees ending up in Serbia. Serbia adopts a practice similar to that of Greece which, although an EU Member State, has such a sub-standard asylum system that returns on the basis of the Dublin Regulation would amount to inhuman treatment.[3]

Through the EU- Türkiye Statement, Türkiye was effectively declared to be a safe third country, and is seen as such in Greek legal practice (Ovacık, 2021). For Türkiye, there are two ways to limit the impact of this. The first is to limit the influx of Syrian and other refugees via the Syrian, Iraqi and Iranian border; the second is to allow for onward travel of refugees in the direction of Europe. For Türkiye, migration and asylum are an element of a much wider policy context. It may be willing to swallow negative policy outcomes in the field of migration and asylum if it gains enough in others (such as its stakes in the Syrian conflict, its interests concerning the Kurdish question, its membership of NATO and its accession to the EU). The 6 billion EUR for 3.6 million Syrian refugees for 6 years amounts to a mere 1.666 EUR per refugee for 6 years, and 278 EUR per year—not enough to cover the expenses. Resettlement has reached only homeopathic levels; a mere 0,8% of the Syrian refugees in Türkiye were resettled in the EU (Chap. 14 in this volume). Two elements of the EU- Türkiye Statement from which Türkiye would have benefited have not been implemented (visa waiver and accelerated EU accession talks) (Chap. 13 in this volume; see more generally on the link between readmission and visa facilitation; Cassarino and Marin, 2022). While European actors relate this to noncompliance with requirements concerning these issues themselves, Turkish respondents perceive this as illustrative of the EU's exclusive focus on its own interests. Regardless of this blame game, the fact that two potential advantages of Turkish cooperation with European migration policy are not forthcoming limits the Turkish

[2] *Ilias and Ahmed v Hungary* App No 47287/15 (ECtHR, 21 November 2019), para 159.

[3] *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR (Grand Chamber), 21 January 2011); Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECR I-13905.

motivation to implement European containment policy. The incidents at the Turkish-Greek land border in March 2020 are seen by Turkish state actors in this context. Turkish willingness to cooperate will not have increased after the European response to the massive earthquake on 6 February 2023 in the areas in Türkiye and Syria hosting most refugees. While the disaster has fundamentally affected Türkiye's capacity to host Syrian refugees, Europe's professed "unwavering solidarity" remained limited to deploying rescuers and humanitarian assistance to victims in Türkiye and Syria. Alleviating the burden by considering the resettlement of refugees is nowhere on the European agenda.[4] The Greek authorities have reinforced their border controls in anticipation of refugees from the affected area.[5]

The major shortcoming of the Tunisian asylum system, namely the absence of asylum legislation, is related to European containment policy. The Tunisian government is unwilling to adopt the Asylum Bill (which has been drafted with assistance of UNHCR and EU funding) because it fears that, once adopted, it will facilitate European containment policies. The evident overall focus of European actors on containment of refugees in Tunisia is seen as problematic by Tunisian government and civil society actors (Chap. 13 in this volume). Tunisian policy makers have been able to observe, and learn from, the Turkish experience. Türkiye adopted EU inspired asylum law in 2013, has cooperated with European containment policy (the 2015 Joint Action Plan, the 2016 EU- Türkiye Statement), and now has to host the largest refugee population in the world. Tunisia (which since the NATO intervention in Libya in 2011 is located in a very unstable region) is not willing to follow a similar path.

For Nigerien authorities who are in conversation with European actors, the financial stakes are big. Projects reinforce general state capacities and provide precious funding for core state functions. As a consequence, projects are supported by those state institutions which benefit directly from them. At the same time, state institutions which do not benefit directly from these projects have no reason to support them. The Emergency Transit Mechanism (ETM) is an arrangement agreed between the state of Niger, UNHCR and IOM, and funded by the EU. In the framework of the ETM, certain categories of people are transferred from Libya to Niger, with a view to admission as a refugee in European countries. The ETM was negotiated from the Nigerien side by two directorates within the Ministry of the Interior. Not included in the negotiations on and the development of the ETM were key players such as the foreign ministry, and the regional and local authorities where refugees were to be hosted (Chap. 11 in this volume). The local authorities were also not involved in the development of the UNHCR bureau in Agadez, and are critical of it because as they see it, it turns their city into a European hotspot. This results in limited support for the ETM and for the hotspot in Agadez from key players.

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[4] European Council, 'Special meeting of the European Council (9 February 2023)—Conclusions', EUCO (2023) 1/23.

[5] The Guardian. (2023). Greece fortifies border to block refugees from Turkish-Syrian earthquakes, *The Guardian* 26 February 2023.

In conclusion, the European policy of supporting asylum systems in third countries in order to further its containment policies is ambiguous and even contradictory. Because of the power difference, third countries are not in a position to reject cooperation with the EU outright. On the other hand, they frustrate the effective implementation of European containment policies because they consider these as unfair. The manner in which this combination of cooperation and frustration plays out is highly contextual and changeable, and closely related to the power dynamics between the EU and the country concerned. But the tendency of third countries to frustrate effective implementation of European containment policies on their territories is foreseeable, and it is hard not to see the legitimacy of the perspective of the third countries concerned.

10.3 Democracy

The concerns that cooperation with the EU 'asylum for containment' agenda (*supra*) will lead to European hotspots on their territory make cooperation with the EU controversial domestically in third countries. European actors as well as actors in third countries seek to side-step potential or actual opposition against the adoption and implementation of EU instruments in three ways: secretive cooperation; selective cooperation with local actors; and the undermining of democratic procedures.

One of the ways in which domestic unrest or opposition to cooperation between the EU and third countries can be limited is by operating in confidential or even secret contexts. The Memoranda of Understanding between Tunisia and Italy from 1998, 2009 and 2011 were and are secret. It is remarkable that even when Tunisia was a functioning democracy between 2011 and 2021, migration agreements with Germany (2011, 2017) and Belgium (2018) remained secret. In Niger, basing the ETM on a Memorandum of Understanding was partly inspired by a wish to circumvent the Nigerien parliament. In Serbia there is little or no information available about the implementation of measures that may be controversial domestically, such as the implementation of the Readmission Agreement. The European Commission has ceased giving transparent information about the implementation of the EU-Türkiye statement since October 2017, while there is no information about the implementation of the EU- Türkiye Readmission Agreement. Reportedly there is a Readmission Protocol between Bulgaria and Türkiye, which is not public. The monitoring and evaluation of EU funded projects is not public.

European actors whom we interviewed for our research insisted that local governmental and non-governmental actors are involved in the development and implementation of the cooperation with third countries. Our research shows however that such involvement, if any, is selective. Some actors are side-lined. An example of this is the side-lining of the national parliament, core government institutions such as the RSD authority, the Ministry of Foreign Affairs, as well as local authorities in the conclusion of the Memorandum of Understanding concerning the ETM in Niger. Another example is the exclusion of the representative of the Serbian Ministry of

EU Integration who insisted that the response to the refugee and migration challenges since 2015 should be covered by separate additional emergency funding and not through the regular Serbia-EU Accession Negotiation process. This may seem a minor issue but in fact concerns the question whether peripheral EU member states (which Serbia hopes to become soon) are to bear the uneven distribution of the migration of asylum seekers resulting from the Dublin system and wider European migration policies. Furthermore, European actors control the consultations with local actors. They decide whether actors will be involved, if so which actors, at which stage of decision making, whether the consultations will inform, modify or amend European programming, whether the consultations will be substantive or purely procedural. Actors in third countries are not aware of the criteria European actors use for deciding about these issues, and find the process of consultations opaque (Pastore & Roman, 2020). In some cases, local actors are not involved at all. Major instruments concerning Africa are unilateral EU documents, such as the 2015 Regional Action Plan for the Sahel, the 2017 Migration Partnership Framework and the 2021 Comprehensive Strategy for the Sahel. While the 2015 Western Balkans statement formally was a joint statement of the political leaders of the countries involved, Serbia was not involved in its drafting and the text is perceived as an EU document. Countries that hope to accede to the EU (Serbia, Türkiye) adopt asylum legislation that conforms to the EU acquis, over which they have no say and the wisdom of which (for example concerning the uneven effects of the Dublin system) they cannot effectively dispute.

The preference which European actors (EU institutions itself, member states) display for informal and secret arrangements with third countries undermines democratic procedures (Seeberg & Zardo, 2022). Informal documents (Memoranda of Understanding, but also the 2016 EU- Türkiye Statement which closed the Aegean route, and the 2015 Western Balkan Route Leaders' Statement which led to the closing of the Western Balkans route) undermine parliamentary ratification procedures (Cassarino, 2022; Roman, 2017).[6] Neither the Turkish nor the European Parliament were, for example, involved in approving the EU- Türkiye Statement. If in addition to being informal such documents are also secret, parliaments are even unable to exercise their supervisory function outside formalized ratification processes and outside formal sites of public debate. This approach has side-lined not only national European parliaments and the European Parliament (Carrera et al., 2017; Spijkerboer, 2017), but also the Nigerien, Turkish and Tunisian parliaments.

In conclusion: in all countries included in this research there are concerns about the establishment of European hotspots on their territory. As a consequence, it is easier for the EU to cooperate in the field of migration and asylum with third countries which are not well-functioning democracies. Third countries with well-functioning democratic systems are less likely to cooperate with EU migration and asylum policies because containment of refugees and asylum seekers in Niger, Serbia, Tunisia or Türkiye is unlikely to be seen as legitimate by the local

[6] House of Lords International Agreements Committee. (2022).

population. The exception to this may be Serbia, where the negative effects of European containment policies are seen as outweighed by the benefits of EU accession.

10.4 Rule of Law

EU external actions supporting asylum systems in third countries contribute to the rule of law (Venice Commission (European Commission for Democracy through Law), 2011) by supporting the development of a legislative basis for state action in the field of migration and asylum. Creating such a legal basis is conducive to legality (basing state action on law) and legal certainty (limiting state discretion in the field of refugee protection and migration management). However, EU instruments also lead to rule of law concerns, in two different ways. First, in some cases the implementation of the instruments contributes to violations of international legal norms by third countries. Secondly, during the implementation of the instruments, in some cases there are no effective legal remedies against potential or actual violations of European law or human rights law by European actors (EU institutions or EU member states).

10.4.1 Rule of Law Violations by Third Countries

Human rights and non-refoulement are mentioned regularly in documents concerning EU funded projects. However, such references tend to be part of the generic parts in the documents (for example the paragraphs on the overall aim or strategic objectives of a project). They are not to be found in the operational parts of the funding documents, such as the paragraph on operational objectives or expected results. European external action may contribute to human rights violations in third states.

Türkiye has closed its borders with Syria and has introduced visa requirements for Syrian nationals. This is a logical response to Europe's policy to contain refugees in Türkiye as laid down in the EU- Türkiye Joint Action Plan and the EU-Türkiye Statement. The containment of Syrian refugees within Syria is explicitly endorsed in the EU- Türkiye Statement.[7] In Tunisia and Türkiye, European actors have undertaken considerable steps so as to equip and train the Coast Guard, often with EU funds. While these activities are presented as supportive of international maritime law obligations concerning search and rescue, at the same time international maritime law is instrumentalised by European actors so as to prevent

[7] Para 9 reads: "The EU and its Member States will work with Türkiye in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe", https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf.

predominantly nationals as well as third country nationals to leave the country.[8] The Nigerien Act 2015–36, drafted and implemented with European support, deprives people of the possibility to leave Niger in the direction of Libya or Algeria, even when they are lawfully present on Nigerien territory because they are ECOWAS or even Nigerien citizens. This legislation was legitimized as contributing to the prevention of the loss of lives in the Sahara and on the Mediterranean. In all these cases, European actors are implicated in denying people the right to leave any country, including their own (Chap. 17 in this volume). This may take the form of enabling third countries to do so through funding (Türkiye, Niger, Tunisia); by enticing them to do so by policies which create an interest for the third country to prevent leaving (Turkish border closure); and by endorsing border closure (EU-Türkiye statement). The *right to leave any country*, including one's own, has been laid down in numerous international law instruments (Article 2(2) Protocol 4 ECHR; Article 12(2) ACHPR; Article 12(2) ICCPR) (Markard, 2016). The generalised prevention of leaving a country amounts to a violation of this right because the generalised nature of the infringement makes a proportionality assessment impossible. Needless to say, preventing people from exercising their right to leave any country, including their own, also prevents them from exercising the *right to ask for asylum* and to have their asylum application examined (Article 18 CFR; Article 12(3) ACHPR).

The *freedom of movement* within the state where one is lawfully present is likewise well-established in international law (Article 2(1) Protocol 4 ECHR; Article 12(1) ACHPR; Article 12(1) ICCPR). In Niger, Act 2015–36 was drafted through European projects, while its implementation was supported by Europe. The Act requires transport companies to ensure that all passengers are in the possession of documents allowing them to enter the presumed destination state. This requirement is, in line with the text of the Act, also applied on domestic bus trips, in particular from the capital Niamey in the south-west of Niger to Agadez in the north of the country. While this legislation has been presented as having as its main aim to save lives in the Sahara Desert and on the Mediterranean Sea, it also affects Nigerien nationals. According to World Bank data, in Niger 36% of births are not registered, while of those whose birth has been registered many do not have the means to acquire identity documents. Therefore, Act 2015–36 deprives a substantial number of Nigerien nationals from the right of free movement within their own country. In addition to Nigerien citizens, ECOWAS citizens also are legally present on Nigerien territory thanks to ECOWAS free movement law. They are equally deprived of the right to move from, for example, Niamey to Agadez. As this effect has not been made explicit during the legislative process, no justification had been provided. Therefore, the infringement of the right to free movement amounts to a violation. Like Niger, Tunisia is part of free movement agreements with other Maghreb countries. Tunisian measures to prevent Libyan, as well as Algerian, Moroccan and Mauritanian nationals from entering its territory are at odds with the obligation to

[8] Comparable criticism comes from an Egyptian CSO, Refugees Platform in Egypt. (2022).

promote free movement. In the case of Libyan nationals they violate bilateral free movement law.

The *prohibition of collective expulsion* is well entrenched in international law (Article 4 Protocol 4 ECHR; Article 12(5) ACHPR). Individuals have a right to ask for asylum and to have their asylum application examined (Article 18 CFR; Article 12(3) ACHPR). The pushbacks performed by Serbian state agents at the border with North Macedonia constitute evident violations of these rights (NB: the pushbacks carried out by EU Member States are addressed in the next section). These pushbacks were carried out by the Serbian border police, which were supported through Instrument for Pre-Accession funding and Integrated Border Management projects implemented by, among others, IOM.

Everyone whose fundamental rights are violated has the right to an *effective remedy* (Article 13 ECHR; Article 47 CFR; Article 7 ACHPR; Article 14 ICCPR). European projects fund non-governmental, intergovernmental and international organisations to carry out activities in the field of refugee protection and migration management. In a number of cases, such organisations de facto exercise state functions. A clear example is UNHCR, which in Tunisia does refugee status determination. In Türkiye, NGOs and international organisations provide basic livelihood assistance to Syrian refugees. In Niger, UNHCR provides shelter to people transported from Libya in the framework of the ETM. Refugees in this centre have protested against the reception conditions. Many NGOs and international organisations have internal complaint mechanisms. Although it is positive that these organisations provide essential services, and although it is positive that there are internal complaint mechanisms, individuals who feel their fundamental rights have been violated in the process do not have access to an effective remedy that lives up to the standards of international law. An internal complaint mechanism does not constitute recourse to an impartial authority. This is of particular concern where such complaints may concern core *de facto* state functions (recognition as a refugee; guaranteeing the most basic necessities of life to vulnerable persons). Despite the fact that ICMPD plays a major role in the build-up of Tunisia's border management capacity, according to our information this international organisation does not even have such an internal complaints mechanism.

10.4.2 Effective Legal Remedies Against (Potential) Violations by European Actors

Another rule of law concern is the absence of effective legal remedies against potential or actual violations of European law or human rights law by European actors themselves.

A first issue of concern is the large scale refoulement by European states of people to Serbia, Tunisia and Türkiye. The EU member states Croatia, Hungary and Romania engage in massive pushbacks towards Serbia as a systematic daily

practice. According to UNHCR, in 2020 more than 25.000 pushbacks occurred, and in 2021 almost 28.000. Although these pushbacks have been addressed by the Serbian Constitutional Court, the Serbian Ombudsperson, the CJEU and the ECtHR, they continue to occur in large numbers on a daily basis. The implementation of the agreements between Italy and Tunisia on the immediate return of both Tunisian nationals and third country nationals leads to grave concerns among Tunisian human rights organisations. They point to the collective nature of many of these returns (and they dispute the correctness of the ECtHR' judgment on the issue[9]). They also refer to Tunisians whose return, they argue, violated international refugee law, and point to a pending case at the ECtHR concerning a LGBTQ Tunisian national. The implementation of the EU- Türkiye statement has *de facto* established Türkiye as a safe third country (Ovacık, 2021). This is problematic because Türkiye maintains the geographical limitation to the Refugee Convention; because Türkiye has at times not acted in conformity with the principle of non-refoulement; and because Türkiye hardly has the capacity to offer the four million refugees it hosts effective international protection. Also, there are consistent reports about refoulement by the Greek authorities (Izuzquiza et al., 2022), which increased after the EU- Türkiye statement. The manner in which these returns to Serbia, Tunisia and Türkiye are implemented by EU member states is such that domestic remedies in the EU member states concerned are not effective. This means that, in effect, only the ECtHR is an option for an effective remedy. However, a supranational court, while having a crucial role in complementing domestic remedies concerning purported human rights violations, cannot fulfil the role of a court of first instance to protect individuals against violations.[10]

A second context in which no effective legal remedies are available concerns the Frontex status agreement with Serbia (Letourneux, 2022). This agreement foresees immunity from Serbian jurisdiction for Frontex staff engaged in Frontex activities in Serbia. Because of Frontex's involvement in border management activities and the rights violations that do occur at Serbian borders, this makes the issue of remedies against purported rights violations by Frontex staff more than theoretical. The immunity concerns only actions performed in the exercise of the official functions of Frontex staff in accordance with the relevant plan of action. The Executive Director of Frontex decides whether actions were performed in the exercise of the official functions of Frontex staff in accordance with the relevant plan of action. This means that in effect Frontex has the unilateral capacity to exclude its staff from Serbian jurisdiction, which could provide an effective remedy. In such a case, actions are only subject to Frontex's internal complaint mechanism which (laudable as it may be in itself) is not an effective remedy as required by international law. This means that the Executive Director of Frontex has the power to unilaterally decide whether a purported human rights violation by Frontex staff will be subject

[9] *Khlaifia and Others v. Italy* App No 16483/12 (ECtHR (Grand Chamber), 15 December 2016)

[10] ENNHRI (European Network of National Human Rights Institutions) (2022).

to an effective remedy, or to an internal complaints mechanism which is not an effective remedy.

10.5 Conclusion

From a European perspective, it seems logical and legitimate to think that third countries can and will cooperate with the containment of migrants and refugees on their territories. Third countries often cooperate with European containment policies. They are eager to do so to the extent that this means support for their governance capacities. As migration management and border control are enforced with policing instruments, this implies reinforcing the repressive capacities of third states. Third countries are not eager to cooperate when this implies measures which may lead to more migrants and refugees on their territory. As a result, they are hesitant to agree with effective refugee protection (refugee status determination, provision of basic needs). They fear that Europe will use effective refugee protection on their territories as a legitimation of the confinement of refugees—as has been the case with Türkiye, which in 2013 adopted asylum legislation based on EU standards, and which now hosts the largest refugee population world-wide. This example has contributed to the non-adoption of similar legislation in Tunisia.

Europe responds to non-cooperation with “sticks and carrots”, i.e. with retaliation for non-cooperation and rewards for good cooperation. This is known as conditionality, and is a key element of the European Commission policy proposals known as the 2020 Pact on Migration and Asylum (Spijkerboer, 2021). Although conditionality can affect the cost-benefit calculation which third countries make, it does not address their normative perspectives on containment policies. These relate to a number of issues. Both governments and civil society organisations in third countries fail to see why it is reasonable that they bear a heavier burden than Europe, with its (in some cases infinitely) richer resources, is willing to do. In addition, they notice that while their citizens have problems in getting entry visa for European countries, economic and political inequalities make it unrealistic for third countries to be as harsh with European nationals as Europe is with theirs. The inequality that results from the formal equality of states in the field of migration, and which is barely noticed by Europeans, is considered as highly problematic in third countries. Also, a substantial part of the migrants and refugees third countries are expected to contain on their territory result from military interventions in which European countries took part (Afghanistan, Iraq, Libya) and from armed conflicts which are protracted in part through support for one (and in the case of Libya: both) (Chivvis, 2013; Weighill & Gaub, 2018) of the warring sides (Somalia, Yemen, Syria). Whether these military activities are seen as legitimate or not by third countries is not the main issue. Even if third countries see their legitimacy, they think that if Europe considers it in its interest to undertake them, it is unfair to expect third states to bear the collateral damage.

These normative objections to European containment policies cannot addressed by sticks and carrots because they are normative, not material. As a consequence, even when third countries do cooperate to some extent in setting up asylum legislation and policies because they seek EU accession (Serbia, Türkiye), or because this brings direly needed financial resources (Niger), they will try to undo the effects of their cooperation by various forms of non-implementation and obstruction. The limited success of containment policies can be considered as a consequence of this.

The result of this is that refugee protection in third countries is less effective than it could be if promoting asylum were not to be part of European containment policies. Addressing this will require a fundamental reconsideration of external European migration policy, which takes into account the normative perspectives of third countries. This is a long-term process, because over the past decades third countries have learnt to distrust European external migration policy.

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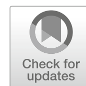
Chapter 11
The Outsourcing of European Migration and Asylum Policy in Niger



Bachirou Ayouba Tinni and Abdoulaye Hamadou

11.1 Introduction

For more than 10 years, migration has been a topical international issue, due to its extensive coverage in the media. As a result, it has been high on the international diplomatic agenda. More and more migrants are travelling via different parts of the Mediterranean coastline to reach Europe. Whether they come from Africa or the Middle East, they try to circumvent the restrictions on the issuance of Schengen visas. Those setting out from Africa pass through certain countries, and in particular Niger, on their way to the Western Mediterranean coastline.

In Europe, several initiatives have been developed to find a solution to what is now referred to as the "migration crisis", in connection with the rise in so-called irregular migration to the continent. In this context, the departure and transit countries, especially in Africa, are targeted as an integral part of the search for a solution.

Niger, which straddles sub-Saharan and Arab-Berber Africa, has been targeted by these outsourcing initiatives. The country is a transit zone on the way to Libya and Algeria, and in some cases to the Central Mediterranean (Brachet, 2009; Molenaar, 2017; 2018; Hamadou, 2018; Boyer, 2019; Moretti, 2020; Frowd, 2020; Bøås, 2021). To reduce these flows, European officials have made a concerted effort to seek Niger's cooperation on this issue. To this end, the foundations of

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cooperation between the European Union and Niger have been laid in a number of instruments—primarily policy, legal and financial instruments.

This chapter looks at asylum and migration in Niger. It aims to analyse the organisational changes that have occurred as a result of the EU's engagement with Niger and the UNHCR in Niger in the field of asylum since 2015. It is mainly based on an analysis of the instruments used to contain migration in Niger in the light of relations with the European Union. In addition, two mechanisms introduced after the Valletta Summit—the ETM and the provision of asylum in Agadez in the context of mixed movements—will also be analysed.

11.2 Legal, Political and Financial Instruments Between the EU and Niger

As part of its strategy of outsourcing the management of refugees from countries under attack from terrorist groups (notably Nigeria, Mali and Burkina Faso) and those in Libya, the EU has developed a proactive policy to support the Republic of Niger in its asylum governance. More specifically, the EU's efforts have focused on building a national asylum system capable of containing flows of refugees while ensuring their protection. The basis for these efforts by the EU is expressly set out in several instruments to which the state of Niger has voluntarily acceded. These instruments are of three kinds: (a) policy-related, (b) legal and (c) financial.

11.2.1 Policy Instruments

Policy instruments mean any agreement, arrangement or document between two or more parties, reflecting the will or consent of the political authorities at the highest level, with a view to facilitating cooperation in one or more areas, without necessarily including the formalities required by treaties under traditional international law.

In Niger's case, these instruments consist of the 2015 Valletta Summit Declaration, the 2015 Joint Valletta Action Plan, the 2017 Migration Partnership Framework and the Sahel Regional Action Plan for the period 2015–2020. To these instruments, the Memorandum of Understanding (MoU) of 26 December 2017 establishing the ETM, and revised on 20 February 2020, between the State of Niger, the UNHCR and the IOM should also be added. While the degree to which these instruments are binding varies, all are influential in many respects.

The Valletta Declaration and Action Plan (2015)

These two policy instruments (Valletta Summit, 2015, November 11–12, Political Declaration; Valletta Summit, 2015, November 11–12, Action Plan) focused on the following pillars:

Addressing the root causes of migration; intensifying cooperation on legal migration and mobility; strengthening the protection of migrants and asylum-seekers; preventing irregular migration, and the smuggling of migrants and asylum-seekers; preventing irregular migration, migrant smuggling and human trafficking; and working together more closely in order to improve cooperation on return, readmission and reintegration (Thiombiano, 2020).

The Migration Partnership Framework (2017)

The short-term objectives of the Migration Partnership Framework are as follows:

To save lives at sea and in the desert; to fight traffickers and smugglers' networks that benefit from people's despair; to enable migrants and refugees to stay closer to home rather than embark on dangerous journeys; and to open up legal channels in Europe for those who need them, particularly with regard to resettlement.[1]

The Sahel Regional Action Plan, 2015–2020 (2015)

The main aim of the Sahel Regional Action Plan, 2015–2020 is: 'The enhancement of security in the region through the fight against terrorism, illicit trafficking, radicalisation and violent extremism'.[2,3] This instrument reflects an implicit desire on the part of the EU to protect its borders against migration flows by helping to reinforce the borders of countries in the Sahel, including Niger.

The Emergency Transit Mechanism (2017)

The Emergency Transit Mechanism (ETM) organises the voluntary transfer by the UNHCR of persons meeting certain criteria, by air or land, from Libya to the Republic of Niger.

All these policy instruments officially have two objectives, which are both in the interests of the parties involved, particularly the European side.[4] The essential aim

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[1] European Commission (n.d.). Migration Partnership Framework A New Approach To Better Manage Migration https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf

[2] The term "violent extremism" covers promoting, supporting or committing acts which may lead to terrorism and which are aimed at defending an ideology advocating racial, national, ethnic or religious supremacy or opposing core democratic principles and values. (Guidelines for prison and probation services regarding radicalisation and violent extremism, adopted by the Committee of Ministers of the Council of Europe on 2 March 2016) https://rm.coe.int/16806f3d51

[3] Council of the EU (2015) Council Conclusions on the Sahel Regional Action Plan, 2015–2020 https://www.consilium.europa.eu/media/21522/st07823-en15.pdf.

[4] This position is shared by (Tardis, 2018) who believes that the partnership frameworks proposed to African countries are still defined by the Europeans, leaving the former little room for manoeuvre in terms of objectives.

is to provide international protection for people who need it while preventing their movement towards the EU's borders. The second objective, which is emphasised less strongly in these documents, is technical and financial and constitutes the main interest of the Nigerian side.

The Integrated Strategy in the Sahel (2021)

In the Integrated Strategy in the Sahel, '[t]he EU wishes to continue to promote fruitful cooperation in the area of migration, based on the constructive partnerships established in recent years'.[5]

11.2.2 Legal Instruments

In legal terms (Boidin, 2021)[6] and generally speaking, the Republic of Niger's relations with the EU are affected by the Cotonou Agreement, but also by Law 2015–36 on Migrant Smuggling, which is a national law, which symbolises Niger's commitment to complying with the political agreements that bind it to the European Union.

The Cotonou Agreement (2000), the Post-Cotonou Agreement (2020)

The Cotonou Agreement (2000) governs cooperation between the EU and the African, Caribbean and Pacific Group of States (ACP states). This treaty devotes an important place to asylum and migration issues. Article 13 reaffirms the usefulness of development aid in eradicating the root causes of migration. It also introduces an instrument for combating illegal immigration in the form of readmission agreements.

The issue of migration takes on even more importance in the Post-Cotonou Agreement, where it is the subject of an entire title (Articles 62–76). A particular feature of the Post-Cotonou Agreement is the emphasis now placed on the "migration-security" relationship, by contrast with the 2000 agreement, which focused on the "migration-development" relationship.

[5] Council conclusions on the European Union's Integrated Strategy in the Sahel, Brussels, 16 April 2021, 7723/21.

[6] The legal basis of the treaty has not yet been determined. However, given the wide range of areas covered, it will almost certainly be a mixed agreement involving the EU and each of its Member States.

Law 2015–36 (2015)

This law aims to 'prevent and combat migrant smuggling, protect the rights of migrants who are smuggled, and promote and facilitate national and international cooperation with a view to preventing and combating migrant smuggling in all its forms'.

In its legal approach, Law 2015–36 of 26 May 2015 is intended to be both repressive and protective, criminalising and penalising migrant smuggling and protecting migrants as victims. In essence, Niger's Law 2015–36 aims to prevent and combat migrant smuggling, protect the rights of those who are subject to migrant smuggling and promote national and international cooperation to prevent and combat migrant smuggling (Article 1).

The law criminalises migrant smuggling and sets out severe penalties for offenders. An analysis of the law's provisions indicates a tightening of mobility conditions across Niger.

11.2.3 Financial Instruments

These are the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration in Africa (EUTF) on the one hand and the European Fund for Sustainable Development (EFSD), which is part of the external investment plan,[7] on the other. Our analysis will therefore focus on the EUTF and its implementation in Niger in the areas of migration and asylum management.

The EU Emergency Trust Fund for Africa (2015)

The overall objective of the EU Emergency Trust Fund for Africa, adopted at the 2015 Valletta Summit, is to promote stability and improve migration management in three regions: Sahel and Lake Chad (SLC), the Horn of Africa and North Africa. The SLC region is the largest EUTF region in terms of the number of countries

[7] The EFSD includes financial guarantees and mixed (private/public) financing mechanisms to support private investments that promote the implementation of the United Nations Sustainable Development Goals (SDGs) and address the socio-economic causes of migration. Organised into two regional platforms—one for Africa, the other for the EU's neighbouring countries—the fund contributed €1.3 billion during its first year of operation to the mixed financing of some fifty projects in sub-Saharan Africa (€900 million) and in the neighbouring countries (€400 million), which was expected to lead to more than €10.6 billion in private and public investment. Across the 30 projects approved for sub-Saharan Africa, 48% of the funds went to transport infrastructure and 36% to the energy sector; the remaining 15% was divided between agriculture and private sector development in the form of subsidies (61%), loans and guarantees (23%) and technical assistance: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640137/EPRS_BRI(2019)640137_FR.pdf.

concerned (thirteen), financial commitments and the number of actions (programmes and projects) financed (€2.1 billion) (Altai Consulting, 2021). More specifically, the objectives of the EUTF, as set out in its strategy document,[8] are as follows: improved migration management in countries of origin, transit and destination; and improved governance and conflict prevention and reduction of forced displacement and irregular migration.

This major financial instrument is considered by some to be 'the most visible tool in the partnership policy on migration' (Tardis, 2018) and in particular in the fight 'against irregular migration' (Thiombiano, 2020). The implementation of the EUTF in Niger has enabled 12 projects to be financed, almost all of which concern this region where migration routes cross, especially around the city of Agadez. They aim to develop alternative economic activities to those based on migration, to strengthen the authorities' capacity to manage these flows and to receive migrants in transit and organise their return to their country of origin (Latek, 2019).

Protection and Sustainable Solutions for Migrants and Refugees along the Central Mediterranean Route

This project has a regional dimension, with activities mainly in Niger. In the framework of the Emergency Transit Mechanism (ETM), the UNHCR is providing emergency protection and life-saving assistance to persons of concern at a reception centre in Niger. In addition, the UNHCR is providing resettlement support and complementary pathways for those in need of international protection. The IOM is participating in the project through the following activities: assistance to migrants wishing to return voluntarily to their countries of origin; improving the reintegration of migrants in their countries of origin; informing and raising the awareness of prospective migrants; and strengthening data and communication on migratory flows (part of the Data Tracking Matrix, DTM).[9]

Contract for the Reconstruction of the State in Niger in Addition to the SBC II Under Preparation/Support for Justice, Security and Border Management in Niger (AJUSEN)

This project had a budget of EUR 90 million,[10] including EUR 80 million of conditional budget support to the State of Niger. Additional support of EUR ten million (not specified for any of the concrete elements mentioned below) was implemented

[8] European Union. Emergency Trust Fund for Africa (n.d.) https://trust-fund-for-africa.europa.eu/our-mission/strategy_en

[9] Action document T05-EUTF-SAH-REG-16, p. 11–15, https://trust-fund-for-africa.europa.eu/system/files/2023-03/t05-eutf-sah-reg-16_pdf.pdf

[10] We have used the amended budget https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-sah-ne-06_-_avenant_2_-_clean.pdf

by the French Development Agency (AFD) and Civipol, and consisted of support for the Ministry of Justice, the "Agence Nationale de Lutte contre la Traite des Personnes et le trafic illicite de migrants" (National Agency for the Fight against Human Trafficking and Migrant Smuggling—ANTLP/TIM), and the "Bureau de Coopération et d'Entraide pénale internationale" (Office for Cooperation and International Mutual Assistance in Criminal Matters). Two other components of the additional support involve capacity-building for Niger's Internal Security Forces (FSI) and improved border management.

GAR-SI SAHEL (Rapid Action Groups—Surveillance and Intervention in the Sahel)

This project aims to make the preventive and reactive action of national security forces more effective, in order to ensure more effective control of the territory and borders of the target countries, including in remote and cross-border areas, by improving cross-border and regional cooperation, among other things.

Strengthening Sustainable Management of the Consequences of Migration Flows

The project has three components: setting up observatories to identify migration hot spots; building the local authorities' capacity to respond to the needs of the local populations, migrants who are in transit or returning and refugees; and a range of structural and cyclical measures to manage migration and its consequences at local level.

Strengthening Migration Management and Governance and Sustainable Return from Niger (SURENI)

The activities of this project consist of the registration and reception of 30,000 migrants at five transit centres (in Niamey, Arlit, Agadez and Séguidine); the voluntary return of 12,000 migrants to their communities of origin; raising the awareness of 40,000 migrants en route or potential migrants 'of the risks of irregular migration'; and collecting and disseminating data on voluntary returns and reintegration.

Migrant Response and Resource Mechanism (MRRM) Phase II

This project is a continuation of an IOM project in place since August 2015. It aims to support Niger's response to complex migration flows, to promote feasible and effective alternatives to irregular migration from Niger and to promote economic and social development through circular migration in the region.

Strengthening the Resilience and Empowerment of Refugees, Returnees and Internally Displaced Persons Related to the Conflict in Northern Mali

The project's activities in Niger include food and non-food support and assistance with health, education and shelter; improving access to domestic energy, infrastructure and basic services (water, health, education) for the refugee and host population; and the voluntary repatriation of Malian refugees.

Strengthening Institutional and Community Resilience in the Diffa Region, Lake Chad Basin, Niger

The project aims to strengthen the housing capacity of communities with a high population density and to improve the authorities' capacity to manage crises involving displaced persons in the Diffa region.

Supporting the Security Forces of the G5 Sahel Member Countries in the Fight Against Impunity and Strengthening their Links with the Population

Project activities include the development and dissemination of strategic, operational and other manuals, modules and documents relating to human rights, and the inclusion of these materials in the training and practice of the Internal Security Forces (FSI); strengthening the FSI's internal mechanisms for human rights accountability; supporting national human rights institutions; and strengthening civil society's security capacities.

Creation of a Joint Investigation Team (ECI) for the Fight Against Criminal Networks Linked to Irregular Immigration, Human Trafficking and Smuggling of Migrants

The project aims to strengthen the operational and judicial capacities of the Nigerian national police services involved in the fight against organised crime networks, including improving police management of borders and improving the resolution rate of investigations linked to the fight against criminal networks involved in illegal immigration, human trafficking and migrant smuggling.

G5 Support Programme for Sahel Security (PAGS) Phase II

This aims to build the capacity of G5 Sahel's structures and bodies. More specifically, the project aims to strengthen the G5 Sahel Permanent Secretariat by, among other things, finalising a dynamic mapping information system that uses an interactive tool to visually display the security situation at the internal and external borders of the G5 Sahel area; developing a G5 Sahel strategy for managing migratory flows,

combining action and facilitating the harmonisation of public policies in the security, economic and social fields; and supporting training projects.

Support for the Creation of a Multipurpose Squadron of the Niger National Guard (EP-GNN)

This project aims to contribute to the security of the population and the stabilisation of Niger, including remote and cross-border areas, particularly in the Tahoua region.

11.2.4 Other Projects

These are projects implemented by the UNHCR partners in Niamey and Agadez, as part of ongoing migration and asylum initiatives.

Identifying Refugees and Asylum-Seekers in the Migration Flows in Agadez

Implemented since October 2017 by the national NGO "Action Pour le Bien Être" (APBE) with funding from the UNHCR, this project aims to identify, refer and direct potential asylum-seekers to the State structure in charge of asylum in order to submit a formal asylum application to it, but also to raise awareness of the opportunities offered by the opening of the asylum space in Niger.

Facilitate Access to Complementary Pathways in Niger

Implemented between 2017 and 2020 by the NGO "Forum refugiés-Cosi" (FrC) with funding from the UNHCR, the project aims to broaden the search for sustainable solutions by using legal and safe pathways for refugees in Niger. The aim is therefore to promote legal alternatives to mixed migration.

11.3 Analysis of the Instruments

11.3.1 Transparency

The Emergency Transit Mechanism

With the support of the EU as a potential donor, the UNHCR wrote to the government of Niger about its wish to set up a mechanism for the evacuation from Libya to Niger of people seeking protection. In response to this request, in November

2017 the Nigerian Ministry of the Interior set up a task force to prepare a draft memorandum establishing the ETM mechanism. The group's membership consisted exclusively of Ministry officials, and the draft memorandum they produced was further improved by the Ministry's legal adviser.

The memorandum was signed on 26 December 2017 for a renewable period of 2 years. The text clarifies the role and responsibilities of each player involved in the process. It also defines the beneficiaries of the ETM mechanism. It should be noted that throughout the process, the relevant actors in the field of asylum in Niger, as defined by Law 97 and its implementing decree setting up the National Eligibility Committee (CNE), were excluded from the process.

Following the signing of the memorandum of understanding between the Nigerian government and the UNHCR, under the aegis of the Ministry of the Interior, a meeting took place at the end of December 2017 at which the contents of the memorandum were shared with the members of the CNE (RN9).

The Provision of Asylum in Agadez

The initiative is based on the fact that 20–30% of migrants who arrive in Europe via Niger are granted asylum in Europe. The UNHCR's approach, in conjunction with the authorities and the IOM, is therefore to set up a facility in Agadez, a transit city, in order to identify these migrants and offer them protection on the spot, thus sparing them the perilous journey across the Mediterranean.

Law 2015–36

In addition to capacity-building, this law aims to develop local competencies in migration management in accordance with the international norms and standards governing this issue (Spijkerboer 2019).

Facilitating Access to Complementary Pathways as Alternatives to Resettlement in Niger

This action complements the instruments of 4(d)(ii)) with a particular emphasis on finding solutions. The operational part of the project focuses on two pillars: First, setting up an office in Niamey to provide information, advice and support for people in need of international protection; and second, developing a multi-stakeholder advocacy programme in France and Europe. The project aims to provide international protection and seek lasting solutions to identified situations in mixed migration movements.

11.3.2 Accountability

As part of the implementation of asylum-related activities, the UNHCR and its partners have a one-stop shop for refugee services in Niamey. The aim of this approach is to bring together the key players in one place in order to facilitate the granting of international protection and the search for sustainable solutions for refugees and asylum-seekers.

Remedies in the Event of the Rejection of an Asylum Application

In terms of procedural safeguards and from an administrative point of view, Niger's refugee management system provides for contentious proceedings in which unfavourable decisions by the CNE can be challenged. If their application is rejected, asylum-seekers may, if they wish, appeal to the Informal Appeals Committee (CRG).

The procedure before this committee is governed by Articles 9 and following of Order 127 MI/D/DECR of 28 March 2006, which sets out its remit, composition and functioning.

Remedies in the Event of Detention of Migrants

In view of international law, the perception in Niger is that there is no reason to detain a migrant. However, a distinction should be made between two possible detention situations. The first is where migrants are held with their free consent when they have decided, freely and in full knowledge of the facts, to return to their country of origin. The second situation, which is prohibited by international law (Art. 6, Additional Protocol), is unlawful detention.

Remedies in the Event of Trafficking or Torture

Complaints relating to trafficking and torture are governed by the rules of ordinary law, i.e. the provisions of the Criminal Code (Law 2020–05 of 11 May 2020 amending and supplementing Law 61–27 of 15 July 1961 establishing the Criminal Code).

11.3.3 Compatibility with International Law

The EU and some of its Member States regard Niger as a major transit zone for migrants and refugees on their way to Europe's borders via the Central Mediterranean. It is with this in mind that close cooperation between the two parties has gradually been built up and consolidated. The foundations of this partnership have been laid

in several political, legal and financial instruments. The content of these instruments, particularly the first two, is open to discussion in light of Niger's international obligations in terms of human rights in general and refugee rights in particular. This raises the question of their compatibility with international and Community law. This analysis will assess the compatibility with international and regional law of the policy instruments (Sect. 11.3.3.1.) and the legal instruments (Sect. 11.3.3.2).

The Political Instruments

The political instruments underpinning the EU's external policy on asylum and migration are the Valletta Declaration and Action Plan, the 2017 Migration Partnership Framework, the Sahel Regional Action Plan, 2015–2020 and the Memorandum of Understanding between Niger, the UNHCR and the IOM concerning the ETM.

The Valletta Declaration and Action Plan

These instruments are based on a number of objectives, namely: (1) addressing the root causes of migration (declining production potential, climate crises, persistent poverty, lack of security, etc.); (2) intensifying cooperation on overall migration and mobility; (3) strengthening the protection of migrants and asylum-seekers; (4) preventing irregular migration and the smuggling of migrants and asylum-seekers; (5) preventing irregular migration, migrant smuggling and human trafficking; and (6) working together more closely to improve cooperation on return, readmission and reintegration.[11]

The objectives of these two instruments are consistent with the desire for international cooperation expressed in the 1951 Convention and its Protocol.

The 2017 Migration Partnership Framework

The objectives of the 2017 Migration Partnership Framework include saving lives at sea and in the desert and enabling migrants and refugees to stay closer to home rather than embarking on dangerous journeys. These objectives are consistent with those of the Geneva Convention Relating to the Status of Refugees and its Additional Protocol in the field of cooperation and assistance for refugees, as is clear from Articles 23 and 35 of the Convention and Article 2 of the Additional Protocol.[12]

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[11] 2015 Valletta Summit Declaration.

[12] Article 23 of the Convention Relating to the Status of Refugees: 'The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals'; Article 35: 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other

However, a comprehensive and in-depth analysis suggests that, in spirit, the content of this Partnership Framework is inconsistent with certain requirements in the relevant human rights instruments on migrants and refugees, as it tends to limit the free movement of persons enshrined in the Universal Declaration of Human Rights[13] and the Geneva Convention Relating to the Status of Refugees, in Articles 13 and 26 respectively. In practice, it should also be noted that the means and methods used by the forces of law and order in transit countries such as Libya,[14] in application of this framework or otherwise, do not respect the rights inherent to human dignity to which migrants and refugees are entitled in all circumstances.

The Sahel Regional Action Plan, 2015–2020

The Sahel Regional Action Plan, 2015–2020, whose main objective is 'The enhancement of security in the region through the fight against terrorism, illicit trafficking, radicalisation and violent extremism',[15] is a unilateral instrument adopted solely by the European side. In this respect, it is an instrument for guiding the strategy on combating illegal immigration, while emphasising the relationship between 'development and security' in the Sahel.

This political instrument basically focuses on two dimensions: on the one hand, combating irregular migration and human trafficking, and on the other, strengthening border control by inviting Common Security and Defence Policy missions, such as EUCAP Sahel Niger, to provide technical support to local law enforcement agencies and by ensuring international coordination for effective border management.[16] It is clear that, in focusing essentially on security and the control of migration flows as a guarantee of stability in the region (Khouja & Mehd, 2020) this Action Plan prioritises Europe's security by securing migration and outsourcing its borders to the Sahel.

From the point of view of international law, this approach is problematic in the following respects (Khouja & Mehd, 2020): Firstly, there is no international cooperation as provided for in the 1951 Convention: the Plan focuses exclusively on European interests; secondly, the total lack of attention paid to the rights of refugees, and the marginal attention given to the rights of migrants, are surprising for a

agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'; Article 2 of the Additional Protocol to the Convention Relating to the Status of Refugees.

[13] UDHR, Art.13 '(1) Everyone has the right to freedom of movement and residence within the borders of each State. 2) Everyone has the right to leave any country, including his own, and to return to his country.'

[14] Numerous observers and NGOs have, through the media and in press releases, expressed concern at and criticism of certain practices of the Libyan security forces involving the abuse and detention of migrants without any legal procedure.

[15] Sahel Regional Action Plan, 2015–2020.

[16] Council of the EU (2015) the Sahel Regional Action Plan, 2015–2020, Brussels, p. 16.

document that aims to address migration issues, and that could potentially undermine the right to asylum; and thirdly, the restriction of the movement of persons between West African states is in contradiction, or at least inconsistent, with ECOWAS Community law (Castillejo, 2019).[17]

The Emergency Transit Mechanism

The aim of this mechanism is to reinforce the instruments already in place in connection with the European Union's asylum policy with third countries, in particular Niger. In a way, the ETM reflects the willingness of the parties involved to comply with the international obligations contained in the international legal instruments for the protection of refugees. As a mechanism for providing assistance to refugees or asylum-seekers, through cooperation between the states and United Nations bodies concerned, the ETM is in keeping with the spirit of international cooperation provided for in the 1951 Convention and its Protocol.

The assessment of the ETM varies according to the framework adopted. In terms purely of the resettlement of refugees in Niger, the ETM is a form of resettlement and burden-sharing that fully complies with the 1951 Convention and its Protocol. The assessment is already different if the analysis takes account of the fact that resettled persons have been transported to Niger from Libya by the UNHCR, before potentially being resettled from Niger to elsewhere in the world. From this point of view, the ETM initially increases Niger's burden before reducing it to some extent, if the number of resettled refugees remains below the number of refugees transported from Libya to Niger.

Finally, if account is taken of the fact that refugees moved from Libya to Niger have first been transported to Libya from the Mediterranean, this results in an even more critical assessment of the ETM. The result of these two activities is that people are intercepted on the high seas and then transported to Libya, where they are exposed to inhumane treatment, before being moved to a third country (Niger), without their claims of non-refoulement ever having been assessed in a procedure that complies with international law (ECHR Article 13, etc.). These actions have been ruled to be contrary to the European Convention on Human Rights.[18]

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[17] The relevant provisions applicable to this freedom are set out firstly in Article 59 of the 1993 Revised ECOWAS Treaty, which reads as follows: 'Citizens of the Community shall have the right of entry, residence and establishment and Member States undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto. Member States undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights referred to in para 1 of this Article. (….)' These provisions were subsequently supplemented by the Economic Community of West African States (ECOWAS) Protocol relating to Free Movement of Persons, Residence and Establishment of 29 May 1979 (Articles 2, 3, 4 and 5). This Protocol was adopted in Dakar on 29 May 1979 and ratified by Niger on 29 May 1979. (Ordinance 79–41 of 29-11-1979, JORN 24 of 15-12-1979, p. 1056; publication decree 80–68 of 9 June 1980, JORN 12 of 15 June 1980, p. 395).

[18] European Court of Human Rights, Hirsi Jamaa v Italy, 23 February 2012, 27765/09.

Legal Instruments

The Cotonou Agreement and Subsequent Amendments

In the field of migration and mobility, one of the six priority and essential areas identified,[19] the parties agree under the terms of the Agreement that '[t]he issue of migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership. The Parties reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion.'

Although the Agreement provides for an identical obligation on the part of the EU, the asymmetry is in reality clear. Analysed in this way, the Cotonou Agreement is consistent with international law, including international human rights law, in emphasising respect for the dignity and rights of all refugees and migrants. The emphasis on non-discrimination in Article 13(1) reflects an African concern.

It must be admitted, however, that by prioritising the management of migration flows according to a strictly legal approach, through the fight against trafficking and irregular migration and readmission (Article 13(5)), this Agreement creates the conditions for tension with the ECOWAS Community approach to the movement of persons.

Law 2015–36

Law 2015–36 on Migrant Smuggling symbolises Niger's commitment to complying with the political agreements that bind it to the European Union. It is based on a dual legal approach, criminalising and penalising migrant smuggling and protecting migrants as victims.

In its implementation, Law 2015–36 gave rise to widespread debate and elicited numerous points of view. The law and its implementation pose problems in the areas of freedom of movement, given Niger's membership of ECOWAS; the right to asylum; the right to freedom of movement within one's own country; and the right to leave any country, including one's own.

From a strictly legal point of view, Law 2015–36 is problematic in view of its restrictive effect on people's freedom of movement. By favouring a markedly security-conscious approach to the movement of people, it creates an obvious tension between the Republic of Niger's obligations in terms of the free movement of people and the right of residence agreed to within the framework of ECOWAS and

[19] The other areas are: human rights, democracy and governance in people-centred and rights-based societies; peace and security; human and social development; environmental sustainability and climate change; and inclusive sustainable economic growth and development. See https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1553.

UEMOA.[20] By restricting the movement of foreigners to the north, particularly to Agadez, the law undermines regional mobility.

This restriction on movement also prevents refugees from fleeing armed conflicts and other types of violence in neighbouring countries such as Mali and Nigeria. From this point of view, a contradiction can also be identified with the refugee protection system as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, both of which have been ratified by Niger.

In conclusion, the analysis of the compatibility with international and regional law of the various political and legal instruments described above leads us to make two observations. The first is that the proliferation and diversification of agreements between the state of Niger and the European Union have two complementary objectives. The first objective is to help ensure minimum conditions of international protection for refugees and migrants in a context of multifaceted crises. The design and implementation of the ETM in Niger, as well as many of the projects financed under EUTF, are intended to achieve this objective of protection. The second objective is clearly to strengthen the Nigerian government's capacity to receive and protect refugees and migrants on its territory. This second observation concerns the analysis of the political and legal instruments referred to above, which reflect the EU's success in developing with Niger a strategy for the delocalised management of refugee and migrant flows, far from Europe's borders. It is therefore clear that Niger's implementation of these instruments is difficult to reconcile with international and regional law.

The EU Emergency Trust Fund for Africa

Since 2015, the EU Emergency Trust Fund for Africa has been regarded as the main financial instrument for the implementation on the ground of European policies in the field of outsourced management of migrant and refugee flows in the Sahel countries, particularly in Niger. There, some 14 projects are financed through this fund.

From a fundamentally legal point of view, and in particular, concerning relevant international law, these projects are somewhat ambivalent, requiring a twofold reading.

The first, and most obvious, reading is that the benefits of these projects for the protection of migrants and refugees should be recognised from two points of view. Firstly, in that they contribute to direct care for migrants and refugees. From this point of view, the EUTF is an instrument that is compatible with international law, in particular in terms of states' protection obligations.

[20] Niger is a member of ECOWAS and of the West African Economic and Monetary Union (UEMOA). The revised ECOWAS Treaty (Articles 3(2)(d)(iii) and 59(1)) and the UEMOA Treaty (Article 4(c)) guarantee citizens of the Member States the free movement of persons, goods, services and capital within the territory of the Community and of the Union, as well as the right of residence and establishment.

Secondly, by helping to strengthen the capacity of the state of Niger to provide better care for migrants and refugees on its territory, the projects financed by the EUTF are an expression of the international solidarity advocated by the 1951 Geneva Convention, as well as by the Global Compact for Safe, Orderly and Regular Migration and the December 2018 Global Compact on Refugees.

The second possible reading of the relationship between EUTF-funded projects and relevant international law points to a glaring contradiction. There is good reason to believe that by supporting the Nigerian authorities in the areas mentioned above, with a view to strengthening their operational competencies, the EU is seeking to contain the flows of migrants and refugees on Niger's territory.

This containment strategy is contrary not only to the principle of non-refoulement, but also to the principle of shared responsibility advocated by the Geneva Convention and the Global Compact on Refugees.

The development of initiatives aimed at finding solutions to the problems of refugees appears to be positive in the context of asylum in Niger. One possible criticism of such an initiative concerns its nature, and more specifically the impossibility for a non-profit organisation with limited experience in the field of carrying out this type of initiative. An international NGO with a presence both in Niger and in Europe is needed, with the necessary advocacy capacity to move things forward.

The opening up of asylum services in Agadez has made this region the leading centre for identifying and registering asylum-seekers. In this context, coordination between the organisations involved in providing protection has been visibly improved. However, the process of determining refugee status is rather slow, due to the limited capacity of the state agency responsible for this work.

11.3.4 Results

Initially operating with a very small staff, the CNE subsequently expanded rapidly with the introduction of the ETM and the opening of UNHCR's Agadez office and now has over 100 employees. It has also gone from managing less than a dozen individual cases up to 2017 to managing a considerably higher number of refugees. Today, 200 cases can be examined in a single refugee status eligibility session. The capacity for refugee status determination has been strengthened.

On an institutional level, the Directorate of Civil Status, Migrations and Refugees has been set up. The rapid evacuation mechanism has protected a total of 3361 evacuees from Libya. The ETM has reinforced the capacities of the relevant parties in Niger, in particular the Directorate of Civil Status, Migrations and Refugees and the members of the National Eligibility Committee. In terms of political gain, testing out this mechanism has raised the profile of the Nigerian authorities.

11.3.5 Containment/Mobility

All the projects analysed aim to confine refugees and asylum-seekers to the region, and in our case to Niger. This is reflected in the policy instruments adopted by the EU, which aim to reduce the number of refugees coming to Europe by confining them to the African continent.

The ETM is a notable exception, as it provides for the evacuation of refugees from Libya to Niger and their resettlement in European countries.

11.3.6 Alignment with the Global Compact on Refugees

The objectives of the Global Compact on Refugees are fourfold: to ease pressure on host countries; to enhance refugee self-reliance; to expand access to third-country solutions; and to support conditions in countries of origin for return in safety and dignity.[21] Firstly, it should be emphasised that the Global Compact is not legally binding. Secondly, from a specific point of view, it is in line with the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees, which are instruments widely accepted by the states of the international community.

What is specifically important about the Global Compact is that it complements the existing normative framework for the protection of refugees.

Ideally, therefore, all four of the Compact's interrelated and interdependent objectives should be achieved by all parties involved. In this light, it is important to analyse to what extent the political and legal instruments (as described above) that form the basis for cooperation between Niger and the European Union in refugee governance on the territory of Niger are aligned. To do this, we will check whether the objectives assigned to these instruments are consistent with the Compact's objectives.

Firstly, it should be noted that in most of the instruments analysed, the refugee category is subsumed under the irregular migration category. In general, we can make the following four observations about the GCR's objectives:

- easing pressure on host countries: the EU's interventions are doing the opposite of easing the pressure on Niger. By confining refugees to the region, and in this case to Niger, the instruments analysed in this study increase the pressure;
- enhancing refugee self-reliance: there are two projects that aim to reinforce refugees' resilience and self-reliance. While we are not in a position to assess the current success of these projects, their aim is clearly compatible with the GCR;
- expanding access to third-country solutions: the EU is not taking any initiatives in this area. Even the ETM seems to end up transporting more people to Niger than it resettles;

[21] Global Compact on Refugees, p. 3.

– improving the conditions in countries of origin for return in safety and dignity: the return of refugees from Niger to their countries of origin is a clear priority for the EU.

As to the Valletta Declaration and Action Plan, it should be pointed out that one of the objectives concerning refugees (intensifying cooperation on legal migration and mobility and strengthening the protection of migrants and asylum-seekers) could be in line with the objectives of the Compact.

The implementation of the Valletta Declaration and Action Plan is supported by the EU Trust Fund for Africa. In Niger, this fund has financed several structural projects, the most relevant of which concern, first, governance and conflict management, and second, migration management. On the other hand, the fund has also supported the strengthening of Niger's asylum system, the identification and transfer of potential refugees to government agencies, and the provision of assistance, which is consistent with the objective of easing pressure on Niger. In addition, thanks to EU funding, UNHCR set up an office and awareness-raising and assistance activities in the Agadez migration centre in 2017 to ensure access to asylum and assistance (Lambert, 2020). In this respect, this funding is consistent with the Compact's emphasis on funding and effective and efficient use of resources (point 32).

Secondly, the 2017 Migration Partnership Framework, by aiming in particular to enable migrants and refugees to stay closer to home rather than embark on dangerous journeys and to save lives at sea and in the desert, is in tension with Objectives 1 and 2 of the Compact, concerning easing pressure on host countries and enhancing refugee self-reliance. The objective of ensuring that more refugees remain in the region results in increased pressure on Niger and restricts refugees' options by denying them the option of travelling to regions with more capacity to receive refugees.

Some of the objectives of the Partnership Framework, such as 'enabl[ing] refugees to stay closer to home rather than embark on dangerous journeys' and 'fight[ing] traffickers and smugglers' networks that benefit from people's despair', cast some doubt as to whether it is entirely consistent with the Compact.

The Sahel Regional Action Plan, 2015–2020 is also relevant to the Compact. Of all the political instruments between the state of Niger and the EU, this is the one that raises the most doubts about its consistency with the Compact.

Finally, the policy instrument whose alignment with the Compact appears to be the clearest is the Emergency Transit Mechanism (ETM). This concerns the voluntary transfer, organised by the UNHCR by air or land, of persons meeting certain criteria from Libya to the Republic of Niger, and their subsequent movement to a third country. It can be claimed that the ETM is broadly in line with the objectives of the Compact. Specifically, the ETM is helping not only to ease the pressure on Libya, but also to widen access to solutions in countries other than Libya.

From a functional point of view, the ETM seems to constitute a form of humanitarian assistance, as referred to in point 32 of the Compact. The Compact also stresses the importance of setting up 'efficient mechanisms' as an alternative to

refugee camps (point 54). By facilitating the resettlement or relocation of refugees to other countries, the ETM contributes to the fulfilment of these rights guaranteed to refugees.

It has to be said, however, that in its implementation, the ETM has at times reduced the sovereignty of the state of Niger, and in particular the powers of the body responsible for managing refugees. In this respect, the ETM does not fully respect the sovereignty of the state of Niger, and is therefore inconsistent with the Compact (point 5 of the guiding principles). Furthermore, while the ETM is easing the pressure on Libya, it seems to be increasing the pressure on Niger for the time being, as more refugees are being transported to Niger than are being resettled.

A third point of doubt concerning the ETM arises once this mechanism is analysed in relation to European projects for funding Libyan coastguards who perform "pull-backs" of migrants (including refugees) from the Mediterranean to Libya. These activities have intensified the pressure on Libya.[22] In this context, European state actors initially organised and funded the return of people who were picked up at sea to Libya, from where a very small number were transported to Niger. Both of these activities have been ruled contrary to the European Convention on Human Rights (Hirsi Jamaa) and contrary to the objective of easing pressure on host countries (such as Libya and Niger), and constitute either a return to the country of origin or a form of indirect access to resettlement countries, both of which are in flagrant violation of fundamental rights (in Libya in particular).

11.4 Conclusion

In conclusion, the ETM's consistency with the GCR varies depending on the framework used to study the phenomenon. When we assume that the refugees managed by the ETM are in Niger, it is to be viewed as a resettlement program that reduces pressure on Niger. When the fact that these people were evacuated from Libya to Niger is taken into account, it becomes an instrument to reduce the pressure on Libya and increase the pressure on Niger. Notwithstanding the resettlement of 90% of evacuees and projects in support of refugees. On the other hand, when the frame includes the fact that people evacuated from Libya were returned to this country in the first place through activities organized and financed by European state actors subsidized by European funds, then it becomes clear that this is a complex operation that increases the pressure on Libya and Niger, at the expense of serious human rights violations for the people concerned.

[22] In 2020, 11,891 people were intercepted and returned to Libya; in June 2021, the International Rescue Committee reported that 13,000 people had already returned to Libya in 2021; International Rescue Committee: Number of migrants and refugees intercepted at sea and brought back to Libya to reach all-time high in 2021, warns the IRC, (June 17, 2021) Retrieved from https://www.rescue.org/eu.

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Chapter 12
EU Cooperation with Serbia for Externalization of Asylum

Olga Djurovic and Rados Djurovic

12.1 Introduction

EU influence over Serbian migration and asylum system and its regular functioning is directly proportional to the quantity of EU funding. Apart from helping Serbia to address the refugee influx since 2015 onwards, the EU perceives Serbia as its long-term external partner in managing migration coming across the Balkan route from Turkey and has *de facto* incorporates Serbia in its regional response to future similar situations. This can be seen in the EU-Serbia Readmission Agreement, the agreement with FRONTEX, memoranda with the European Union Agency for Asylum (EUAA), former EASO, the adjustment of Serbian asylum, migration and border management policies and legislation to the EU *acquis*.

However, the EU is certainly aware of the violent and unlawful pushbacks from its Member States to Serbia, of Serbia's weak and dependent asylum and reception system, and of the Serbian initiative to construct a border fence along its border with North Macedonia. The EU thus seems ready to sacrifice its values and refugees' guaranteed human and refugee rights, as long as that happens beyond its borders, in Serbia, in exchange for containment of migration on non-EU territory. EU involvement prioritizes containment—preventing movement towards the EU and keeping refugees housed in third country partners. Containment limits the operational, political, and legal liabilities of European actors. This goal is in tension with a parallel goal of supporting the refugee protection and asylum processing systems for the sake of advancing human rights norms and furthering humanitarian support to refugees in need (Djurovic et al., 2022). This Chapter notes that this tension drives domestic resistance to capacity building efforts. Serbia as a third country partner, on the other hand, tend to undermine the containment strategy preferring not to house

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large numbers of refugees, fearing to become refugee buffer zone on the outskirts of EU. As a result, while EU assistance through legal instruments and funding seeks the development of refugee reception and protection systems, it simultaneously incentivizes domestic actors in Serbia to push back against EU efforts by disregarding the legal instruments in practice and ensuring the funding fails to actualize its foreseen goals related to effectiveness and long-term sustainability.

12.2 Nature of EU Assistance to Serbia

The construction of Serbia's first asylum law, drafted in 2007 and implemented in 2008, was largely driven by pre-accession and accession negotiations with the European Union. Substantive involvement accelerated with the refugee crisis in the mid-2010s. With the Western Balkans Route Leaders Statement 2015, the EU started its more active engagement in dealing with migration management challenges in Serbia, with political, legal, and financial arrangements to follow. Since then, EU support for Serbia's asylum, refugee protection and border management systems has been provided for in several political and legal instruments, as well as through extensive funding via a variety of channels. Combined, these instruments and funding streams provide the bulk of support for relevant Serbian institutions. At the time of writing this Chapter, the EU had contributed over EUR 150 million to Serbian migration reception, border control, and asylum systems.

12.2.1 Political and Legal Instruments

What are the relevant political and legal instruments connecting the EU to Serbia's asylum, migration, and border management system? The first of these agreements—the 2007 EU-Serbia Readmission Agreement—came at approximately the same time as Serbia's first asylum law—Law on Asylum—and was driven by Serbia-EU visa liberalization process. All other instruments evaluated in this Chapter, besides these two mentioned, came after 2015 and after the start of refugee crisis and after the opening of the Western Balkan Migration Refugee Route.

Readmission Agreement with the EU

Signed on 18 September 2007, the Readmission Agreement is the first legal instrument to be examined According to the agreement, Serbia will readmit to its territory any migrant who traveled through Serbia directly to an EU state destination who does not satisfy the requirements to remain legally in the EU member state. Serbia then signed individual agreements with all neighboring EU countries though these bilateral agreements are subject to the binding force of the Readmission Agreement.

Problems with the implementation of Readmission Agreement, along with related bilateral readmission agreements, that require official notice and acceptance prior to readmission, contributed to the proliferation of pushbacks both to and from Serbia since 2016, which in turn prompted the creation of the "Hungarian waiting list" by the Serbian Commissariat for Refugees and Migration (KIRS) and other Serbian alternative strategies to avoid stranding of refugees in Serbia addressed further *infra*.

Western Balkan Route Leaders' Statement

After the influx of refugees to the Balkans and Europe in 2015, leaders of countries along the Western Balkan Route, along with several proximal EU states, met under the auspices of EU Commission in Brussels in late October and issued a joint statement, a 17-point plan, on common measures to be taken to address refugee flows in the region. The 17-point plan had several major elements: permanent exchange of information; limiting secondary movements; supporting refugees and providing shelter and rest; jointly managing the migration flows; border management; tackling smuggling and trafficking; and information sharing on the rights and obligations of refugees and migrants.

In the following months, the countries involved held several additional meetings and conducted joint initiatives, mostly aimed at reducing physically the flow of migrants and refugees along the route. These joint initiatives initially prompted restrictions on the nationalities of migrants allowed to travel through the route that followed with complete lockdown of borders. These restrictions spurred the first pushbacks of refugees observed at the Serbian border with Croatia. By mid-March 2016, the Western Balkan route was fully closed, and pushbacks practices have flourished along Serbian borders ever since.

Law on Asylum and Temporary Protection

Serbia's first asylum law regime was replaced by the Law on Asylum and Temporary Protection (LATP) in 2018, prompted by EU funding and expert support within EU—Serbia Accession negotiations Action plan for Chap. 24. It was drafted to conform to EU directives on asylum procedure, qualification, temporary protection, and reception conditions.

Law on Foreigners

A parallel Serbian law, also adopted in 2018, expanded the availability of humanitarian residence, introduced new forms of temporary residence, and created procedural guarantees for refusal of entry and return procedures. Like the LATP, the Law on Foreigners (LOF) came about with substantial EU funding and was drafted to

comply with EU directives on family reunification, long term residence, visas, students, human trafficking, and return. In tandem with the LATP, the LOF forms the legal basis for assisted voluntary return.

FRONTEX Status Agreement

The Serbian Ministry of the Interior has been cooperating with the European Border and Coast Guard Agency (FRONTEX) in connection with a working agreement since 2009. This partnership, focused on countering illegal migration and cross-border crime, was emphasized by the Western Balkan Route Leaders Statement in 2015. In 2019, Serbia signed an agreement for the deployment of FRONT that came into force in 2021.

12.2.2 Funding

In addition to the political and legal instruments binding Serbia's refugee admission and protection system to the EU, the EU has funded the system through various financial agreements. This Chapter evaluates three different streams of funding from the EU, one of which—IPA funding—began because of accession negotiations, while the remaining two came in response to the refugee crisis in the mid-2010s.

IPA Funding

Since at least 2013, the Serbian migration system has received financial support from the EU in the form of Instrument for Pre-Accession Assistance (IPA) funding. In 2014, EUR 28.45 million was allocated for combatting human trafficking, improving the efficiency of migration flows, supporting border management and crossings, and improving the asylum system (IPA II, 2014, p. 16). In 2015, Serbia received multi-country IPA (MC IPA) funding to improve the quality and capacity of migration reception. This grant funded acquisition of equipment for KIRS and medical supplies. It also supported NGOs that assist migrants. In 2016, MC IPA funding strengthened Serbian border security by improving surveillance, funding additional officers, and equipping border police with necessary equipment. Similar funding was provided in 2017. Since 2017, IPA funding has been aimed at improving the capacity of reception centers for migrants in Serbia, providing supplies for humanitarian assistance, strengthening human rights protections for migrants in Serbia, and generally improving institutional capacity to respond efficiently and effectively to the needs of migrants and refugees.

The Serbian government opposes using of national IPA funding for the migration and asylum system purposes in relation to 2015 refugee crisis and its effects in later

years. It believes that migration should not be a component of accession negotiation and should be addressed as a separate issue by additional EU funding.

ECHO Funding

Since the influx of refugees in 2015, Serbia has received EUR 13 million through the Directorate General for Humanitarian Aid and Civil Protection (DG ECHO). This funding supports countries with urgent humanitarian issues, in concrete case of mass migration, and provides supplies necessary for humanitarian provision, such as beds, toilets, food, medical provision, sanitation, etc.

Madad Fund

In 2016 and 2017, the EU Trust Fund in Response to the Syrian Crisis (Madad Fund) allocated over EUR 24 million to Serbia to provide food security to migrants and refugees and improve access to protection services. Functionally, this funding primarily served for the operational costs of reception centers and the reception system in general and without prejudicing the legal status of exiles in Serbia (if they are irregular migrants or managing to regulate their stay as asylum seekers or refugees).

12.3 Analysis of Effect of EU Assistance to Serbia

This Section evaluates each of the political, legal, and financial instruments studied above under six central questions: transparency, accountability, compatibility with international law, results, containment/mobility, and alignment with GCR objectives.

12.3.1 Transparency

The question of transparency considers whether the actors involved have made public the instruments used between Serbia and the EU. Specifically, this Chapter considers whether the instruments were prepared in a transparent manner that allowed participation by the public; whether its final form was made available in an accessible, public document; and whether it was implemented in a transparent manner that involved all relevant parts of the government and interested civil society organizations.

The level of transparency in EU association with Serbia varies by instrument. Some are relatively inaccessible to interested third parties, while others more intentionally engage with the whole of society. As an overarching theme, the legal

instruments and funding agreements are publicly available but neither Serbia nor the EU has made an effort to increase their visibility or publish details about their implementation (European Commission, 2015a, b, c; EU Delegation in Serbia, 2015a, b, 2016).

With respect to the Leaders Statement, though it was made generally available, the state made no effort to effectively communicate it to the general public or those involved with refugees and asylum seekers. Most respondents said they did not remember the statement well, and it did not significantly impact their work. The 2007 Readmission Agreement is characterized by similar trends. The agreement itself is publicly available, but information about compliance and statistics regarding readmissions are not available to the public or relevant nonstate actors. The authorities are silent about violations to the agreement and especially regarding refugee pushbacks practices taking place constantly since 2016 along EU-Serbia borders.

Domestic legislation is similar. Fortunately, the process of drafting the LATP was transparent and involved much of society. But information about its implementation and statistics about foreigners residing legally in Serbia are not readily available. To receive this information, interested parties must request it from the government or receive it from UNHCR. The availability of data about implementation of the LOF is similarly limited, though its drafting process was also relatively participatory and transparent. EU annual progress reports do make a limited set of information available to the general public.

Conversely, the FRONTEX status agreement has been opaque from the beginning. Interested members of the public were not informed of its drafting process. Instead, Serbian, and European authorities misled them about the process and content of the draft. At no point did civil society have a say in drafting the agreement. Even when the agreement was finalized and publicized, information about its implementation was obfuscated. At the time of writing, information about the agreement's implementation was restricted to a narrow set of civil society organizations. Information about funding from the EU is also available but not widely publicized. For example, ECHO funding in 2015 and 2016 was available in press releases and on EU websites, but the existence and availability of funding was never directly communicated to local NGOs.

Instruments for MADAD funding were also drafted with involvement from several international organizations, but the process excluded local CSOs. The funding itself is generally available, but information about its use is fragmented. Several respondents perceived it as "being in the EU Delegation's interest to avoid publicly linking EU financial support with the containment of migrants in Serbia, while Serbian state institutions found communicating to the Serbian public about MADAD funding in the field of asylum and migration a non-priority within their own political agenda" (Djurovic et al., 2022, p. 52). IPA funding is more transparent, and information about both the instruments and implementation of the funding are generally available but dispersed among several sources.

12.3.2 Accountability

The question of accountability considers to what extent actors implementing the instruments are held accountable for violations of international, European, or domestic law. It also considers to whom the actors are accountable.

Even though there are some domestic and international enforcement mechanisms to ensure implementation of legal instruments in accordance with human rights and refugee law more generally, these mechanisms are lacking in most cases. Their ability to improve the plight of refugees in Serbia is often illusory. To begin with, the Western Balkans Route Leaders Statement makes no pretense to be legally enforceable. As a political agreement announcing a commitment to work together to effectuate ideals of migration flow and refugee treatment, it makes no claim to be binding on the parties who made it.

Other important agreements are similarly unenforceable. The Readmission Agreement, though a legal instrument that claims binding authority, does not appear to be supported by any accountability mechanisms, at least not bilateral or supranational ones, while envisaging common commission for readmission that has more implementing and problem-solving role (European Commission, 2019). As a result, victims of violations in the form of pushbacks from EU member states bordering Serbia cannot meaningfully appeal to this agreement as a legal authority. They may still be deemed illegal by international adjudicatory bodies under more general human rights or refugee law. While political pressure or coordination through occasional readmission commission meetings could theoretically prevent such pushbacks, they still occur regularly with little legal, political, or diplomatic response, despite knowledge by Serbian authorities of the illegality of such actions.

Additionally, with respect to the FRONTEX agreement, FRONTEX staff in Serbia are essentially unaccountable for their actions in the country. Reporting and evaluation of any allegation of rights violations by FRONTEX staff is done internally by reporting to a human rights officer. But the human rights officer has no meaningful institutional independence from FRONTEX, meaning they have little ability to truly hold staff accountable in the absence of a favorable institutional culture. Moreover, the FRONTEX executive director has a crucial and exclusive role of determining whether an unlawful act was performed in the scope of official duties.

The relevant Serbian domestic accountability mechanisms for protecting migrants' rights are also lacking. Parliament has essentially no role in implementing these instruments, and migrants almost never bring criminal charges due to lack of information or practical ability. Although the Ombudsperson has regularly visited refugee camps, their recommendations are typically non-binding, and they have little ability to meaningfully pressure offending actors. Individual actors can, however, bring cases before the Ombudsperson, which is one of the few mechanisms available for refugees to bring their claims.

Migrants also suffer because KIRS is an independent agency not under ministerial control. They report directly to the government, but the lack of ministry oversight precludes effective response when staff violates the rights of refugees.

Although the law provides that refugees can complain to senior officers when administrative staff violate their rights, these complaints are typically ineffectual. Senior staff tend to automatically reject the complaints, leading to lengthy court procedures. Migrants with uncertain accommodation are ill-equipped to pursue such proceedings. While many organizations supported by EU funding—including other departments in the Serbian government—receive independent external evaluation, KIRS did not opt for such oversight. The EU has not accepted responsibility for actions taken by organizations receiving EU funding.

Several international bodies are competent to investigate and adjudicate allegations of rights violations against refugees in Serbia. The European Ombudsperson investigates complaints about poor administration by EU institutions (ECRE, 2020; European Ombudsman, 2020). But, to date, there have been no complaints regarding EU support of the Serbian migration, asylum, or border control systems. Historically more meaningfully, the European Court of Human Rights (ECtHR) evaluates claims brought under the European Convention of Human Rights, including its prohibitions on torture and collective expulsion. Serbian authorities typically comply with ECtHR interim measures.

Various other international bodies have authority to investigate Serbian institutions and issue reports and recommendations. First, the Council of Europe's (CoE) Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) visited Serbia in 2015, 2017, and 2021. Though their visits did not specifically address refugee and migration issues, during their 2015 visit they found that individuals detained at the holding premises of the Belgrade International Airport were not systematically informed of their legal status or rights and were not provided medical care (Council of Europe, 2015, 2017, 2021).

Second, the Special Representative of the CoE Secretary General on migration and refugees visited Serbia in 2017 and identified several concerning characteristics of its migration policy. In addition to the existence of the Hungarian list, migrants did not receive adequate information about their ability to seek asylum, many migrants had an irregular but "state tolerated status," and there was a weak guardianship system and irregular age-assessment practices.

Third, the CoE Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) monitors the implementation of the Istanbul Convention. In 2019, it issued a number of recommendations to Serbia regarding its treatment of refugee women. These recommendations included that the country ensure asylum seekers are informed of their rights, that it makes a firmer effort to identify asylum seekers who are victims of or at risk of gender-based violence, and that they improve migrants' access to legal and other counseling.

Fourth, the U.N. Committee Against Torture (UNCAT) features a mandatory State monitoring mechanism, an independent inquiry procedure, and can consider individual complaints. Its measures are not binding, however, and the pressure imposed by its decisions is primarily political and diplomatic. For instance, Serbia deported an asylum seeker to Turkey despite a UNCAT interim measure to refrain from deportation. UNCAT has elsewhere noted that Serbia should intensify its efforts to facilitate access to the asylum procedure, train immigration officials on

relevant international refugee and human rights law—especially non-refoulement—and include experts from civil society in border monitoring to ensure compliance with international law (Committee against Torture, 2009, 2019, 2021).

12.3.3 Compatibility with International Law

The question of compatibility asks to what extent the instruments linking the EU and Serbia comply with international and European human rights norms with respect to refugees.

By the language of relevant legal and political instruments, they are entirely compliant with International Refugee Law and International Human Rights Law. They claim to affirm the right to seek asylum, to advance humanitarian pursuits, and to protect the human rights of migrants and refugees. But there is a massive gulf between the claims of legal and political instruments and their practical implementation. The pushbacks, both to and from Serbia, regularly violate the non-refoulement principle that is ubiquitous in International Human Rights and Refugee Law, as well as prohibitions on collective expulsion and the imposition of inhumane treatment. These practices violate, among several other international legal instruments, Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees and articles two, three, and four of the European Convention of Human Rights.

Activities in Serbia supported by EU funding are also regularly in violation of international law. In addition to pushbacks by Serbian authorities on the southern border, KIRS staff were reported to regularly mistreat migrants in the field. For example, staff at Obrenovac in 2018/19 assessed the age of individuals by inspecting the development of their genitals. The reported violations of international and EU law have taken place in a migration and asylum governance system that has been enabled to a very large extent by EU financial support (Djurovic et al., 2022).

12.3.4 Results

The broad question of "results" asks to what extent the goals of the instruments have been realized in Serbia. It considers whether Serbian institutions were able to absorb and implement EU assistance or if it brought little change. It also asks whether the changes brought by EU partnership have contributed to sustainable capacity building instead of propping up temporary solutions. Given the rights violations occurring in the Serbian system, its malfunctioning and lack of sustainability solutions, there are serious concerns about the extent to which Serbia has absorbed and implemented EU assistance. Despite its purely political nature, the Leaders Statement was one of the most significant developments in the Serbia-EU relationship. Though the Western Balkan Route was open for less than a year, the cooperation that followed the Statement and was based on EU-Serbia accession negotiations opened the

door for EU humanitarian aid and support in building Serbia's reception system and border management capacities.

At the beginning of EU's stronger assistance to the Serbian migration system, its primary purpose was providing urgent humanitarian relief to migrants in Serbia. Additionally, while the 2015 Leaders Statement had some similar effects as more recent instruments—notably increasing the Serbian migrant reception and migration management capacity—it embodied a containment strategy into a legally nonformal document. By the time financial assistance from the EU came in earnest, Serbia was facing a dire humanitarian situation since there was neither capacity nor political will to accommodate the influx of refugees into the existing system.

The readmission agreement has had much less meaningful effect. Because of Serbia's repeated refusal to accept readmission requests from neighboring states, most "readmissions" happen through pushbacks. As a result, the readmission agreement has done little to normalize the status of migrants, facilitate asylum requests, or systematize the migration system. As pushbacks both to and from Serbia became ubiquitous and tolerated by Serbian authorities, "a sense of arbitrariness and irresponsibility spread among Serbian institutions. Their staff expressed their indifference with the transitional character of migration and temporary stay of persons in need of international protection in Serbia" (Djurovic et al., 2022, p. 76).

In a similar manner, the LATP and LOF failed to comprehensively reform the migration system, despite their lofty language. These laws textually improved the Serbian structures and procedures for reception of migrants and processing of asylum claims. To conform to EU standards, they introduced legal concepts that would make the system more precise and effective. Unfortunately, their implementation remained contested due to the limited knowledge, expertise and capacity of relevant institutional staff (Djurovic et al., 2022). And the whole system remained underfunded and understaffed. The result is a system out of step with the governing legal regime, as reception centers and migration officials do not have the experience or capacity to effectuate the legal protections or standards provided by the LATP and LOF.

Finally, with respect to funding, despite substantial EU funding, the Serbian migration system falls short of domestic legal protections and international human rights and refugee law norms. However, nearly every aspect of the Serbian migration system is propped up by EU funding, so the situation would almost certainly be disastrous in the absence of EU funding. But implementation of the funding's goals falls short in several ways. First, reception capacities remain limited and substandard. As a result, "despite EU financial support, the access of migrants and refugees to legal and other reliable information, to the legal system, to asylum or other legal procedures and to fair proceedings in general, remained seriously limited. It relies solely on local NGO professional free legal aid that was not financed by the state nor sufficiently financed by the EU" (Djurovic et al., 2022, p. 80). However, the EU has failed to recognize the critical role of CSOs in the reception and protection of refugees in Serbia and as a result has failed to fund them properly or systematically. Instead, EU funding goes predominantly toward failed and inefficient state

institutions. Second, the system still violates international human rights and refugee law norms, meaning EU funding has failed to bring about the change it seeks. Conditions in reception centers are poor, and Serbia has never issued travel documents to refugees. The ECtHR has even found that Serbia cannot be considered a safe third country because of inefficiency in its asylum system and risk of refoulement. While EU was strengthening integrated border management capacities, voluntary return perspectives, police regional and EU cooperation, police anti-smuggling and technical capacities, "Serbia faced a high risk of becoming a buffer zone with thousands of migrants stranded on its soil in dire humanitarian need" (Djurovic et al., 2022, p. 17) once EU would withdraw with its predominant funding. It is questionable whether EU assistance has truly alleviated that risk. On the whole, the results have not lived up to the language of international instruments or goals of EU funding.

12.3.5 Containment/Mobility

The question of containment asks whether the instruments have promoted the containment of refugees or if they have advanced the mobility of individuals and groups seeking international protection. Despite humanitarian and reception concerns underlying EU assistance to Serbia, EU legal agreements and continued funding are also driven by implications related to slowing down or containing refugees along Serbian borders and Balkan migration routes (Bodo Weber, n.d., 2017; FRONTEX, 2022; Euroactiv, 2021; Schengenvisainfo, 2021; Intellinews, 2022; Euronews, 2021). The Readmission Agreement of 2007—the first addressed EU legal instrument between Serbia and the EU—expressly set conditions for return of migrants to Serbia, to be substituted with de facto refugee pushbacks practices in the field ever since 2016.

Obviously, the refugee containment strategy is not solely confined to Serbia having in mind EU arrangements with other neighboring third countries of transit, as Tunisia, Turkey, and Niger, that have various levels of engagement with the EU. In that regard, EU actors are supporting asylum governance in third countries as part of a containment agenda which in turn leads to resistance by third country actors (See Chaps. 10 and 13 of this Volume).

As noted above, the Western Balkan Route Leaders Statement did not necessarily solidify a strategy of containment on the part of the EU. Instead, it provided groundwork for common initiatives that could have solidified into many forms of cooperation. However, this attempt at shared ground quickly collapsed into containment with the beginning of discriminatory rejections at the border later in 2015. Given these rejections and pushbacks, which became widespread in the intervening years, the implementation of the Western Balkan Leaders Statement was primarily directed towards containment.

Refugee pushbacks from Croatia and Romania aimed at slowing down and containing migration influx coming over Serbia. Refugee pushbacks from Hungary, which have been ongoing since 2016, contributed to the creation of the infamous "Hungarian waiting list" (AIDA Hungary Report, 2020, pp. 19–21). In order to claim asylum in Hungary, the country requires that migrants enter legally via border crossings. Otherwise, they will be pushed back to Serbia. However, there were many more migrants in Serbia who wanted to enter Hungary than there was capacity to enter through regularized border crossings. KIRS's solution was to create a list of refugees seeking to enter Hungary to avoid their long term stay and tensions along borders with EU and within the country. To get on the list, migrants had to register at a temporary reception center in Serbia and wait for their turn. The waiting period often lasted over a year. This mechanism, though suspect legally and problematic from a humanitarian perspective, calmed tensions among migrants and encouraged long periods of waiting at temporary reception centers in Serbia. As a result, it contributed to longer stay of certain number refugees in Serbia who were willing to try "Hungarian list" solution. Others continued with the aid of developing local and cross-border smuggling criminal networks The flow of refugees to Hungary does continue, but slowly only for those admitted from the list. On the other side, the FRONTEX status agreement also contributed to containment by strengthening the readmission of refugees from Serbia to Bulgaria.

It seems that EU policies prefer for the influx of migrants to be housed outside of its borders, but with only a narrow set of those in dire need of international protection to trickle into member states. As a result, the overarching strategy is aiming toward restricting the flow of migrants from Serbia to the EU through financial, policy and legal arrangements and improve the capacity of Serbian institutions to protect borders, to handle reception, to manage migration and protect those in need, even including those, victims of violent pushbacks. Helping Serbia so that it cannot be accused of neglecting the plight of migrants altogether.

However, the domestic situation in Serbia means the EU's containment strategy is less effective than one might have hoped. EU funding targeting humanitarian and running systems needs indirectly slowed down irregular migration in Serbia, but without refugee integration into the Serbian social system and regularization of status, migrants and refugees remained on the move. They overwhelmingly still planned to reach the EU. Because proper implementation of the LATP is generally lacking, most migrants still exist in Serbia without legal status, though they are tolerated by authorities. The lack of legal status, combined with the continued lack of protection or respect for human rights, discussed *infra*, drives many migrants to seek entry to the EU through any channel available, abundantly using smugglers. As a result, it is not right to say that EU funding, in any form, stopped or significantly impeded mobility of migrants and refugees in Serbia. But it did initially buy time for the EU and its member states to build a strategy to address the influx of refugees across the Western Balkan Route and beyond.

12.3.6 Alignment with Global Compact on Refugees

Finally, the question of alignment considers to what extent the instruments and their implementation are in accordance with the objectives of the UN Global Compact on Refugees (GCR). The GCR has three objectives: (1) easing pressures on host countries, (2) enhancing refugee self-reliance, and (3) expanding access to third country solutions. EU support for Serbia is "two-faced" regarding first objective. The overarching strategy of containment undoubtedly compounds pressure on Serbia as presumably a host country for refugees. It makes it difficult for refugees to legally enter the EU from Serbia, increasing the number of refugees pushed back to and housed in Serbia and contributing to overcrowding at reception centers and inability for the system to protect or integrate the entire refugee population. On the other hand, EU assistance also provides necessary support to alleviate the symptoms of the disease it created. EU funding constitutes most of the operational funding for the Serbian migration and asylum system. Thus, in the short term, EU funding eases the financial burden faced by Serbian authorities in hosting the country's refugees.

The effect of EU involvement on the second objective is more straightforward, though no less pessimistic. EU assistance has done little, if anything, to enhance refugee self-reliance. This is despite the Leaders Statement of 2015, which announced a commitment to ensuring refugees' access to the asylum procedure, education, health care, basic social care, camp accommodation, and integration into society (Asylum Protection Center, 2017, 2018). Tragically, a majority of rights envisaged in this legislation are not accessible in practical terms, "especially without institutional professional free legal support provided by a few legal CSO's, or UNHCR, leaving most of individuals in a dire, uncertain and highly vulnerable position" (Djurovic et al., 2022, pp. 88–89).

It does not help that EU funding provided relief in reception centers but did little to strengthen receptiveness to refugees throughout other Serbian institutions. Because of this, refugees receive provisions of food, accommodation, and other necessities through the camps but struggle to meet these needs self-sufficiently because they don't know where to turn when they leave, facing no meaningful support for integration, employment, education, or naturalization. Additionally, Serbia does not issue travel documents to refugees, which necessarily restricts their freedom of movement and independence. The system fails to provide adequate information and aid for refugees to become self-reliant or pursue an asylum claim, meaning both information and assistance in making this transition is only available from rare and professional local civil society organizations.

Finally, because EU support bolsters domestic Serbian institutions for the sake of containment, none of the relevant EU instruments facilitate access to third country solutions from Serbia. Third country solutions (in the scope of family reunification of unaccompanied minors with their parents) are only available in a minority of cases through the assistance of civil society organizations such as APC.

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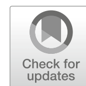
Chapter 13
Tunisia-EU Cooperation in Migration Management: From Mobility Partnership to Containment



Fatma Raach and Hiba Sha'ath

13.1 Introduction

Migration cooperation between the EU and its member states and Tunisia has been longstanding. However, the 2011 Tunisian revolution, which was followed by a spike in irregular migrant arrivals by boat to Italy, followed by the war in Libya that led to mass displacement of Libyan and Sub-Saharan nationals to Tunisia, acted as catalysts to intensify the EU's focus on migration cooperation in the country, as evidenced by various political, legal, and financial instruments. This chapter highlights main findings of research conducted for the project ASILE (Raach et al., 2022). We evaluated instruments between the EU and some of its member states and Tunisia related to asylum and mobility to determine if they are in line with international legal standards and international refugee law, and to determine the extent to which they lead to effective protection of refugees and other vulnerable populations in Tunisia.

There is no one single instrument between the EU and Tunisia covering aspects related to migration, asylum, borders, and mobility. Instead, some European countries have bilateral agreements with Tunisia that cover one or several aspects of these themes (such as readmission or visa facilitation for Tunisian nationals), while agreements at the EU level relate to financing development projects (through the EU Trust Fund for Africa—EUTF) or the Mobility Partnership concluded in 2014 within the framework of the EU-Tunisia Action Plan (2013–2017). In examining the

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various instruments, our key finding is that EU instruments contribute to the containment of refugees' and asylum seekers and undermine their access to protection for several reasons:

- They are negotiated and implemented with limited to no transparency, and lack accountability mechanisms in the case of human rights violations occurring within their framework
- They focus disproportionately on the security aspect of migration, which includes strengthening border protection, preventing irregular migration and the readmission of Tunisian nationals. Far less funding is devoted to strengthening protection and assistance systems for vulnerable migrants and refugees in Tunisia
- Some provisions in the instruments are not compatible with international refugee law
- The instruments are not aligned with the Global Compact on Refugees, particularly in relation to improving burden-sharing with regards to hosting refugees

In the remainder of the chapter, we will briefly outline our study's methodology and will follow by assessing the instruments according to six criteria: their transparency, accountability, compatibility with international law, alignment with the Global Compact on Refugees, results, and the extent of their contribution to the mobility or containment of refugees.

13.2 Methodology

Two types of analysis underpin the research done for this project: a legal analysis of all instruments, and a qualitative analysis relying on interviews with experts, activists, and practitioners in the fields of migration and asylum in Tunisia. The interview component of this study is meant to complement the legal analysis of the instruments that was conducted. Stakeholders to be interviewed were identified based on their presumed involvement and awareness of the various instruments covered in the report. Purposive and participant referral (snowball) sampling were used to identified parliamentarians, decisionmakers in local and international organizations, academics, activists and independent researchers who would be able to evaluate the instruments along the criteria identified by drawing on their involvement in the negotiation, implementation, consultations, support services related to, or research about, the abovementioned instruments.

Legal instruments analyzed consist of bilateral agreements between Tunisia and EU member states (Italy in particular, but also France, Switzerland, Germany, and Belgium) through which provisions on readmission, security cooperation—particularly in relation to border management and control—and visa facilitation schemes are negotiated. Although these bilateral agreements are not EU instruments, it is necessary to take them into account to be able to analyze the EU-Tunisia context for migration cooperation. Financial instruments covered by this report include the European Neighborhood Instrument (ENI), which was the framework for bilateral

cooperation between 2014 and 2020, and the EU Trust Fund for Africa (EUTF), which since 2015 has been the main financial instrument covering projects related to migration, asylum, and border control.

13.3 Analysis

13.3.1 Transparency

In assessing the transparency of the instruments, we examined the extent to which the text of the instruments (and projects), and the process of preparing and implementing them was conducted in a clear, accessible, and transparent manner. Generally, there was a low level of transparency surrounding the preparation and implementation of political, legal, and financial instruments. Any consultations that were carried out with the public were of a symbolic nature, treaties were hardly, if ever, debated in parliament, and the texts of most instruments are either not available to the general public, or not easily accessible. The use of security cooperation agreements in the forms of Memorandums of Understanding bypasses all forms of transparency.

Preparation

There were varying levels of transparency in the preparation of instruments. Legal and political instruments (bilateral treaties, the Privileged Partnership Agreement) are usually negotiated by the Ministry of Foreign Affairs, and some are ratified by parliament. Some of them, such as the Franco-Tunisian bilateral treaty, are available online and can be accessed easily. Others, such as the bilateral agreement with Italy, are not publicly viewable.

A common theme characterizing bilateral cooperation between Tunisia and EU member-states is the informal character, non-publication of the agreements and the opacity of the conditions governing their implementation. The executive branch of the Tunisian government treats the topic as a security matter in order to avoid any public debate and only mentions the broader focus of the agreement.

Security cooperation agreements and projects funded through financial instruments were prepared with a higher level of secrecy. Security cooperation agreements are usually prepared by the Ministry of Interior in direct communication with its foreign counterparts and their texts are not publicly available. Projects funded through financial instruments are proposed by the implementing agencies (mostly international organizations such as ICMPD, UNHCR, or IOM) and approved by the team managing the funding instrument (the EU Delegation or the relevant EU Directorate General).

With regards to the Action Plan and the Mobility partnership, civil society representatives we spoke to noted that although public consultations were held formally, these were carried out in order to *inform* rather than seek inputs from civil society representatives, as the texts had already been prepared ahead of time and the most significant decisions were already in place.

Implementation

Drawing on our interviews, news sources, and publicly available documents, we argue that the implementation process of all instruments, including the Action Plan, the Mobility Partnership, projects financed by the EUTF, and bilateral agreements, is not transparent.

While the Tunisia-France treaty was *negotiated* with a high degree of transparency, the implementation of mobility-related provisions within the treaty is far from transparent. For example, the visa allocation to Tunisian nationals, which made up part of the initial agreement, is politicized and appears to be arbitrarily determined, with opaque decision-making processes regarding visa rejections for Tunisian nationals, along with geopolitical considerations (such as Tunisia's purported unwillingness to readmit its own nationals from Europe) influencing the number of visas allocated to Tunisia (Le Monde, 2021).

The Tunisia-Italy agreement contains provisions related to security cooperation and the readmission of Tunisian nationals from Italy. In practice, however, the application of these provisions is agreed upon in memorandums of understanding concluded between the two Ministries of Interior, without any public access or input to the texts or the terms of the agreements.

With regards to the implementation of the Plan d'Action (2014–2020) and the Mobility Partnership (2014), our civil society respondents noted that although formal consultation processes with them did exist, these were more of a ceremonial rather than substantive nature, as major decisions regarding programs had already been made prior to the consultations, and civil society representatives invited to the consultations were merely informed of the decisions rather than given an opportunity to help shape them. In fact, in 2014 several organizations were critical of both the partnership and of their exclusion from its preparation, calling on the EU and Tunisia to "Guarantee the participation of Tunisian and European civil society organizations – especially those working to protect and assist migrants – in the negotiations, implementation and follow-up of the Mobility Partnership in the framework of the joint committee" (Euromed Rights, 2014). In a study of Tunisian civil society's framing of EU migration policies, Pastore and Roman (2020) found that only technocrats and "expert" NGOs are knowledgeable about Tunisia's cooperation with the EU on migration, as the state frames it as a matter of technocratic expertise rather than a political issue up for debate (Pastore and Roman, 2020, pp. 11–12).

Finally, the implementation of the projects related to the EU Emergency Trust Fund for Africa (EUTF) is notable in its lack of transparency. EUTF-funded projects are developed by international organizations and submitted to the Fund for

approval. Discussions between the EU Delegation, the Ministry of Development and International Cooperation, the Ministry of Social Affairs, and other national ministries help determine government needs and inform the Delegation's annual programming. However, neither civil society nor the general public are aware of, or involved in, the project development process. Approved project action fiches are posted online (European Commission, n.d.); however, amendments, logical frameworks, monitoring and evaluation reports are not available online, and neither are details of equipment procured or training provided with funding from these projects. As a result, it is difficult for the public and human rights organizations to maintain oversight about project activities and results.

13.3.2 Accountability

When examining accountability mechanisms built into the instruments, we inquired whether there were *organizational*, *national*, and *international* mechanisms available to make actors answerable in the cases of human rights violations committed within the framework of the instruments.

At a national level, some pathways to pursue accountability and enforce international human rights and refugee law exist, but they are limited due to the country's legal framework that lacks specific asylum governance legislation. As a result, in cases related to the violation of asylum seekers' and refugees' rights or to detention, the judiciary instead refer to international or other sources of domestic law.

Parliament does not play an oversight role as an accountability mechanism, particularly since the constitutional changes enacted in August 2022 by the Tunisian President to limit the powers of parliament. Prior to that, parliamentarians' limited exposure to and experience of the application of international refugee law and human rights norms impeded their ability to conduct oversight. This was compounded by their limited access to the texts of the instruments, given that parliament had a limited role to play in approving Tunisian cooperation agreements that were prepared in the forms of MOU's.

Two independent bodies, the National Body for Combating Trafficking in Persons (INLTP) and the National Body for the Prevention of Torture (INPT), have mandates to enforce specific laws in line with international conventions that Tunisia has signed. The two bodies remain active following the 2022 constitutional changes, as their creation is based on national legislation adopted according to international obligations. Nevertheless, their specific mandates limit their ability to act as oversight mechanisms in other human rights violations related to refugee rights.

Although the implementation of readmission agreements or of EU-funded projects in Tunisia can lead to violations of international law, the use of international accountability mechanisms related to human rights violations in Tunisia has been very limited. Tunisian NGOs are studying the feasibility of pursuing strategic litigation at the European and African Courts of Human Rights to create jurisprudence on actions related to detention and expulsion; however, our respondents recognize that

these mechanisms are not useful to pursue accountability for individual cases, or obtain reparations or justice for them. One case was submitted to the European Court of Human Rights related to the forced return of an LGBTQ Tunisian national to Tunisia by Italy. However, this process has been lengthy: the file was submitted to the Court in 2018, and had not yet been taken up at the time of our interviews in 2021. Civil society organizations are looking into the possibility, and feasibility, of pursuing the issue of arbitrary detention of foreigners in Tunisia with the African Court for Human and Peoples' Rights.

International organizations implement many of the projects funded by the EUTF. UNHCR and its subcontracted NGOs are beholden to UNHCR's code of conduct, and violations are dealt with either at the country office, or at the level of the UNHCR Inspector General (based in Geneva). On the other hand, no accountability mechanisms exist within ICMPD to provide oversight on any potential human rights violations conducted through its work. While IOM also has an office of the Inspector General (IOM, n.d.-a), their website does not explicitly mention human rights violations in the list of issues within this office's mandate to investigate (IOM, n.d.-b).

13.3.3 Compatibility with International Law

Civil society respondents have reported that the EU's approach to migration, which has predominantly been security-focused, has emphasized stronger border controls, deterrence measures and the return of irregular migrants often at the expense of protection and human rights. Respondents implementing EU-funded projects reported that these projects refer to international refugee and human rights law where applicable.

Asylum Law and RSD by UNHCR

Tunisia received the assistance of the EU in order to adopt a national law on asylum. The draft asylum law extends the refugee concept beyond the 1951 convention to include the concept within 1969 OAU Convention. However, as of the time of writing, the law was still in draft form and had not been passed. This has made it difficult to verify the compatibility of the procedures related to asylum and refugee rights with international law.

UNHCR has been carrying out refugee status determination (RSD) independently (without judicial oversight) since June 2011, when it signed a cooperation agreement with the Tunisian government that fully recognized UNHCR's mandate (UNHCR, 2016; Ben, 2019). According to UNHCR, the procedures are still aligned with the 1951 Refugee Convention. Our interviews highlighted that that the ministries and authorities recognize refugee status conferred by UNHCR. Social protections for UNHCR-recognized refugees and registered asylum seekers, such as

enrolment in national social security and the rights to employment granted by the Ministry of Employment, are in line with international refugee law.

A respondent working for an international organization noted that Tunisia respected the principle of non-refoulement. However, as a case of Algerian national Slimane Bouhafs who was granted refugee status by UNHCR in Tunisia and was later deported to Algeria under a political deal demonstrates, state practices do not always conform to international law (Amnesty International, 2021). Racist discourse employed by the Tunisian president against sub-Saharan migrants in 2023 has provoked a wave of violence against them (Tebini, 2023). They were victims of racist acts, coup and violence. Furthermore, the Tunisian authorities have pushed-back many sub-Saharan to the Libyan desert. They remained stuck in the border area between Tunisia and Libya in a situation of great vulnerability.[1]

Detention

Immigration detention is practiced in Tunisia. It should be noted that the immigrant detention centers under the Ministry of Interior's authority are to be distinguished from the reception centers run by the Tunisian Red Crescent, IOM, and UNHCR in Zarzis and Medenine, where migrants returned from sea are accommodated on a temporary and short-term basis. As far as we could determine, the situation in these centers does not amount to detention.

However, respondents and documentary sources indicate that immigration detention is practiced in several "retention" centers across the country, most notably Ouardia and Ben Guerdane centers (Bisiaux, 2020a, b, p. 54; Middle East eye, 2020; OMCT et al., 2021). These centers do not have a clear legal status in Tunisia. The centers are under the authority of the National Guard, which falls under the Ministry of Interior (Veron, 2020, p. 8).

Deprivation of liberty is an exception and it is possible only when it is provided by an explicit provision in domestic law. Article 6 of the African Charter on Human and Peoples' Rights (ACHPR) provides that everyone has the right to liberty. This means that the deprivation of liberty of migrants for immigration-related grounds constitutes a violation of Article 6 ACHPR.

The jurisprudence is scarce in this matter, the tribunal administrative of Tunis adopted a protective position when it ordered the suspension of a deportation decision and a decision to keep the migrants in a detention centre. The court applied article 29 of the 2014 constitution which prohibits arrest or detention without a judicial order.

[1] « Tunisie: il faut aider les réfugiés et migrants bloqués dans le désert (ONU) », https://news.un.org/fr/story/2023/07/1137192

Readmission of Tunisian Nationals from Italy

According to an organization that has worked on legal support for repatriated Tunisians, Tunisian nationals are subject to simplified repatriation procedures from Italy, which do not provide for the chance for individual interviews, and therefore do not take personal circumstances for arriving to Italy into account and do not allow for the possibility of seeking asylum on the basis of those circumstances. For the simplified procedure to be carried out, it is only necessary for Tunisian consular officials to verify the individuals' nationality for them to be returned to Tunisia. According to this respondent, such repatriations thus do not take into consideration vulnerability criteria, protection needs, or the harm perpetuated upon the individuals due to the severing of local ties. Further, their effectiveness may be limited, with evidence that some returnees attempt to depart once again towards Italy through irregular means (Poletti, 2020): as an example, the respondent knew of one returnee who was repatriated in October 2020 and had already departed once again to Italy at the time of the interview. These cases concern the forced return to Tunisia of Tunisian nationals. We conclude that there is tension between these returns and international law because non-refoulement is insufficiently guaranteed. According to respondents in civil society organizations, the repatriation of the Tunisian nationals from Italy, which occurred under the Tunisia-Italy readmission agreement, are violating international law and the refugee law.

Border Management (SAR, Pullbacks, Interceptions)

Under international maritime law, states have the obligation to protect the right to life. When the intercepted persons are in a situation of distress, these cases involve positive obligations by states to protect the right to life, which are operationalized in international maritime law in the obligation of search and rescue (SAR).

European states are instrumentalizing this international obligation for migration management objectives. In fact, European states fund North-African states to intercept boats with Tunisians and third country nationals departing from their shores and return them to, in our case, Tunisia. EU funded operations such as operation Mare Nostrum and operation Sophia, have been considered as indirect pushbacks (commonly referred to as pullbacks (Nováky, 2018; Cusumano, 2019)). In the case of Libya, European involvement in these interceptions/SAR operations/pullbacks has been criticized by UN institutions because Libya is not considered to be a safe place of disembarkation as required by international maritime law.

The compatibility with international law of EU support for the Tunisian Coast Guard in similar operations depends on whether Tunisia can be considered as a safe place of disembarkation in international maritime law. A significant part of the EU's work on combating illegal migration has consisted of security cooperation and capacity-building of the Tunisian Coast Guard (Garde Maritime Nationale). Notable projects include the BMP Maghreb project, and the Integrated Border Management (IBM) Tunisia project. Bilateral projects add to these EU funded projects. Germany

has provided equipment including speedboats, lifeboats, and vehicles (European Commission Services, 2021, p. 9).

In addition to making the Tunisian Coast Guard pull back migrants, the EU also invokes the duty of shipmasters to save life at sea to pressure Tunisian fishermen and ships to retrieve migrants and bring them back to Tunisia while they were close to European coasts (Farahat & Markard, 2020). This is very much criticized by civil society associations, especially the Tunisian Forum for Economic and Social Rights (FTDES) which argues that Tunisia is neither a safe country of origin nor a safe place for those rescued at sea.[2] As nearly all respondents noted, however, in the absence of a national legal framework for protection and asylum in Tunisia, the country cannot be considered a safe place of disembarkation for the return of third country nationals who may want to invoke international refugee law, particularly as asylum seekers may be subjected to detention without any express legal provision. Consequently, we can conclude that the EU support for interceptions by the Tunisian Coast Guard arguably is a violation of the international maritime law requirement that people rescued at sea are brought to a place of safety, as well as the norms to which this notion of safety refer (nonrefoulement and the right to liberty).

Human Rights Impact Assessments by the EC

The European Commission does not conduct human rights impact assessments related to its contracts in Tunisia implementing EU funded projects. Several participants mentioned monitoring exercises that the European Union conducts periodically by hiring independent third parties to assess EU-funded projects. However, these monitoring exercises evaluate projects according to their initial stated objectives and monitoring indicators rather than according to standards of human rights and international law. If the initial project document and logical framework included indicators related to human rights impacts, then this would be taken into consideration in the monitoring exercises. If not, then human rights impact of the project activities would not necessarily be evaluated. Further, as mentioned earlier, these reports are not made public; they remain internal to the European Union and occasionally to the organization. This lack of a special monitoring mechanism dedicated to assessments of the EU funded projects reinforces the violation and the incompatibility with the international law rules and standards.

[2] La Tunisie n'est ni un pays d'origine sûr ni un lieu sûr pour les personnes secourues en mer, https://ftdes.net/la-tunisie-nest-ni-un-pays-dorigine-sur-ni-un-lieu-sur-pour-les-personnes-secourues-en-mer/

13.3.4 Results and Limitations of EU-Funded Technical Assistance

EU-funded technical assistance in Tunisia covers nearly all activities related to asylum and protection, including registration and refugee status-determination activities and direct assistance. Additionally, technical assistance (funded primarily through the European Neighbourhood Instrument (ENI) and the EU Emergency Trust Fund for Africa (EUTF) funds work in migration governance, border protection, Tunisian returnee reintegration, and migrant protection and assistance. Nearly all of this is done by funding either international organizations such as IOM, UNHCR, and ICMPD who then implement the projects directly or subcontract international or local NGOs to do so. More recently, the EU has also started funding local and international NGOs directly as well.

The results of EU instruments are mixed. EU-funded programs have been successful in enhancing the capacities of officials and civil society in working on asylum and migration issues. However, implementing an effective asylum system is not only related to technical capacity, but is crucially dependent on political will. Thus, the absence of national asylum legislation is not due to a lack of capacity or expertise, but due to the one-sided focus of European Instruments that has made Tunisian policymakers wary of legislative changes that could increase their burden in hosting refugees on their territory.

Limitations to Effectiveness of Assistance

The technical assistance delivered by the EU to Tunisia is limited by the economic and political context in the country, the misalignment of assistance outcomes with Tunisia's interests, and the lack of financial sustainability for the asylum system currently in place.

Tunisia's Capacity to Absorb Assistance

Tunisia has the capacity to absorb the technical assistance, and in fact much of the technical assistance in the last few years in the form of trainings and study visits has been useful in enhancing the knowledge and skills of ministry bureaucrats, and exposing them to good practices internationally. As our interview participants noted, the lack of technical capacity to govern and protect refugees and asylum-seekers in Tunisia is not the main problem.

The key concern is *political*. As several participants have pointed out, the key reason for the Tunisian government's hesitancy in passing the draft asylum law have been related to the fact that the government does not feel it is being supported enough in hosting its current population of migrants and refugees. The government

is experiencing EU pressure in relation to setting up disembarkation platforms in Tunisia and cooperating on the returns of third country nationals from Europe.

Challenges to Sustainability

Interviewees mentioned several challenges to the sustainability of the EU's technical assistance and direct migrant assistance work on migration and asylum in Tunisia. The first is a fragmented governance structure for migration and asylum in Tunisia. There is no single government body or entity that leads and coordinates work on migration and asylum governance. Several ministries (Labour, Social Affairs, Interior, Foreign Affairs, and others) work on migration as it relates to their mandate, but sometimes there are gaps, duplications, or overlaps in their work. A National Observatory on Migration (ONM) exists within the Ministry of Social Affairs; however, is it mainly concerned with Tunisian emigrants and returnees, and does not work on refugee governance. The second is the lack of a clear legal framework concerning asylum and migration, which has been discussed earlier.

Finally, the current funding structure for RSD and protection activities is unsustainable, being totally dependent on the availability of EU funding. This absence of a governmental structure with a specific mandate for migration and asylum governance means that there is no allocation in the national budget dedicated to assistance and service provision. The implication is that international organizations (through EU funding) are responsible for these issues. By creating this dependency, the EU has only temporarily assuaged an issue without addressing its root cause. The concern remains that if the funding is reduced, support to migrants and refugees will also disappear, and the governmental actors involved in governance and service provision will have their work significantly curtailed.

Broader contextual factors affecting the sustainability of the EU's work relate to ongoing political instability in the country that translates to lack of clarity or longer-term vision regarding Tunisia's approach to migration and asylum. This is accompanied by high turnover among government staff focused on this portfolio which prevents the building of institutional memory.

13.3.5 Containment/Mobility

Our analysis of the distribution of EU funding related to migration shows that 57.8% of the EU's expenditure in Tunisia for this theme is targeted towards enhancing border protection capabilities, giving an indication that the containment of migrants and refugees to Tunisia is the EU's priority. At the same time, only 20% of EU migration funding for Tunisia is earmarked towards the protection of vulnerable migrants, refugees, and asylum-seekers and towards socio-economic integration (Veron, 2020, p. 14).

There are several ways in which containment is practiced and evident in Tunisia. On a policy level, asylum and migration are increasingly framed as security issues, with state approaches to this portfolio involving the police forces and military.

This approach is reinforced by amendments to the legal framework. A law ratified in 2004 amended the law on passports and foreign documents, criminalizing irregular entry and exit from the country and any act of assistance to irregular migrants. This law, one of our interview respondents noted, was passed soon after the conclusion of bilateral agreements between Italy and Tunisia.

In practice, suspicion of irregular migration and criminal activity targets migrants of Sub-Saharan origin in Tunisia, who are surveilled and harassed by security actors through routine identity checks, and whose mobility within the country is curtailed (Blaise, 2023).

Other evidence of containment includes a rapid increase of registered asylum seekers in Tunisia in recent years, and the practices of detention that the state engages in, which do not have legal backing.

We note that these restrictions aiming to contain migrants have not stopped migration from Tunisia to Europe, but have changed the modes of peoples' transnational mobility to more dangerous means, characterized by irregular boat crossings due to the lack of other safe options available to them. Participants did point out that the Tunisian constitution guarantees rights to mobility and asylum; however, without updated legislation to encode the rights enshrined in the constitution, the ways of protecting and upholding these rights remain limited.

13.3.6 Alignment with Global Compact on Refugees

We analyzed the extent of the instruments' alignment with the Global Compact for Refugees by examining how they may be easing pressure on Tunisia to host refugees, helping increase the autonomy of refugees, and improving refugees' access to third country solutions. Our analysis has found that instead of burden-sharing, much of the work carried out through these instruments in fact increase Tunisia's burden in supporting asylum seekers, refugees, and its own population, standing in opposition to their purported purpose.

The EU's migration and border controls have increased refugee hosting pressure and economic pressure on Tunisia. The programs have made little to no progress on increasing the autonomy of refugees. Further, none of the instruments or projects have improved access to third country solutions. No EUTF funding was earmarked to third country resettlement, and no other pathways such as family reunification, study, and labour mobility schemes have been made available to refugees in Tunisia.

13.4 Conclusion

EU policies focused on the strengthening of border controls have been counterproductive as they have not reduced the number of people who want to cross the Mediterranean. Rather, they have reinforced the authorities' fear of playing the role of policeman of the external borders of the European Union while undermining vulnerable populations' access to asylum and protection when needed.

This is largely due to the Tunisian government's concern that EU pressure—which is already high with regards to securing Tunisia's cooperation for the readmission of Tunisians from the EU—would increase even more with the strengthening of local asylum systems. Policymakers worry that the presence of an asylum law—making Tunisia in theory a safe country for return—would be instrumentalized pushing for the (re)admission of third-country nationals who departed Tunisia, along with the installation of offshore processing centers on Tunisian soil. As a result, people in need of protection are made more vulnerable as they make perilous journeys to make safety, while security actors in Tunisia benefit from greater training, funding, and impunity as a result of Tunisia's instruments with the EU.

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Chapter 14
Cooperation for Containment: An Analysis of the EU-Türkiye Arrangements in the Field of Migration

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14.1 Introduction

Due to its strategic location, Türkiye has been a transit country for most migrants and refugees, and a necessary stop on their way to Europe (Kirişçi, 2012; Yilmaz-Elmas et al., 2016). However, while Türkiye is a party to the 1951 Refugee Convention and the 1967 Protocol, it has limited its international law obligations to refugees fleeing "events occurring in Europe" and generally avoided regulating the field and establishing a national framework until the early 2000s. Largely driven by the EU accession processes, Türkiye implemented legislative, institutional, and policy reforms related to asylum and began making gradual changes to align its asylum and migration structures with the EU framework from 2001. Cooperation between the EU and Türkiye in the field of asylum and migration significantly changed with the so-called migration crisis in the EU in 2015. The EU- Türkiye Statement in 2016[1] which foresaw the delivery of one of the most significant

[1] European Council. EU-Turkey Statement. (2016), 18 March). https://www.consilium.europa.eu/en/press/pressreleases/2016/03/18/eu-turkey-statement/

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financial assistances of EU history relating to refugees, became a model for the EU's future externalisation policies. It is imperative to conduct a comprehensive analysis of the EU-Türkiye cooperation arrangements in the field of migration and assess their implementation over the last 7 years.

This chapter based on the extensive fieldwork conducted in Türkiye between June and October 2021, analyses the political, legal and financial instruments through which the EU and Türkiye have cooperated in the field of migration and asylum between 2015 and 2021 (Ovacik et al., 2022; Ovacık et al., 2024). The analysis focuses on the three main instruments: the EU- Türkiye Statement of March 2016, the EU- Türkiye Readmission Agreement,[2] and the Facility for Refugees in Türkiye (FRiT)[3] and these instruments are analysed at six points; transparency, accountability, conformity with international law, results, promoting containment or mobility and finally, the alignment with the Global Compact on Refugees[4] (GCR).

The EU-Türkiye Readmission Agreement was signed on 16 December 2013 and took effect on 1 October 2014.The agreement includes provisions related both to the readmission of the nationals of the EU Member States and Türkiye, and to the readmission of any other persons including the third country nationals and the stateless persons that entered, or stayed on, the territory of either side directly arriving from the territory of the other side. As of February 2022, the Türkiye Readmission Agreement was not fully in force.

In October 2015, the EU and Türkiye agreed on a Joint Action Plan to "step up their cooperation on support of Syrians under temporary protection and migration management."[5] Within this framework of cooperation in November 2015, the European Commission announced the establishment of the Refugee Facility for Türkiye (later renamed the Facility for Refugees in Türkiye, FRiT) (Spijkerboer & Steyger, 2019). The FRiT has a total budget of €6 billion in two tranches, and funded actions were gathered under two categories: humanitarian and development. Furthermore, the Facility also identified six priority areas: humanitarian assistance, education, health, municipal infrastructure, socioeconomic support, and migration management.

On March 18, 2016, the EU and Türkiye adopted the EU- Türkiye Statement whose purpose is to end irregular migration from Türkiye to the EU. The Statement foresaw that after 20 March 2016, migrants who do apply for asylum or whose applications have been found unfounded or inadmissible in accordance with the EU Asylum Procedures Directive[6] will be returned to Türkiye. In return for the

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[2] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (2014a) OJ L 134.

[3] EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey. (2015). https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6162

[4] Global Compact on Refugees. (2018). https://www.refworld.org/docid/63b43eaa4.html

[5] EU-Turkey Joint Action Plan MEMO/15/5860 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860

[6] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032

readmission aspect of the arrangement, the EU agreed that '[f]or every Syrian being returned to Türkiye from the Greek Islands, another Syrian will be resettled from Türkiye to the EU, taking into account the UN Vulnerability Criteria. The Statement noted that priority would be given to those who have not previously entered or tried to enter the EU irregularly. This arrangement is sometimes referred to as the 1:1 resettlement scheme. The EU- Türkiye Statement also included incentive elements for Türkiye to implement the agreed instruments such as allocation of considerable funds by the EU for refugees in Türkiye, accelerating the visa liberalisation roadmap and re-energising the EU accession negotiations.

The methodology of the present chapter follows document analysis, literature review, and 25 interviews were conducted with actors involved in migration and asylum in Türkiye. The interviews were held with respondents working for governmental, international, and non-governmental organisations that have different degrees of involvement in the preparation and implementation of EU- Türkiye Instruments on migration and asylum. As the focus of our study, we selected the most pertinent legal, political, and financial instruments concluded between the EU and Türkiye that directly affected Turkish national immigration laws and policies after 2015. Therefore, this chapter mostly focuses on the EU- Türkiye Statement of March 2016 and the political, legal, and financial instruments related to the Statement, which provided an important milestone for migration management in Türkiye. This chapter will focus on and analyse the EU- Türkiye Readmission Agreement as a legal instrument, the EU- Türkiye Statement as a political instrument and Facility for Refugees in Türkiye (FRiT) as a financial instrument and mainly make an analysis of these three instruments.

14.2 Transparency

14.2.1 EU-Türkiye Statement

During the drafting period of the EU-Türkiye Statement in early 2016, the Turkish government and EU officials were mainly involved in the process, and it was neither transparent nor publicly accessible. It was intended to be a political instrument and was published both on the websites of the EU Council[7] and the Turkish Ministry of Foreign Affairs[8] as a press release and still is publicly available. A number of stakeholders[9] noted that the Turkish Parliament, Turkish public, some Turkish Ministries, Turkish media, or some UN agencies and international organisations were not

[7] EU-Turkey Statement. (2016),18 March). https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

[8] Turkish Ministry of Foreign Affairs Directorate of EU Affairs. https://www.ab.gov.tr/files/AB_Iliskileri/18_mart_2016_turkiye_ab_zirvesi_bildirisi_.pdf

[9] TR1; TR9; TR6; TR13; TR15. (National Migration Practitioners and International Organisation Representatives).

involved with the preparation of the EU- Türkiye Statement and they became aware of the EU- Türkiye Statement following its publication. One of the interviewees noted that the political nature of the Statement and the emergence of the situation that necessitated the adoption of the arrangement at the time may have contributed to the lack of transparency during the drafting of the EU- Türkiye Statement.[10]

Compared to the drafting of the Statement, implementation of the EU-Türkiye Statement is much more of an open process. Different stakeholders[11] noted that implementation of the EU-Türkiye Statement involves active participation of many stakeholders including Turkish ministries, PMM, UN agencies including UNHCR, international organisations and NGOs. However, it should be noted that although the implementation of the Statement arrangements is a transparent process for those involved in this process, for the public it is still quite opaque.

14.2.2 EU-Türkiye Readmission Agreement

Before the EU-Türkiye Readmission Agreement[12] was approved, the Agreement and its provisions have been debated by the Turkish MEPs at the Parliament session and the minutes are still accessible though only available in Turkish.[13] This point is raised by a number of stakeholders in their respective interviews including where they all concluded that the preparation and adoption of the Agreement, to a certain extent, was transparent. However, it is also noted that the involvement of the EU Delegation to Türkiye in the drafting of the Readmission Agreement was rather limited since Brussels was the main player involved in the preparation of this agreement.

As opposed to the preparation phase of the EU-Türkiye Readmission Agreement, there are serious transparency issues with regard to the implementation of the Agreement. In particular, the following aspects, which are still to date, are contested and unclear:

(a) Article 4 of the EU-Türkiye Readmission Agreement (establishing a duty for Türkiye to readmit third-country nationals and stateless persons) entered into force?[14]

[10] TR1. (National Migration Practitioner).

[11] TR23; TR6; TR15; TR11. (National Migration Practitioners and International Organisation Representatives and Civil Society Practitioners).

[12] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (2014b) OJ L 134/3 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN

[13] See for the records of debates in the Turkish Parliament on the EU- Turkey Readmission Agreement (2014) https://www5.tbmm.gov.tr//develop/owa/ab_komisyonu_web.birlesim_baslangic_ab2?P4=22185&P5=H&page1=51&page2=51

[14] See Article 24(3) of the EU-Turkey Readmission Agreement.

(b) Is the EU-Türkiye Readmission Agreement officially suspended by the Turkish government and, if so, exactly when did this suspension take effect?
(c) If the Agreement is indeed suspended, is the Agreement as a whole suspended or are only its provisions relating to third-country nationals and stateless persons not being implemented?
(d) Is the EU-Türkiye Readmission Agreement still in force today?

Different sources offered different answers to the questions outlined above. Whilst the EU and Turkish Ministry of Foreign Affairs have not published any official statement about the mentioned issues,[15] some news articles and academic sources cite a TV interview of the Turkish Minister of Foreign Affairs Mevlüt Çavuşoğlu where he noted that Türkiye suspended the EU-Türkiye Readmission Agreement in July 2019 because the visa liberalisation process for Turkish citizens had not been completed by the EU (Euroactiv, 2019). However, no official confirmation by the Turkish MFA has followed these news articles to date. Similarly, although some sources cite another interview by Minister Çavuşoğlu to report that readmission protocol between Greece and Türkiye has been also suspended (Deportation Monitoring Aegean, 2019) the suspension of this protocol has also not been confirmed by official sources. Moreover, there is no publicly available data on the number of readmissions which took place under this Agreement.

Article 20 of the EU-Türkiye Readmission Agreement provides that upon request of a Member State or Türkiye, Türkiye and a Member State should conclude an Implementing Protocol on readmission. It is reported that Türkiye and Bulgaria concluded such an Implementing Protocol in 2016 but this Protocol is not publicly available (Anadolu Agency, 2016). In view of these issues, it can be concluded that although the drafting of the EU-Türkiye Readmission Agreement can be identified as transparent to a certain extent, the implementation of this Agreement is not transparent.

14.2.3 Facility for Refugees in Türkiye (FRiT)

As a major EU fund, the Facility for Refugees in Türkiye (FRiT) has multiple actors and stakeholders involved in different phases and multiple target groups and sectors with different objectives. The complexity of this instrument and the overall speed of funding realisation resulted in varying practises and experiences in the field. Transparency is especially an area where the results of those varying practises were visible. As some of the interviewed stakeholders[16] underlined, the focus of the FRiT was not clear and transparent due to political pressure on the parties to move quickly.

Following the EU-Türkiye Joint Action Plan in November 2015, the needs assessment report was prepared in consultation and collaboration with

[15] See for the text: https://www.avrupa.info.tr/en/readmission-agreement-6895

[16] TR12; TR22. (International Organisation Representative and Civil Society Practitioner).

representatives of Turkish central, regional and governmental authorities, UN agencies, international, national and local NGOs and academics, and it is still available online.[17]

While the initial preparation phase was generally transparent, the two projects in the migration management area created an exception. The European Court of Auditors considers the decision to use FRiT for funding migration management projects as "questionable" (ECA, 2018) because this was not in line with the objective of the Facility -which is to support refugees and host communities- and was not identified as a priority area to fund by the needs assessment that was conducted following the EU Türkiye Joint Action Plan in 2015. Although the migration management area was selected as a priority area for funding by the Steering Committee of the Facility, after funding the above-mentioned two migration-management projects within the first tranche, the Steering Committee decided not to allocate any more money to this area. No further explanation was provided on the inclusion of those projects in the first tranche of the FRiT and exclusion from further funding.

On the other hand, the distribution of funds proved to be more problematic regarding transparency. In general, two methods are adopted to select and fund projects and organisations (ECA, 2018). For a number of projects, the implementing institution is predetermined during the planning phase when the implementing institution has a certain speciality. This method is used especially in exclusive areas such as border management. The second method is the issuance of a tender to which eligible international organisations, non-governmental organisations, and consultancy firms can participate. These are announced in advance with the possibility of making preparations. In the first method, only the relevant parties are aware of the relevant project, whereas in the tender method, the project is known in the sector in general. The first method was mainly used in the first tranche of the FRiT, and the second method was dominant in FRiT-II. The distribution of funds and awarded organisations clearly shows a distinct pre-determination of the distribution of available funds.

Furthermore, there is a transparency problem with publicly available data. Access to primary data during the preparation, implementation, monitoring, and auditing periods is regularly denied by Turkish authorities. The European Court of Auditors reports that while it was in their right to access the related primary data, their requests, as well as requests of other UN and EU bodies, were denied or they were provided with modified data (ECA, 2018).

[17] Technical Assistance for a comprehensive needs assessment of short and medium to long term actions as basis for an enhanced EU support to Turkey on the refugee crisis https://ec.europa.eu/neighbourhood-enlargement/system/files/2018-12/2016_needs_assessment_.pdf

14.3 Accountability

14.3.1 EU-Türkiye Statement

Accountability of the EU, the Member States, and Türkiye for the acts and arrangements concluded under the EU- Türkiye Statement is difficult to establish before international or supranational courts, to say the least (Spijkerboer, 2018; Costello & Mann, 2020; Tsourdi, 2020; Lindberg, 2020) NF, NG and NM brought an action seeking annulment of the EU- Türkiye statement before the CJEU, arguing that the Statement is an act of the European Council establishing an international agreement contrary to EU law (*NF and Others v European Council*). In its order of 28 February 2017, despite the explicit wording and institutional context of the Statement the General Court found that the Statement cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union. Instead, it held that on the European side the Statement was an act of the 28 Member States acting outside the EU framework. Consequently, it dismissed actions on the grounds that it lacked jurisdiction.[18] Moreover, an appeal against this decision failed on formal grounds.[19]

Although it is clear that one of the authors of the Statement was the EU (Ineli-Ciger & Ulusoy, 2021) the EU by denying the authorship of the Statement and the European Courts confirming this denial led to the following conclusions: first, that the Statement remains outside of checks and balances applicable to EU law (Carrera et al., 2017) and second, that the EU cannot be held responsible for the breaches of international law and human rights principles that may arise from the implementation of the Statement (Ineli-Ciger & Ulusoy, 2021). These two conclusions certainly raise serious issues with regard to accountability relating to the EU- Türkiye Statement. It has been argued previously that due to the absence of any specific monitoring or supervision bodies or accountability mechanisms, shortcomings or misconduct taking place during the implementation of the Statement cannot be identified (Ineli-Ciger & Ulusoy, 2021). This is still the case, and interviews conducted within the scope of this study support this claim.

Many stakeholders[20] mentioned that human rights accountability mechanisms provided under Turkish laws as well as international human rights mechanisms such as the ECtHR can be used in case the Statement arrangements lead to a human rights violation. Though many also pointed out that although general human rights mechanisms are available there is no specific accountability mechanism in relation to the EU-Türkiye Statement. As for the legal accountability mechanisms available in

[18] Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* of 28 February 2017.

[19] Order of the Court (First Chamber) of 12 September 2018, *NF and Others v European Council* [2018] ECLI:EU:C:2018:705.

[20] TR1, TR2; TR12; TR11; TR4; TR9 (National Migration Practitioners and International Organisation Representatives).

Türkiye, a Turkish NGO noted that although judicial mechanisms such as individual application before the administrative court and Constitutional Court are available, their use is not widespread.[21] Another Turkish NGO[22] pointed out that quasi-judicial mechanisms such as Turkish Ombudsman's Office and Turkish Parliamentary Commissions usually do not yield any results, whereas it is time consuming and difficult to exhaust domestic legal remedies which are a prerequisite to apply for international human rights protection mechanisms including the ECtHR.

An international organisation representative noted that, although there is no specific accountability mechanism linked to the Statement, the EU authorities at times have alerted Turkish government authorities when they become aware of a human rights violation. This means that EU authorities do not make use of legal accountability mechanisms, even if they become aware of human rights violations. This illustrates that there are systemic problems related to accountability arising from EU- Türkiye Statement. Some stakeholders pointed out the unwillingness of the EU to hold the Member States such as Greece accountable due to human rights violations arising from Greece's push back operations at the Aegean Sea and alleged shootings, and use of tear gas on migrants at the land border (Human Rights Watch, 2020) between Türkiye and Greece in February and March 2020 (Ergin, 2022).[23]

14.3.2 EU-Türkiye Readmission Agreement

The EU- Türkiye Readmission Agreement aims to establish rapid and effective procedures for the identification and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence or residence in, the territories of the third country (in this case Türkiye) or the EU Member State in question (EMN, 2021). In the case of a breach of international law principles arising from the implementation of the EU- Türkiye readmission agreement, both parties (the EU and Türkiye) would be responsible and accountable. Compared to the EU-Türkiye Statement, establishing accountability under this Agreement is more straightforward.

14.3.3 Facility for Refugees in Türkiye (FRiT)

As for the projects funded under the Statement, nearly all stakeholders, including Turkish institutions, UN agencies, international institutions, and NGOs, reported that they have internal accountability mechanisms, and these mechanisms can be used, among others, in relation to complaints and allegations of human rights

[21] TR22. (Civil Society Practitioner).

[22] TR24. (Civil Society Practitioner).

[23] TR2. (National Practitioner).

violations arising from the EU-Türkiye Statements.[24] Only one respondent stated that, while an accountability mechanism is included within the project, there have not been any applications to trigger it so far.[25]

The national authorities[26] underlined the existence of the national accountability procedures and systems for any possible violations. However, as an international organisation representative underlined, there is no specific system put in place linked to EU funding. International organisations and civil society representatives[27] addressed the lack of such a procedure and told that they follow up such matters legally, formally and informally through the trust relations they have at local level. However, as an international civil society practitioner explained, since they work with individual refugees and not on systemic problems, they do not have any direct communication channels with higher authorities that would enable them to flag any possible human rights issues; therefore, these violations or complaints are not reported and followed up systematically.

14.4 Compatibility with International Law

14.4.1 EU-Türkiye Statement

Stakeholders mentioned that the incompatibility of the EU-Türkiye Statement with international law may lie not necessarily within the instrument itself, but how the Statement is being implemented.[28]

This Statement is based on the assumption that Türkiye is a safe third country to which refugees and asylum seekers can be returned after an expedited procedure. This is problematic considering Türkiye's geographic limitations under the 1951 Refugee Convention and the shortcomings of the Turkish asylum system. One of the main legal problems with the Statement (Ineli-Ciger & Ulusoy, 2021; Tometten, 2018; Davitti, 2019; Kaya, 2020) concerns its return aspect that is built on the assumption that Türkiye can be accepted as a 'safe third country' and/or 'first country of asylum' pursuant to Article 35 and Article 38 of the EU Asylum Procedures Directive for Syrians and other asylum seekers (Tan & Vedsted-Hansen, 2021; CCTE, 2023).[29] The EU Commission's view that Türkiye can be accepted as a safe third country and the first country of asylum has been contested by many

[24] TR12; TR13; TR15; TR11; TR16; TR17; TR25; TR24; TR14; TR21; TR22. (International Organisation Representatives and Civil Society Practitioners).

[25] TR8 (National Practitioner).

[26] TR4; TR7; TR9 ((National and Migration Practitioners).

[27] TR18; TR20; TR21; TR22 (Civil Society Practitioners).

[28] TR12. (International Organisation Representative).

[29] Communication from the Commission to the European Parliament, the European Council and the Council. (2016). Second Report on the Progress made in the Implementation of the EU-Turkey Statement. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0349

commentators for good reasons (Roman et al., 2016; Ulusoy & Battjes, 2017; ECRE, 2016; Alpes et al., 2017). Türkiye's geographical limitations to the 1951 Convention and the challenges that asylum seekers and migrants face in accessing the right to an effective remedy and safeguard against *refoulement* in Türkiye, coupled with reports that Türkiye has, at times, not acted in conformity with the principle of *non-refoulement*, make it difficult to assume Türkiye is a safe country for all asylum seekers and refugees (Alpes et al., 2017; Kaya, 2020; Michaelson & Narlı, 2022). Moreover, Türkiye has little capacity to offer nearly four million asylum seekers and refugees dignified life standards and effective international protection.

The implementation of the Statement on the Greek Islands included detention (before 20 March 2016, refugees were not routinely detained). The conditions in the reception-center-turned-detention centres deteriorated drastically after the implementation of the Türkiye statement. Concerning the detention of asylum seekers and refugees on the Greek Islands, a case was brought before the European Court of Human Rights to challenge conformity with the European Convention of Human Rights of the Greek detention practise (as part of the hotspot approach), implementing the EU- Türkiye Statement. In *JR and Others v Greece*, three Afghan nationals who were detained for a month in a hotspot in Chios under abysmal conditions argued that their detention constituted a violation of Article 5 of the ECHR and their detention conditions breached Article 3 of the ECHR. While it did not assess the Statement or its legal nature or implications as such, the Court, similar to the CJEU, identified the Statement as an instrument concluded between Member States and Türkiye (*JR and Others v Greece* para 7). It rejected applicants' main claims on substantive grounds. The Court concluded that the 1-month period of detention that aimed to guarantee the possibility of removing the applicants under the EU- Türkiye Statement, was not arbitrary and could not be regarded as unlawful within the meaning of Article 5 § 1 (f) and that the applicants' detention conditions did not reach the threshold of severity required for Article 3 of the ECHR to be violated because these conditions could be explained by the exceptional and brutal increase of migratory flows, resulting in organisational, logistical and structural difficulties (*JR and Others v Greece).* In another case, Kaak and others v. Greece, the Court found no violation of Article 3 and Article 5(1) but noted that Greece violated Art. 5(4) of the ECHR in relation the detention of 49 applicants, of Syrian, Afghan and Palestinian nationality who arrived in Greece by sea between 20 March and 16 April 2016 in the VIAL 'Hotspot' and SOUDA camp since little or no legal assistance had been provided to the applicants to ensure that the expulsion orders had been properly understood (*Kaak and others v. Greece).*

Although the detention practise and conditions are found to be not in breach of the ECHR provisions in *JR and Others v Greece*, the hotspot approach and detention component of the EU- Türkiye Statement is severely criticised by many NGOs on the account that the Statement arrangements has led to "severe overcrowding, substandard reception conditions and delayed asylum procedures" in Greece (Amnesty International et al., 2021). The mentioned problems, in particular, automatic detention of all new irregular arrivals and substandard detention conditions are still capable of creating issues in terms of Articles 3 and 5 of the ECHR (Gkliati,

2017; Ineli-Ciger, 2019; Kaya, 2020). Moreover, problems with regard to access to asylum procedures, interpreters, and legal assistance, especially severe delays in the processing of asylum applications for asylum seekers who have arrived in the Greek Islands, raise compatibility issues with Directive 2013/32/EU, especially Article 6 and Article 12.

With the adoption of the EU-Türkiye Joint Action Plan and the EU-Türkiye Statement, Türkiye's border with Syria is closed, visa requirements are introduced for Syrians arriving in Türkiye by sea and air access, and Türkiye began actively working towards preventing irregular arrivals to Greece (Ineli-Ciger & Yigit, 2020; Öztürk, 2022). With the adoption of the EU-Türkiye Statement, displaced persons are confined to Syria as well as Türkiye, which infringes on the right to seek asylum, which is identified as the third compatibility issue. The right to seek asylum is not explicitly secured under the Refugee Convention; however, Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum.[30] The EU-Türkiye statement certainly makes it more difficult for thousands of forcibly displaced persons to seek asylum.

14.4.2 EU-Türkiye Readmission Agreement

The EU-Türkiye Readmission Agreement, from the outset, does not provide any provisions that violate international refugee law and/or international human rights law. In the Preamble, it is noted that "this Agreement shall be without prejudice to the rights and procedural guarantees for persons who are subject to return procedures in or who apply for asylum in a Member State as laid down in the respective legal instruments of the Union, which means an asylum seeker cannot be removed and readmitted under this agreement until their international application is processed in line with the EU asylum *acquis* (Arıner & Kader, 2022).[31]

The non-affection clause provided under the EU-Türkiye Readmission Agreement introduces further safeguards. Article 18 of the Agreement foresees this agreement to be without prejudice to the rights, obligations, and responsibilities of the Union, its Member States, and Türkiye arising from international law, including international conventions to which they are a party, in particular, inter alia, the 1951 Convention, the ECHR, and the CAT. In light of this, the text of the EU- Türkiye Readmission Agreement is, on paper, compatible with international law though its implementation, and whether the mentioned safeguards are observed in practise is another issue. It is noted by a migration practitioner that the EU-Türkiye Readmission Agreement contributed to the protection of migrants in Türkiye since, following the adoption of this Agreement and the Statement, the EU became more involved and

[30] Charter of Fundamental Rights of the European Union (2012) OJ C 326.

[31] Arıner and Kader argues 'regardless of Turkey's status as a safe third country, the EU–Turkey Readmission Agreement does not allow the inclusion of asylum seekers within its scope'.

concerned with the conditions of readmitted migrants in Türkiye. On a negative note, a civil society practitioner pointed out that the EU- Türkiye Readmission Agreement together with the EU-Türkiye Statement hinders the right to seek asylum.

14.5 Results

14.5.1 EU-Türkiye Statement

In 2015, over one million refugees and migrants arrived irregularly in Europe by sea whereas arrivals to Greece accounted for 80 per cent of this one million. In 2019, 2020, and 2021, 59,726, 9714 and 3653 sea arrivals in Greece were recorded, respectively (UNHCR. (2021). Although one of the most celebrated outcomes of the Statement, especially by the European Commission, is the decrease in the number of irregular sea arrivals to Greece, available data show that this decrease cannot be a result of the EU- Türkiye Statement (Ineli-Ciger & Ulusoy, 2021). The decreasing trend that occurred since October 2015 did not intensify after 20 March 2016. Consequently, it is hard to consider the decrease in the number of Aegean crossings after October 2015 as a result of EU policy instruments, even though these instruments were aiming at such a decrease (Spijkerboer, 2016; Reslow, 2019).

Nonetheless, an international organisation representative identified the main purpose of the EU-Türkiye Statement as to decrease irregular mobility and to ensure refugees and asylum seekers access basic services without risking their lives and noted that these objectives have been accomplished to a great extent.

As for the resettlement arrangement agreed under the Statement, as of April 2023, according to the Presidency of Migration Management (PMM), so far 37,347 Syrian refugees have been resettled from Türkiye to the EU.[32] From the outset, the number of resettled Syrians is insignificant (namely around 0,1%) compared to 3,seven million Syrian refugees and asylum seekers hosted by Türkiye. Many stakeholders[33] noted that 1:1 resettlement scheme is far from providing most asylum seekers and refugees a durable solution in Türkiye and the resettlement element of the Statement is called weak by an international civil society practitioner for instance.

The EU and Türkiye initiated the Visa Liberalisation Dialogue on 16 December 2013 with the aim of making progress towards the elimination of the visa obligation currently imposed on the Turkish citizens travelling to the Schengen area for a short-term visit.[34] However, as of 2022 2023 no visa liberalisation for the Turkish

[32] This is as of 30 March 2023, see PMM Website. https://en.goc.gov.tr/temporary-protection27

[33] TR24; TR18; TR3. (National Practitioner and Civil Society Practitioner).

[34] Delegation of the European Union to Turkey. Visa Liberalisation Dialogue. https://www.avrupa.info.tr/en/visa-liberalisation-dialogue-6896

citizens has taken place and no real prospect of Türkiye becoming an EU Member in the near future exists (Terry, 2021).

14.5.2 EU-Türkiye Readmission Agreement

There are no publicly available data on the implementation of the EU-Türkiye Readmission Agreement, and no comments were made in the interviews in relation to the results of this Agreement.

14.5.3 Facility for Refugees in Türkiye (FRiT)

Five years after the introduction of the Facility for Refugees in Türkiye (FRiT), both tranches combined, and all operational funds–€6 billion–have been committed and contracted, and €4.35 billion was disbursed as of April 2023.[35] Initially, approximately €2.5 billion of that budget was committed to humanitarian assistance. Several projects continue their activities, but significant delays and obstacles have been reported due to the Covid-19 pandemic in 2019. Reports and respondents have highlighted the crucial role and importance of the Emergency Social Safety Net and other humanitarian assistance programs for the livelihood and well-being of refugees in Türkiye. The EU reported additionally allocating €78.2 million to respond to the humanitarian needs following the earthquake in Türkiye in February 2023.[36]

Development assistance, aiming to provide structural support for the institutions and organisations, mount to €3.5 billion in Türkiye under the FRiT. The bulk of the funding was committed to projects in the education, healthcare, and socio-economic support areas targeting mainly, if not exclusively, Syrian nationals or refugees coming from Syria. The sustainability of projects funded by the FRiT and other financial instruments is also a recurring theme within the reports and interviews. While it is generally pointed out that the actions for capacity building contribute extensively to sustainability,[37] all respondents agree that if sustainability is desired, then funds should not be terminated because change takes time.

[35] Communication from The Commission to The Council And The European Parliament Sixth Annual Report on the Facility for Refugees in Turkey. (2022). https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/COM_2022_243_1_EN_ACT_part1_v3.pdf; The EU Facility for Refugees in Turkey. (2023). https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/frit_factsheet.pdf

[36] 'This amount includes €35 million of reallocated ongoing projects funded under 2022 budget.' https://civil-protection-humanitarian-aid.ec.europa.eu/where/europe/turkiye_en

[37] TR17. (International Organisation Representative).

14.6 Containment/Mobility

14.6.1 EU-Türkiye Statement

The explicit objective of the Statement is to prevent new irregular arrivals to the EU and take necessary measures to prevent the opening of any new sea or land routes for illegal migration from Türkiye to the EU.

Many stakeholders[38] stated that the EU-Türkiye Statement was a migration management instrument and its main purpose was to prevent new arrivals to Europe hence, it can be seen as a containment tool. A migration practitioner mentioned that the main driver of the containment policy is the EU: EU actions (including Frontex operations in the Aegean Sea and pushback practises by the Greek forces) restrict mobility and promote containment. The long-term detention of asylum seekers and migrants who have arrived at the Greek islands in so-called hotspots in dire conditions is a form of containment within Greece (AIDA, 2020). Although as of December 2021, the Greek government closed some of these camps on the Greek islands which are close to Türkiye, asylum seekers and migrants who used to live in the camps have been moved to so called 'Closed Controlled Structures' funded by the EU, featuring barbed wire fences, surveillance systems and ID and fingerprint scanning at the gates (EC, 2021).

This Statement can be identified as an effective containment policy tool that restricts the mobility of refugees from origin and transit countries to Türkiye and from Türkiye to the EU, as well as within the territories of Türkiye and Greece. In comparison to nearly 3.7 million Syrians that Türkiye hosts, the EU Member states have so far resettled 37,332 Syrian refugees under the 1:1 resettlement scheme[39] and this means, resettlement remains not a viable durable solution and a legal entry mode to the EU for many asylum seekers and refugees.

14.6.2 EU-Türkiye Readmission Agreement

The fact that the readmission of third country nationals is exclusively an obligation of Türkiye vis-à-vis EU Member States and not vice versa is illustrative of the aim of the Readmission Agreement to contain refugees in Türkiye.

Although the EU-Türkiye Readmission Agreement alone is not a containment instrument, its implementation is part of a broader policy which encourages administrative detention policies and the establishment of more Removal Centres in Türkiye.

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[38] TR1; TR2; TR3; TR 5; TR24; TR18; TR4; TR9; TR16. (National and Migration Practitioners, International Organisation Representatives and Civil Society Practitioners).

[39] As of 30 March 2023, PMM Website https://en.goc.gov.tr/temporary-protection27

14.6.3 Facility for Refugees in Türkiye (FRiT)

While the FRiT did not have a clear mandate to fund projects to limit the mobility of migrants and refugees, all respondents shared their common experiences in the field that these projects improved conditions for refugees and migrants in Türkiye, and at the same time reduced mobility.

A national authority[40] pointed out that, the rule that requires children to attend schools only in their families' place of residence limits mobility within Türkiye. Registration of children with irregular status to schools is accepted and their families are encouraged by the authorities to register with PMM, so the child's education becomes an important factor impacting mobility.

On the other hand, another national authority[41] drew attention to the varying patterns of mobility according to different national groups, such as Afghans and Syrians. While instruments had a positive impact on Syrian nationals on their stay in Türkiye through measures such as facilitation of work permit procedures, decrease in work permit fees, flexibility in change of provinces, and education projects, this is not always the case for irregular migrants or asylum seekers, such as Afghan and Iraqi nationals.

In general, the interviewed national authorities agreed that the advantages of the instruments provided in Türkiye in the fields of health, education, and agriculture, which enhanced the conditions in Türkiye, prevented the movement towards the EU. However, representatives from international organisations were more critical; one[42] of them argued that to reach containment, rather than putting up fences, EU is adopting a more subtle way by outsourcing migration control. Another organisation[43] defined border management as an important element of IPA and FRiT which means they are not contributing to mobility.

Two projects were funded by FRiT for migration management. Under the first FRiT-funded project, six life boats were delivered to the Turkish Coast Guard to conduct search and rescue operations (European Commission, 2020). Whereas a second project funded under the FRiT aimed to support the implementation of the EU- Türkiye Statement through assistance to the PMM in the management of returns from the EU and in the day-to-day operations in 21 removal centres in doing so the EU covered the costs of building a removal centre and covered utility costs of some of these removal centres (European Commission, 2020). These projects funded under the FRiT to enforce Türkiye's border management and return capacity seek to enable Türkiye to manage migration more effectively and to restrict the mobility of migrants and refugees from Türkiye to the EU, while in the removal centres their mobility is restricted even within Türkiye. Pointing out a similar aspect, an international organisation representative noted that the EU- Türkiye Statement is

[40] TR7 (National Practitioner).

[41] TR6 (National Practitioner).

[42] TR16 (International Organisation Representative).

[43] TR12 (International Organisation Representative).

intrinsically not in support of mobility, considering that the EU funds projects under the Statement to strengthen Türkiye's management of its borders, its return capacity, and establishing new Removal Centres.

14.7 Alignment with Global Compact on Refugees

14.7.1 EU-Türkiye Statement

The first objective of the GCR is to ease the pressures on host countries. Instead of easing pressure on Türkiye, which currently hosts the largest number of refugees worldwide, the EU-Türkiye Statement imposes additional burdens by foreseeing Türkiye to prevent new irregular arrivals to the EU and requiring Türkiye to readmit those who have transited through Türkiye to reach EU territories.[44] Nevertheless, financial assistance provided under the FRiT to Türkiye can be considered as easing pressures on Türkiye, hence as being in line with the GCR.

The second objective of the GCR is to enhance refugee self-reliance. A number of projects such as Conditional Cash Transfers for Education[45] and Emergency Social Safety Net (ESSN)[46] projects funded under the FRiT improves self-reliance of refugees. These projects and others funded by the EU to increase Syrians' access

[44] The number of readmitted migrants and asylum seekers remain as 2139 as of December 2021. https://en.goc.gov.tr/return-statistics

[45] "Conditional Cash Transfer for Education Programme (CCTE) is a national social assistance programme implemented by the Turkish Ministry of Family, Labour and Social Services since 2003. The objective of the program is to improve school attendance. Extension of the CCTE programme to Syrians under temporary protection and other refugees is being implemented through a partnership between the Ministry of Family, Labour and Social Services, the Ministry of National Education, the Turkish Red Crescent (TRC) and United Nations Children's Fund (UNICEF). The programme is being funded by European Union Directorate General for European Civil Protection and Humanitarian Aid Operations (ECHO). The objective of the Conditional Cash Transfer for Education Programme is to increase access to education and encourage children to continue their education. The eligibility criteria are: (a) all members of the family must be registered in Turkey, (b) the family must not have any regular income at the time of application (including no high value or income-generating assets), (c) no member of the family must have social security, and (d) the family must have at least one school-going child at the time of application." See GCR Website. CCTE. https://globalcompactrefugees.org/article/conditional-cash-transfers-education-ccte-programme-refugee-children

[46] "ESSN is the Emergency Social Safety Net Programme funded by the European Union Civil Protection and Humanitarian Aid (ECHO) and implemented in partnership with the International Federation of Red Cross and Red Crescent Societies (IFRC), the Turkish Red Crescent (TRC) and Ministry of Family and Social Services. The ESSN delivers cash assistance to vulnerable people under Temporary Protection / International Protection / Humanitarian Residence Permit in Turkey, have an ID card starting with 99 number and aims to allow refugees and asylum-seekers living outside of camps across Turkey to cover their basic needs such as food, shelter, and clothing in dignity. The assistance will be based on vulnerability assessment and will be delivered through the ESSN (kızılay) card". See Kızılaycard. (2021). https://kizilaykart.org

to education, healthcare, and social assistance contribute to refugees' self-reliance. Following the adoption of the EU- Türkiye Joint Action Plan, Türkiye introduced a limited right to work for Syrians, holding a temporary protection status in early 2016 (Ineli-Ciger, 2017).[47] The EU and pledged EU funding in the EU- Türkiye Joint Action Plan played a significant role in the introduction of the right to work for Syrians in Türkiye. This is in line with the GCR which emphasises the importance of fostering inclusive economic growth for host communities and refugees (GCR para 79). Yet, although Turkish laws offer Syrians a limited right to work, thousands of Syrians in Türkiye still work illegally, without access to minimum wage or social security benefits (Ineli-Ciger, 2017). Introducing the right to work in Türkiye, although not an absolute right, contributes to the self-reliance of refugees, although exercise of this right should be enhanced further.

The third objective of GCR is to expand access to third-country solutions. In particular, the GCR calls on States to establish, or enlarge the scope, size, and quality of, resettlement programmes (GCR para 91). In theory, the resettlement scheme agreed under the EU-Türkiye Statement, or the so-called 1:1 resettlement scheme, is in line with this objective; however, in practise, according to the PMM, 37,347 31,616 Syrian refugees have been resettled from Türkiye to the EU.[48] However, in comparison to the 3.7 Syrian refugees hosted by Türkiye, this resettlement figure is too insignificant to be recognised as a success or a good practise in line with the GCR. Moreover, although the EU-Türkiye Statement initially foresaw that irregular crossing between Türkiye and the EU are ending or at least have been substantially and sustainably reduced, a voluntary humanitarian admission scheme to be launched has not been established.

14.7.2 EU-Türkiye Readmission Agreement

While the EU- Türkiye Readmission Agreement, as an international agreement, does not run contrary to the GCR, returning asylum seekers from the EU to Türkiye without providing them durable solutions in Europe is not in line with the first objective (to ease the pressure on host countries) and third objective (to expand access to third-country solutions) of the GCR.

[47] In January 2016, Turkey adopted the Regulation concerning Work Permits of Temporary Protection Beneficiaries which introduced a right to apply for work permits for Syrians who have been granted temporary protection status for more than 6 months.

[48] This is as of April 2023 see PMM Website. https://en.goc.gov.tr/temporary-protection27

14.7.3 Facility for Refugees in Türkiye (FRiT)

Many funded projects and activities within the FRiT instrument specifically address two objectives of the GCR: easing pressure on host countries and enhancing refugee self-reliance.

As a country hosting the largest refugee population today, the Turkish infrastructure and economy have been under substantial stress (Gökalp Aras & Şahin Mencütek, 2015). In 2021, Türkiye alleged that it has spent more than $40 billion on providing basic services to Syrian refugees (Emmott, 2021). In contrast, €6 billion funding provided under the FRiT may not seem very significant. However, financial instruments such as the FRiT and Madad Fund provided much needed support, especially in the education and healthcare sectors, according to respondents. However, some respondents[49] expressed that while the Instruments contribute to easing pressures, the support provided comes with delay and it is not sufficient. Furthermore, one respondent argued that "the EU should change its strict position as to reserving the funding exclusively to refugees and that it should include host communities as well."[50]

Two seemingly conflicting and fundamentally different approaches to enhance refugee self-reliance are in play in Türkiye with considerable financial support from the EU. The first approach is to support projects on access to the Turkish labour market. The second approach is providing direct cash assistance to refugees. FRiT funded projects on access to the labour market include the recognition of diplomas, language and skills training, and supporting small and middle-sized enterprises. Launched in 2016, the Emergency Social Safety Net is the largest humanitarian programme in the history of the EU[51] in form of a direct cash assistance.

One respondent[52] underlined that, while support on access to labour market including obtaining work permit enhances refugee self-reliance, direct cash assistance creates dependency on aid. Another respondent[53] expressed that while refugee self-reliance is supported by the EU funds through vocational training and employment centres, it must be analysed how much of this turns into employability. According to this respondent, an individual who works on the minimum wage can obtain half of the minimum wage through an ESSN card when he/she is unemployed, which increases informal employment and makes people dependant on aid.

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[49] TR9, TR8, TR22 (National Practitioners and Civil Society Practitioner).

[50] TR18 (Civil Society Practitioner).

[51] European Commission: The Emergency Social Safety Net (ESSN): Offering a lifeline to vulnerable refugees in Turkey. https://ec.europa.eu/echo/emergency-social-safety-net-essn-offering-lifeline-vulnerable-refugees-turkey_en

[52] TR13 (International Organisation Representative).

[53] TR25 (Civil Society Practitioner).

14.8 Conclusions

This chapter analyses the political, legal and financial instruments through which the EU and Türkiye have cooperated in the field of migration and asylum between 2015 and 2021. The analysis focuses on the three main instruments: the EU-Türkiye Statement of March 2016, the EU-Türkiye Readmission Agreement, and the Facility for Refugees in Türkiye (FRiT) in terms of transparency, accountability, conformity with international law, results, containment or mobility, alignment with the GCR. While the texts of the Statement, the Readmission Agreement and FRiT are public, transparency remains a concern. The implementation of all three instruments is not fully transparent. It is not clear whether the Readmission Agreement, is still in force at all, and if so whether the provision on readmission of third country nationals by Türkiye is still in force. Additionally, concerns exist about the transparency of the projects funded under the FriT. In relation to accountability of the EU, its Member States, and Türkiye for the acts and arrangements under the EU-Türkiye Statement it is difficult to establish before courts. Since the EU-Türkiye Readmission Agreement is a formal international agreement, demonstrating accountability under it is more straightforward than under the EU-Türkiye Statement. Furthermore, there are issues with the EU-Türkiye instruments' compliance with international law. Given Türkiye‘s geographic limitations under the 1951 Convention, shortcomings in the asylum system, and its overburdened capacity for hosting refugees, it is exceedingly difficult to consider Türkiye a safe country for all asylum seekers and refugees. The implementation of the Statement has led to an immediate deterioration of the conditions on the Greek islands and a depriving Syrians of their right to apply for asylum and protection from persecution and cruel treatment in Syria. The 1:1 resettlement scheme established by the Statement provides minimal number of Syrians in Türkiye with a durable solution and is in that sense an insignificant result. There has been no progress on the abolition of the EU visa requirement for Turkish nationals, and kick starting the negotiations on Turkish accession to the EU did not materialize. Furthermore, it should be noted that the Statement did not reduce the number of irregular arrivals from Türkiye to Greece. Moreover, all three instruments aim to contain migrants and refugees in Türkiye, and even within Syria, thus restricting mobility of refugees within Greece as well. Concerning the alignment of instruments with the Global Compact on Refugees, the Statement and the Readmission Agreement increase the pressure on Türkiye by requiring Türkiye to prevent new arrivals to the EU and requiring Türkiye to readmit those who have transited through Türkiye to reach the EU. Although closing the Turkish-Syrian border may alleviate the pressure on Türkiye, it does so at the expense of international law's designed purpose of providing protection against persecution and inhuman treatment. The number of Syrians resettled under the 1:1 scheme is insignificant and does not constitute a contribution to easing the pressure. However, most projects funded under the FRiT contribute to the self-reliance of refugees and, to a certain extent, to easing pressures on Türkiye. Hence, in that respect these projects are in line with the GCR.

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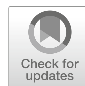
Chapter 15
The Global Compact on Refugees in Serbia and Tunisia: Exploring the Roles of EU and Domestic Policy Actors in Asylum Governance



Angeliki Dimitriadi and Julian Lehmann

15.1 Introduction

In 2018, the United Nations' 2018 Global Compact on Refugees (GCR, "the Compact")[1] set ambitious policy objectives on the governance of large-scale displacement. The GCR seeks to (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity. By adopting the Compact, UN member states, in concert with international organisations, civil society, and other stakeholders have forged a new consensus on policy objectives and on a desired response model on forced displacement. It is a centrepiece of the international regime on international protection that the ASILE project takes interest in.

Nearly 5 years after adoption, what remains less clear is "what it takes" to achieve these objectives. The GCR suggests that itself will contribute to creating political will on the implementation of its objectives, in particular through increased cooperation and burden-sharing. Yet, is there evidence on whether and how these factors do indeed support GCR implementation? Answering that, we suggest, requires examining the actions and motivations of relevant policy actors in a given context. We do so in relation to Serbia and Tunisia, for reasons explained below. We use a lens of political responsibility. We understand political responsibility as the link between policy outcomes on one hand, and individuals, institutions, and processes

[1] UN General Assembly, A/73/12 (Part II).

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on the other hand (refer to Lehmann (2022) and Dimitriadi (2022)). We take a particular interest in untangling the interplay of domestic and international actors in the two countries. We thereby seek to complement ASILE research exploring the financial and political instruments underlying the EU-Serbia relationship (Chap. 12 in this volume) and the EU-Tunisia relationship (Chap. 13 in this volume), as well as research on the legal concept of responsibility in relation to the GCR (Chap. 17 in this volume).

Tunisia and Serbia are amongst the countries that have committed to the GCR. Both are priority countries for the EU as regards migration policy, albeit for different reasons. Serbia has become the central theatre on the "Balkan route" since 2015. Due to its geographic position and its candidate status for EU membership, Serbia is of strategic importance for the EU as a cooperation partner to manage migration (Council of the EU, 2020). At the same time, Serbia is heavily affected by the border management policies of its neighbours, specifically Hungary. Tunisia, in turn, is a key country of origin and transit for irregular migrants and asylum seekers travelling through the Central Mediterranean route. Tunisians are, since 2020 (ASF, ASGI and FTDES, 2022), one of the main nationality of arrivals by sea in Italy, alongside Egyptians, Bangladeshis and Syrians.[2] This is largely the reason why the EU—urged by Italy—has established in September 2023 a Memorandum of Understanding, focusing on equipment for the Tunisian coastguard, protection of migrants in Tunisia in cooperation with the United Nations High Commissioner for Refugees (UNHCR) and returns and reintegration from Tunisia to the countries of origin, in cooperation with the International Organisation for Migration (IOM) (European Commission, 2023).[3]

We adopt a mixed-methods approach based on document analysis and semi-structured key informant interviews (including domestic and international, governmental and non-governmental interviewees) in Tunisia and Serbia, all under condition of anonymity/non-attribution.[4] Research took place in late spring and summer of 2022, and the chapter reflects the findings of that period. However, where significant changes have taken place since 2022 and the time of writing in early 2024, we highlight them. We focus on two overarching areas of the GCR, namely "reception and admission" (including access to territory, reception arrangements, registration and asylum procedures), and "meeting needs" (including access to services and integration). We do not focus on pledges made in connection with the GCR, given they either do not exist (Tunisia) or are not perceived to have impacted policy (Serbia). In the case of Serbia, we select instances of policy shifts or developments that occurred since the adoption of the GCR in 2018. The chapter begins with a brief discussion around why we use the framing of political responsibility and how we understand it. Section three focuses on border management and

[2] UNHCR Operational Portal: Italy, https://data.unhcr.org/en/situations/mediterranean/location/5205

[3] European Commission (July 16, 2023). "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia."

[4] Tunisia n = 10; Serbia n = 16.

access to territory, with sections four to six addressing status determination, reception arrangements, and integration respectively.

15.2 Understanding Political Responsibility

Political responsibility is, first and foremost, a lens of description and analysis that helps to delineate the scope of relevant domestic and international actors, as well as their different and potentially conflicting roles and interests in shaping policy outcomes. Besides, however, it is also a notion that helps to pinpoint issues of democratic political accountability, given that feedback for policy outcomes can best be directed when both policies and those responsible for policy outcomes are clear. Accountability, a core facet of democratic systems, presupposes that responsibility for policies can be attributed to identifiable political actors (Lindberg, 2013). The literature on (political) responsibility allocation distinguishes between several factors, including on the role of individual decision-makers (Hobolt & Tilley, 2014; Marsh & Tilley, 2010) in undertaking policy decisions that are in turn perceived as responsible for the outcomes.

We opt to utilize here a different approach, drawing from political attribution in multi-level governance structures (Cutler, 2004; Anderson, 2006) whereby policy-making authority is distributed in complex multi-level systems. As Natter highlights, "Ultimately, most immigration policies – regardless of the political system in place – are likely determined by the dialectic between interests, institutions, and ideas evolving at the intersection of domestic and international spheres. The crux is to specify the dynamics between factors and the relative weight of each of them" (Natter, 2018). The resulting complexity has ramifications on the role of individuals in political responsibility, who can more easily "dodge responsibility for policies they have enacted themselves" (Rittberger et al., 2017).

The cases of Serbia and Tunisia offer different reflections on political responsibility for policies relevant to the GCR. The two countries have pursued different migration and asylum policies, influenced by the interplay of both domestic and international actors and their respective priorities. Serbia, although it's asylum system in practice is defunct, pursues a policy that formally adheres to several elements relevant to GCR implementation. Political responsibility often remains complex, as the EU (institutions and single EU states, in particular its neighbours) does set important framework conditions for domestic actors and their policy choices.

In Tunisia, the institutional setup is a mixture of the legacy of the Ben Ali regime and the post-2011 revolution and democratization process. The multi-level governance structure on migration and asylum is more complex still than in Serbia, producing a deliberate politics of 'non attribution'. This is mirrored by earlier research. Natter has characterized Tunisian as an 'adhocracy'. That notion has been conceptualized in bureaucratic theory and public policy studies as an intentional institutional outcome and an unintentional outcome of policy implementation, respectively. Natter argues that an ad-hocracy can be "intentionally ambiguous governance

strategy to secure state power" (Natter, 2021). In this approach the entire policy cycle is included, from policy setting to implementation, and state power includes all political actors including bureaucracies[21]. There are three core components of ad-hocratic immigration governance: (1) flexibility; (2) the pragmatism and (3) the informality of case-by-case arrangements. All three apply in the case of Tunisia. Ad-hocratic governance allows for intentional ambiguity which also allows for the State to choose which policies to avoid, with which to comply and where and when to respond to domestic pressures in favour or against certain policies. Thus, political responsibility becomes even harder to pin down to specific institutions and individuals.

In the following sections, we sketch how these dynamics play out in practice, in two overarching areas of the GCR—"reception and admission" (including access to territory, reception arrangements, registration and asylum procedures), and "meeting needs" (including access to services and integration).

15.3 Access to Territory and Border Management

The GCR "is grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement", so that putting in practice a GCR approach is predicated on access to territory (Osborn & Wall, 2021).[5]

Although access to territory and border management differ between Serbia and Tunisia, both countries use deterrence measures (pushbacks in the case of Serbia and interceptions in the case of Tunisia) explained both by both domestic preferences, and by reactions or responses to actions or requirements of EU institutions or single member states.

Serbia's geographic position renders it a critical transit country for EU member states, which means that border management has been supported and prioritised EU member states' bilateral support in the Western Balkans. A recent policy development that helps to examine the role of different actors is the construction of a barbed wire fence by authorities in the municipality of Preševo at the border with North Macedonia, launched in mid-2020 (Stojanović, 2022). The origins of the fence appear to be an indirect response to the policies of Serbia's EU neighbour states, specifically Hungary and Turkey. This is mirroring earlier developments: In 2016, the border closures in Hungary had been a key factor prompting Serbia to drastically change its response to migrant arrivals; shifting from facilitation of movement to securing borders and restricting entry (Beznec et al., 2016) following the adoption of the Western Balkans Route Leaders' statement (European Union, 2015). Again, in 2020, the decision to build a fence occurred after Turkey had announced, in February 2020, that it would no longer stop refugees moving onward (Deutsche Welle, 2020).

[5] This has also been reflected in some GCR policy commitments made by host states.

Similar to 2016, the interdependence of Serbia's asylum policy is also visible in relation to countries "upstream" on the migration route. The then head of KIRS, Vladimir Cucić, stated in 2020 that the aim of the fence was to slow down arrivals to the European Union and that the construction was a "late reaction" to comparable responses in neighbour states (Lekić, 2020). Several informants took the view that Serbia's approach continues to be influenced in particular collective expulsions into Serbia, which remain rampant.[6]

While the fence did coincide with lower numbers of arrivals (Lehmann, 2022), it is complimentary to a wider practice of deterrence at the border that includes push-backs (Lehmann, 2022; Danas, 2021).[7] The Serbian Ministry of Interior (MOI) reported that an aggregate 120,000 foreign nationals have been denied access to Serbia since 2016 (among which an unknown share are presumed to be pushbacks) (Kovačević, 2022). Political responsibility for the decision to build a fence is multi-faceted across ministry and sub-ministry levels of the Serbian central government. There is no clear evidence on the formal or informal involvement of EU institutions, and the European Commission has stated that EU funds have not been used for the construction of the fence (Vesti, 2020). Nonetheless, our informants in summer 2022 highlighted that in the discussions on the new cycle of pre-accession funding for Serbia, the EU Commission is sending the message that, among other things, Serbia needs to beef up border management.

In Tunisia, access to territory, while not physically restricted, over the years has become more difficult, since the land border is heavily securitized due to Tunisian concerns of terrorism spilling over from Libya. Although pushbacks are not systematic, watchdogs have condemned Tunisia for collective expulsions of migrants and asylum seekers (Global Detention Project, 2021) on the border with Libya as well as more recently on the border with Algeria (Human Rights Watch, 2023). In July 2023 particularly, following clashes between groups of Tunisians and sub-Saharan Africans, security services conducted raids in Sfax, in which they arbitrarily arrested and expelled to regions bordering Libya and Algeria thousands (North Africa Post, 2023).

The said policies are a product of both historical continuity from the Ben Ali period, concerns over Libya, as well as a securitisation of migration (Cassarino, 2014) influenced by the relationship with the EU. The main actor in sustaining the security driven policy is the Ministry of Interior, which is responsible for border management, and it is one of the few ministries with relative continuity in its staff from the pre-2011 period (Dimitriadi, 2022). Political responsibility for policies at

[6] UNHCR's numbers of people subjected to expulsion to Serbia peaked at 27,233 in 2021 and has since decreased considerably. See UNHCR's monthly statistical snapshots, https://data.unhcr.org. The majority of these expulsions are from the EU member states Romania and Hungary.

[7] Informant interviews highlighted that access to territory was very much possible for asylum seekers, and had even improved through capacity-building efforts. A number of informants pointed out that an assessment of the scope of pushbacks necessarily prompts a comparison with Serbia's neighbour states, and that the conduct of Serbian authorities is widely seen as less restrictive and violent.

both land and sea borders appears to rest almost exclusively with the Ministry of Interior, which guides all policy related to border controls (Roman & Pastore, 2018), and has a strong preference towards deterrence measures and border management. The latter is one area where there is a convergence of interests between the EU and Tunisia, albeit for different reasons.

At the same time, EU has a strong interest in promoting the integrated border management (IBM) approach and in 'securing' the land border that is perceived as the main entryway for irregular migrants that will eventually travel via the Central Mediterranean. Thus, EU border management priorities have allowed the Tunisian Ministry of Interior as well as the Ministry for National Defense to tap into technologies and processes that are useful for security purposes beyond migration control. This, in turn, has facilitated a convergence with EU preferences.

Partial convergence of preferences is also visible on the maritime border. Tunisia's border management includes the maritime border, where Tunisian Navy warships and other auxiliary vessels (under the Ministry of National Defence) as well as Tunisian Coast Guard vessels (under the Ministry of Interior) conduct a mixture of search & rescue and interceptions. As Tunisians make up a significant portion of those on the move via sea routes, the maritime border is priority for the Tunisian side. An informal approach appears to exist on disembarkation, where individuals are not arrested but are allowed to remain in the country in a legal limbo (for non-Tunisians, see discussion below on status determination). For the EU, the focus is overwhelmingly on reducing boat arrivals mainly to Italy. Since the signing of the EU-Tunisia Memorandum of Understanding in July 2023, efforts are taking place to strengthen the cooperation on the maritime border. A recent example of this is the building by the Tunisian authorities of a Maritime Rescue Coordination Centre with the support of the EU and its development partners, to function as the main point of contact for incidents at sea in international waters and Search and Rescue coordination efforts.

15.4 Status Determination

While the GCR does not provide policy guidance on asylum procedures, it is predicated on the principle that refugees' have a distinct status under international law, which is the source of individual rights and state obligations. A refugee response in line with a GCR approach will, for that matter, be grounded on status assessment, typically led by states. It is this aspect where Serbia and Tunisia significantly diverge both in terms of practice and political responsibility for that practice.

The Serbian system of registration and asylum procedures has been marked by relative continuity. The formal process is regulated by Serbian Law on Asylum and Temporary Protection (LATP), in place since June 2018 (Kovačević, 2022).[8] The

[8] Pending applications were processed under the preceding law until 2019.

Police issues a registration certificate to those who express, on Serbian territory or at border crossings, an intention to submit an asylum application (2306 registration certificates were issued in 2021) (Kovačević, 2022). The submission of an asylum application formally initiates the asylum procedure, which is conducted by the Asylum Office, a department under the responsibility of the Ministry of Interior (MOI), followed by a potential administrative and judicial appeal component (Kovačević, 2022).

Political responsibility can be illustrated in particular around the adoption of the LATP. The law brought about several noteworthy changes, including a reformed application of the Safe Third Country concept. That concept has impacted outcomes in status determination: prior to the 2018 LATP, the Asylum Office was obliged to assess circumstances barring return only in relation to the country of origin, which in most instances resulted in an automatic rejection of asylum applications on the procedural ground that applicants could obtain protection in transit countries (Belgrade Centre for Human Rights, 2019). The LATP has aligned the criteria on the application of the concept with EU asylum law, requiring a substantive review of the quality of protection in other countries rather than an automatic application. The adoption of the law is consistent with the EU accession process[9] largely supported by the instrument for pre-accession (IPA) (Chap. 12 in this volume). However, there is a low number of decisions and low rate of recognition. In 2023, out of 196 applications, 9 positive decisions (granting refugee status or subsidiary protection), 59 negative decisions were taken. The majority of cases (115) were discontinued after asylum seekers' onward movement (UNHCR, 2024). Our research identified multiple factors including the onward movement of people who have lodged asylum applications; lack of judicial and Commission reviews of asylum decisions; ongoing issues of capacity in the Asylum Office. Some informants noted that low recognition rates are deliberate policy, since issues such as adequate information to asylum seekers, budgeting for interpretation and accessing legal assistance are perceived to be easily solvable (Lehmann, 2022). Thus, transit is utilized as a justification for a lack of progress on access to procedures, and a policy direction to facilitate onward movement.

Although political responsibility for legislative reform primarily lies with the Ministry of Interior that is responsible for the LATP, the EU is ascribed—through the accession process and its capacity development efforts—a certain level of influence. This investment has been the driving force behind convergence of the LATP with EU asylum law. The practical effect of legislative changes has been limited, however, as conflicting policy interests between the Serbian government and EU actors have impeded political ownership and leadership of reform.

[9] The same is true for 2022 draft amendments to the LATP, as well as the Law on Foreigners, the LATP, and the Law on Employment of Foreigners, which were part of the legislative calendar of the Revised Action Plan of Chap. 24 http://www.mup.gov.rs/wps/wcm/connect/9be2669f-e783-4911-9471-7f20ae6145ce/Revised+AP24_worksheet.pdf?MOD=AJPERES&CVID=nbcua4H

The case of Tunisia is drastically different to Serbia. Migration legislation and policy in Tunisia is predominantly focused on the emigration of Tunisian nationals that remain the priority (Dimitriadi, 2022). Despite being a party to the 1951 Refugee Convention as well as to the 1969 AU Refugee Convention, Tunisia does not have a national asylum system. The right to asylum, is enshrined in the Tunisian Constitution of 26 January 2014,[10] however, the draft asylum law is pending approval by Parliament since 2014. In practice, asylum determination and reception are "outsourced" to UNHCR and civil society. In June 2022 UNHCR had approximately 9000 persons under its mandate, with the majority originating from the Middle East, sub-Sahara, and Horn of Africa.[11] Once in Tunisia, asylum seekers are legally allowed to stay in reception centres set up by UNHCR and its local partners, for up to 60 days while having their claims for assistance processed. Since the document issued by UNHCR is not recognised by Tunisian authorities, there are several difficulties for refugees in acquiring residency and work permit. It can be argued that the country remains relatively safe for many nationalities that are not in danger of refoulement, however since 2023 it is increasingly unsafe for Black Africans (Human Rights Watch, 2023).

There are several reasons why progress has not taken place regarding the adoption of an asylum law. Concern over Tunisia being labelled a "Safe Third Country" has placed reforms on hold, alongside an unwillingness to transform the country into a desired destination for asylum seekers (Dimitriadi, 2022). In this, the efforts of the EU to facilitate reforms have produced unintended consequences. Some informants highlighted that there was a willingness to cooperate on migration and asylum but disappointment at what was offered by the EU resulted in partial disengagement from the Tunisian side (Dimitriadi, 2022; Natter, 2018). However, it is not only the EU that has sought to encourage Tunisia to formalise the asylum law. Civil society organisations in Tunisia (Euromedrights, 2019), as well as UN bodies have also asked for its formal endorsement—with little success thus far. This indicates the prevalence of domestic preferences over international actors and commitments, including the GCR.

Political responsibility is harder to allocate to a specific institution, considering the delays in the endorsement of the law are attributed at the highest political level. The dominance of the Ministry of Interior in setting the agenda can partially explain why asylum is not a salient issue. However, it appears there is consensus from the Tunisian state and all governments past and present in delaying asylum reform and in this, we see a continuity in the policy. The incomplete progress has allowed for the utilization of asylum as a negotiating tool with the EU while facilitating the outsourcing of responsibility to international organisations like UNHCR.

[10] Constitute Project. (2014). Tunisia. https://www.constituteproject.org/constitution/Tunisia_2014?lang=en

[11] That number reached 12,000 in 2023.

15.5 Reception Arrangements

The GCR requires stakeholders to jointly support host states' response measures on "reception and transit areas sensitive to age, gender, disability, and other specific needs," and the provision of "basic humanitarian assistance and essential services." (GCR, para 54–55) Like in other areas, the GCR approach requires sharing "burdens," with international actors contributing to nationally-led responses, predicated on the inclusion of asylum seekers and refugees in, ideally, national planning, budgets, and national systems of service provision.

Similar to asylum processing, there are marked differences between the respective practice and political responsibility in Serbia and Tunisia.

Serbian reception arrangements have remained largely unchanged in recent years. Serbia has an official reception capacity of some 5500 places.[12] Responsibility for reception arrangements is with the Commissariat for Refugees and Migration (KIRS). Asylum seekers and irregular migrants in transit are referred by the Serbian border police and MOI to 12 Reception-Transit Centres.[13] People who express an intention to lodge an asylum application are subsequently referred to (and are obliged to report to) one of the seven Asylum Centres, which are reception facilities where the asylum procedure is conducted (Kovačević, 2022). Although reception capacity has developed in the last decade, numerous issues remain on reception conditions, access to asylum procedures in the centres, and access to services (Kovačević, 2022).

Formal political and legal responsibility had always been with the Serbian government, with non-governmental organisations and UN agencies providing in the past basic services in all key sectors. As funding reduced there has been a gradual retreat of international non-governmental and governmental organisations, and the handover of responsibility for service provision to KIRS and Serbian line ministries. This appears to have been a relatively uncontroversial issue domestically, partly due to the transitory status of most migrants. While agencies such as the UN Children's Fund (UNICEF) continue to strengthen national systems and NGOs continue to provide support, (Chap. 12 in this volume) particularly in protection, most service delivery in the centres has, since 2020, been formally assumed by the respective government institutions.

The role of the EU has been critical in this process, since pre-accession funds have been used to support reception arrangements in the country. Under the funding cycle II (2014–2020, effectively prolonged until 2022) of the IPA, Serbia has received some 40 million EUR in the field of migration and asylum (Chap. 12 in this volume). Funding by EU and bilateral partners has been, a key driver not only for

[12] Numbers differ across sources, with official Serbian sources pointing to 6000 places, while others point out that the realistic number is considerably lower, given that most places are suitable for short-term stays only.

[13] For an official profiling of the centres, including location, capacity, and provided services, see Commissariat for Refugees and Migration. https://kirs.gov.rs/lat/azil/profili-centara

investment in the public reception system but also an important ingredient in its communication on migration, designed to assure the general public, and aspiring anti-migrant groups, (Stojanovic, 2022; Vucic, 2021) that Serbia's financial costs are minimal. While the EU has encouraged efforts to towards transitioning funding sources from EU funding instruments to the national budget, no significant steps in that direction had occurred until summer 2022.

Tunisia is markedly different. A direct result of the absence of a national asylum law in Tunisia, is also the disengagement of the Tunisian state from the reception and services provision for asylum seekers that are also outsourced to UNHCR Tunisia and civil society. There are several accommodation sites across the country for those applying for asylum,[14] yet budget cuts of UNHCR Tunisia have significantly affected the organisation's ability to address emerging needs. As the few reception centres are overcrowded and underfunded, the Tunisian government has resisted requests to open new ones, arguing it lacks the capacity to offer reception services to asylum seekers.

In 2021, UNHCR began evictions from its Medenin shelter that is primarily used to accommodate people intercepted at sea as well as those who are most vulnerable. Those evicted were offered financial assistance for housing (250DT per month for three months), as well as referral to a Tunisian employment association to potentially find a job (Gasteli, 2022) but unless they received a positive determination from UNHCR they could not register for a work permit. Multiple reports (InfoMigrants, 2022; Alarm Phone, 2022) stress that refugees did not wish to return to the familiar conditions where "Migrants face insufficient food, hygiene, difficulties in accessing necessary health care and a lack of information on their fundamental rights" (FTDES, 2019) but rather resettle to the EU. In February 2022, demonstrations broke out in Zarzis and Medenin in front of UNHCR offices protesting the limited access to basic material conditions. The situation resolved only in June 2022, when the Ministry of Interior undertook an evacuation to a shelter in Tunis. The delayed interference is indicative of the unwillingness of Tunisian line-ministries to engage with reception.

Even though some positive steps have taken place initiated by international organisations and civil society,[15] the state remains disengaged from reception, including referral for asylum seekers, accommodation, and access to material conditions. Disengagement, however, is not simply a result of the unwillingness to host refugees. Rather, similar to the asylum law, it is an unintended consequence of EU policy in Tunisia. The funding offered for training, capacity building, enabling refugee status determination and reception facilities, as well as cash assistance to refugees (Chap. 13 in this volume) is associated at the political level with the effort to contain asylum seekers in Tunisia and prevent their journey across the Mediterranean.

[14] It was not possible to ascertain an exact number.

[15] For example, in 2021, UNHCR and its partner the Arab Institute for Human Rights (AIHR), together with the International Organization for Migration (IOM), established a one-stop shop pilot service within the structure of the Municipality of Raoued (Greater Tunis).

15.6 Integration of Recognized Refugees, Asylum Seekers, and Migrants

Enhancing refugee self-reliance is one of the four objectives of the GCR. Specifically, the GCR points to states and other stakeholders contributing "resources and expertise to promote economic opportunities, decent work, job creation and entrepreneurship programmes for host community members and refugees, including women, young adults, older persons and persons with disabilities." (GCR para 70). In most countries, this is reflected in national integration plans, legislation, and practices of inclusion particularly in the labour market.

Both countries Serbia and Tunisia face significant socio-economic challenges. The transitory nature of movement preferred by domestic policy actors means that Tunisian policy actors in particular have refrained from undertaking major efforts in facilitating integration of migrants and refugees.

In Serbia, access to the labour market remains a challenging issue hampering the local integration of asylum seekers and refugees. People whose refugee or subsidiary protection status has been recognised have full access to the labour market, although access can still be difficult in practice.[16] Asylum seekers, in turn, for a long time could only obtain a work permit nine months after they have lodged their application for asylum (Article 15(1) of the Reception Conditions Directive). The rule applied to the majority of asylum seekers, given the length of the procedure, and was considered one reason for discouraging asylum applications in Serbia. (Kovačević, 2022). In 2022, in line with the EU accession's legislative calendar, draft laws that foresee asylum seekers' earlier access to the labour market (after six months) were compiled by KIRS and the respective reporting ministries, namely the MOI and the Ministry of Labour, Employment, Veteran and Social Policy,[17] and adopted in parliament in 2023. The reason why reforms are forthcoming now could not be ascertained. Several interlocutors have linked the changes to greater domestic interest in questions of refugee self-reliance, and in changes of government (Lehmann, 2022).

Beyond legislative reform on access to employment, another policy development is the decision to grant temporary protection to people fleeing Ukraine. On 18 March 2022, the Serbian government adopted a decree on the eligibility of people fleeing Ukraine for temporary protection in Serbia, including citizens of Ukraine and their family members; asylum seekers, refugees, and beneficiaries of international protection; and foreign nationals with temporary or long-term residency

[16] For example, with recommendations mirroring key challenges: Centar za zaštitu i pomoć tražiocima azila (APC/CZA) (2019). "Recommendations in the field of employment of asylum seekers and persons who have been granted asylum 01.07.-31.12.2019." https://www.azilsrbija.rs/preporuke-u-oblasti-zaposljavanja-trazilaca-azila-i-lica-koja-su-dobila-azil-01-07-31-12-2019/?lang=en

[17] Zakon o izmenama i dopunama Zakona o zapošljavanju stranaca, (27 July 2023). http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/13_saziv/634-23.pdf

permits in Ukraine who cannot return to their country of origin.[18] Temporary protection regularises the stay of people fleeing Ukraine, their access to basic services, and access to the labour market. Like in the EU, which had taken a decision on temporary protection only some two weeks before, this marks the first time the instrument of temporary protection has been used.

The decision, which is ascribed to both relevant line ministries and the government leadership, stands in contrast to the approach taken and rules applying in the asylum system generally, but particularly in respect to access to services and employment, where conditions for those benefiting from temporary protection are more favourable. What is more, public communication on people fleeing Ukraine has also been more favourable.

The differences have prompted several interlocutors to illustrate that the Serbian asylum system could improve more quickly towards regularising status and economic inclusion, were there to be political will. Likewise, the Ukraine example shows how EU and neighbour country policies contributed to favourable framework conditions for the Serbian decision: Not only does the instrument of Temporary Protection exist as the result of legislative approximation with EU asylum law,[19] but the decision to use and quickly implement the instrument is also ascribed to the EU opening its doors to people fleeing Ukraine (meaning that many would be expected to move onward), and Serbia navigating pressure by EU partners to more clearly change its stance towards Russia.

In Tunisia, the socio-economic situation severely impacts the capacity of the state to undertake integration-related projects. Like with the asylum legislation, Tunisia post-2011 drafted a National Strategy for Migration (NSM) that would also address the needs of migrants in the country. The NSM, has a long history of revisions, with the most recent in 2016–2017 “coinciding with the launch of work on the five-year plan for economic and social development (2016-2020)”. (Tunisian National Strategy for Migration, 2016). The NSM makes explicit reference to Article 26 of the 2014 Constitution, which recognizes the right to political asylum, yet it only commits to “efforts” in developing a law that guarantees the rights of asylum seekers and refugees. The focus of the NSM is on Tunisians rather than migrants and asylum seekers in the country. It includes strengthening the search for employment opportunities and job placement schemes abroad, protection of rights (and advocacy) for Tunisians abroad and awareness of irregular migration risks (Tunisian National Strategy for Migration, 2016). Though the strategy has not been formally adopted at Ministerial level, it does shape some of the policies and approaches by certain Ministries and government agencies (Veron, 2020). According to Abderrahim et al., the fact that the NSM has not been adopted at the

[18] The decision of 18 March 2022 is available at the Legal Information System. https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/odluka/2022/36/1/reg

[19] European Union. (20 July 2001). Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing. *Official Journal of the European Union, L 212*: p. 12–23.

ministerial council "does not represent a major challenge for implementation, since projects to operationalize, the strategy are in place" (Abderrahim et al., 2021). Nonetheless, the delay is indicative of the government's desire to retain flexibility in migration policy and different priority areas. The absence of national strategy for migrants in Tunisia is complemented by an overall restrictive framework for employment and housing.

Unlike asylum and border management, integration of non-nationals to Tunisia has not been supported financially by the EU and the member states as highlighted also by the European Training Foundation (European Training Foundation, 2021) on projects implemented under the EU Trust Fund for Africa. Emphasis[20] has been placed on the mobility (through training and job placement) or reintegration of Tunisians (deported and/or returned from EU member states), which is also in line with the priority of Tunisia. Trade Unions are active in advocacy for the labour rights of migrants and refugees (ILO, 2018). Despite their efforts, the absence of a national legislation on integration proves to be a key obstacle for integration of foreign nationals. In principle, political responsibility for integration lies predominantly with the Ministry for Social Affairs and Ministry of Labour (for employment) yet the turf war on migration priorities between the Ministry of Interior, Foreign Affairs and Social Affairs has functioned as an obstacle in the development of a national integration system (Dimitriadi, 2022).

15.7 Conclusion

We have examined in this chapter how the domestic and international actors and their preferences have shaped policy developments on asylum over recent years in both Serbia and Tunisia, in areas relevant to the implementation of the GCR.

In Serbia, in the few cases where progress has been made towards a nationally owned policy of service-provision and inclusion, domestic and foreign policy considerations have interplayed with either EU financial support mechanisms, legislative reform facilitated by EU institutions, or policies by neighbour countries "upstream" on migration routes. Constraints were created by the restrictive policies of EU neighbour states on border control that have had a spill-over effect on Serbia, as well as the EU accession process.

In Tunisia, the GCR appears to have neither facilitated nor discouraged policy preferences. Domestic constraints have been main determinants of policy alongside the policies of international actors. Where funding has prioritised border management and the reintegration of Tunisians in the country, it has also coincided with

[20] Under the EUTF has been allocated (€ 3.9 m was contracted at the end of 2021 following € 2.5 m of support) to support socio-economic reintegration of returnees via Tunisian-led reintegration programme (100 people have benefitted so far)- see EU support on migration in Tunisia (2020). EU Emergency Trust Fund for Africa—North of Africa window. https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf-factsheet_27102020_-tunisia_0.pdf

domestic preferences. In contrast, international pressure for a national asylum law and reception system have produced disengagement. The absence of political responsibility on asylum and integration is a product of different priorities that are also reflected in the multi-actor governance structure- which is increasingly made up of international organisations, national civil society actors, and local governance structures like municipalities (that lack official mandate).

Attempting to be "entirely non-political in nature, including in its implementation," the GCR tries to square a circle of depoliticising a combined humanitarian and development-focused response, all the while stating that the Compact will contribute to mobilising the necessary "political will" for implementation. The cases of Serbia and Tunisia show how action seeking to support GCR implementation from the outside requires clarity in aims, identifying the overlapping interests and priorities, and understanding of the domestic political economy and potential levers of reform.

In Serbia, the EU has an opportunity to act more consistently to facilitate the implementation of the GCR. Its recent reform decisions on the Common European Asylum System, meanwhile, go into a different direction. They will allow to declare Serbia a "Safe Third Country" more easily, which will disincentivize Serbia from investing in improving its asylum system, may increase push backs at its borders, and may put additional pressure on a system that is not fit to cope with high inflows (Lehmann, 2022).

Similarly, in Tunisia it is unlikely that reforms on asylum will take place in the long term, fearful of labelling Tunisia a "Safe Third Country". However there is an opportunity, in light of the 2023 Memorandum of Understanding to better align some of the EU and Tunisian priorities and encourage Tunisian authorities to improve conditions for asylum seekers and migrants in the country.

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Part IV
Responsibility Allocation and Attribution

Chapter 16
EU Third Country Arrangements: Human Rights Compatibility and Attribution of Responsibility

Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen

16.1 Introduction

This chapter analyses specific forms of EU cooperation with selected third countries that give rise to questions of compatibility with binding norms of international, European and EU law, and assesses the attribution of responsibility in this context. It does so by applying principles of the law of state responsibility under general international law and international and European human rights law to these forms of EU cooperation with third countries.

Attribution here refers to the mechanism used to assess whether and which acts or omissions are considered the conduct of a state or international organisation at the level of international law (International Law Commission, 2001; Fry, 2014). Dual complexities cloud the question of attribution for breaches of international or European law to the EU or its Member States in this context. Firstly, in many cases, breaches of the rights of asylum seekers and refugees take place outside EU territory, for example on the high seas or the territory of the third state. Secondly, complex constellations of actors involved in EU containment approaches blur questions of attribution for conduct resulting in rights violations. As a result of these

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complexities, in most cases, the EU or its Member States will share responsibility with other actors, most notably the third state.

Shared responsibility under international law has been described as ‘indistinct’ (Brownlie, 2008) and ‘undeveloped’ (Noyes & Smith, 1988). Rather than putting forward a decisive definition, we consider shared responsibility as an umbrella term describing situations where two or more entities—namely states or international organisations—may be held responsible for internationally wrongful acts in the course of cooperation. Thus, shared responsibility includes forms of direct responsibility, often termed ‘joint’ or ‘concurrent’ responsibility, as well as situations of indirect responsibility, such as where one entity provides aid or assistance to a primary actor (Nollkaemper & Jacobs, 2013; Nollkaemper, 2017).

The chapter adopts a doctrinal approach, with a focus on binding sources of international and European law and builds on existing ASILE work (Tan & Vedsted-Hansen, 2021). The findings from the ASILE research covering Serbia, Tunisia, Türkiye and Niger (See Chapters 11, 12, 13, and 14 in this volume) have informed the choice of third country arrangements in Sect. 16.4 of this chapter. This chapter considers attribution of responsibility on the part of EU actors with respect to the use of ‘safe third country’ concepts; cooperation on return and readmission; funding, equipment and training of border control and migration management; and deployment of Frontex officers in third states.

16.2 Attribution of Responsibility Under General International Law

The law of international responsibility provides a framework of rules governing responsibility of states and international organisations for breaches of primary rules of international law, such as international human rights or refugee law (Crawford, 2013). It is not concerned with the content of primary rules, nor whether a violation has occurred (International Law Commission, 2001). Central to a finding of international responsibility is the question of attribution, the key mechanism to assess, whether a particular act or omission can be ascribed to a state or international organisation as a matter of international law.

16.2.1 State Responsibility

Although the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) are not formally binding, broad state practice accompanied by *opino iuris* suggest that at least parts of it reflect customary international law (Aust, 2011; Gammeltoft-Hansen and Hathaway, 2015; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* 2007).

The ARSIWA requires two elements to arrive at direct state responsibility: an action or omission that is, first, attributable to the state under international law and, second, constitutes a breach of an international obligation of the state. There is no distinction between territorial and extraterritorial acts or omissions (den Heijer, 2012a).

In the context of EU third country arrangements, the acts of immigration or border authorities will be attributable to the state, even when acting extraterritorially (Farahat & Markard, 2020; Tan, 2019). At present, there is no jurisprudence finding attribution based on the conduct of *de facto* state organs in the context of migration control (*Military and Paramilitary Activities in and against Nicaragua*, para 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para 392). However, Article 4 ARSIWA may indeed become relevant in connection with private companies or other non-state actors providing services in this area (Tan, 2019). In addition, such private actors may fall under Article 5 if (*de jure*) authorised to fulfil public functions, such as private security firms (International Law Commission, 2001, para 2). Their conduct may further be attributable to a state under Article 8, if acting under the instruction, direction or control of the state (den Heijer, 2012a; *Nicaragua v United States of America* para 109; *Prosecutor v Dusko Tadić* (Judgment, Appeals Chamber) para 122; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para 393 f.), or under Article 6, where one state places its organs at the exclusive authority of another state (International Law Commission, 2001, para 3).[1]

Responsibility of two or more states may arise where they breach an international obligation and exercise jurisdiction simultaneously or in concert (concurrent or joint responsibility). Joint responsibility, where one act is attributable to several states and for each of them constitutes a breach of their international obligations, is regulated in Article 47 ARSIWA, which recognises the responsibility of plural states in such a case (International Law Commission, 2001, para 3).[2]

In addition, the rules on derived or indirect responsibility are highly relevant for third country agreements. Responsibility here does not require attribution of the primary wrongful act on the part of the 'assisting' state (Giuffré, 2012). Moreover, indirect responsibility does not necessarily require jurisdiction over the victims of the wrongful act, thus opening up a finding of responsibility without the essential human rights law precondition for direct responsibility.[3]

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[1] Compare *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001); See, however, *X. and Y. v Switzerland* App nos 7289/75 and 7349/76 (European Commission of Human Rights, 14 July 1977); *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 June 1992).

[2] *Oil Platforms (Islamic Republic of Iran v United States of America)* Merits [2003] ICJ Rep 4; *Saddam Hussein v Albania and twenty other states* App no 23276/04 (Admissibility decision) (ECtHR, 19 March 2006); *Ilse Hess v the United Kingdom* App no 6231/73 (Admissibility decision) (European Commission of Human Rights, 28 May 1975).

[3] Cf. Section 16.3.2 on the issue of jurisdiction under the ECHR and Sect. 16.4.3 for examples of indirect responsibility.

Article 16 ARSIWA provides that a state is internationally responsible for its *aid or assistance* in the wrongful act of another state, if it does so with knowledge of the circumstances and the act would be internationally wrongful if committed by that state. In the *Bosnian Genocide* case, the ICJ further noted that this provision constituted customary international law[4] and also the Venice Commission found Article 16 applicable to European states in the context of ECHR breaches.[5] According to Article 17, a State is further responsible if it *directs or controls* the wrongful acts of another state under the same two prerequisites.[6]

16.2.2 Responsibility of International Organisations

Whereas the ARSIWA are primarily relevant regarding the responsibility of EU Member States, the EU itself is an international organisation (IO) (Casteleiro, 2016)[7] making it subject to the *Articles on the Responsibility of International Organisations* (ARIO).[8] Article 1(2) furthermore holds that the ARIO apply to the international responsibility of a state in connection with the conduct of an IO. Similar to the ARSIWA, the ARIO foresee responsibility when an internationally wrongful act is attributable to the IO and constitutes a breach of its international obligations (Art 4) (Nollkaemper & Jacobs, 2013).

Breach of International Obligations

The breach of international obligations might be more difficult to establish with regards to IOs in comparison to states, since IOs are less often parties to human rights treaties (Klabbers, 2017). However, customary international law can create further binding obligations for IOs that are relevant for the assessment of a possible

[4] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para 420.

[5] European Commission for Democracy Through the Law (Venice Commission), *On the International Legal Obligations of Council of Europe Members States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no 363/2005, CDL-AD(2006)009, para 44 f.

[6] *Big Brother Watch and others v the United Kingdom* (GC) App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021) para 495.

[7] Consolidated version of the Treaty on European Union [2016] OJ C 202/1 (TEU), art 47; On the question of international legal personality of other entities of the EU, such as Frontex, see Blokker N. (2016). The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law. *Yearbook of European Law* 35(1), 471–483.

[8] International Law Commission (2011).

breach (Konstadinides, 2016).[9] Following this logic, as regards human rights obligations, the EU is only party to the *UN Convention on the Rights of Persons with Disabilities* (CRPD)[10] and, thus, would be bound by this treaty alone and potentially customary international law.

Yet, due to the EU's internal rules, human rights obligations stem from three formal sources binding the EU and Member States when acting within the scope of EU law: The EU recognizes the *Charter of Fundamental Rights of the EU* (EUCFR)[11] as primary law in Article 6(1) of the *Treaty on European Union* (TEU). Article 6(2) TEU also foresees the accession to the *European Convention on Human Rights* (ECHR)[12] in the future. Even before Article 6 TEU existed, the ECHR was seen as an inspiration for EU human rights principles by the CJEU (Craig & de Búrca, 2020). Furthermore, the ECHR, just as national constitutional traditions and international treaties signed by the Member States, form general principles of EU law according to Article 6(3) TEU (Craig & de Búrca, 2020).[13]

The differentiation between the internal rules of an IO and international law is generally more difficult than those of a state and international law. As the ARIO Commentary explains, this stems

> from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law. (International Law Commission, 2011, 54)

Hence, the question remains whether obligations of EU law equal the *international* legal obligations referenced in the ARIO. European debates and the CJEU case law might cast doubt on the assumption that the breach of EU human rights also constitutes an international wrongful act, due to the insistence on the *sui generis* character of the EU as an IO as well as the autonomy and supremacy of EU law.[14] Nevertheless, the CJEU has referred to international legal obligations in its case law on several occasions (Butler & De Schutter, 2008) and its reasoning in the *Kadi* cases was serving the purpose of upholding the respective higher standard of protection.

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[9] CJEU Case C-286/90 *Poulsen* para 9; Case C-27/11 *Vinkov* para 33; Case C-292/14 *Elliniko Dimosio v Stroumpoulis and others.*

[10] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

[11] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389 (EUCFR).

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005 (ECHR).

[13] See further CJEU Case 29/69 *Stauder v City of Ulm*; Case 11–70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* paras 3 f; Case 4/73 *Nold v Commission* para 13; particularly regarding migration and asylum, see i.a. CJEU Case C-540/03 *Parliament v Council*; Joined Cases C-175-179/08 *Aydin Salahadin Abdulla v Germany*; Joined Cases C-57 and 101/09 *Bundesrepublik Deutschland v B and D.*

[14] See CJEU Case 6/64 *Costa v E.N.E.L.*; *Opinion 2/13 pursuant to Article 218(11) TFEU*; Joined Cases C-402 and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*; Case T-315/01 *Kadi v Council and Commission (Kadi II).*

Hence, it cannot be derived from these cases that the Court would assume primacy of EU law over international law, where the latter gives a higher level of protection. In addition, even other international agreements concluded by the Member States have been found binding upon the EU.[15]

Systematically, the question must be answered by international law and Article 5 ARIO states: 'The characterization of an act of an international organization as internationally wrongful is governed by international law.' According to the *ICJ Advisory Opinion on the Agreement between the WHO and Egypt*, international organizations are 'bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[16]

Article 10 ARIO further elaborates:

> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, *regardless of the origin or character of the obligation concerned.*
>
> 2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization *towards its members under the rules of the organization.*[17]

The 'rules of the organization' are defined in Article 2 (b) ARIO as meaning 'in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'. Hence, the text of the ARIO seems to include the obligations created by the EU treaties.[18] And good reasons of coherence have been invoked by scholars to argue for binding the EU to international human rights law (Butler & De Schutter, 2008).

Yet, also amongst international law scholars, the views seem divided on whether really all internal rules of an IO form international obligations. Consequently, the ARIO Commentary does not give a definitive answer to the question (International Law Commission, 2011; Ahlborn, 2011).

Attribution of the Wrongful Act

Chapter II ARIO regulates the element of attribution. The conduct of organs or agents is attributable, including organs and agents placed at the disposal of an IO that exercises *effective control* over the conduct. Also in cases, where the conduct exceeds the authority of that organ or agent, it will be attributable to the IO, if done in an official capacity and within the overall functions of the IO (Arts 6–8 of ARIO).

[15] CJEU Case 22–24/72 *International Fruit Company*; Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen.*

[16] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, para 37.

[17] Emphasis added.

[18] See i.a. arts 3(5), 6, 21 TEU; see further Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU) art 205.

For the EU, these rules may be relevant, where Member States contribute agents or forces to EU agencies, such as Frontex or EASO. In third country arrangements, liaison officers can be posted in partner states for assistance. In addition, such agents' conduct may fall under Chapter IV, which regulates complicity in the commission of internationally wrongful acts.

According to Article 14 ARIO, acts of *aid or assistance* can be attributed, in case of knowledge of the circumstances and when the act would also be wrongful, if committed by the contributing IO. Under the same requirements, an IO which *directs and controls* a state's or other IO's conduct is responsible (Art 15 of ARIO). In a case of *circumvention*, the IO's responsibility also arises when it adopts decisions binding or causally authorising its members to commit acts that are internationally wrongful, if committed by the IO itself. This rule applies even if the act is not breaching an obligation of the respective member (Art 17 of ARIO). Whereas Article 48 ARIO regulates the case of *joint responsibility*.

16.3 Attribution of Responsibility Under International and European Human Rights Law

The primary purpose of this section is to explore the concept of jurisdiction in international and European human rights law, the threshold test for the application of a human rights law instrument to a state or international organisation. Where a state or international organisation holds jurisdiction, it will usually be directly responsible for any breaches of obligations owed to the relevant individuals at the relevant time (Besson, 2012).

At the level of international human rights law, the section focuses on the application of the International Covenant on Civil and Political Rights (ICCPR)[19] and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[20] which both contain a set of rights relevant to asylum seekers and refugees. Two European treaties are of primary importance in the assessment of third country arrangements of the EU and its Member States: the EUCFR and the ECHR. The EUCFR and the ECHR both include clauses which safeguard the respective higher applicable human rights standard (Arts 52, 53 of EUCFR and Art 53 of ECHR).

In general, the human rights instruments explored below are not well suited to findings of shared responsibility, with their respective regimes geared toward the attribution of responsibility to a single state. The ECtHR has, in rare cases, found situations of shared responsibility (den Heijer, 2012b), for example in the context of

[19] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[20] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 6 June 1987) 1465 UNTS 85 (CAT).

two Member States exercising a high degree of influence over a separatist region[21] and in the context of Dublin cooperation.[22] However, the ECtHR is of course limited to assessing the responsibility of Council of Europe Member States.

16.3.1 ICCPR and CAT

Article 2(1) ICCPR requires that a state party respects and ensures the rights of 'all individuals within its territory and subject to its jurisdiction'. The Human Rights Committee (HRC) has interpreted Article 2 disjunctively rather than cumulatively, thus opening up the possibility of an individual being subject to jurisdiction outside of a state party's territory.[23] With respect to the right to life 'this includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (…).'[24] Already in *Lopez Burgos v Uruguay,* the HRC confirmed this interpretation[25] and in *Celiberti de Casariego v Uruguay* clarified that it would be 'unconscionable' to permit a state party to perpetrate violations on the territory of another state, which it could not perpetrate on its own.[26]

In the recent individual communication of *A.S., D.I., O.I. and G.D. v Italy,* which concerned the deadly sinking of a boat carrying 400 people south of Lampedusa, the HRC applied the 'direct and foreseeable' standard regarding the right to life. The Committee found that distress signals, rescue coordination and the proximity of an Italian vessel to the boat in distress created 'a special relationship of dependency' between the people onboard and Italy. The Committee found that the individuals' right to life was 'directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable' such that Italy's jurisdiction under the ICCPR was triggered.[27]

The HRC has further confirmed that its approach to jurisdiction applies to all individuals, including asylum seekers and refugees in the territory or subject to the

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[21] See, for example, *Ilaşcu and Others v Moldova and Russia* (GC) App no 48787/99 (ECtHR, 8 July 2004).

[22] *MSS v Belgium and Greece* (GC) App no 30696/09 (ECtHR, 21 January 2011).

[23] Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) para 10; Wouters, K. (2009). *International Legal Standards for the Protection from Refoulement*. Intersentia, 370; King, H. (2009). The extraterritorial human rights obligations of states.' *Human Rights Law Review* 9(4), 521–556; Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities) CCPR/C/21/Rev.1/Add.5 (1994) para 4.

[24] Human Rights Committee, General Comment No. 36: Article 6: right to life CCPR/C/GC/36 (2019) para 63.

[25] *Lopez Burgos v Uruguay* Communication No 52/1979 (HRC, 29 July 1981) para 12(3).

[26] *Lilian Celiberti de Casariego v Uruguay* Communication no 56/1979 (HRC, 29 July 1981) para 10.3.

[27] *A.S., D.I., O.I. and G.D. v Italy* Communication no. 3042/2017 (HRC 28 April 2021).

jurisdiction of a state party. It then follows that if a person is subject to a state party's *authority or control* when acting extraterritorially, the state will owe obligations to that individual under the ICCPR (Da Costa, 2012; Scheinin, 2004).

Also, Article 2(1) CAT obliges state parties to prevent acts of torture 'in any territory under its jurisdiction'. In its General Comment on Article 2 of 2008, the Committee Against Torture 'recognised that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.'[28]

In *JHA v Spain,* the Committee considered an individual complaint relating to the maritime interception and subsequent detention by Spanish authorities of asylum seekers and migrants in Mauritania, pursuant to an *ad hoc* bilateral agreement. The Spanish Coast Guard responded to a distress call from *Marine I,* which had capsized in international waters. Spanish authorities towed the vessel toward the coast of Mauritania, where it remained for 8 days. Following negotiations with Mauritanian authorities, the passengers were transferred to the port city of Nouadhibou. There the group was placed in an unused fish processing factory and guarded by Spanish security forces while authorities negotiated their repatriation. The Committee found that Spain's jurisdiction was enlivened by both its interception of a vessel in international waters and its subsequent detention of passengers on Mauritanian territory.[29]

Moreover, extraterritorial jurisdiction under CAT is not limited to effective control over territory. In *Sonko v Spain,* concerning the return of a migrant to Morocco who later drowned, the Committee further found that Spanish officers 'exercised control over the persons on board the vessel and were therefore responsible for their safety'.[30] Thus, where a state party exercises *de jure or de facto effective control over a territory or person* in, for example, a vessel or a detention centre, the state will owe that individual obligations under CAT (Da Costa, 2012).

16.3.2 European Convention on Human Rights

Article 1 ECHR formulates an obligation on Council of Europe states to secure Convention rights 'to everyone within their jurisdiction' as defined by the ECtHR[31] and reflecting its meaning in public international law.[32] Where a state

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[28] Committee Against Torture, General Comment 2: Implementation of article 2 by States Parties, CAT/C/GC/2 (2008) para 16. See also Committee Against Torture, Concluding Observations: United States of America, CCPR/C/79/Add.50 (1995) para 284.

[29] *JHA v Spain* Communication no 323/2007 (CAT, 21 November 2008).

[30] *Fatou Sonko v Spain* Communication no 368/2008 (CAT, 25 November 2011) paras 2.1, 10.3.

[31] See *Catan and Others v Moldova and Russia* (GC) App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 103 ff.

[32] *Ukraine v Russia (re Crimea)* (GC) App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) para 344; see further *Loizidou v Turkey* (GC) App no 15318/89 (ECtHR, 18 December 1996) para 52; *Assanidze v Georgia* (GC) App no 71503/01 (ECtHR, 8 April 2004) para 144.

holds jurisdiction, it will usually be *directly responsible* for any breaches of ECHR obligations (Besson, 2012). It is irrelevant, which specific national authority the breach is attributable to, even if a State has difficulties with securing compliance in all parts of its territory.[33]

The ECHR does not allow for territorial exclusions that would reduce its territorial scope selectively.[34] This is also the case for border fences that are located some distance from the line forming the border, where territorial jurisdiction begins.[35] Particularly, the ECtHR has noted that the practical difficulties in the migration context cannot justify excluding this area from the ECHR's protections.[36]

Regarding **extraterritorial scope**, the ECtHR has developed several exceptions to the territoriality principle.[37] According to the Court, a State's jurisdiction can be extended outside its own borders, either on the basis of the power or control exercised over a person, or over the foreign territory in question.[38] Jurisdiction *ratione personae* is particularly important in the context of asylum, since a state might exercise authority or control over a person in the case of joint interceptions or third country processing (Gammeltoft-Hansen & Hathaway, 2015). It can be established through the acts of *diplomatic agents* where they exercise authority and control over persons or their property,[39] including *on board of aircrafts and ships*.[40] Furthermore, the *use of force by state agents* can entail jurisdiction.[41] *Shared responsibility* might

[33] *Assanidze v Georgia* para 146 ff; *Ilaşcu and Others v Moldova and Russia* para 319.

[34] *Assanidze v Georgia* para 140; *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 106; *A.A. and Others v North Macedonia*, App nos 55798/16, 55808/16, 55817/16, 55820/16 and 55823/16 (ECtHR, 5 April 2022) paras 61 ff; compare art 56(1) ECHR.

[35] N.D. *and* N.T. *v Spain* para 109.

[36] *A.A. and Others v North Macedonia* para 63; N.D. *and* N.T. *v Spain* paras 104 ff.

[37] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31(1); *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001) paras 61, 67, 71; *Catan and Others v Moldova and Russia* para 104; *M.N. and Others v Belgium* (GC) App no 3599/18 (ECtHR, 5 May 2020) para 99.

[38] *Al-Skeini and Others v the United Kingdom* (GC) App no 55721/07 (ECtHR, 7 July 2011) para 133; *Hassan v United Kingdom* (GC) App no 29750/09 (ECtHR, 16 September 2014) paras 138 ff; *Georgia v Russia (II)* (GC) App no 38263/08 (ECtHR, 21 January 2021); *Shavlokhova and Others v Georgia*, App no 45431/08 (ECtHR, 5 October 2021) paras 32 ff; *Bekoyeva and Others v Georgia,* App no 48347/08 (ECtHR, 5 October 2021) paras 37 ff.

[39] *Banković and Others v Belgium and Others* para 73; compare *M.N. and Others v Belgium* paras 112 f.

[40] *Cyprus v Turkey* (Commission decision, 26 May 1975); *Banković and Others v Belgium and Others* para 73; *Medvedyev and Others v France* (GC) App no 3394/03 (ECtHR, 29 March 2010) para 65; *Hirsi Jamaa and Others v Italy* (GC) App no 27765/09 (ECtHR, 23 February 2012) para 75; *Bakanova v Lithuania,* App no 11167/12 (ECtHR, 31 May 2016) para 63.

[41] *Issa and Others v Turkey*, App no 31821/96 (ECtHR 16 November 2004) para 71; *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia*, App nos 75734/12, 2695/15 and 55325/15 (ECtHR, 19 November 2019) para 161; *Carter v Russia*, App no 20914/07 (ECtHR, 21 September 2021) para 130.

arise through the exercise of all or some of the public powers normally exercised by the *local government with its consent*.[42]

16.3.3 EU Charter of Fundamental Rights

Contrary to the ECHR, the EUCFR has no jurisdictional clause. Hence, the applicability of EU law entails the applicability of Charter rights.[43] Article 51 (1) addresses the EU institutions, bodies, offices and agencies as well as the Member States, when implementing EU law. When these actors set measures outside the EU territory, the Charter will be applicable. It should be noted that the Treaties commonly do not refer to the territory or territorial jurisdiction of the Union, but that of the Member States. For EU spatial concepts, the Treaties usually use the term 'area'. (Moreno-Lax & Costello, 2014).[44] In that sense, the human rights obligations 'simply track EU activities' (Moreno-Lax & Costello, 2014) internally and externally.

This is limited by Article 51(2) stating that the EUCFR does not extend the field of application of EU law beyond the given powers of the Union. In principle, the EUCFR's applicability is autonomously regulated by the general provisions governing the interpretation and application of the Charter in Title VII.

The meaning of 'implementation' has been interpreted broadly as including all situations where Member States fulfil their obligations under EU law (Lenaerts, 2012). This even includes the exercise of discretionary power of Member States under EU law.[45] Moreover, Member States may not undermine the exercise of individuals' fundamental rights in the implementation of EU Law[46] and the CJEU generally has interpreted the applicability of the Charter generously (Moreno-Lax & Costello, 2014).

In sum, the applicability of the EUCFR follows a functional approach that is based on the activities of the EU and its Member States. Hence, the applicability of the EUCFR is not limited through the territoriality principle but depends on whether a situation is governed by EU law or not (Moreno-Lax & Costello, 2014).

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[42] *Banković and Others v Belgium and Others* para 71; see further *X. and Y. v Switzerland*; *Gentilhomme, Schaff-Benhadji and Zerouki v France,* App nos 48205/99, 48207/99 and 48209/99 (ECtHR, 14 May 2002); *Al-Skeini and Others v the United Kingdom* para 135.

[43] CJEU Case C-617/10 *Åkerberg Fransson* (GC) para 21.

[44] Compare arts 26(2) and 67(1) TFEU.

[45] CJEU Joined Cases C-411/10 and C-493/10 *NS and ME* paras 64 ff.

[46] CJEU Case C-502/10 *Singh* para 51; Case C-508/10 *Commission v The Netherlands* paras 65, 73.

16.4 Application to Selected EU Third Country Arrangements

16.4.1 The 'Safe Third Country' Concept

Whereas the 'safe third country' concept has been subject to critical analysis in legal theory (Legomsky, 2003; Hofmann et al., 2024; Moreno-Lax, 2015; Hathaway, 2021) and some authors have questioned its legality under international law (Moreno-Lax, 2015), the criticism does not seem to warrant the conclusion that application of this concept is in all circumstances incompatible with states' obligations under international refugee law or human rights law. In EU law, referring asylum seekers to 'protection elsewhere' based on the presumption of safety in another state has been conceptually approved as a procedural device in the context of admissibility of asylum applications.[47] Thus, the decisive question seems to be the manner in which the 'safe third country' concept is being interpreted and applied.

'Safe third country' policies and practices do not as such necessarily involve specific arrangements with the third countries that are presumed to be safe. In practice, however, the receiving state will normally have to consent to the readmission in order to enforce the inadmissibility decision and ensure that the asylum seeker will be treated in compliance with the requisite protection standards (UNHCR, 1995; Colloquium on Challenges in International Refugee Law, 2007; Foster, 2007).

The ECtHR Approach to 'Safe Third Countries'

The most detailed examination of decisions to return asylum seekers to a third intermediary country has been carried out by the ECtHR in cases of removal by the authorities of an EU Member State to a non-EU third country without any examination of their need for international protection. Where a violation of Article 3 ECHR (and possibly of Article 4 Protocol 4 and Article 13 ECHR) is in issue, the ECtHR has reiterated that the removal leaves the responsibility of the removing state intact not to deport them if such action would expose them, directly or indirectly, to treatment contrary to Article 3 ECHR.

The ECtHR differentiates states' duties under Article 3 ECHR in inadmissibility cases based on the notion of 'safe third country' from cases of return to the country of origin. While in the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin, in the former situation the main issue before them is whether or not the individual will have *access to an adequate asylum procedure* in the receiving

[47] Art 33(1)(c) in conjunction with art 38 EUAPD.

third country.[48] In order to be considered 'safe', the third country has to fulfil *both procedural and substantive standards* relating to the treatment of asylum seekers and their applications. The expelling state is therefore required to conduct an up-to-date assessment of the 'accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice'.[49] These ECHR standards do not, however, require the third country to be in compliance with the refugee definition or the full scope of refugee rights under the Refugee Convention (Freier et al., 2021; this chapter in this volume).

The 'Safe Third Country' Concept in EU Law

Removal of an asylum seeker to a presumed 'safe third country' at variance with the abovementioned standards will incur responsibility for violation of Article 3 ECHR (and possibly other ECHR provisions). By contrast, EU Member States are systemically less exposed to being held responsible under EU law for non-compliance with EU asylum standards, including those defining the concept of 'safe third country' and governing its application.[50]

Nonetheless, the CJEU has delivered several judgments finding the removal of asylum seekers from Hungary to Serbia under national 'safe third country' rules to be incompatible with the EU asylum standards, partly because asylum seekers were routinely returned to Serbia regardless of their connection to the country.[51] So far this has not resulted in effective state responsibility being attributed to Hungary under EU law, due to the prevailing system of questions of interpretation being referred from national courts to the CJEU for preliminary ruling. Furthermore, infringement proceedings against Member States are only brought before the CJEU by the Commission on a rather selective basis. Even in instances with rather clear breaches of EU asylum standards such a finding by the CJEU does not in and of itself effectively secure the enforcement of these standards and does not in reality constitute legal responsibility of the Member State in question.[52]

Specific issues of responsibility in the context of 'safe third country' policies have been raised regarding the EU cooperation with Türkiye. In particular, the

[48] *Ilias and Ahmed v Hungary* (GC) App no 47287/15 (ECtHR, 21 November 2019) paras 130–31; see also *M.K. and Others v Poland* App. nos. 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) paras 172–73; *D.A. and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021) paras 58–59; *T.Z. and Others v Poland* App no 41764/17 (ECtHR, 13 October 2022) paras 17–19.

[49] *Ilias and Ahmed v Hungary*, para 141.

[50] Art 33(1)(c) and art 38 EUAPD.

[51] CJEU Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*; CJEU Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others*; CJEU Case C-821/19 *European Commission v Hungary.*

[52] See paras 42 and 144 and the operative paras of CJEU Case C-821/19 *European Commission v Hungary*, judgment of 16 November 2021.

'EU-Türkiye statement' of 18 March 2016 has attracted attention due to potential breaches of international, European and EU law.[53]

16.4.2 Cooperation on Return and Readmission Agreements

A common practice is the return of persons who have no legal grounds for staying within the territory (Eisele, 2019). This return requires the EU's and Member States' cooperation with third countries including regular returns,[54] but also 'hot returns' (Hruschka, 2020)[55] and 'pull-backs' (Chap. 13 in this volume; Markard, 2016; Farahat & Markard, 2020). Some elements of such cooperation may be based on contracts or non-binding political arrangements. In others, the cooperation is likely only based on incentives, potentially accompanied by agreements that are not public (Jones et al., 2022).[56]

Cooperation between the EU and Tunisia (Chapters 11, 12, and 14 in this volume), for example, is based on several kinds of arrangements (Chap. 3 and 13 in this volume). Several Member States have bilateral legal agreements with Tunisia for readmission, security cooperation and visa facilitation (Chap. 13 in this volume). Italy's readmission agreement for the return of Tunisian nationals without asylum procedure has raised concerns related to the right to access to the asylum procedure (Chap. 4 of this volume),[57] the right to leave,[58] prohibition of collective expulsion and *non-refoulement* (Farahat & Markard, 2020; Chap. 13 in this volume). The text of this agreement has not been made public (Chap. 13 in this volume).

The lack of transparency in third country arrangements is not only concerning regarding their democratic legitimisation (Eisele, 2019). The lack of clarity on the concrete conditions in the text as well as on the implementation actions makes the attribution of responsibility extremely difficult (Chap. 13 in this volume), since the EU's or Member States' effective control over and knowledge on the operations of the partner state remain unknown (Deleja-Hotko et al., 2023). Despite the lack of transparency, serious concerns exist regarding the human rights compatibility of the return of Tunisians under the Italian readmission agreement (Chap. 13 in this volume).

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[53] See overview and analyses of EU responsibility in Chapter 3 and this chapter in this volume.

[54] See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (EU Return Directive), in particular the possible exclusion from its scope under art 2(2).

[55] See N.D. *and* N.T. *v Spain.*

[56] *Khlaifia and Others v Italy* (GC) App no 16483/12 (ECtHR, 15 December 2016) para 36 ff.

[57] See discussion of the right to access in Tan, N. F. & Vedsted-Hansen, J. (2021). *Catalogue of International and Regional Legal Standards: Refugee and Human Rights Law Standards Applicable to Asylum Governance*. ASILE: CEPS, Brussels, 10 ff.

[58] Compare *J.A. and Others v Italy* App no 21329/18 (ECtHR, 30 March 2023) para 100 ff.

The danger of human rights violations is only insufficiently addressed by vague human rights clauses in cooperation agreements. If human rights compatibility is mentioned in their text, it usually stays non-operational, and its implementation remains unclear (Chap. 13 in this volume). This circumstance is further aggravated by the strong securitization and containment focus of most agreements (Chap. 13 in this volume). Moreover, the EU's monitoring of EU funded projects does not include the assessment of human rights impacts on principle and, if so, the reports are not publicly accessible (Chap. 13 in this volume; Farahat & Markard, 2020).

Although an abstract agreement without implementation does not constitute an infringement on human rights *per se*, the context here still raises the question, if the entering into these agreements—where the breach of human rights obligations during its implementation is clearly foreseeable despite theoretical duties to observe them in the text of the agreement and without the text or context securing compliance with these duties—might suffice to infringe human rights based on the neglect of obligations to protect. Additionally, preparing the ground for human rights violations by other states in this way, with requisite levels of knowledge, may amount to aid and assistance.[59] Admittedly, whether this line of reasoning will be backed in future case law and doctrine remains to be seen. However, the direct contradiction of Member States' obligations deriving from *jus cogens* will render such agreements void according to Articles 53 and 63 VCLT.

16.4.3 EU Funding, Equipment and Training of Border Control and Migration Management

All four countries' EU arrangements include funding, equipment and training of border control and migration management. ASILE research reveals forms of cooperation which raise particular rights compatibility concerns: European funding and capacity-building of the Tunisian Coast Guard and subsequent interception and summary return at sea; EU's funding of Serbian border control which includes systematic pushbacks of protection seekers; and, in the case of Niger's ETM, European support to the Libyan Coast Guard. These and similar forms of support, such as EU funding for Egypt's maritime border control, raise complex questions of indirect responsibility and, in particular, aid and assistance under Article 16 ARSIWA and Article 14 ARIO (Jackson, 2016).

The provision of financial assistance, patrol boats or other material equipment to third state authorities meet the material definition of aid and assistance envisaged by the ARSIWA and ARIO, as it contributes significantly to the wrongful act, even if not essentially. Whether training is sufficiently linked to the subsequent wrongful act will turn on the facts and the nature of the training undertaken. Article 16 also

[59] Cf. Sect. 16.4.3 below.

includes a *nexus* requirement between the assistance given and the wrongful act, which requires that the aid and assistance be directly related to the wrongful act.

A finding of indirect responsibility in this context further turns on the knowledge or intent of the EU or its Member States in providing funding, equipment or training. While Article 16 only refers to 'knowledge' of the circumstances of the wrongful act on the part of the assisting state, the ILC Commentaries clarify that aid or assistance must be given 'with a view to' the commission of the wrongful act. This appears to introduce the higher standard of *intention* on the part of the assisting state. According to the ILC, '[a] State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct of the aided or assisted State' (International Law Commission, 2001, para 5).

Elsewhere the Commentaries use terms synonymous with intention, such as 'deliberately' and 'intended to', suggesting that Article 16 requires a level of knowledge approaching wrongful intent (Aust, 2011). The finding of the ICJ in *the Genocide Case* suggests that the minimum knowledge standard in situations of aid and assistance is *knowledge of the intent of the principal state*.[60]

Various scholars have weighed in on the issue. *Jackson* argues that knowing participation is sufficient, defined as 'something approaching practical certainty as to the circumstances of the principal wrongful act' (Jackson, 2016). In the context of Italy-Libya cooperation, *Moreno-Lax and Giuffré* argue that an overly strict intent requirement would lead to no responsibility for conduct that falls short of an express desire to violate obligations, but nonetheless involves acceptance of the risk that wrongful acts will occur (Giuffré & Moreno-Lax, 2019). *Gammeltoft-Hansen and Hathaway* argue for a broader reading requiring 'constructive' knowledge on the part of the assisting state, with reference to the ECtHR decision in *Hirsi* (Gammeltoft-Hansen & Hathaway, 2015) *Nolte and Aust* argue for a narrow interpretation of the intent requirement not to discourage ordinary forms of international cooperation (Nolte & Aust, 2009).

Finally, aid or assistance requires the existence of common obligations on behalf of both cooperating states with respect to the wrongful act. This third element may be unproblematic as the fundamental nature of the obligations at stake in migration control mean they are owed by almost all states via one source of international law or another. For example, funding, equipment or training resulting in the arbitrary detention of asylum seekers and refugees will amount to a breach of common obligations of the European state and Tunisia, relying on both treaty and customary law.

[60] Cf. Sect. 16.2.1.

16.4.4 *Frontex Joint Operations in Third States*

Under a 2019 Status Agreement,[61] Frontex officers carry out joint operations on Serbian territory with their Serbian counterparts since mid-2021 (Chap. 12 in this volume). Under the Agreement, Frontex officers 'assist Serbia in border management, carry out joint operations and deploy teams in the regions of Serbia that border the EU'.[62] Article 7 of the Agreement affords Frontex officers criminal, civil and administrative immunity from Serbian jurisdiction. Article 5 of the Agreement limits the function of Frontex staff to exercising border control and return powers under instructions from Serbian agents, though Serbian agents can authorise the use of force in the absence of Serbian officers. Under Article 6, both parties may suspend the operation of the Agreement in cases of breaches of fundamental rights, notably the principle of *non-refoulement*. Article 9(1) includes an obligation on the part of Frontex officers to respect fundamental rights. This Agreement, in general, and Article 7 in particular, raises questions around the responsibility of the EU agency for breaches of fundamental rights in the course of such joint operations.[63]

According to ASILE's country report on Serbia, the Status Agreement was finalised without consultation and negotiated in secret between Frontex and Serbia. The immunity of Frontex staff has raised particular concerns, especially in the absence of a common monitoring mechanism of joint Serbia-Frontex operations at Serbian borders and the lack of sharing of field information regarding the implementation of the Agreement (Chap. 12 in this volume). Arguably, 'Frontex has the unilateral capacity to exclude itself from responsibility from the Serbian legal accountability system' (Chap. 12 in this volume). However, to this point ASILE research does not indicate evidence of fundamental rights violations in joint operations at the Serbia-Bulgaria border (Chap. 12 in this volume).

A number of authors have raised concerns about Frontex's operational role in third countries, including with respect to a lack of human rights safeguards, Frontex's responsibility for violations under international or EU human rights law (Coman-Kund, 2019), and accountability mechanisms where breaches are established (Karamanidou & Kasparek, 2020; Chap. 12 in this volume).

First, the ECHR does not govern Frontex operations in Serbia as the EU is not a party to the Convention.[64] On the other hand, the EU Charter applies to EU 'institutions, bodies, offices and agencies'.[65] As discussed above, the Charter contains no

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[61] Council Decision (EU) 2019/400 on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ L 72/1.

[62] European Commission. (November 19, 2019). Border management: EU signs agreement with Serbia on European Border and Coast Guard cooperation.

[63] Frontex Liaison Officers (FLO) are also deployed in all four countries, but do not engage in joint operations.

[64] Cf Sect. 16.2.2 above.

[65] Art 51(1) EUCFR.

jurisdictional clause and thus its application is not bound to the geographic area of the EU, but rather extends to wherever the activities of EU agencies take place or wherever EU law is applied.[66] In sum, EU Charter obligations track Frontex activities in third countries, on the basis of the concept of 'portable responsibility' (Carrera et al., 2018).

As a result, Frontex remains bound by its EU Charter obligations when taking part in joint operations in third states and is not released of its Charter obligations notwithstanding immunity granted by the Status Agreement. Whereas litigation efforts against Frontex have so far been largely unsuccessful, three of the rulings of the General Court either dismissing a claim for compensation or dismissing the action against Frontex as inadmissible have been appealed and the cases are currently pending before the Court of Justice.[67]

Second, the EU may bear direct international responsibility where an internationally wrongful act is attributable to Frontex officers and constitutes a breach of the EU Charter. There is no doubt that, under Article 4 ARIO, Frontex is an EU organ and the conduct of its officers is attributable to the EU as an IO (Letourneux, 2022). According to Article 7 ARIO the conduct of agents of European Member States placed at the disposal of Frontex is attributable to the latter as the agency exercises effective control over deputised officers.

Under Article 8 ARIO, conduct will be attributable to the EU even where it exceeds its authority if done in an official capacity and within the overall functions of the Agency. A Frontex operation resulting in pushbacks in breach of the principle of *non-refoulement* and/or the prohibition against collective expulsion would clearly attract the direct international responsibility of the agency, and hence of the EU.

Third, with respect to indirect forms of responsibility in the course of joint operations, Article 14 ARIO contains largely similar elements as Article 16 ARSIWA. Hence, where Frontex agents provide support to Serbian officers in carrying out an internationally wrongful act, the Agency may bear indirect responsibility. This would require aid or assistance, such as providing operational support on an unlawful pushback operation, knowledge on the part of Frontex officers that Serbian agents intended to act in breach of international law, and that the act would also be wrongful, if committed by the Agency itself, such as *refoulement* or collective expulsion.

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[66] See Sect. 16.3.3 above.

[67] CJEU General Court Case T-282/21 *SS and ST v Frontex*; Case T-600/21 *WS and Others v Frontex* (pending before the Court of Justice, Case C-679/23 P); Case T-600/22 *ST v Frontex* (pending before the Court of Justice, Case C-62/24 P); Case T-136/22 *Hamoudi v Frontex* (pending before the Court of Justice, Case C-136/24 P); Case T-205/22 *Naass and Sea-Watch v Frontex.*

16.5 Conclusion

This chapter provided an overview of international law and human rights provisions relevant to the assessment of responsibility regarding EU cooperation with third countries and analysed four forms of EU cooperation that raise questions of human rights compatibility and attribution of responsibility: the use of 'safe third country' concepts; implementation of return and readmission agreements; EU funding, equipment and training of border control and migration management; and deployment of Frontex officers in third states.

While the EU's use of 'safe third country' concepts does not necessarily involve specific arrangements with receiving third countries, such 'safe third country' policies display similar tendencies as other forms of EU cooperation with third countries towards informal arrangements being entered into by, or on behalf of, the EU. In certain instances removal of asylum seekers to a presumed safe country may result in responsibility under general international law for the receiving state, and potentially for the EU as well. In practice, however, the human rights obligations of EU Member States provide the most effective basis for attribution of responsibility in case of unlawful removal to third countries.

Cooperation on returns and readmission raise concerns due to a vast lack of transparency in connection with their operationalisation. Where agreements foreshadow the breach of human rights obligations or fail to protect human rights by securing compliance, it may result in responsibility as well.

In addition, EU funding, equipment and training may lead to indirect responsibility on the basis of Article 16 ARSIWA or Article 14 ARIO, but only where European aid and assistance contributes significantly to the wrongful act, with the requisite level of knowledge or intent and where the wrongful act would have breached the EU or the Member State's own international obligations.

Lastly, the EU Charter binds the activities of EU agencies such as Frontex beyond the territorial area of the Union. Any wrongful conduct of Frontex officers in the course of joint operations is attributable to the EU under the law of international responsibility, even where it exceeds its authority, if done in an official capacity and within the overall functions of the Agency.

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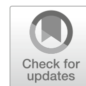
Chapter 17
Attributing Legal Responsibility in the Context of Mobility Containment



Gregor Noll, Gamze Ovacik, and Eleni Karageorgiou

17.1 Introduction: What Is the Problem?

EU third country arrangements to pursue common objectives in the field of migration control, refugee protection or both are complex matters. They bring together a multitude of actors and are implemented in a context where issues related to migrant and refugee rights may arise. In the domain of international law, responsibility issues are broached by asking two questions: is there an internationally wrongful act; and is that act attributable to a state or an international organisation? (Art 2 of ARSIWA; Art 4 of ARIO) Where rights are violated, international law offers particular resources for an analysis of responsibility attribution.

These arrangements unite a number of actors in the pursuit of cooperation, which entails what is known as 'the problem of many hands' (Thompson, 1980). Where the number of authors of an act increases, so does the difficulty of determining any individual responsibility of each author for that act. A further difficulty results from the informality of certain aspects of these arrangements: not all actors are capable of formally assuming responsibility under the law of international responsibility, and the obligations of actors may be left unclear.

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Today, the attribution in multi-actor settings can no longer be exclusively considered under the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the 2011 Articles on the Responsibility of International Organizations (ARIO). Since the adoption of ARSIWA and ARIO respectively, the debate on attribution now features new interventions, such as the 2020 Guiding Principles on Shared Responsibility in International Law (hereafter GPSRIL) (Nollkaemper et al. (2020) and critiques of the two ILC documents and of the GPSRIL (Chimni, 2021). In this chapter, we consider potential arguments under these novel frameworks. We do so to offer insight into the potential risks that the EU and its Member States take in their attempts engage in migration control and refugee protection cooperation with third countries.

The chapter proceeds as follows: first, we introduce how mainstream articulations and interpretations of attribution norms have been challenged by novel rearticulations and critiques, including those originating in the Global South. Then, we map the main norms of international law on responsibility attribution of relevance for GCR implementation in collaboration with actors in Türkiye, Tunisia, Serbia and Niger. These four countries might not appear to be cases typically associated with GCR implementation, as the GCR is generally associated with cooperation in and with states in the vicinity of refugees' countries of origin. We expand that perspective to include responsibility attribution in the context of externalisation and containment practices by actors such as the EU.

17.2 Formal and Systemic Approaches to Responsibility Attribution

Any analysis of responsibility attribution will depend on our baseline understanding of international law: is it primarily a bilateral, or a community matter? As Aust has shown, there is no convincing story of progress, where a 'bilateralist' understanding of state responsibility gradually gives way to one that foregrounds a community interest of sorts. Rather, he contends, 'both the constraints of bilateralism and the promises of the new, community-oriented international law appear to impact heavily on the issue of complicity' (Aust, 2011). To assess how indebted international responsibility norms still are to bilateralism today, suffice it to recall that the secondary norms of international responsibility are assumed to derive from primary norms that states have agreed to. Article 48 ARSIWA provides a concrete example of community orientation. It enables states other than the injured one to invoke responsibility, once the norm breached 'is established for the protection of the collective interest' of a group of states.[1] However, Aust points out that there is no primary rule making it illegal for states to aid and assist other states committing an internationally wrongful act, which leads to 'problems in grasping how the

[1] For an articulation of this approach, see the *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda): ICJ Judgment, 19 December 2005, (Separate Opinion of Judge Simma) para 35.

[ARSIWA] can provide for a rule on complicity' (Aust, 2011) at all. As Aust has made clear, the problem of complicity is indeed one of the material completeness of international law (Aust, 2011), and the challenge is for us to understand what such 'completeness' might imply in the concrete contexts of implementing EU third country arrangements.

That said, there is a practical reason to separate approaches invested into the primacy of states and their bilateral relations from approaches that take their cue from a totality. The former we term *formal approaches* to responsibility attribution, arguments typically based on the ARSIWA or the ARIO, as the case may be. We term *systemic approaches* to responsibility attribution as those which are invested in the primacy of a totality, as Aust's international rule of law or Chimni's justice (Chimni, 2019). Here, references are mainly to those articles in ARSIWA and ARIO that address attribution in collective action, as well as to the GPSRIL, or to arguments from justice. To exemplify, formal approaches are slow to assume limitations to state freedom other than those that the state in question consented to, and circumscribes attributability from this vantage point. Their methodological register consists of a legal formalism resonating with the tradition of positivism. The interests promoted by these approaches are those of states powerful enough to make or influence the primary and secondary rules of international law, while their temporal horizon is limited to the short and medium term, reflected, inter alia, in tropes as that of intertemporal law.[2] This would bar arguments from justice in international law that take their cue from the longue durée of colonialism. At the other end of the arc, the presumption of a collective entity in international law informs arguments under a systemic approach to responsibility attribution. We have chosen to label it as systemic, as it refers to a greater whole, even as its referents are shifting—an international community, the completeness of law, or the justice in both. Methodologically, a range of approaches lend their support, stretching from liberal constitutionalism over an analysis of international law in history to Marxist thought or Third World Approaches to International Law (TWAIL). The perspective is informed by an international collective rather than that of the single sovereign, and its relation to history is transtemporal, letting demands on law accrue from the long view. In the following sections, we will explore potential arguments for systemic responsibility for Türkiye and Syria, for Tunisia, for Serbia and for Niger.

[2] In international law, the concept of intertemporal law refers to the rule according to which, in Max Huber's formulation, 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled'. Permanent Court of Arbitration, Island of Palmas (Miangas) 2 U.N. Rep. Int'l Arbitral Awards 829 (1928), p. 14.

17.3 Systemic Responsibility with Respect to the Containment of Refugee Movements Originating in Türkiye and Syria

17.3.1 Wrongful Act

The wrongful acts identified in this case of systemic responsibility attribution consist of the violation of the right to leave any country, including one's own, and the right to seek asylum as a consequence of the containment of refugee movements in Türkiye following the implementation of the EU-Türkiye Statement.

17.3.2 Causation

From the perspective of containment, the EU-Türkiye Statement resulted in the following developments at the borders and in the territories of Türkiye and Greece (Chap. 14 in this volume):

- Türkiye prevented new arrivals from arriving to the EU and took measures to prevent the opening of any new sea or land routes for illegal migration from Türkiye to the EU;
- Greece designated Türkiye as a safe country and, as a consequence, regular classification of asylum claims by those who have arrived by sea were deemed inadmissible;
- Refugees from Greece whose asylum claims were rejected or found inadmissible were readmitted;
- Reported pushbacks by Greece together with Frontex operations at the Aegean Sea actively restricting mobility;
- Prolonged detention and confinement of refugees who have arrived in the Greek Islands by sea in hotspots, in detrimental conditions which deters mobility towards Greece;
- Funding of projects by the EU to support border management and the return capacity of Türkiye.

The first five developments serve to contain potential and actual refugees in Türkiye, while the last development serves to confine potential and actual refugees in Syria.

In the aftermath of the EU-Türkiye Statement, Türkiye closed its border with Syria and introduced visa requirements for Syrians. This denied Syrians in need of international protection the possibility to avail themselves of the right to seek asylum and to be protected against persecution and inhuman treatment in Syria (Chap. 14 in this volume). Türkiye also took active measures to prevent irregular passages to Greece. Thus, the adoption of the EU-Türkiye Statement resulted in confining displaced persons to Syria as well as to Türkiye, which was an infringement of the right to leave any country including its own and the right to seek asylum (Chap. 14 in this volume).

17.3.3 Responsibility Attribution

The intention of containment that underlies the EU-Türkiye Statement opens the door to arguments on systemic responsibility attribution to the EU and its Member States.

The right to asylum is guaranteed in Article 18 of the EU Charter of Fundamental Rights. The EU-Türkiye Statement makes it more difficult for individuals from Syria in need of international protection to make use of their right to seek asylum due to their confinement in Türkiye and Syria (Chap. 14 in this volume). Whereas Article 18 of the EU Charter of Fundamental Rights provides for the right to asylum with reference to the Refugee Convention, the attempts to establish formal legal responsibility of the EU for its violation has so far failed due to considerations *ratione personae*.[3] Moreover, the fact that the Charter does not bind Türkiye as a matter of law denies formal responsibility attribution to Türkiye with respect to right to asylum, as the acts of containment of refugees in Türkiye and Syria do not qualify as wrongful under Article 12 ARSIWA on the existence of a breach of an international obligation and Article 13 ARSIWA on the international obligation being in force for a state. By consequence, a derivative formal legal responsibility of EU Member States under Article 16 ARSIWA on aid and assistance is not arguable.

The right to leave any country including one's own is laid down in Article 13(2) of the UDHR (as such not binding as a matter of international law) and Article 2(2) of Protocol No. 4 to the ECHR (ratified by neither Türkiye nor Greece). This right also finds a legal basis in Article 12(2) ICCPR which is binding for both Türkiye and Greece as well as for EU Member States.

The question arises whether the right to leave any country is infringed by measures of containment. One could anticipate an argument against there being a breach once alternative destinations are available for exercising the right. For example, it could be claimed that the harm sustained by the individuals contained in Türkiye, Serbia and Niger cannot be regarded as an infringement of their right to leave since the possibility of leaving for any other country, including their countries of origin, might still be open. This would apply even though the route to leave these countries bound for EU countries might be blocked (unless a person qualifies for resettlement in the case of Türkiye and Niger).

Subscribing to Stoyanova's convincing analysis (Stoyanova, 2020), we reject this proposition primarily because the possibility of leaving for other countries (for example, Niger's neighbours) cannot per se rule out an infringement of the right to leave. As held by the Human Rights Committee, the triggering of the application of Article 12(2) of the ICCPR need not entail a complete inability to leave the territory of a particular state. The Committee has found the provision applicable to circumstances where individuals could leave for one particular country but could not go to a country where they specifically wished to go.[4]

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[3] In General Court of the European Union 28 February 2017, T192/16, NF v. European Council; General Court of the European Union 28 February 2017, T193/16, NG v. European Council; General Court of the European Union 28 February 2017, T257/16, NM v. European Council; it was denied that the EU-Türkiye Statement is entered into by the EU holding it legally not responsible.

[4] HRC, *Loubna El Ghar v Libya*, UN doc CCPR/C/82/D/1107/2002 (15 November 2004).

One could also anticipate an argument against the applicability of the right to leave in cases of contained mobility, based on the claim that countries of destination are precisely seeking to facilitate such movement in an orderly fashion through their cooperation with host third countries (such as Türkiye, Serbia and Niger). However, that objective does not consume the right to leave. This conclusion is strengthened further, once we consider the level of protection in these host countries or the expected level of protection that migrants can avail themselves of in any alternative destination.

On this basis, we would like to emphasise that the right to leave any country including one's own might engender arguments attributing legal responsibility to actors jointly embarking on containment-related conduct. However, due to evidentiary and justiciability concerns, as well as the sizeable endeavour of capturing the overall policy purposes underlying the EU-Türkiye Statement, this case is considered to be a likely candidate for an argument on systemic responsibility attribution.

As expressed by the respondents in the field study on Türkiye, 'although the EU-Türkiye Statement on paper does not violate international law, its implementation (and especially its containment focus) raises issues with regard to the compatibility of these arrangements with fundamental rights including the right to seek asylum' (Chap. 14 in this volume). In general terms, containment aims at preventing movement of irregular migrants and asylum seekers towards the EU. Part of its rationale is to evade legal responsibility of the EU or its Member States by preventing the establishment of a jurisdictional link between a relevant third country national and European actors (Chap. 14 in this volume).

The limitation of freedom of movement, the right to leave any country including one's own and the right to seek asylum, is the underlying purpose of the EU-Türkiye Statement. Moreover, despite considerable support by the EU to improving conditions in Türkiye through the funds mobilised in connection with the EU-Türkiye Statement, the implementation of the Statement has increased the pressure on protection systems in Türkiye and Greece and thus conflicts with the GCR objective of easing the pressures on host countries (Chap. 14 in this volume).

17.4 Systemic Responsibility with Respect to the Containment of Refugee Movements in Tunisia

17.4.1 Wrongful Act

The wrongful acts identified in this case of systemic responsibility attribution consist of the violation of the right to leave any country including one's own and the right to seek asylum as a consequence of the containment of refugee movements in Tunisia through pullbacks that take place in the course of maritime cooperation and Integrated Border Management (IBM) as implemented by ICMPD.[5]

[5] For the purpose of analysis here it should be clarified that ICMPD is an international organisation with 20 member states and the Agreement on the Establishment and Functioning of ICMPD entered into force in 1993, (https://www.icmpd.org/about-us/about-icmpd).

17.4.2 Causation

An overview of areas of international cooperation in support of migration management by Tunisia reveals the involved actors' underlying motivation of containment of refugees in Tunisia. Accordingly, international cooperation with Tunisia as supported by the EU and its Member States centre around border management including maritime operations for search and rescue (SAR), and interceptions at sea as well as integrated border management (IBM).

The EU's three funding instruments available to Tunisia, namely the European Union Emergency Trust Fund for Stability and Combating the Root Causes of Irregular Migration and the Displaced Persons in Africa (EUTF); the Asylum, Migration and Integration Fund (AMIF); and the regional European Neighbourhood Instrument (ENI) which total EUR 58 million, EUR 55 million of which is used for border management, showcase the policy priorities of the EU in its cooperation with Tunisia. This is also reflected in the bilateral cooperation of EU Member States such as Italy and Germany in their bilateral cooperation with Tunisia that centre around financial and technical assistance to border management through procurement of patrol boats and surveillance equipment. IBM is implemented within the framework of the EUTF with the objectives of combating irregular migration and mitigating vulnerabilities that arise from irregular migration through establishment of an institutional framework for monitoring and controlling borders. IBM is implemented on the ground by ICMPD and it is ultimately a process with actions such as providing equipment for screening and surveillance, capacity building for border officials including border guards, police, and coastguard as well as establishing inter-institutional coordination at national level and supporting the development of Tunisia's National Strategy on Border Security. To this end ICMPD supports line ministries and other national actors involved in border management by providing training and technical expertise. As part of IBM, the Integrated System for Maritime Surveillance (ISMariS) has been developed a monitoring tool for the Tunisian coast that will facilitate SAR operations and interceptions (Dimitriadi, 2022).

Overall, European states and ICMPD provide funding and technical assistance to Tunisia basically for the interception and return of boats departing from its shores. This modality comes across as an attempt to evade legal responsibility that would otherwise be triggered in case of interception/SAR operations directly carried out by EU agents as in the case of operations *Mare Nostrum* and *Sophia.* So instead of carrying out pushbacks, the EU, its Member States and ICMPD extend support to Tunisia that eventually enables pullbacks (Chap. 13 in this volume).

17.4.3 Responsibility Attribution

Whereas financial and technical cooperation by the EU, its Member States and ICMPD may trigger international responsibility under ARSIWA and ARIO (Chap. 16 in this volume), these formal legal responsibility models require that such

cooperation contributes significantly to the wrongful act and fall short of capturing the overall containment perspective in the migration cooperation of foreign actors with Tunisia. Moreover, evidentiary issues arise in identifying the degree of individual contributions to joint responsibility in view of the relations and cooperation between Tunisia and ICMPD as well as ICMPD and its member states. Finally, the right to leave and the right to seek asylum do not appear for all actors involved as formal international legal obligations, the breach of which would trigger formal responsibility.[6] Thus, we suggest the model of systemic responsibility to capture the indirect yet tangible sequence of actions that serve the purpose of containment of refugees in Tunisia.

Considering the human rights violations in Tunisia arising from detrimental reception conditions, the instances of collective expulsions of migrants and asylum seekers to Libya and the general informality in migration management due to the absence of relevant legislation, it is possible to conclude that the safety of refugees contained through SAR operations and strengthened border management is uncertain (Chaps. 13 and 15 in this volume). However, beyond these issues of compatibility with international law that arise from the question of whether Tunisia can be considered as a safe place of disembarkation in interception / SAR operations, we argue that EU support for such maritime operations effectively serves the overall purpose of obstructing the departure of refugees from Tunisia to the detriment of the right to leave and the right to seek asylum.

17.5 Systemic Responsibility with Respect to the Containment of Refugee Movements in Serbia

17.5.1 Wrongful Act

The wrongful acts identified in this case of systemic responsibility attribution consist of violations of the right to leave, the right to seek asylum, the right to effective remedies, and the prohibition of torture and inhumane and degrading treatment, with the closure of the Western Balkan route.

[6] On this account for example Tunisian Law 2004–6 dated 3 February 2004 that is still in effect and officially aimed at fighting against human trafficking, prohibits the right to leave to seek protection abroad for migrants and for Tunisian nationals alike.

17.5.2 Causation

Serbia has been a key partner of the EU in managing migrant movements during the 2015/2016 so-called European refugee crisis (European Commission, 2018; ECORYS, 2013). Negotiations between the EU and Serbia have resulted in the introduction of several measures in the Serbian system (such as the asylum border procedure, different types of residence, IBM system of border control, concept of blocking migration).

The starting point of these negotiations was been the Western Balkans Route Leaders Statement of 2015 (European Union, 2015), a political instrument expressing commitment of the EU and non-EU Western Balkan route countries to cooperate on addressing migration challenges. The Statement resulted in a 17-point Plan of Action, including the following goals: 'limiting secondary movements; supporting refugees and providing shelter and rest; managing the migration flows together; border management; tackling smuggling and trafficking' (European Union, 2015). Essentially, the agreement marked the starting point of the coordinated closure of the Western Balkan route and the introduction of limitations to the movement of various national groups of migrants. This coincided with the signing of the EU-Türkiye deal, reflecting a pattern of policy response with the aim of containing refugee movements originating from Syria.

The closure of the formalised, state-facilitated Western Balkan corridor (European Union, 2015) left refugees and asylum seekers in Europe with no choice but to move irregularly, becoming victims of abuse at the hands of both smugglers and border authorities (of EU states, of Serbia), including through pushbacks (Lehmann, 2022). As one expert interviewee emphasised: 'With the buffer zone established in Serbia and/or in other Balkan non-EU countries, influx of irregular migrants to EU would reduce to only a few in need of international protection, all others would eventually be stranded in the Balkans' (Chap. 12).

The nature of EU cooperation with Serbia is similar to that of Türkiye, an EU candidate as well. The similarities are in terms of EU support for development of formerly non-existent asylum legislation in line with the EU *acquis* as well as political agreement to stop irregular movement towards the EU and human rights violations committed against such background which has rendered its position as a safe third country questionable. Although the EU has been advocating for formalisation in the asylum context, EU-Serbia cooperation has been informal. For instance, by tolerating migrants' *de facto* irregular position, authorities in Serbia, including camp management and the police, strongly encouraged migrants to keep looking for opportunities to (irregularly) enter the EU (Chap. 12). In that sense, informality as in staying outside legal procedures and being invisible to the system offered a way to escape containment.

17.5.3 Responsibility Attribution

Although the financial instruments were meant to help Serbia cope with the humanitarian situation in its territory, they have essentially ensured that refugees and asylum seekers are contained there, alleviating pressures for EU countries at the EU's external borders. In that sense, financial responsibility of the EU for financing border management in Serbia might be arguable, together with political responsibility. However, the EU's role in EU-Serbia cooperation has remained largely at the level of technical and financial support. Even in the context of the Frontex-Serbia cooperation (Chap. 12 of this book) no direct involvement of the EU or its partners in alleged human rights violations can be established. Thus, it is rather hard for the requirements for formal responsibility attribution to be fulfilled, primarily due to evidentiary problems. It is plausible, though, to argue attribution on the basis of concerted action under GPSRIL.

Following this line of reasoning, a systemic approach to responsibility attribution focuses on the wider involvement of the EU and its Member States in migration governance in Serbia. Similar to Türkiye and Tunisia, the EU has shaped Serbian migration and border policy in the direction of preventing refugees from entering the country (deterrence) or keeping refugees there (containment), which has resulted in systematic violations of migrant rights.

17.6 Systemic Responsibility with Respect to the Containment of Refugee Movements in Niger

17.6.1 Wrongful Act

The wrongful acts identified in this case of systemic responsibility allocation consist of violation of the right to leave, the right to seek asylum and *non-refoulement*.

17.6.2 Causation

Niger is a transit country to Libya and Algeria and onwards to the Central Mediterranean. Since 2015, EU efforts to combat irregular migration from the African continent have resulted in close cooperation with Niger, formalised under the EU Emergency Trust fund for Africa (EUTF) (Spijkerboer & Steyger, 2019).[7] A key component of the EU-Niger cooperation has been the implementation of the Emergency Transit Mechanism (ETM) for the evacuation of vulnerable refugees

[7] Commission Decision C(2015)7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa.

and asylum seekers from detention in Libya to Niger. European pressures have led the Nigerien authorities to tighten the conditions of entry and stay for migrants (e.g. restrictions in the transportation of migrants by private companies; intensifying border controls and introducing internal checkpoints; increased use of detention), meaning to prevent migrants from travelling northwards. EU–Niger negotiations resulted in several measures introduced in the Nigerien system (such as the IBM system of border control, imposition of documentation requirements, identification of asylum-seeking persons, reception of refugees).

These negotiations have been criticised as furthering EU interests in stopping onward migration from West Africa as a whole. Measures such as border control and concentration of evacuees in Niger have been seen as an attempt to turn the country into a buffer zone for migration towards Europe. Political involvement of the EU in migration governance in Niger and the region more broadly has led to the disruption of an existing regulated system of mobility, i.e. ECOWAS,[8] by another system of ambiguous character, resulting in internal instability and structural inequality.

Flagrant violations of human rights have been reported, e.g. at the borders with Libya and Algeria as well as violation of freedom of movement as enshrined, among others, in the International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights and ECOWAS Protocol on the Free Movement of Persons.[9] These instruments contain obligations for actors bound by them, or may reflect obligations in general international law.

17.6.3 Responsibility Attribution

Similar to the Serbian case, as much as the financial aid was meant to help Niger cope with the reception and asylum demands in its territory, they have essentially ensured that refugees and asylum seekers are contained there, alleviating pressures for EU countries at the EU's external borders. However, no direct involvement of the EU or its partners in alleged human rights violations can be established. Thus, although formal responsibility attribution cannot be fulfilled here, systemic responsibility attributable to the EU because of its broader political involvement of the EU in migration governance in Niger and ECOWAS is possible.

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[8] The Heads of State and Government of fifteen West African Countries established the Economic Community of West African States (ECOWAS) when they signed the ECOWAS Treaty on the 28 May 1975 in Lagos, Nigeria. With new developments and mandates for the Community a revised treaty was signed in Cotonou, Benin Republic in July, 1993. The member states are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Sénégal and Togo. Also, Mauritania signed a new associate-membership agreement in August 2017. The aim of the Community is to promote cooperation and integration, leading to the establishment of an economic union in West Africa; a borderless region where the population has access to its abundant resources and is able to exploit them through the creation of opportunities under a sustainable environment. For details see https://ecowas.int/about-ecowas/.

[9] 1979 Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment.

In particular, systemic responsibility captures the containment / deterrence perspective, emphasised in Chap. 11 of this volume. As noted by Tinni, Hamadou, and Spijkerboer, the European containment strategy in this case has a twofold face: while its aim is to strengthen Niger's capacity to host refugees and asylum seekers, and provide a path to resettlement, asylum seekers, who have not been recognised as refugees and thus have not been resettled, and who have been living in limbo in Niger for years, are transported from Libya to Niger (Chaps. 10 and 11 in this volume). If we add to the equation that some of these asylum seekers have been transported to Libya as part of the EUTF-funded and Italian supported 'pullbacks', the question is whether this chain of activities—made possible by the EU—is contrary to the prohibition of *refoulement* and collective expulsion (see e.g. ECHR's *Hirsi Jamaa v Italy* judgment).

EU leverage in this context stems from the dependence of less affluent countries on development aid that has become the main channel of funding migration control via the EUTF. West African countries face the challenge of adhering to the EU's migration control agenda, while at the same time ensuring free movement in ECOWAS and implementing their obligations of *non-refoulement*.

In light of the above, the ETM can be seen as a mechanism promoting the controlled mobility of refugees to resettlement countries, but also as a mechanism promoting containment (pullback to Libya, evacuation, resettlement at the discretion of European countries). The same applies for the establishment of an asylum procedure in Agadez. The possibility to receive asylum in Niger—even if resettlement is not applicable—is a positive development for the mobility of refugees, especially considering the torture-like situation in Libya they were faced with. However, the fact that these people are transferred from Libya, Sudan, and Chad to Niger and that some of them will not be able to move further, turns the city into 'a waiting space', exacerbating precarity. In this sense, the case is similar to Türkiye and Tunisia, in that the EU has shaped Nigerien migration policy in the direction of controlling the movement of refugees, essentially depriving them from deciding themselves their migration journey with no guarantee that protection through resettlement would be secured.

Refugees have been prevented from entering the EU and its Member States spontaneously through the sub-Saharan Africa route (deterrence). Instead, the majority has been kept in Niger (containment) and for a small number of refugees, contained mobility to resettlement countries has been the alternative. Based on several reports, this policy has resulted in systematic migrant rights violations (Carrera et al., 2019).[10] Arguably, this form of hypercomplex concerted action has been chosen by the EU and its Member States with (direct) intent to evade attribution under ILC rules.

[10] The European Ombudsman has acknowledged the possible human rights impact of EUTF projects noting that the usage of surveillance technologies by the partner countries may go beyond the purposes foreseen under the EUTF project, which may entail a 'risk for human rights of individuals in these countries, as well as for the ability of the EU to fulfil or realise its human rights obligations', European Ombudsman. (2021). Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities (case 1904/2021/MHZ) p. 5 https://www.ombudsman.europa.eu/en/decision/en/163491. The Ombudsman found it 'regrettable that the EUTFA projects in question were not subject to a clear human rights impact assessment' by the Commission. See pages 6–7.

17.7 Conclusions

A comprehensive conclusion drawn from our analysis is that actors engaged in migration cooperation such as the EU and its Member States are at a considerable risk of encountering arguments regarding the attribution of responsibility for violations of individual rights in the context of migration control or refugee protection arrangements with third countries. These arguments may be based on systemic responsibility attribution, drawing on certain ILC articles, the GPSRIL or arguments from justice. Such arguments are likely to emerge in the diplomatic interplay between South and North, as well as in public critiques of EU policies, in particular those stemming from contexts in the Global South. It is beyond our mandate to specify institutional pathways for potential claims resting on such arguments, but it should not be ruled out that these are identified and used, for example in strategic litigation. Moreover, it is important to consider that new arguments on responsibility attribution, based on a systemic approach, may be developed. These arguments could potentially affect the development of the law of international responsibility possibly reducing its historical bias in favour of Northern states.

Whereas our analysis is empirically based on EU cooperation with four select countries, our framework serves as a blueprint that is applicable in other contexts as well, for instance where such third countries that EU is cooperating with, seek to shift the burden further away through similar cooperation modalities with countries of origin. Such arrangements could call for responsibility attribution to involved states beyond EU member states. It is also conceivable that other international organizations than the EU, when carrying out migration and asylum functions, would open themselves to analogous responsibility attribution.

We analysed the containment of refugee movements in cases related to all four countries. While attribution proved arguable drawing on ILC articles in the case of Türkiye and Tunisia, Principle 7 GPRSIL offered a pathway towards attribution for Niger, in parallel to an attribution argument based on a systemic approach drawing on arguments from justice. In the case of Serbia, the sole avenue for an attribution argument was the systemic approach and arguments from justice. Neither ILC articles nor the GPSRIL offered stepping stones for attribution for Serbia.

In its future collaborations with third parties, whether they be international actors or not, the EU and its Member States should be mindful that the law of international responsibility is developing in ways that obliterate *lacunae* in attribution. The risk of being held responsible before a court of law—or, indeed the court of public opinion—is growing and systemic attribution might come to play a role in it. Over time, the law catches up with those seeking to evade it.

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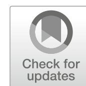
Chapter 18
Conclusions: The Interplay Between Containment and Mobility in Asylum Governance



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18.1 Introduction

What are the characteristics and impacts of emerging international and European Union (EU) asylum governance regimes, and what are their policy implications on the EU's role in implementing the United Nations Global Compact on Refugees (GCR), which calls for more equitable and effective arrangements for responsibility sharing? By way of conclusion, this chapter distils key themes and tendencies, drawn from the findings of the various contributions in this Collective Volume.

18.2 Containment and Mobility

Asylum governance instruments, officially framed as 'mobility' or 'closer to home protection' and portrayed as 'promising practices' internationally, feature *sophisticated forms of contained mobility* in their design, practical implementation and

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effects (Carrera et al., 2023). These include a range of modalities and instruments—referred to by the GCR as 'third country solutions' and, in some cases, asylum capacity development (UNHCR, n.d.)[1], with resettlement, community/private sponsorships, humanitarian admission/dispensation programmes, labour and education pathways and temporary protection regimes on the one hand, and capacity assistance in third states on the other.

These instruments feature relevant inclusionary and human rights-upholding components seeking to facilitate entry or admission for certain categories of asylum seekers and refugees. However, as this Volume has made clear, they also display exclusionary components and often form part of wider containment and migration management agendas. They are not always protection-driven and *additional to* the right to asylum. They are often time-bound, leaving beneficiaries with insecurity of residence or in permanent temporariness (Part II of this book).

These asylum governance instruments also raise questions regarding non-discrimination due to their limited personal scope applying only to individuals coming from specific countries of origin (Carrera & Ineli-Ciger, 2023). They foresee working rights which not always qualify as 'decent work' under international labour standards (Costello & O'Cinneide, 2021) and nurture hyper-precarity (Carrera et al., 2023). Furthermore, they are characterised by legal uncertainty primarily because of two reasons. First, a large margin of discretion is left to implementing actors which results in evading or shifting responsibilities, and second due to a lack of effective remedies for applicants (Costello et al., 2022) which renders their access to fair and effective procedures for determining their statuses and rights 'theoretical and illusory',[2] contrary to well-established case law. In addition, several contributions to this Volume stress how selection processes and eligibility criteria of applicants are driven by hierarchies and vague criteria of deservedness (e.g. who is 'vulnerable'), temporariness and utilitarianism.

This can be evidenced in EU policy too. Some asylum instruments supported or adopted by the EU feature components favouring inclusion and mobility oftentimes as part of efforts to build or develop national asylum systems in third countries. As a result, even asylum capacity building and narrow forms of mobility serve the dominant EU containment agenda. These instruments and arrangements thus show a prevailing securitarian and *externalisation*(Solveig et al., 2022) agenda where asylum serves the larger purpose of containment—*asylum for containment*

[1] The UN GCR foresees the objective of increasing the availability and predictability of complementary pathways to protection, including by establishing 'private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative (GRSI)', para 95.

[2] As per standard formulation by the ECtHR, see for example *Hirsi Jamaa and Others v. Italy* App. No. 27765/09 23 February 2012 para 162.

(Tinni, 2023).[3] Non-EU states are artificially labelled as 'safe' to serve EU and its Member States' interests to implement and hasten expulsions and readmissions of irregularised asylum seekers. Instruments such as the 2016 EU-Türkiye Statement and its 'one-for-one' resettlement component, the 2014 EU-Tunisia Mobility Partnership, or the 2017 Emergency Transit Mechanism (ETM) in Niger, include sophisticated forms of exclusion, selectivity and discrimination (Part III of this book) running contrary to the GCR commitments as well as international refugee and human rights legally binding standards (Chap. 4).

18.3 The Reframing of People Seeking Asylum

The concepts of 'refugee' and 'protection' remain contested across many jurisdictions around the world. Emerging asylum governance actors, and their instruments, tend to relativise refugeehood. The experiences of people on the move are homogenised and the status of legitimate asylum seekers and refugees, particularly those engaging in spontaneous unauthorised arrivals, is relabelled and construed in a manner which is incompatible with the right to asylum (Chap. 4 of this volume). This is the case despite the fact that the vast majority of refugees still access protection via spontaneous arrival. This relabelling includes terms such as 'forced migrants', 'forcibly displaced migrants', 'temporary protection beneficiaries', or even 'irregular immigrants' and 'unauthorised entrants' (Carrera et al., 2023; Costello, 2015).

The use of these terms can be partly understood as a strategy by wealthier Western states to evade their own legal responsibilities, or as a form of contention by 'Global South' actors against international refugee protection norms that are perceived to originate from and serve 'Global North' countries' interests, and which fail to consider structural inequalities and responsibility shifting on asylum at global levels (Chap. 2 of this book).

This reframing or relabelling of people problematically blurs refugee protection and asylum with a migration management rationale which negatively impacts people's human dignity, their security of residence, access to justice, rights to decent work and family life, and more generally their human rights and agency. It also impacts the way in which international and regional legal standards are understood and applied, the role of UN agencies in assisting states with implementation as well as, knowledge production in these fields. It is alarming that human rights courts'

[3] The term 'containment' has been used in this Volume to refer to instruments aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers and refugees to countries of transit or origin. These include restrictive visa requirements, carrier sanctions, the use of the 'safe third country' and 'safe country of origin' concepts, readmission agreements and arrangements, and interdictions at sea.

reasoning, including by the ECtHR, has been embracing such reframing in recent case law concerning non-admission at the border and collective expulsions (e.g. *N.D. and N.T. v Spain; A.A. and Others v North Macedonia)* (Carrera, 2020, 2021).

18.4 Rights Curtailed and Informality

The GCR refers to the principles of humanity, international solidarity and responsibility-sharing. It is anchored in the international refugee protection regime and guided by relevant international human rights. However, absent in the GCR are express mention of the issue of access to territory and the right to asylum. The GCR equally includes no references to containment policies, ongoing pushbacks and pullbacks malpractices, as well as the 'externalisation' of asylum initiatives around the world (Refugee Law Initiative Declaration on Externalisation & Asylum, 2022).

Research in this Volume has evidenced the ongoing misuse and proliferation of policies focused on containment, deterrence, and the mandatory use of expedited border procedures, and *de facto/de jure* detention Carrera and Geddes (2022). These have led to well-documented human rights violations and rule of law-backsliding contrary to binding international and regional standards and national constitutions (refer to Part III of this volume).

Emerging asylum policies come increasingly in the shape of non-legally binding, secretive or informal deals or migration cooperation arrangements, of a bilateral or multilateral nature, such as Memoranda of Understanding (MoUs), readmission arrangements, joint declarations and so-called partnerships. These arrangements often include the provision of funds to support projects giving priority to trainings and so-called capacity building migration and border management, which are directly or indirectly linked to containment practices such as pullbacks or unlawful interdictions at sea, 'safe third country' and readmission policies, border surveillance technologies, etc.

The nebulous nature of these instruments negatively impacts their enforceability, democratic accountability and judicial control. They contradict with principles of legal certainty and due process which leads to curtailing individuals' 'right to have rights'(Arendt, 1986). Finally, the use of such arrangements in asylum governance risks serious illegitimacy costs for all parties involved, including the EU which is constitutionally required to ensure and promote *full consistency* in all its external or foreign affairs policies with these values.[4] As contributions to this Volume show, the EU can only be a legitimate and credible international actor championing human rights if it fully upholds them on its own territory.

[4] Article 21.3 TFEU states that 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. Article 21.2 TFEU emphasis that 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values…; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law'.

18.5 Policy Concepts Contesting Norms and Principles

The asylum governance regimes under investigation in this Volume make use of a toolbox of concepts raising fundamental challenges to asylum:

18.5.1 Vulnerability

This concept finds no common place across national jurisdictions and languages around the world. It remains controversial in nature. The term disregards how policies co-create structural precarity affecting various groups of people (Chaps. 5, 6 and 9 of this book). Its official framing and increasing use in some countries, together with other managerial techniques such as registration and recording biometric data in the scope of resettlement policies, undermine individuals' agency and exclude certain applicants from protection such as young male applicants and those from LGBTQ+ communities (Costello et al., 2022; Carrera et al., 2023).

18.5.2 Self-Reliance and Integration

These two notions, found in migration cooperation and trade policy instruments, primarily associated with labour market integration for refugees, promote a utilitarian, selective and managerial approach to asylum. They come with high expectations and demands for refugees to swiftly 'integrate' into the labour market and contribute to the local economy. They fail to acknowledge their specific individual characteristics, traumas and experiences, existing structural inequalities and national procedural barriers which may actually prevent refugees from doing so. This is why, they need to be critically examined as part of wider containment-driven policies (Chaps. 5 and 7 of this volume).

18.5.3 Solidarity

This concept tends to follow an *exclusionary and state-centric understanding of responsibility sharing* (Karageorgiou & Noll, 2023), without considering the impacts of the policies adopted in its name on individuals' rights and their agency. It problematically reframes states' obligations to uphold their responsibilities under international, regional and national constitutional norms as a 'pick and choose' menu or charity-based humanitarianism (Carrera & Cortinovis, 2023). In this context, solidarity serves containment and immobilisation instead of mobility and protection, becoming the vehicle for wealthier countries, including EU Member States

in its cooperation with transit countries, to interfere with national and regional policies far beyond their jurisdiction. A case in point is the way in which solidarity in the form of border management support by the EU to sub-Saharan countries has frustrated free movement for migrants and ECOWAS countries nationals alike (refer to Chap. 10 of this volume).

18.6 Responsibility

The existence and interplay of multi-instruments and multi-actors' settings where asylum governance regimes are shaped and implemented complicates the attribution of international responsibility in cases of international refugee law and human rights violations. The informality and externalisation dynamics characterising cooperative arrangements in these fields not only do they obscure the identification of international wrongful acts but they also make arguments of causation and attributability highly implausible.

However, these policies may well unlock direct or indirect responsibility for the receiving state, international organisations, and potentially also for the EU institutions and actors, under the law of international responsibility, international refugee law or human rights law (Chap. 4 of this book). In addition, considering how the law of international responsibility has developed over the past decade to better capture multi-actor and hyper-complex conduct, a more comprehensive understanding of rules of international responsibility is put forward in this Volume, including arguments based on shared responsibility, third world approaches to international law and justice/abuse of rights claims (Chap. 17 of this volume).

A straightforward claim is put forward: responsibility should follow not only a wrongful act but also an effort to circumvent the law based on bad faith interpretation of international rules and standards. Equally, a *portable justice* model (Carrera & Stefan, 2020), is envisaged for in these circumstances, whereby justice and responsibility should be expected to follow misconduct, regardless of where this has occurred. Justice can be expected to catch up with those seeking to evade it, while rule of law principles and fundamental rights should function as sensors for the exclusionary policies exercised in their name (Habermas, 2001).

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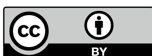

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