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Migration and Human Rights in the Mediterranean Region

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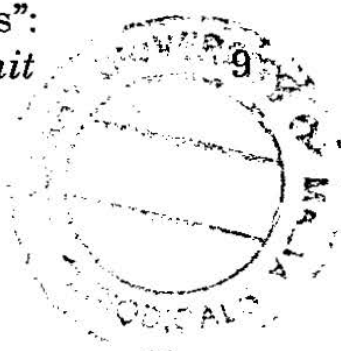
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EDITORIAL

THE SUBJECT OF RIGHTS IMMERSED IN A “SEA OF TROUBLES”

ANNA MARIE GALLAGHER, MICHELE R PISTONE,
DAVID E ZAMMIT

Given the multiple human rights issues implicated by migratory flows, the topic of this special issue of our journal may appear excessively open-ended. In reality, however, the themes addressed by our contributors represent controversial flashpoints in the Mediterranean migratory process as well as in the legal and political responses such migration provokes. These include the replacement of traditional intra-regional migration by more globalised migration, the rise in both the number of undocumented “irregular” immigrants and in mixed migratory flows, the increasingly restrictive immigration policies imposed by Southern European states, the concomitant tendency to resort to asylum law in order to identify legitimate immigrants, and the more prominent role being assumed by EU laws and policies in the field.

A recent lecture¹ by the distinguished law professor James Hathaway provides us with a good point of entry into these controversies. In this lecture Hathaway criticized what he sees as

¹ I am here referring to the lecture he delivered in London in October 2006, which can be found here: http://www.heythrop.ac.uk/images/stories/hirepl/events/2006_jrs_london_lecture.pdf

a growing tendency to move away from a human rights based understanding of refugee law and to replace it with a "therapeutic" model. This new model views the refugee not as the holder of an internationally recognised status endowing her with certain fundamental rights, but as a pathologically stateless victim in need of a permanent cure for her condition. Hathaway pointed out that this kind of thinking, which seeks "solutions to refugee-hood", is used to justify certain ill-judged attempts to "voluntarily repatriate" refugees, which are neither voluntary nor safe. By contrast, a human rights based approach would not seek to impose a permanent top-down "solution" to the refugee's "problem". Instead it would aim to respect the refugee's rights in the interim period until the cause of flight is eliminated or until the refugee herself can determine her own future. Such a human rights based approach to international refugee law is also one of the best ways to enforce respect for human rights internationally as:

"The surrogate protection of human rights required by refugee law is too valuable a tool not to be widely understood and conscientiously implemented".²

Hathaway argues that we cannot respect the human rights of refugees unless we treat them as choice making actors with the ability to determine their own future. This implies that recognition as a refugee should give a stable, clear and precisely defined legal status to the person so recognised within the hosting state. It is the lack of such legal clarity that the articles by Chiara Marchetti and Lena Karamanidou attempt, in their differing ways, to pinpoint and explain. Thus, Marchetti's article explores the Italian asylum adjudication system following the Bossi-Fini law and stresses the contrast between the high percentage (46.8%) of asylum seekers granted humanitarian protection and the much smaller proportion (9.5%) who are actually recognised as Convention refugees. She argues that these statistics point to a blurring of the boundaries of the refugee category, which had previously been defined in an essentialist way. While the recognition of humanitarian protection is positive insofar as it acknowledges the need for more

² *Ibid*, p.20

differentiated forms of protection, it also leads to reduced protection for genuine refugees, since the decision to grant some form of protected status comes to be seen as political and not legal in its nature. In addition, as more and more refugees are granted humanitarian status, they are popularly perceived as not being "genuine" (political) refugees but rather are seen as economic migrants.

In her article, Lena Karamanidou makes a parallel argument by analysing the policy discourses surrounding asylum seekers in Greece, claiming that in recent years these discourses have tended to re-categorise asylum seekers as illegal immigrants. The resulting discursive opposition between refugees and illegal immigrants has rendered the asylum-seeker category structurally invisible and therefore tended to legitimate restrictive Government policies, reflecting:

"the preoccupation of Greek policy with the prevention of irregular immigration, which is linked to wider objectives of European Union policy with regards to the protection of its external borders and the prevention of asylum seeking and irregular migration."³

In another contribution, Katerina Kratzmann explores certain impacts of these policies on irregular immigrants and asylum-seekers. She focuses on undocumented migrants in Austria, showing how they are burdened by their awareness of their own extra-legal status. This preoccupation not only influences their anxiously conformist public behaviour, but even the ways in which they construct and perceive their own identities. This is significant as it suggests that the negative effects of the fuzzy legal status of these immigrants are not limited to arousing suspicion in the hosting population but also motivate immigrants themselves to turn their backs on their immigration status and prefer to identify themselves in terms of their ethnic background. On the strength of her analysis, Kratzmann stresses the need for host states to adopt policies based

³ See Karamanidou, L. "Refugees, 'Illegal Immigrants' and Asylum Seekers: Use of Discursive Categories and Legitimation of Asylum Policies in Greek Political Discourse", in this issue.

both on national *and* human rights grounds, echoing Hathaway in her argument that what are needed are not permanent solutions but the recognition of minimally secure and stable rights in such fields as work, accommodation, healthcare and family reunification, while the refugee remains on the territory of the host state.

The analysis being developed here clearly has various implications for policy making by host states. Two of them are developed in the next two articles that will be reviewed. In their article on "The Regularisation of Undocumented Migrants," Ruth Ferrero and Gemma Pinyol focus on regularisation as a legal instrument for ensuring the protection of immigrants' rights, as they point out that: "*the first step towards a good social integration is to have rights.*"⁴ After carefully distinguishing the various kinds of regularisation that have been attempted by various European states, the authors zoom in on the Spanish regularisation programme of 2005, which they praise for its attempt to comprehensively legalise those immigrant workers who could prove that they had been living and working in Spain for a certain amount of time, while at the same time clamping down on irregular employment and increasing border control. Ferrero and Pinyol argue that such a regularisation scheme has the advantage of directly tackling the informal economy and thereby simultaneously supporting workers and migrants' rights, while also helping to control irregular migration. On the other hand, Ferrero and Pinyol acknowledge that Spain's efforts to regularise immigrant workers exposed various tensions and conflicts between Spain and other states in the European Union, which felt that Spain's policy might increase the collective "pull" factor experienced by irregular immigrants towards the EU more broadly. In this context, the authors stress the need for greater consultation and collaboration at the EU level in framing and implementing regularisation programmes.

The importance of EU-wide collaboration and also of developing a holistic approach towards migrants that does not impose top-down

⁴ At the same time, the authors observe that there is a clear difference here between EU states and the U.S.A., since in the latter country the hiring of irregular foreign workers does not generate a black labour market, given the flexibility of its labour market.

solutions to their "problems" is also emphasised by Andrea Gallina. In his contribution he focuses on the best way to concretise the linkage between migration and development that is becoming a prominent item on the EU agenda. The basic thinking here is that instead of addressing migration and development in separate policy frameworks, the EU should seek to integrate them: using the skills and local knowledge of migrants to ensure that development assistance does not create passive welfare recipients but operates in tandem with and promotes local entrepreneurship. Gallina argues that this process would be facilitated if the EU were to adopt a resource-based conception of migrants that is open to the various ways in which they can contribute to the development of their home societies. Because it sees immigrants as partners in developing their countries of origin and because it builds on the choices that immigrants are already making regarding the sending of remittances and so on, Gallina's proposed approach meshes well with the emphasis on the human rights of migrants advocated throughout this volume. Central to both approaches is the idea that immigrants are best thought of as individuals capable of making free and rational choices.

In contrast to Gallina's article, the next cluster of contributions we publish raise the question whether the EU is part of the problem or part of the solution when it comes to respecting immigrants' human rights. This is because they broaden their geographical scope of investigation beyond the internal space of the EU and in the process highlight the negative external impact of EU policies on sending and transit countries. Thus Jose Rodriguez Mesa argues that there is an intimate relationship between the increase in illegal immigration from Morocco and the restrictive approach that European regulations and visa constraints have imposed since the 1990's on Moroccans who wish to travel to Spain. He shows how the increase in illegal migration and the development of a new route for entering Spanish territory via the Canary Islands cannot be understood unless one factors in the development of a range of immigration control mechanisms. Massimo Frigo takes this argument a step further by showing, with particular reference to the relationship between Italy and Libya, how the process of externalising EU border control is forcing prospective immigrants to the EU to reside in Libyan detention centres. In these detention centres, genuine refugees face various other forms of human rights

abuse and a very real possibility of arbitrary repatriation back to their home countries. Since the EU emphasises collaboration in migration management in its relations with Libya but then declines to insist vigorously on strong human rights preconditions, the stance taken by the EU exposes the gap between its own rhetoric on human rights and the real effects of its policies. After carefully analysing the relevant human rights duties of the EU as a whole and each of its member states, Frigo observes that immigrants are being pushed into legal black holes, as:

“this (EU) policy does not respect the principle and purposes of the UN Charter... defies the human rights duties contained in the International Bill of Rights...can give rise to international responsibility for wrongful acts and, finally...is not consistent with EU basic law. This notwithstanding, there is no mechanism for enforcing these obligations.”⁵

This *cri de coeur* is also echoed by Zeynep Selen Artan, Atila Gokturk and Guler Unlu, who highlight the impact of such EU policies on Turkey. Thus, Artan claims that the leitmotif of the EU approach to migration is that it is a *securitised* concept, where:

“More and more, the emphasis was put upon controlling trans-border movements, stopping migrants before they put foot on EU territory and sending them back to their country of origin.”⁶

This approach perceives immigrants as a security threat on various fronts, which range from internal security, the economy, social welfare and cultural cohesion. As a candidate country for EU membership, Turkey cannot avoid adopting and internalising this new securitised concept of immigration. In fact this new understanding of migration is an intrinsic part of the process of harmonisation of migration policies by EU candidate countries, being embedded in the changes which must be made to Turkey's

⁵ See Frigo, M. “Beyond the 21st Century Hadrian's Wall: The externalization of immigration and border control policy by the European Union, Conclusions.

⁶ See Artan, Z. S. “Securitization of Migration: the case of Turkey”, Introduction.

visa policy and external border management, *inter alia*. Moreover, Artan argues that the perception of migrants as potential security threats has started to percolate, via the attitudes adopted by government bureaucrats and policy makers, to the general Turkish public and is increasing the likelihood that human rights abuses will be committed against irregular migrants.

The connection we are tracing between EU migration policies and rights abuses suffered by migrants in non-EU Mediterranean states is highly significant for our purposes. Far from implying that the EU is an innocent bystander in this process, it suggests that the retreat away from a human rights based understanding of refugee law may form part and parcel of new international alignments converging around what observers like Liza Schuster have termed the "New Asylum Paradigm."⁷ This paradigm aims as far as possible to contain refugees in their region of origin, to encourage extra-territorial processing of asylum claims and to pressure developing countries (through which irregular migrants travel) to enter into readmission agreements with EU states. Schuster claims that its biggest novelty lies in "*the declared and expressed intention to return people from EU states without examining their claim to asylum.*"⁸ In this context, the tendency to elide the category of the asylum-seeker noted by Karamanidou as well as the trend to conflate the status of refugee with that of economic migrant documented by Marchetti appear in a new and dangerous light. Far from being purely internal developments within Greek and Italian society respectively, they appear to be a means through which the *refoulement* of asylum seekers could be legitimised, eroding the solid foundations of the Refugee Convention.

Finally, we are publishing two articles that provide an interesting counterpoint to the others we have been considering. This is because they are each concerned with documenting the internal treatment given to refugees and asylum seekers within

⁷ See Liza Schuster, "The Realities of a New Asylum Paradigm", *Working Paper No. 20*, Centre on Migration, Policy and Society, University of Oxford, 2005: <http://www.compas.ox.ac.uk/publications/papers/Liza%20Schuster%20wp0520.pdf>

⁸ Schuster, *ibid*, p.18

non-EU states and they consequently help the reader to understand how the Refugee Convention interacts with other non-European laws and Conventions. Thus Tarek Badawi's rich and interesting paper explores the right to education of refugee children in Egypt. In the process, he guides us through a legal maze, composed of international treaties, domestic legislation, court decisions and *Shari'a* norms, through the medium of which international human rights standards must pass if they are to be implemented within Egyptian society. Moreover, Badawi does not restrict himself to showing how advocating refugee's rights in Egypt is an exercise in legal pluralism but also explores the role played by institutional barriers deriving from the way the educational sector is organised. His conclusion, that formal legal guarantees of the right to education must be supplemented by follow-up legal mechanisms to ensure this law is implemented, reaffirms the importance of guaranteeing the Rule of Law to ensure the effective protection of Human Rights. It is echoed in Michelo Hansungule's wide-ranging survey of the state of African refugees in Africa. In this survey, Hansungule shows how the celebrated broad definition of protected refugees enshrined in the OAU Convention often does not translate into more effective protection at the local level. In a conclusion that can also serve for this editorial, because it epitomises the themes with which this issue is concerned, he states:

"In contrast, however, the African refugee is the most unprotected in Africa itself... Discrimination against the African refugee . . . is as rampant in Africa as in alien societies. Refugees in Africa simply have no rights to claim when faced with these situations. Asylum and refugee offices around the continent are places where government grounds to a halt."⁹

⁹ Michelo Hansungule, *"African refugees in Africa: Perspectives, Challenges and Prospectives, in this issue, Conclusion.*

REFUGEES, 'ILLEGAL IMMIGRANTS' AND ASYLUM SEEKERS: USE OF DISCURSIVE CATEGORIES AND LEGITIMATION OF ASYLUM POLICIES IN GREEK POLITICAL DISCOURSE

LENA KARAMANIDOU

It has been noted that the categorisation of migrants into distinct categories and the hardening of the boundaries between these categories has been a significant part of European policy and discourse in immigration and asylum (Lewis and Neal, 2005). While this can be seen as a consequence of the inadequacy of the Geneva Convention definition of refugees in the current socio-political context, it also serves the objectives of EU and state policies of controlling migration and preventing irregular immigration. An example of this trend includes the re-categorisation of asylum seekers as illegal immigrants, which, as Story (2005:17) argues, 'is a meaningful discursive act, with important repercussions for how asylum seekers and unauthorised migrants are perceived and acted upon.' Irregular migrants have been criminalised and constructed as a threat to the security of the state, a discursive move which legitimates restrictive policies (den Boer, 1996; Humphrey, 2003; Story, 2005). The aim of this paper is, firstly, to examine the employment of the categories 'asylum seeker' 'refugee' and 'illegal immigrant' in Greek political discourse, taking into account domestic as well as European factors. Secondly, it considers its social effects at the discursive level, especially with regards to the legitimisation of restrictive policies and the denial of protection to forced migrants.

1. Introduction

The categorisation of migrants into distinct categories and the hardening of the boundaries between these categories has been a significant part of European policy and discourse in immigration

and asylum¹. Such categories, ranging from settlers to irregular migrants usually have specific definitions in law, even if their interpretation tends to vary in different contexts.² They are also accorded different rights depending on the legal status according to international and domestic laws and policies.³

However, this article is concerned with such categories not as legal but as discursive ones. In contrast to legal categories, discursive ones can have flexible, elusive meanings. The term refugee, for example, has a specific legal meaning derived from the Geneva Convention but can encompass a wide range of different meanings in different settings, from what Zolberg calls 'ordinary parlance' to academic definitions.⁴ Similarly, it has been pointed out that the terms 'refugee' and 'asylum seeker' have both been used interchangeably in political and media discourse and in a manner in which the latter has been given negative meanings and replaced the former in political and media discourse.⁵ Moreover, there is an increased trend in the European Union (and beyond) to re-categorise asylum seekers as 'illegal immigrants'.⁶

Attributing a category to a group is not only linked with categorising or identifying them but also with particular viewpoints

¹ G. Lewis and S. Neal (2005) "Introduction: Contemporary political contexts, changing terrains and revisited discourses," *Journal of Ethnic and Racial Studies*, Vol.28 No. pp. 423-444.

² E. Guild (2005) "The legal frameword: Who is entitled to move?" in E. Guild and D. Bigo, eds., *Controlling Frontiers : Free Movement into and within Europe*. Aldershot: Aldgate; P. Tuitt (1999) "Rethinking the refugee concept" in F. Nicholson, and P. Twomey, *Refugee Rights and Realities: Evolving International Concepts and Realities*. Cambridge: Cambridge University Press; R. Zetter (1991) "Labelling refugees: Forming and Transforming a Bureaucratic Identity," *Journal of Refugee Studies*, Vol.4. No.1. pp. 612-635.

³ G. Lewis and S. Neal, op. cit.

⁴ P. Tuitt, op.cit.

⁵ A. Bloch and L. Schuster (2002) "Asylum and welfare: contemporary debates," *Critical Social Policy*, Vol.22. No.3., pp. 393-414; S. Moss (2001) "Mind your language: the semantics of asylum," *Forced Migration Review*, Vol.11., p.39; F. Prieto Ramos (2004) *Media and Migrants a Critical Analysis of Spanish and Irish Discourses of Immigration*. Bern: Peter Lang.

⁶ B. Story (2005) "Politics as usual: The criminalisation of Asylum seekers in the United States," RSC Working Paper No. 26, <http://www.rsc.ox.ac.uk/PDFs/RSCworkingpaper26.pdf>, Accessed 12/10/06.

and argumentation.⁷ For example, the re-categorisation of asylum seekers in European Union asylum policy as irregular migrants can be seen as a consequence of the inadequacy of the Geneva Convention definition of refugees in the current socio-political context, but also reflects the objectives of preventing and controlling entry of forced migrants.⁸

An example of this trend includes the re-categorisation of asylum seekers as illegal immigrants, which, as Story argues, 'is a meaningful discursive act, with important repercussions for how asylum seekers and unauthorised migrants are perceived and acted upon'.⁹ Irregular migrants have been criminalised and constructed as a threat to the security of the state, a discursive move which legitimates restrictive policies.¹⁰

The article looks at how three of these categories, 'refugees' 'asylum seekers' and 'illegal immigrants'¹¹ are employed in Greek political discourse and how they can contribute to the legitimisation of restrictive asylum policies. It would be first helpful to examine how these categories are legally defined. Refugees, according to the Geneva Convention, are 'any person who, {...} owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'¹² Asylum

⁷ F. Prieto Ramos, op.cit.

⁸ A.Geddes, (2003) *The Politics of Migration and Immigration in Europe*. London: Sage F.Duvell and B.Jordan (2002) "Immigration, Asylum and Welfare: the European Context," *Critical Social Policy*, Vol.22. No. 3., pp. 498-517 G.Lewis and S.Neal, op.cit.

⁹ B.Story, p. 17.

¹⁰ M. den Boer (1996) "Moving between Bogus and bona fide: the policing of exclusion and incursion in Europe," in R. Miles and D.Thronhardt, eds., *Migration and European Integration: The dynamics of inclusion and exclusion*. London: Pinter; M. Humphry (2003) "Refugees: an endangered species?," *The Australian Sociological Association*, Vol.39. No.1. pp.31-43; B. Story, op.cit.

¹¹ The words are placed in inverted commas to signify that they categories used in the texts, especially in the case of 'illegal immigrants', a term which is not adopted by the author as an analytical category.

¹² UNHCR (1996) *Convention and Protocol Relating to the Status of Refugees*, p. 16 <http://www.unhcr.com> Accessed 13/11/2004.

seekers, on the other hand, are defined by the UNHCR as 'a person who has left their country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on their application.'¹³ Irregular immigrants on the other hand can include 'a foreigner arriving clandestinely on the territory of a state; a foreigner staying beyond his or her permitted period of entry and residence; a foreigner working when not permitted to do so or in a manner inconsistent with his or her immigration status.'¹⁴

It is argued that the employment of categories by different political actors in the Greek context is greatly varied and tends to reflect their political viewpoints and overall argumentation – for example, left-wing political actors are more likely to employ the term 'refugee' to refer to forced migrant, while government and right wing political actors show a preference for the term 'illegal immigrant'. It is also notable that the meaning given to these categories does not necessarily reflect their legal meaning or even a shared meaning among political actors. Moreover, the employment of categories by the government actors suggests that there is an effort to re-categorise asylum seekers as 'illegal immigrants' which, I argue, helps the legitimisation of restrictive policies regarding the prevention of entry of potential asylum seekers.

2. Greece: the socio-political background

Greece has been seen, until the 1990s, as a sending rather than a receiving country with considerable labour out – migration to western industrialised countries from the late 19th century until the 1970s.¹⁵ This generalisation tends to obscure the variety of inwards

¹³ UNHCR (2003) 'Information and Briefings: Basic facts' http://www.unhcr.org.uk/info/briefings/basic_facts/definitions.html Accessed 16/04/07.

¹⁴ E. Guild (2003) "Who is an irregular migrant," Paper presented at the conference 'Irregular Migration and Human Rights', University of Leicester, 27th-29th June 2003.

¹⁵ J. Cavounidis (2002) "Migration in Southern Europe and the Case of Greece," *International Migration*, Vol.40. No.1., pp.45-70; C. Kassimis and K.Kassimi (2004) "Greece: A history of Migration," Migration Policy Institute, <http://migrationinformation.net/Feature/print.cfm?ID=228>, Accessed 15/06/2004; P.Kiprianos, S. Balias and V. Passas (2003) "Greek Policy towards

and outwards migration until the early 1990s. In the 20th century Greece has received refugees, returnees and repatriates of Greek origin, the most notable one being the settlement of approximately 1.5 million refugees from Asia Minor.¹⁶ Similarly, outwards movements included political refugees to eastern European countries following the Greek Civil war (1947-1950) and a small number of Greek citizens seeking refuge abroad during the military dictatorship of 1967-1974.¹⁷

Immigration increased in the early 1990s and consisted mostly of economic migration from former communist countries, with largely an informal character linked to the opportunities for irregular and black-market employment.¹⁸ An Immigration Act introduced in 2001 attempted to impose a more regulated framework for economic migration, although it focused more on preventive and repressive measures rather than on legal routes of entry or integration.¹⁹ The two regularisation exercises in 1998 and 2001 are seen as more representative of the ad-hoc nature of immigration policy.²⁰

The limited history of reception extended to refugees and asylum seekers. Until the 1990s, assistance for applications and welfare assistance was provided by non-governmental organisations, including the UNHCR, which granted refugee status along with the

Immigrants and Immigration" *Social Policy and Administration*, Vol.37. No.2., pp.148-164; A. Papadopoulou (2004) "Smuggling into Europe: Transit Migrants in Greece", *Journal of Refugee Studies*, Vol. 17, No.2., pp.167-184.

¹⁶ R. Black, (1994) "Asylum policy and the marginalisation of refugees in Greece," in W.T.S.Gould and A. M. Findlay, eds. *Population migration and the changing world order*. New York: J. Wiley.

E. Voutira, (2003) "Refugees: whose term is it anyway? *Emic* and *etic* constructions of 'refugees' in Modern Greece," in J.van Selm et al., eds, *The Refugee Convention at Fifty : a view from forced migration studies*. Lanham, Md.: Lexington Books. Tsoukala.

¹⁷ R.Black, *ibid.* P. Kiprianos et al, *op. cit.*

¹⁸ M. Baldwin -Edwards (1999). "Where Free Markets Reign: Aliens in the Twilight Zone," in Arango & M. J.Baldwin-Edwards, eds. *Immigrants and the informal economy in Southern Europe*. Portland, Or.: Frank Cass; C. Kassimis and K. Kassimi, *op.cit.*

¹⁹ M. Baldwin-Edwards (2004) *Immigration into Greece, 1990-2003*. Athens, Mediterranean Migration Observatory.

²⁰ M. Baldwin-Edwards, *ibid.*

Greek state.²¹ UNHCR recognised refugees from Eastern European countries were resettled in the US, Canada and Australia, all of which operated immigration offices in Athens.²²

Those asylum seekers who were not resettled in western states would remain in Greece informally, with no specified legal status and largely employed in the black economy, with the exception being refugees from Turkey, mainly Kurdish who would be granted asylum officially for reasons of foreign policy. Underpinning this state of affairs was the belief among political actors that Greece was predominantly a transit country for refugees who were interested in settling in other western states – an attitude which continued into the early 1990s.²³ Even then, the recognition rate was about 2%, compared to the 33% recognition rate by the UNHCR. The informal approach of the Greek state – allowing refugees to remain without status – and the high recognition rates by UNHCR have led some authors to suggest that the asylum policy of the Greek state in the 1980s and early 1990s was a particularly tolerant one, even suggesting that the recognition rate during the 1980s was higher than in subsequent years.²⁴

Numbers of asylum seekers did fall in the 1990s and 2000s although peaks in application by Kurdish, Iraqi and Afghani – the main asylum seeking groups in Greece- nationals, were associated with political upheavals and wars in the areas of origin.²⁵ Moreover, because of geo-political, policy and economic changes, more refugees were likely to settle rather than move on to European countries.²⁶ The legislative framework soon proved inadequate and the need for new legislation became obvious, but it has been widely considered

²¹ R. Black, op.cit., P.N.Papadimitriou and I.F.Papageorgiou (2005) "The 'New Dubliners': Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities," *Journal of Refugee Studies*, Vol.18 No.3., pp. 299-318; N. Sitaropoulos (2002) "Refugee Welfare in Greece: towards a remodelling of the responsibility-shifting paradigm," *Critical Social Policy* Vol.22. No.4. pp.536-455.

²² R. Black, op.cit. P.N.Papadimitriou and I.F. Papageorgiou, ibid.

²³ R. Black, op.cit.

²⁴ R. Black, op.cit.; P. Kiprianos et al, op.cit.

²⁵ A. Papadopoulou, op.cit.

²⁶ P.N. Papadimitriou and I.F. Papageorgiou, op.cit.

more reactive than proactive. The first legislation specifically for asylum was introduced in 1996 replacing the earlier Act of 1991 and was supplemented by presidential decrees which regulated its implementation.²⁷ EU instruments on asylum and immigration, notably the Schengen Treaty and the Dublin Convention were also incorporated into Greek law and policy – often without extended discussion and debate –, which was also influenced by EU recommendations and directives, such as the ones on manifestly unfounded procedures and safe third countries.²⁸ However, both law and administrative practice, especially in the area of reception, have been criticised as inadequate.²⁹

At the same time, Greek asylum law and practice moved from 'tolerance' to ever increasing restrictions, with limited provision of protection and an emphasis on preventing irregular migration and entry of potential asylum seekers.³⁰ The former is evident in the low recognition rates, as low as 0.08% in 2002 and 0.4% in 2005³¹. Moreover, delays in the asylum process system, using domestic law to deny applicants access to the asylum process and downright refusal to accept applications have all been used in varying degrees to limit the granting of asylum.³² Other measures were geared towards the control of Greek borders and preventing the entry of asylum seekers and irregular migrants. The establishment of a body of border guards in 1997 and the signing of a readmission agreement with Turkey in 2001 – by which migrants entering illegally, an offence in the 2001 Immigration Act, could be returned immediately to Turkey – are examples of this kind of measures.³³ Deportations of failed asylum seekers, lately to countries considered

²⁷ P.N. Papadimitriou and I.F. Papageorgiou, op.cit.

²⁸ M. Baldwin-Edwards, *Immigration into Greece*, op.cit.

²⁹ N. Sitaropoulos (2000) "Modern Greek Asylum policy and Practice in the Context of the Relevant European Developments", *Journal of Refugee Studies*, Vol.13. No.1. pp.105-117; A. Skordas and N. Sitaropoulos (2004). 'Why Greece is not a Safe Host Country for Refugees'. *International Journal of Refugee Law*, Vol.16. No.1 pp.25-52.

³⁰ R.Black, op.cit.; A.Papadopoulou, op.cit.

³¹ A.Papadopoulou, op.cit.; A.Skordas and N.Sitaropoulos, op.cit.

³² M. Baldwin-Edwards, *Immigration into Greece*, op.cit.; A.Papadopoulou, op.cit.; P.N. Papadimitriou and I.F. Papageorgiou, op.cit.

³³ A.Papadopoulou, op.cit.

unsafe such as Iraq, and long detention periods have also been reported.³⁴

The reasons for this restrictive turn in Greek asylum policy can be seen as varied, but the main influence is the overall direction of EU immigration and asylum policy. The establishment of a zone of free movement in the European Union with the Schengen Treaty and the reconfiguration of asylum and immigration policies within this context with the Amsterdam Treaty meant that increasing emphasis was put on the control of the external borders of the Union.³⁵ These priorities put pressure on the Greek state, which because of its geographical position and long maritime borders has been one of the main points of entry for migrants.³⁶ This has been reflected in the priorities of Greek policy of controlling borders and preventing 'illegal' immigration.³⁷ The implementation of the Dublin I and II Conventions has also meant that since Greece has been in many cases the first port of entry, applications should be considered there, but the slow process and inadequate resources created considerable difficulties in processing the applications.³⁸ This contributed to an unwillingness to grant asylum or in certain cases process and accept claims, also reflecting the general trend in European Union.³⁹ In addition, due to the small number of refugees and the large number of economic migrants in Greece – often with irregular status – asylum in political discourse tend to be subjugated to issues relating more to economic migration.⁴⁰ Popular negative perceptions, shared by officials and the public, of labour migrants, especially those coming from Albania, and the belief that most migrants entering the country are economic migrants rather than

³⁴ A.Papadopoulou, op.cit.; A. Skordas and N. Sitaropoulos, op.cit.; N. Sitaropoulos, *Modern Greek Asylum Policy*, op.cit.

³⁵ A. Geddes, op.cit.; S. Lavenex (2001) *The Europeanization of refugee policies: between human rights and internal security*. Aldershot: Aldgate.

³⁶ N. Sitaropoulos, *Modern Greek Asylum Policy*, op.cit.

³⁷ A.Papadopoulou, op.cit..

³⁸ A.Papadopoulou, op.cit.; P.N. Papadimitriou and I.F. Papageorgiou, op.cit.

³⁹ A. Favell and R. Hansen (2002) "Markets against politics: migration, EU enlargement and the idea of Europe," *Journal of Ethnic and Migration Studies*, Vol.28. No.4. pp. 581-601; P.N. Papadimitriou and I.F. Papageorgiou, op.cit.

⁴⁰ N. Sitaropoulos, *Modern Greek Asylum Policy*, op.cit.

asylum seekers, are also seen as having contributed to restrictive immigration policies.⁴¹

3. Data and methodology

The paper is part of a comparative research study of the political discourse of asylum in Greece and Ireland between 1996 and 2004. It draws on the variety of political texts, such as parliamentary debates, oral questions and written answers, press releases and press conferences, policy documents, articles and interviews, selected on ground of relevance to the research topic. The overall aim of the research project was to examine how political actors legitimate the introduction and maintenance of restrictive policies in the field of asylum.

The method employed for the analysis of the data is Critical Discourse Analysis and was chosen as appropriate for the exploration of the interaction between discursive and social phenomena, which are seen as constitutive of each other.⁴² A further goal of Critical Discourse Analysis is the exploration of power relations in their discursive form, which make it particularly relevant to issues of immigration and asylum seeking, given the unequal relations between receiving states and groups of migrants. The analysis of the data focused on both themes and discursive strategies. In order to overcome some of the methodological weaknesses of Critical Discourses Analysis – the lack of clarity and transparency in the process of analysis – it was supplemented by the use of Nvivo qualitative software, which can offer greater consistency and transparency to the analytical process.⁴³

⁴¹ R.Black, op. cit.; A.Papadopoulou, op.cit.

⁴² N. Fairclough, (2003). *Analysing Discourse: Textual analysis for social research*. London: Routledge; R. Wodak (2001) "What CDA is about - a summary of its history, important concepts and its developments," in R.Wodak and M. Meyer, eds, *Methods of critical discourse analysis*. London:Sage.

⁴³ L. S.Gilbert (2002) "Going the distance: closeness in qualitative analysis software," *International Journal of Social Research Methodology*, Vol.5. No. 3. pp. 215-228; Richards (2002) "Qualitative computing—a methods revolution?," *International Journal of Social Research Methodology*, Vol.5. No. 3. pp. 215-228.

4. The employment of terms in Greek political discourse

4.1 *'Asylum seeker'*

A first – and rather surprising – finding is the rather limited use of the term 'asylum seeker', or as the equivalent translation in Greek is, 'asylum claimant'. It occurs only 26 times in 12 documents out of a total of 120. When it occurs it tends to be used when political actors talk about asylum procedures in a legal or administrative context, as in the following extracts:

(Extract 1)

"When an asylum claim is submitted by a non-native detained for deportation, the deportation is postponed until the final decision on the claim, according to the 4803/13/7 Joint ministerial decision of 18-6-92, and the claim is examined under the fast-track procedure. As a rule, asylum seekers are not deported, even after the dismissal of their claims, but they are given a date for voluntarily leaving the country, because they are considered refugees in the broad sense, according to the Geneva convention of 1951". (F. Petsalnikos, Minister for Public Order)⁴⁴

(Extract 2)

"In what concerns Article 3, the reference to entry points of ports or airports refers only to asylum seekers who submit a claim while they are in a transit zone". (P. Kammenos)⁴⁵

The above quotes are representative of how the category is used in the texts. Firstly, it is employed in an administrative or legal context rather than, for example, as part of an argument in the context of a debate. Secondly, they are representative of the documents where the employment of the category occurs: nine out of 26 instances occur in written answers, while a further nine in

⁴⁴ Records of the Greek Parliament, 05/03/1999 p. 5021, <http://www.parliament.gr/ergasies/praktika/pdf/ES0305.pdf>, Accessed 24/09/2007.

⁴⁵ Records of the Greek Parliament, 12/12/1996, p.1816-7, http://www.parliament.gr/ergasies/praktika/pdf/12_12_96.pdf, Accessed 24/09/2007

a single debate discussing the articles of the 1996 Refugee Act. Thirdly, the language of the extracts where the category occurs tend to be fairly neutral in tone, even if, as in the first extract, the objective is to defend government policy following questions posed by opposition MPs. This differs from the more emotionally charged employment of the categories 'refugee' and 'illegal immigrant'.

The limited use of 'asylum seeker' as a category might be surprising in comparison to its extensive use in other European countries, where 'asylum seeker' is extensively employed not only as a legal category but as a discursive category in political and media discourse.⁴⁶ Moreover, the neutral manner of the employment of the category contrasts with the often negative connotations it has acquired in other European contexts, having in a way replaced or been used a substitute for the category 'refugee'.⁴⁷

It might be complicated to pinpoint the reasons why the category is not in extensive use in Greek political discourse, but one suggestion could be the underdeveloped nature, until the 1990s, of a legal framework specifically for asylum, which would designate asylum seekers as a specific group with a distinct set of entitlements. However, the main explanation for this particularity might lie in the preference for employing the terms 'refugee' and 'illegal immigrant' for reasons that pertain to the particular meaning of the former in the Greek context and because of policy objectives which are reflected in the choice of categories. The next section attempts to clarify the reasons behind the extensive use of the category 'refugee'.

4.2 'Refugee'

Unlike in other European contexts, where the meaning of the category 'refugee' can have both positive and negative connotations, in the Greek context they are overwhelmingly positive. Voutira

⁴⁶ M. Gibney (2006) "A thousand Little Guantanamos: Western States and Measures to Prevent the Arrival of Refugees," in K. Tunstall, ed., *Displacement, Asylum, Migration*. Oxford:Oxford University Press; S. Moss, op.cit.

⁴⁷ M. Gibney, op.cit. F. Prieto Ramos, op.cit.

attributes this to the history of reception of 1.5 million refugees from Asia Minor following the exchange of populations between Greece and Turkey, in addition to smaller number of Pontic Greek refugees from the Ottoman Empire in the first quarter of the 20th century.⁴⁸ The settlement and integration has been widely regarded as successful and contributed to the Greek state building projects of homogenising the population of Northern Greece, rendering 'refugee' a term of honour and intricately linked to Greek national identity.⁴⁹ This perception is enhanced by forced migration experiences in the second half of the 20th century, when around 65,000 political refugees sought refuge in Eastern European countries after the end of the civil war and small numbers of Greek leftists sought asylum to western European countries in the 1960s and 1970s, especially during the military dictatorship of 1967.⁵⁰

These factors affect the use of the category 'refugee' in both quantitative and qualitative terms. It is the most frequently used category in the data, occurring 633 times in all types of documents. It is employed by opposition and government alike – supporting MPs, and more significantly for this research, it tends to replace, in both cases, the category 'asylum seeker'. I outline below the varied usages by different actors.

Firstly, 'refugee' is used as a category encompassing 'asylum seeker' in the talk of speakers who oppose government policy or ideologically support less restrictive policies. For example, in an oral question regarding conditions of detention of foreign prisoners, an opposition MP asks the Public Order Minister:

(Extract 3)

'if he is prepared to offer humanitarian solutions to the refugees who are in our country without documents and cannot obtain them because of the unusual conditions in their countries of origin.(S. Alfieri)"⁵¹

⁴⁸ E.Voutira, op.cit.

⁴⁹ E.Voutira, op.cit.

⁵⁰ Kiprianos et al, op.cit.

⁵¹ Records of the Greek Parliament, 24/10/1997, http://www.parliament.gr/ergasies/praktika/pdf/24_10_97.pdf, Accessed 24/09/2007.

While the speaker, a member of the opposition leftwing Synaspismos party, uses the term 'refugee', it can be inferred from the context of her question that it is more likely to be referring to asylum seekers or undocumented migrants, who are far more likely to be detained in Greece – for instance for entering illegally and not having the required documents.⁵² However, the manner in which it is used in this context is more as an inclusive category than as a narrowly defined one corresponding to specific legal criteria. A similar inclusiveness is also evident in the following extract, regarding the living conditions of Kurdish migrants in the Greek city of Patras:

(Extract 4)

"[...] After the problems with the political refugees in the Agios Andreas campsite [a temporary accommodation centre] we have the same problem in Patras. Around three hundred Kurds live in disused train wagons, having created a makeshift settlement next to the port of Patras, without heating electricity, toilets etc. They see Patras as an exit to Europe, so that they can live in humane conditions and find a home for their children and their families". (I. Karatasos)⁵³

While Kurds in Greece could be considered refugees in the broad sense, and even considering that some of them might have received refugee status, relevant research suggests that Kurdish nationals in Greece are likely to have varied immigration statuses.⁵⁴ The attribution of the category refugee seems to be guided by conditions specific to the Greek socio-political context.

⁵² Amnesty International (2004) *The Greek Policy Towards Refugees, June 2002-November 2003*, [http://www.amnesty.gr/library/2003/2003-01-22%20Refugee Report.doc](http://www.amnesty.gr/library/2003/2003-01-22%20Refugee%20Report.doc), Accessed 04/02/2004; Amnesty International (2005) *Out of the spotlight: The rights of foreigners and minorities are still a grey area*, <http://web.amnesty.org/library/print/ENGEUR250162005>, Accessed 07/10/2005.

⁵³ Records of the Greek Parliament, 04/04/1997, http://www.parliament.gr/ergasies/praktika/pdf/04_04_97.pdf, Accessed 24/09/2007.

⁵⁴ A. Papadopoulou, op.cit.; G. A. Antonopoulos and J. Winterdyk (2006) "The Smuggling of Migrants in Greece: an Examination of its Social Organisation," *European Journal of Criminology*, Vol.3. No.4. pp.439-461.

Kurdish migrants in Greece have been, until at least the end of the 1990s allowed to remain in an irregular manner if not recognised as refugees, for reasons of foreign policy towards Turkey.⁵⁵ Because of their significance in this respect, Kurdish refugees tend to be seen in a positive light by political actors (and publics) of all persuasions. As the speaker in the second extract himself remarks, *'they are not any refugees. They have a particular significance for our country'*⁵⁶

In short, the preference of the category 'refugee' instead of any other category by opposition MPs can be seen as both representative of the domestic context as well as strategic. First, it seems to be bound by the positive connotations of the word in the Greek context and possibly the fact that left-wing opposition MPs are likely to have more positive attitudes towards these groups, given the persecution of left-wing views in Greece until the 1970s. Secondly, it can reflect positive or advantageous views about specific groups, such as Kurdish migrants from Turkey. At the same time, the employment of a category with positive, rather than neutral or negative, connotations could be seen to achieve more favourable responses from other political actors or the wider public to the issues raised.

The employment of the same category by government actors is more varied as it tends to encompass several different conditions. For example, it can refer to Greek returnees and repatriates from the former Soviet republics who came to Greece following the collapse of the communist regime in the beginning of the 1990s. In fact, a significant part of the debates on the Asylum Bill of 1996 focused on this issue. Similarly, it can signify Greek political refugees in former communist eastern European countries. In what concerns non-ethnically Greek refugees, the term refers mainly to two broad groups: political refugees, such as Turkish and Kurdish refugees from Turkey, and refugees from the conflicts in Kosovo, Afghanistan and Iraq. I would distinguish two forms of usage of interest for this paper, refugees being either differentiated from

⁵⁵ R. Black, op.cit.

⁵⁶ Records of the Greek Parliament, 04/04/1997, http://www.parliament.gr/ergasies/praktika/pdf/04_04_97.pdf, Accessed 24/09/2007.

'asylum seekers' as a category or 'refugees' being equated with 'asylum seekers'.

In a very few cases, 'refugees' appears to be used as a different category from 'asylum seekers'. For example, it is mentioned in a written answer that a Presidential Decree would

(Extract 5)

"regulate the provision of medical and socio-economic provisions to recognised refugees, asylum seekers and recipients of humanitarian status." (E.Skoulakis, Minister for Health and Welfare)⁵⁷,

which suggest that the two categories in question are distinguished.

It is more likely, however, that the two categories are used interchangeably – for example, the main accommodation centre for asylum seekers in Greece –Lavrio– is sometimes referred to as an 'asylum seeker accommodation centre' and sometimes as a 'refugee accommodation centre'. This could be attributable to insufficient knowledge of the terms by the actors, but also to the privileged meaning of 'refugee' in the Greek context.

More interestingly, the term 'refugee' is preferred in relation to the category 'asylum seeker' in situations where the latter would be a more accurate one. The following extract from a press conference following the capsizing of a boat and the arrival of around 800 migrants to Zakynthos, several of whom, at the point of this statement, intended to submit an asylum claim⁵⁸: When interrogated by journalists concerning the status of the migrants and the possibility that they are returned to Turkey – the point of departure of their ship – the government spokesperson stated that:

(Extract 6)

"not all 1000 of them are political refugees" and continues by stating that "it is possible, amongst them to be some who can

⁵⁷ Records of the Greek Parliament, 06/10/1998, <http://www.parliament.gr/ergasies/praktika/pdf/ES1006.pdf>, Accessed 24/09/2007.

⁵⁸ Amnesty International, op. cit.; UNHCR (2001) "Greece: boat arrival," <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=3bebce7b4&page=news>, Accessed 11/09/2007

submit a claim, based on international practice and the directions of UNHCR, to be proven that they are political refugees. It is clear that for them there will be a different treatment. We are very sensitive towards political refugees.”(C. Protopapas)⁵⁹

Similar issues arise from another press conference extract, this time with the Greek Foreign Affairs Minister. When a journalist argues that the readmission agreement with Turkey removes access to the asylum procedure for irregular migrants, the foreign minister claims that:

(Extract 7)

“in the preface of the protocol we insisted on including a clear reference to the respect of human rights and refugee rights and in no case do we intend to deny the rights of political refugees. Our country is a country open to political refugees and we are obliged to do so by international law.”⁶⁰

These extracts highlight several issues of interest. It could be argued that what is debated is the possibility for migrants to become asylum seekers and be entitled to protection afforded to claimants under both international and domestic law. However, the category employed by the speakers in response to the journalists' questions is 'refugee' rather than 'asylum seeker', in direct denial in the first extract, and more indirectly in the second one. While the groups in question could be considered refugees in the broad sense, they are not recognised through legal procedures based on the Geneva Convention, therefore not protected by its provisions. Secondly, the speakers refer to 'political refugees' specifically, which relates to experiences of displacement particular to the Greek context – of Greek citizens and of histories of reception. It also adopts a narrow interpretation of the Geneva Convention which can exclude a large number of asylum seekers

⁵⁹ Ministry for the Press and Mass Media, Press Release 07/11/2001, http://www.minpress.gr/minpress/scriptpage_lldoc.html?id=2886153, 24/09/2007.

⁶⁰ Press Conference of G. A. Papandreou, 28/11/2001, <http://www.pasok.gr/portalgr/41/206/7/print/135/1/showdoc.html>, Accessed 24/09/2007.

coming from war affected countries such as Iraq and Afghanistan. Thirdly, whether intentional or not, the choice of the words 'can submit' – authorised by reference to 'international practice' and 'the directions of UNHCR' – suggests that access to the asylum determination procedure depends on fulfilling the criteria beforehand. The speaker seems to imply that being a refugee is an essential condition predating any examination of an asylum claim following set procedures.

This, in a sense renders the category 'asylum seeker' redundant by suggesting that someone either is or is not a refugee, without a need for a procedure to examine the claim. It can be argued that the employment of the two categories so far suggests a kind of 'discursive disappearance' of the 'asylum seeker' category, which becomes more pronounced when compared to the employment of the category 'illegal immigrant' below, the effects of which for the legitimisation of policies are going to be analysed in the following section.

4.3 *'Illegal immigrants'*

The effectiveness of employing the term refugee is further enhanced by opposing it to the other main category in Greek political discourse, that of 'illegal immigrant, which occurs 288 times in 52 documents. This count only includes instances when there are clear indications that the speakers refer to refugees or asylum seekers, such as references to irregular entrants from Iraq or Afghanistan. In such instances, the 'illegal immigrants' category is used in opposition to the category refugee – including asylum seekers – but also as synonymous to it. Fairclough's account of the logics of difference and equivalence is useful in understanding this relationship. These logics are seen as 'social processes of classification' which can work simultaneously in the process of classifying individuals and groups into categories.⁶¹

The continuation of extract 7 in the above section illustrates how the opposition of the two categories work. After expressing commitment to international law, the Foreign Affairs Minister goes

⁶¹ Fairclough, op. cit. p. 100.

on to say that *'This is different from illegal immigrants.'*⁶² Thus the category of 'refugees' is differentiated from and juxtaposed to that of the 'illegal immigrant'. A similar move is also made in the following statement by the Health and Welfare minister, who states that:

(Extract 8)

"[a]ll actions and procedures of examining asylum claims are taking place with the sole purpose of protecting the interests of real refugees and not of the total of illegal immigrants who arrive in our country and who cannot possibly be irresponsibly identified or self-identify as refugees."⁶³

These extracts exemplify claims that illegal immigrants cannot be refugees. The two categories are presented as mutually exclusive, creating a 'logic of difference' between them. However, it is widely accepted by academic literature as well as NGO practitioners that refugees often have to enter in a clandestine manner, as most legitimate ways of entry have been closed by recent immigration policies.⁶⁴

Moreover, the contrast is again made between 'refugees' – who are entitled to protection – and 'illegal immigrants' – who do not. The absence of the category 'asylum seekers' from the frame of reference enhances the distinction between 'genuine' refugees – enforced by the adjective 'real' in the text – and 'non-genuine' 'illegal immigrants', a category which nearly always has negative connotations.⁶⁵ The juxtaposition is enhanced by the underlying positive connotations of the category 'refugees'.

Furthermore, the latter part of the extracts entails a negative moral evaluation of characterising such groups of asylum seekers

⁶² Press Conference of G. A. Papandreou, 28/11/2001, <http://www.pasok.gr/portalgr/41/206/7/print/135/1/showdoc.html>, Accessed 24/09/2007.

⁶³ Records of the Greek Parliament, 18/10/2002, p.3264, <http://www.parliament.gr/ergasies/praktika/pdf/SYN01-18-02.pdf>, Accessed 24/09/2007

⁶⁴ L. Fekete (2001) "The Emergence of Xeno-racism" <http://www.irr.org.uk/2001/september/ak000001.html>, Accessed 13/10/06.

⁶⁵ F.Prieto-Ramos, op.cit.

as refugees, triggered by the adverb 'irresponsibly'. This can be interpreted as suggesting that the interests of refugees are harmed by false claims, as well as the inappropriate use of categories. The distinction between deserving and undeserving is a theme identified in research on the political discourse of asylum and immigration of other European countries.⁶⁶

The other logic that seems to operate simultaneously in Greek political discourse is that of 'equivalence'. In these moves by political actors, 'refugees' are equated to 'illegal immigrants'. An example of this occurs in a press conference where a journalist poses a question regarding "*an increase of Iraqi refugees of Kurdish origin in Greece.*"⁶⁷ The government spokesperson replies in the following manner:

(Extract 9)

"What I can say is that Greek borders are controlled in order to prevent illegal immigration. When there are indications that a mass movement of illegal immigrants will take place, we take more specific measures [...]" (D. Konstas)⁶⁸

The speaker in effect substitutes the category 'refugees' employed by the journalist with that of 'illegal immigrants'. This re-naming of categories is a frequent occurrence in press conferences and question posed by the opposition in the parliament. If the question employs the category 'refugee', the government – supporting speaker may chose to change the terms of reference by employing the category 'illegal immigrants' instead, or by referring to 'illegal immigration' as a phenomenon to be controlled, rather than forced migration, as in the extract above.

⁶⁶ M. Gale (2004) "The Refugee crisis and fear: Populist policies and media discourse," *The Australian Sociological Association*, Vol.40. No.4. pp.321-340; M. Humphrey, op. cit; R. Sales (2002). "The deserving and the undeserving? Refugees, asylum seekers and welfare in Britain", *Critical Social Policy*, Vol.22. No.3., pp. 456-478.

⁶⁷ Ministry for the Press and Mass Media, Press Release 10/09/1996, http://www.minpress.gr/minpress/scriptpage_lldoc.html?id=27412486 Accessed 24/09/2007.

⁶⁸ Ministry for the Press and Mass Media, Press Release 10/09/1996, op.cit.

A similar logic of equivalence exists in the discourse of right-wing MPs, where ‘illegal immigrants’ appears to be the dominant category when referring to refugees and asylum seekers. For example, one speaker from the opposition New Democracy party refers to the reception centre of Lavrio as (Extract 10) “*the main reception centre of illegal immigrants.*” (A. Papakosta-Sidiropoulou).⁶⁹ Likewise, the following extract is taken from a debate about a bill on controlling immigration supported by the opposition right wing New Democracy party illustrates this conflation in more detail:

(Extract 11)

After a bureaucratic process of submitting an asylum claim which is rejected, the illegal immigrant is let free with a note that he should leave Greece within fifteen days. You understand that nobody leaves, because not only they don't try to avoid the procedure, but in Evros, as we've been told, just after they cross the border they look for the nearest police station to turn themselves in. When they see a patrol car passing they shout “come to arrest us”.⁷⁰ (C. Markoyiannakis)

In both extracts the speakers attribute to asylum seekers the category ‘illegal immigrants’, the first by renaming a reception centre for asylum seekers and the second by conflating the two statuses. In addition, the second extract evaluates negatively migrants who apply for asylum for following necessary steps – for example turning themselves over to the authorities – in order to submit an asylum claim. One difference from the aforementioned usages by government actors is that the tone adopted by opposition actors can be more hostile to both refugees and irregular migrants, as the party has adopted a hard line on immigration control.

In short both by conservative opposition and government, either through a logic of equivalence or difference, the two categories are employed in such a manner that they can create specific effects in

⁶⁹ Records of the Greek Parliament, 23/11/2001, p.1713 <http://www.parliament.gr/ergasies/praktika/pdf/SYN102301.pdf> Accessed 24/09/2007.

⁷⁰ Records of the Greek Parliament, 03/04/2003, p.3746 <http://www.parliament.gr/ergasies/praktika/pdf/SYN20030403.pdf> Accessed 24/09/2007.

terms of the legitimization of restrictive policies. These effects are discussed in the next section.

5. Use of categories and legitimization policies

As it has been observed in the previous section, 'asylum seeker' is a nearly absent discursive category from Greek discourse, while 'refugee' and 'illegal immigrant' are preferred by the speakers of all political persuasions at varying degrees. The combined usage of these terms should be seen as linked to the legitimization of policies. With 'asylum seeker' being an absent category, the main contrast in terms of entitlement to refugee protection is expressed through the opposition between 'refugees' and 'illegal immigrants', where the former is constructed as 'genuine' and 'deserving' while the latter as 'non' genuine' and 'undeserving'.

In terms of Critical Discourse Analysis, the employment of the term 'illegal immigrant' can be considered in the context of using negative other-presentation strategies. Negative other-presentation can be broadly defined as depicting an out-group in a negative manner, either in a blatant or subtle way.⁷¹ Employing the category 'illegal immigrant' can be regarded as such a strategy, as the term in itself, and in the way it is used in current discourses of asylum and immigration, suggests a condition outside legality and associated with criminality, especially in relation to the clandestine manner of arrival.⁷² Contrasted to the positive connotations of the category refugee, its employment not only suggests a lack of entitlement to refugee protection in law, but negative qualities which legitimate restrictive measures.

The implications of the 'refugees'/'illegal immigrants' binary are particularly evident in documents whose main theme is the return of migrants to Turkey based on the readmission agreement signed between the two states. The classifications and distinctions made in extracts 6 and 7 in the previous section are geared towards

⁷¹ T. A. Van Dijk (1993) *Elite Discourse and Racism*. London: Sage; C. Boreus (2006) "Negative discrimination: A typology," *European Journal of Social Theory*, Vol.9. No.3. pp.405-424; I. Van Der Valk (2003). 'Right-wing parliamentary discourse on immigration in France'. *Discourse & Society*, Vol.14. No.3., pp.309-348.

⁷² M. Gale, op.cit. Humphrey, op. cit.

justifying the expulsion to Turkey of a particular group of migrants. The following extract is illustrative in terms of the government's legitimating strategy:

(Extract 12)

Journalist: The UNHCR observed in their announcement that after [in] the agreement and the protocol that were signed between Greece and Turkey there is no specific mention of the Geneva Convention. Also, refoulement is forbidden by the Geneva Convention.

Protopapas: Of refugees.

Journalist: Yes, but they should be given the possibility (to claim refugee status).

Protopapas: Yes, but to political refugees or other people given UNHCR prescribed status. Here it's not about refugees. You know very well that this story has created a phenomenon of hundreds of thousands of illegal immigrants in Greece. The admission of refugees – included in international conventions – is a different matter from illegal immigration. (GRPCGS 061201, C. Protopapas)⁷³

Similarly to previous extracts, a distinction is made between 'refugees' and 'irregular migrants', but this extract also highlights how the dichotomy between 'refugees' and 'illegal immigrants' has implication in terms of policy, specifically on whether they can be readmitted to Turkey or not. The right not to be readmitted to Turkey – which has, as the journalist rightly suggests, implications in terms of the right to non-refoulement – is constructed by the government spokesperson as attributed only to refugees and specifically 'political refugees'. This representation can legitimate the exclusion of forced migrants from war affected areas, such as Iraq and Afghanistan, as they do not fulfil narrowly interpreted criteria of the Geneva Convention, an exclusion which can be significant given that large numbers of asylum seekers in Greece originate from there.

⁷³ Ministry for the Press and Mass Media, Press Release 06/12/2001, http://www.minpress.gr/minpress/scriptpage_lldoc.html?id=2890050 Accessed 24/09/2001

Furthermore, the suggestion that access to asylum procedures is the entitlement of those who fulfil the precondition of being refugees combines with the 'discursive disappearance' of the 'asylum seeker' category to deny protection from refoulement that is afforded to the latter category as well as the former – in Greek law even with an oral statement that they wish to claim asylum.⁷⁴ In the light of incidents of preventing access to the asylum procedure, recorded by NGOs in Greece, we can see a correspondence between the discursive level and the social, where policies are enacted.⁷⁵

The legitimization of restrictive policies through the employment of categories is not limited, of course only to texts concerning readmission. Extract 9 above suggests that the 'renaming' of refugees to 'illegal immigrants' can have a wider purpose of legitimating prevention of entry measures, specifically the stricter control of borders in order to prevent entry. The same logic applies to the employment of categories by opposition right wing MPs, illustrated by extract 11, where the characterisation of refugees and asylum seekers as 'illegal immigrants' in parliamentary debates helps legitimate their position for stricter control measures. Again the representation of refugees as political refugees can legitimate exclusions of large groups.

A further legitimating strategy suggested in extracts 6,7 and 9 is that of positive self-presentation, which in discursive approaches is defined as a semantic and rhetorical strategy which permits speakers to present themselves or the group with which they identify in a positive light in terms of values, attitudes and actions and is extensively used in discourses of immigration.⁷⁶ In all these extracts, the speakers state that they respect the rights of refugees and fulfil their obligations under international instruments of refugee protection. Such statements are extensively used in the documents examined, and allow the political actors to showcase 'the

⁷⁴ Amnesty International, op. cit.; A.Skordas and N. Sitaropoulos, op. cit.

⁷⁵ Amnesty International, op. cit.

⁷⁶ A. Triandafyllidou (2000). "The political discourse on immigration in southern Europe: a critical analysis," *Journal of Community & Applied Social Psychology*, Vol.10. No.5. pp.373-389; I.Van Der Valk, op. cit.; T. A.Van Dijk, op. cit.

ethical superiority and intrinsic goodness of the in-group'.⁷⁷ The positive qualities and attitudes of the political actors themselves and in extension the host community indicated by the use of the pronoun 'we' and the first person plural are accentuated further by their contrast to the negative presentation of refugees and asylum seekers as 'illegal immigrants'.

6. Conclusions

The employment of categories can be seen in the context of social practices constituting discourse and discourse constituting social practice. On the one hand, the use of categories related to domestic factors which affect the extent of employment of categories. On the other hand, they reflect the priorities and goals of Greek asylum and immigration policy.

The influence of domestic factors underpins strongly the use of the categories 'asylum seeker' and 'refugee' in Greek political discourse. The research yielded at least one surprising result: 'asylum seeker' is a rarely used category with a predominantly neutral meaning, unlike in the discourse of other European countries and western countries, where it is extensively employed, often with negative connotations attached to it. This might be linked to the relative newness of asylum legislation in Greece and the discursive preference for the term refugee, which resonated strongly with experiences of migration in the Greek context.

Because of these reasons, the term 'refugee' tends to be used instead, both by left wing opposition political actors and government actors. Given their different goals and political orientation, its employment appears rather varied. Left wing opposition actors employ 'refugees' as an all-inclusive category, which incorporates migrants with potentially varied immigration statuses and reflects positive connotations deriving from Greek experiences of forced migration as well as from the positive images of Kurdish and Turkish refugees in Greece. On the other hand, government and right wing opposition actors tend to employ 'refugees' as a category retaining its positive meaning, but narrowly defined so as it can

⁷⁷ A.Triantaphyllidou, *op. cit.* p. 382

legitimate several exclusions. Firstly, the in-built assumption of genuineness can exclude migrants who may have entered illegally and have not yet claimed and been granted asylum. Moreover, it appears that the preferred definition of refugees is that of political refugees which interprets the provision of the Geneva Convention in a limited fashion, which can result in the exclusion of a large proportion of asylum seekers in Greece.

Furthermore, the category 'refugee' – incorporating that of 'asylum seekers' is both opposed and equated to the category 'illegal immigrants'. In opposition, following a 'logic of difference', refugees are distinguished from 'illegal immigrants' and their genuine claims to asylum are opposed to the lack of claims and entitlements of illegal immigrants, a category with heavy negative connotations. At the same time, following a logic of equivalence, refugees are re-labelled 'illegal immigrants' by government and right – wing opposition actors. In both logics, however, the category is laden with negative connotations. The emphasis on the use of 'illegal immigrant' as a category can be seen as reflecting the preoccupation of Greek policy with the prevention of irregular immigration, which is linked to wider objectives of European Union policy with regards to the protection of its external borders and the prevention of asylum seeking and irregular migration.

It is the legitimisation of such policy aims which seems to be served by the employment of the categories illustrated in this article. The designation of refugees as 'illegal immigrants' involves, firstly a strategy of negative other-presentation of this group, where the negative qualities attributed, legitimate in themselves restrictive policies of prevention of entry and readmission. Secondly, its juxtaposition to the category of refugees legitimates boundaries between those who are not entitled to protection and those who are, reinforced by the absence of the category 'asylum seeker' which could extend the obligations of the state to provide protection. The use of positive self-presentation strategies where political actors stress their respect of refugee rights and international laws enhances their moral position and further justifies restrictive policies on the grounds of their good attitudes towards refugees.

As a last observation, it should be noted that the employment of categories, rather than fixed boundaries and meanings, is fluid. Each category encompasses a multitude of meanings derived from different legal, social and historical contexts and dependant on the political

orientation and policy goals of political actors. These meanings and their boundaries are constantly reconfigured and negotiated in the texts, an occurrence exemplified by the co-existence of logics of difference and equivalence between the categories of 'refugee' and 'illegal immigrant'. Again, this can be seen as part of a process of redefining and justifying goals in a changing regional and domestic socio-political context of asylum policy.

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THE IDENTITY STRATEGIES OF UNDOCUMENTED MIGRANTS IN AUSTRIA

KATERINA KRATZMANN

Undocumented migrants are rarely listened to. They seem to be the object of a discourse that focuses predominantly on the impacts of the so called illegal migration on sending and receiving countries: policy options, asylum systems, governance, migration control, etcetera. In this article, I argue from an ethnological perspective with an emphasis on undocumented migrants' identity strategies. The representations of cultural and ethnical identities, which are represented to create a distance to the unattractive illegal status, are of specific concern. I show the migrants views on what it feels like to be illegal, how this legal categorization affects their identity constructions and which consequences an inclusion of their voices and views would have on policy options.

1. A matter of perspective

On April 28th 2007 a boat landed on the Canary Islands. Three of the passengers were dead. One day before, a fifteen year old girl drowned close to the island of Leros, and two days later a man died in the hospital in Las Palmas (Gran Canaria) due to hypothermia and dehydration from staying in the cold sea for too long.¹ Almost every day, Europeans hear news like this about undocumented migrants dying while they attempt to enter the

¹ URL: <http://www.fortresseurope.blogspot.com>.

European Union, and the humanitarian catastrophe on the outer borders of the EU dominates the media in all European countries. But while violations of human rights are being recognized² and there is still a lot of talk about the migrants who tried to enter Spanish territory in Ceuta and Mellila in autumn 2005³, the medial and political discourse pictures undocumented migrants as victims. We, the members of the rich European receiving countries discuss and talk about *them*, the poor illegal immigrants – and their own perspectives are underrepresented. So, what can *they* tell *us* about *our* countries?

In my research, based on interviews with undocumented migrants and involved institutions in Vienna/ Austria in 2003 and 2004⁴, I found that for undocumented migrants the status of illegality goes hand in hand with a lack of identification with the receiving society. To be illegal is perceived on the same level as – or rather the negative of – citizenship; it forms a negative national identification. Some authors argue that the illegal status only becomes relevant to migrants, “when and if [...] the legal reality is a constraint over the relationships and actions of the actor.”⁵ As important as this argument is, I would like to argue that illegality as a “social construction”⁶ not only influences undocumented migrants’ social relationships and their behaviour in public places, but also affects their identity constructions and strategies, i.e., how they think of themselves. There are different opinions on the use of the term ‘identity’ and debates about replacing the term by alternative concepts

² Corinna Milborn (2006) *Fortress Europe. Immigration between Barbed Wire and Ghetto. The Black Book*. Vienna.

³ Emmanuel Blanchard/Anne-Sophie Wender (Ed.) (2007) *Guerre aux Migrants. Le vivre noir en Ceuta et Mellila*. Paris.

⁴ Katerina Kratzmann (2007) ‘*And then I was illegal.*’ *Undocumented migrants in Austria*. Vienna.

⁵ Guiseppa Sciortino (2004) “Between Phantoms and Necessary Evils. Some Critical Points in the Study of Irregular Migration to Western Europe”, In: *IMIS*, 23, p. 17-43, p. 22.

⁶ Godfried Engbersen/Joanne van der Leun (2001) “The Social Construction of Illegality and Criminality”, In: *European Journal on Criminal Policy and Research*, 9, p. 51-70.

like identifications.⁷ In my view the term identity should not be dismissed on the grounds of its ambiguity, and I use it here because undocumented migrants talk about their identities in various contexts.

2. Passport identities

Historically as well as currently, one of the most efficient measures to gain and to exercise territorial power is the control of peoples' movements, usually called migration control. As the frontiers inside the European Union vanish, one can observe a decrease of traditional migration control methods like border patrols and an increase of the externalisation and internalisation of migration control. While externalisation builds on methods like visa systems and bilateral agreements, internalisation of migration control uses methods like residence and work permits, inspections of work places, and identity and passport controls on the streets inside the EU.

Karen Schönwälder, Dita Vogel and Guiseppe Sciortino point out that the fear of detection is characteristic of a life spent in illegality.⁸ Once undocumented migrants arrive on European territory, they are confronted with their legal status, and even if there are different legal frameworks in the EU, their new status affects their daily life, e. g. through passport controls. The fear of detection and passport controls varies and does not affect all undocumented migrants in the same way; some overstayers (people who travel legally into the EU and overstay their permission), for example, do not build up a lot of anxiety, because their migration to the EU could easily be repeated if they were to get deported. But in general, undocumented migrants are frightened of authorities like administrative bodies, border police and police, because contact with them carries the danger of being deported.

⁷ Peter Wagner: Fest-Stellungen (1999) "Observations on the Social Science Debate about Identity", in: Aleida Assmann/Heidrun Frieze (Ed.): *Identities. Memory, History, Identity*. Frankfurt, p. 44-72.

⁸ Karin Schönwälder/Guiseppe Sciortino/Dita Vogel (December 2005) *Migration and Illegality in Germany*. AKI research report, Science Center for Social Science Berlin, p. 61.

Carlos, an overstayer from Chile, who lived in Austria undocumented for eight years in the nineties and now holds citizenship, tells me about a passport control in Vienna:

I was at the Karlsplatz (public place in Vienna) and a policeman came and asked me for my passport. And I said with an accent: 'I am Austrian, let me go'. And it worked. Without the accent and the right skin colour, they would never have been that mild to me. And then I used to do that kind of thing all the time. I stayed away from the police and spoke an Austrian accent as a camouflage; well dressed, so that everybody sees immediately that I am *not* illegal.

Other undocumented migrants pretend they are phoning with a friend when they see policemen in the street to show they have social contacts in Vienna; or they greet and wave to someone on the street even though they don't really know the person to get out of a control situation. Carlos adopted an accent and a certain way of dressing in illegality. Plus, he changed his behaviour in his apartment:

I had a permanent fear of the police, that they are coming in the morning to pick me up and deport me. It was simply too insecure in my apartment and I read in the newspaper about deportation so that I started to sleep on the garret in the summer and in the cellar in the winter. I hid there and it was quite bad. Not only was it uncomfortable, but strange to feel threatened by the police that is protecting other people in this state.

Grace from the Czech Republic, also was frightened while being undocumented:

It is not a nameable fear, but more a fright. Each time you see the police, you store it in your brain, and store it, and store it. And then it keeps growing inside you. Even though I do not tend to be fearful in a psychological way, I always had to tell myself: 'Fuck the police, just keep on walking.' But after a while it becomes almost a paranoia, all of a sudden you are not only afraid of the police, but of everything; to go out, to talk to people, everything.

Grace and Carlos both say that they checked in streets and

public places for police presence, even at the post office, in hospitals and bars. Places seemed different to them – potentially dangerous – and were only safe without any authorities. It follows that in their daily lives, they were aiming for invisibility⁹, because for *them* borders existed everywhere in the receiving country where they could potentially be asked for their papers.

Through the internalisation of migration control and methods like passport controls on the street, identities of undocumented migrants are often reduced to the little data in the passport: name, birth date, nationality, physical appearance and legal status – a passport identity. It is self-evident that identities are not sufficiently represented in the passport, but undocumented migrants experience every day that their individual, social and cultural identities do not really matter in a country which mainly reduces them to their legal status. And with this experience, they (have to) argue their own identities in relation to their passport identity. In passports the national membership is linked to movement possibilities as well as physical attributes, and therefore the passport, which does not give detailed information about a person, determines the recognition given to the passport holder and the behaviour of others towards him or her. Consequently, most undocumented migrants don't show their passport; they hide their "true" identity, as the authorities say.

Apart from the problem that the "true" identities of undocumented migrants are not represented sufficiently in a passport identity, the legal provision for foreigners to carry their passport with them raises practical issues: If there is no duty to carry a passport for Austrians, how can the police recognize if a person is a stranger, if not by his/her foreign appearance? The insecurity which is still evoked by the presence of foreigners shows itself in the aim to control public and social space to keep strangers where they belong. This aim definitely has consequences for city spaces, e.g. by making the police presence stronger in some public

⁹ Eberhard Eichenhofer (1999) "Introduction: Illegal entry, illegal stay and illegal work as questions of migration research", in: Eberhard Eichenhofer (Ed.): *Migration and Illegality*. (IMIS, Volume 7) Osnabrück, p. 11-25, p. 14.

places and by asking certain people – foreign-looking people – for their papers. Passport controls on the street point to an identity politics directed towards migrants in general and undocumented migrants in particular, which is difficult to escape. In a “policy of cultural identities”¹⁰ the lack of a legal title is linked to visual codes and assumed “cultural differences.”¹¹

The passport identity, so is imagined, stands for national and ethnical belongings, which reflect on the social and cultural background of a person. Therefore, one is supposed to be able to tell from the passport identity who one is dealing with in a social sense. This is not true, of course, but the impression that the little information in the passport says something about identities – a sense of belonging, social behaviour and relations – creates a relationship between the passport holder and his or her passport identity; the legal status and attributed cultural and ethnical belongings.

3. Illegal identities

Migrants in general react to their legal and social status and the public discourse about them in the receiving country, and in the interviews conducted, undocumented migrants reflect on their definition as illegal migrants in various ways. Slowly but surely they learn to internalise *our* discourse about *them*, and their daily life as much as their self perception is influenced by their illegal status. Most undocumented migrants use the term “illegal” to describe their situation. Carlos describes what it felt like to be illegal when he gave his expired passport to the police:

When I went to the police department to give them my expired passport, it was weird. I came out of there with the knowledge:

¹⁰ Thomas Meyer (2002) *Identity policy, from The misuse of cultural differences*. Frankfurt, p. 25ff. “Concerning the policies of identity Meyer speaks of a naturalization of the understanding of culture, which smooth the way for a return of a friend-enemy-thinking through the cultural backdoor to the middle of the political arena”. (p. 30).

¹¹ Michel-Rolph Trouillot (2002) “Adieu Culture: A new Duty Arises”, in: Richard Fox (Ed.): *Anthropology beyond Culture*. Oxford, S. 42-53.

Now I am illegal. I did not actually feel any different, but I knew I am one of those bad guys now, which you read in the newspaper about almost every day. And then I had no passport, but everything else.

He did not necessarily feel like a bad person just because he did not have a valid passport anymore, but Carlos knew that for most Austrians he fell under the category of "bad guys" now. The legal definition and the connected associations in the discourse about illegal migration found entry into his life, eventually also as part of his self-description.

Undocumented migrants adopt knowledge orders and interpretation systems of the receiving country and learn to look at themselves through the current discourse. Sebastian, a rejected asylum seeker from Sudan, also refers to himself as being illegal. He says in the interview: "I am illegal. Since they said 'no' to my asylum, I really feel illegal." He is convinced that the government will finally grant him asylum if he behaves in a socially conformist manner, which is, by the way, not all that wrong, since criminal activities from asylum seekers invariably lead to the rejection of their cases in Austria. Therefore, he tries to adhere to all the rules of Austrian society – he buys a ticket for the tube, throws his garbage in the public bins and keeps a distance from crime:

I don't have a problem with the police, I don't like it. You know, a lot of refugees are coming every month and they are really illegal. They [...] have problems with the police. That is not good and I am not like that. I think police is good, because they protect you and people do not fight in the streets.

By spending some time in the receiving country, Sebastian learned about Austrian society and the current discourse about people like him. And because illegal immigrants have a negative connotation, he dissociates himself from other undocumented migrants, the drug selling ones who are "really illegal". With his argumentation he shows that he shares our moral and legal values. Sebastian creates a sense of belonging to Austrian society through identifying with certain moral values; a "moral membership" one could argue that breaks open the excluding definition of being illegal.

But an identification with or a dissociation from illegality is not

solely influenced by the current discourse and the law. The low social position of most undocumented migrants in the receiving country also leads to skirmishes with the illegal status. Back to Carlos: With a social circle, knowledge of the German language and being self-employed, he was well integrated in the Austrian society. Even though he was afraid of deportation, he lived

“relatively easy-going. To find a job was never a problem, also because the IT branch was not one where a lot of illegal people worked. I could stay invisible quite easily, because no one expected me to be illegal.”

At the beginning he experienced “only small changes”, like no health insurance and no tax payments. When Carlos said that he had “no passport, but everything else”, he was referring to his social life, language skills, and employment opportunities that were important to hide his illegal status, and in conversations he developed a special flair for not mentioning the subject of citizenship, or to deflect from it when it was discussed. He had an old student card, which he could still use as an identity document when he was asked for one, and he continued to go to work in order to give the impression that everything was normal: “I was always striving to act normal towards the outside world, and things were normal most of the time, except the passport.”

But in 1993 the law in Austria changed and employers started to ask for proper identification and trade licences. He couldn't find work anymore and his financial resources shrank:

I was never concerned with illegality until it was difficult to earn money. I always saw myself as a privileged illegal person, because I had work, earned good money and was integrated, but then.... It was not the question anymore whether I could afford a weekend trip, like it used to be before. Now the question was whether I could afford the can of tuna or whether I had something to eat.

Carlos does not like to talk about that time and explains that he could imagine becoming involved in criminal practices in this period of his life:

And not because it is such a good option to be a criminal, but because there is nothing else left at the end. The only thing

that kept me from becoming a criminal was my scruples. But one also must be able to afford scruples or have them from somewhere. It was clear that I was going to forget my scruples or overcome them and go sell drugs or something else if nothing would have happened. Anything, but I was not going to live in that poverty.

Certain social circumstances, mainly poverty, fuel an identification with the attributed illegality. Even though illegality is in most cases not a permanent situation¹² and not all undocumented migrants are afraid of passport controls, they still feel their illegal status in a very real way when they are (becoming) poor or get involved in criminal activities. Their social situation – the “Third world in the middle of Europe”¹³ – influences personal identity strategies just as much as psychological and physical problems like anxiety, depression, headache or stomach aches. Because the self identification with the illegal status is not inevitable, but introduced by migration control practices and the low living standards of most undocumented migrants, it makes sense to use the identity terminology of Stuart Hall. Hall sees identity as a concept of social identity, which is strategic and positional:

The concept of identity deployed here is [...] not an essentialist, but a strategic and positional one. That is to say, directly contrary to what appears to be is settled semantic career [...]. It accepts that identities are never unified and, in late modern times, increasingly fragmented and fractured; never singular but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions. They are subject to radical historicization, and are constantly in the process of change and transformation.¹⁴

¹² Migrants change their status and switch from illegal to legal quite often.

¹³ CNN: *Serious Samoura: Illegal Immigrants. A Reportage*. Broadcast on August 5th, 2006.

¹⁴ Stuart Hall (2000) “Who needs ‘Identity?’”, in: Paul du Gay/Jessica Evans/Peter Redman (Ed.): *Identity. A Reader*. London, S. 15-30, p. 17.

Identity is understood as a fluent positioning; it does not take place outside a discourse, but is performed within a demarcation towards other social positions. This does not necessarily mean that migrants distance themselves from other people, like Sebastian does when he draws a line between himself and other asylum seekers, but that they distance themselves from their own social position within illegality: undocumented migrants define and describe themselves as illegal in order to explain their situation and exclusion in the receiving society, and at the same time they present other parts of their identity to imagine, legitimate and produce a different social position. They create a distance to the unattractive illegal status, and by bracketing their illegal identity they show that they want to be part of *our* societies – if not now then maybe in the future.

So, undocumented migrants do not only look at themselves through the discourse of the receiving society, but define themselves from the inside – in opposition to their illegal status. In the interviews they presented their own identities in many different ways, mentioning factors like moral values, social ties, upbringing, religious or cultural backgrounds. Of course not all undocumented migrants refer to cultural belongings, but the cultural background is my main focus here, and *if* it was mentioned in the interviews to present identity, then there were two main lines of argumentation: a new ethnic and a multicultural identity.

4. New ethnic identities

Ismet, a rejected asylum seeker from Macedonia, says:

When I came to Austria, I was not exactly sure. Of course I was Albanian and stuff, but only here I really thought about it, because ... if you are illegal, you need something else, something where you are someone or that means something to you. For me that was the Albanian culture.

I ask: "And what is the Albanian culture?" Ismet answers: "I don't really know. We have traditions." "Which ones?" I keep pushing, and my interviewee says: "I don't know it so much in detail, but my parents always said that we have traditions and that they are very important." From Ismet's statement it becomes obvious how culture functions as a resource, even though the contents of the

Albanian culture are vague. Ismet knows the label "Albanian" stands for certain traditions, values, rules and habits (summed up as culture), but he does not know what these traditions and practices actually are; it is like drinking from an empty cup. His argumentation shows the symbolic value of ethnically defined identities. I find this point very interesting and continue to ask: "And is there anything important from that culture in your every day life?" Ismet: "Yes, the religion. I try to do that 100%, with all the rules. But religious culture is also different to the Albanian one. We Albanians have three different religions: Moslems, Catholics and orthodox people. I am Moslem." "And are there conflicts between the three religions?"

No, there are no difficulties. A priest wrote down the rules for the Albanian people 500 years ago, and everyone still lives after them. About 1400 AD, he was the first one who brought the three religions together and wrote down everything in a document: rules in the family, manners towards women, everything. And this old law, the canon, is what people still live their lives after today.

I wonder if Ismet lives after the rules of his Moslem belief or after the canon from the priest, which has broader rules for all three religions. He states:

Well, that is difficult. To be honest, I never really thought about it. I pray and that is the religion, and it helps me. But to be Albanian is also very important,... maybe because we have always been the minority in Macedonia.

Stuart Hall did not only use the concept of a social identity, but also introduced a new concept of ethnicity, "which engages rather than suppresses difference and which depends, in part, on the cultural construction of new ethnic identities."¹⁵ The development of new ethnic identities can mostly be observed in groups which are classified as minorities, and the new quality of

¹⁵ Stuart Hall (2003) "New Ethnicities", in: Linda Martin Alcoff/Eduardo Mendieta (Ed.): *Identities. Race, Class, Gender and Nationality*. Malden/ Oxford/ Melbourne/ Berlin, p. 90-95, p. 93.

these identities lies within the symbolic value of ethnicity. Ethnic attributes like scarves, turbans, hair cuts and beards, tattoos or henna on the hands mark a cultural difference from the majority of society, and therefore gain a symbolic value for identity constructions.¹⁶ This process is described incompletely here, but should be mentioned, because new ethnic identities or the representation of an ethnic background grows stronger within the status of illegality.

Ismet uses the ethnically based identity representation as a resource to be someone in a country where he is a social and political nobody ("...if you are illegal, you need something else, something where you are someone or that means something to you.") It functions as "means by which the processes of competition, brought about by political and ecological factors, were carried out."¹⁷ So, the migrant's own Albanian identity is set off against the illegal attribution from the receiving country. Plus, the new ethnic identity is not recognised as being an attribution from the government or another state institution, but it is an *own* definition, so that it conveys a sense of belonging – very much in opposition to an illegal identity, which does not convey any sense of belonging or social and political membership.

Gabir, a friend of Ismet, and also a rejected asylum seeker in Austria, argues similarly: "I am illegal here, but at home I am Albanian. We always lived as a minority in Macedonia and my tradition is to be Albanian." I ask Gabir: "Did your parents teach you anything about how to be Albanian?" He answers:

No, that's ... how shall I explain that? In school I learned about the history and there were always conflicts between us and the Macedonians in daily life, we just could not live with each other. The Macedonians always said the Albanians are so bad and then you grow up like that and people tell it to

¹⁶ Vgl. Herbert J. Gans (1996) "Symbolic Ethnicity: The Future of Ethnic Groups and Cultures in America", in: Werner Sollors (Ed.): *Theories of Ethnicity. A Classical Reader*. Hants, p. 425-459.

¹⁷ Muriel D. Schein (1975) "When is an Ethnic Group? Ecology and Class Structure in Northern Greece", In: *Ethnology*, "An international journal of cultural and social anthropology", Volume XIV, p. 83-98, p. 91.

their own children, and then the conflict can take a long time to be sorted out. [...] I personally could live with them, but they can't live with us. They say: 'You are not good'. We should not learn Albanian in school and stuff. It was really strange for me to speak Albanian at home and Macedonian in school.

"Did you ever think about going to Albania to get out of the minority situation?" I ask him and Gabir laughs: "No, my whole family is born in Macedonia [...] I will always feel Albanian." Nasar, a former refugee from the Kosovo, who is now holding the Austrian citizenship, joins the conversation: "Well, everywhere I go now, I say: 'I am Austrian.'" Gabir says: "Yes, but you have Austrian citizenship." Nasar states: "But you have Macedonian citizenship, and nevertheless you don't say that you are Macedonian." Gabir replies: "But I ... it says Albanian in my passport, not Macedonian." Everybody laughs.

It seems absurd, but the connection between the passport identity and the new ethnic identity becomes obvious in this conversation. Ethnic identifications are mostly connected to a national state, but in opposition to the national legal belonging, which builds on an interlink between political membership and an imagined national culture – ethnic identifications (being Albanian, having certain traditions and "roots") exist even if the political membership of the nation state is not given anymore. The new Albanian ethnic identity of the two Macedonians does not contradict their passport identity. They reproduce exactly what their passport says: they are members of the minority group of Albanians in Macedonia. Ismet and Gabir take what *their* nation state gives them as their own identity. And if these migrants are offered an illegal identity (with no sense of belonging or social and political membership), then ethnic identity patterns grow stronger, because they are not necessarily based on a political membership and carry a sense of belonging. "Loose identities"¹⁸, which originally varied in time and space, are presented as stable to open up resources

¹⁸ Donald Baxter (2001) "Loose identity and becoming something else". In: *Nous*, 35:4, 2001, p. 592-601.

against illegality and the lawless status that comes with it. New ethnic identities produce a feeling of belonging and are presented rigidly in the narratives of undocumented migrants. And they are not negotiable (any more), as one can see from Gabir's statement, when I ask him: "If you would have Austrian citizenship, would you call yourself an Austrian?" He says: "I would say: 'I am Austrian, but I feel Albanian.'"

5. Multicultural identities

Grace also formulates an own identity, which could be analysed as a resource against (or more precisely within) illegality. She defines her own identity as a multicultural identity; an identity that is based on the idea of people with different cultural backgrounds living together peacefully. She says in the interview:

I always had my own identity. That has nothing to do with illegality. Of course the illegal status is important, you don't have any money, you don't feel good. But I was brought up very independently. My mother is a communist and my father a capitalist. They both live in Vienna and are getting divorced now, because my father is too sick. My brother was also illegalized and became an alcoholic. There is also the goddamn racism. A lot of Afro-Europeans have an identity problem, because they are black. I don't have one, I know that I look similar to my father. I also know where I stand politically, and humanity is my motto in life. [...] The variety of people I grew up with gave me my identity. Where I grew up, my parents had a lot of different friends, occupationally as well as ethnically. At our house, there did not exist a patriotic home, only the united culture of everywhere. We had friends from ten different countries, from Spain and Vietnam, from Chile... really from everywhere. And when you grow up like that for years... when I thought about multicultural living, I could only ever think of spices. I took this from here and that from there and all in all I am a mix, not original, but it tastes good. When I was a child I was already very self-confident. Back in those days I was racially attacked, and my mother always said: 'Don't let them hurt you.'"

Grace emphasises different aspects which influenced her identity: the education of her parents, the diversity in the household and humanity as her highest value in life. She tells me that her own identity has nothing to do with her illegal status, but nevertheless I assume that she chooses this identity representation in the interview also to create a counter pole to illegality. She presents herself as being a member of a group in which cultural diversity is seen positively, and therefore uses her multicultural identity to position herself in a social way; similar to Sebastian. Grace shows in her argumentation that she does not belong *there* – with the undocumented migrants – but with the winners of globalisation who can afford ideas of hybrid multicultural identities. Grace distances herself from ethnically based identification patterns like Ismet and Gabor argue them. When I ask her if she was ever discriminated against, she replies: “Well yes, exoticism and racism, both. The positive racism, where you meet men who only take you because you are black, that is also very hurtful.” I ask her if such notions don’t affect her identity, even with her multicultural understanding, and she replies:

Yes, of course. It seems to me like a constant struggle sometimes. Always this fight. [...] Wrong identification, that means they reduce you to something and do not really know who I am. When this happens I ask the people sometimes: ‘Do you know how I live, do you know who I am and what I have done?’ And what really matters to me and who I am, gets completely lost.

She sees her multicultural identity as miles away from the idea of a stable ethnic identity, and Carlos argues similarly to her. He explains at the end of the conversation with me that Austria did not become his home, just because he carries the Austrian citizenship now:

I have my peace now, because I am legal, but I’m always kind of in between and not 100% Austrian. Also because of my past, the bad experiences when I was illegal. What I can best identify with is Vienna. I love the city and here I feel at home, I like my Schnitzel and the Maratow Cake and I suppose it makes me a Viennese.

Differences in the presentation of the own identity as a new

ethnic or a multicultural identity can be explained by the migrant's country of origin, their length of stay in Austria and their knowledge of the language and culture of the receiving country. Grace and Carlos lived legally in Austria for a long time before they became undocumented and therefore had a better chance to integrate into Austrian society and identify with the rules, while Gabir and Ismet were undocumented right away and did not have a chance to collect a lot of knowledge about cultural, social and legal patterns. It also has to be taken into account that the given answers were produced in a specific context. In interviews, the expectations of the interviewer and the interviewees play an important part, so when I ask the migrants for their thoughts about their identity, they had different ideas about what they were asked for: Grace associated her upbringing, Sebastian associated the police and him fitting the stereotype of drug-selling asylum seekers and Ismet and Gabir felt that they were being asked about their Albanian traditions. From the answers, it becomes obvious that identity constructions are fragile. The migrants try to produce a continuity in their life through their identity strategies, but this is always influenced by a social context, which is capricious by definition. Therefore, identities cannot be analysed as fixed models of representation; they are argued individually and represent a bigger reference system, which interlinks multicultural and new ethnicity identity strategies.

6. A global reference system for identities

"More persons in more parts of the world consider a wider set of 'possible' lives than they ever did before",¹⁹ writes Arjun Appadurai. The talk about the loss of power of nation states increases just as much as the "discourse of the transnational"²⁰, and identity strategies, which are based on national membership seem

¹⁹ Arjun Appadurai (2002) "Global Ethnoscapes: Notes and Queries for a Transnational Anthropology", in: Richard G. Fox (Ed.): *Recapturing anthropology. Working in the present*. Santa Fé, p. 191-210, p. 197.

²⁰ Katerina Kratzmann (2004) From 'Rethinking History' to 'Rethinking Identity'. "Cultural belonging and Migration in the Ukraine". In: *Ethnologia Europea*, 34.1. Copenhagen, p. 29-42.

to give way to notions about different lives and varying identification patterns. Homi Bhabha's successful concept of the "third space"²¹ stands for the development of new spaces through international migration and a new dimension of border crossing. In these new spaces – also called "transnational social spaces"²² – identities and their representations become detached from territorial boundaries to be newly negotiated: "multiple identities,"²³ which develop into a new form of "cultural hybridity"²⁴.

The Swedish anthropologist Ulf Hannerz showed with his term creolization that globalisation does not necessarily mean a homogenisation of the world, but an increase of "cultural complexity"²⁵. Structures and social orders of meaning have changed, and the different authors (whose theories differ from each other) agree that the traditional linkage between people, culture and space breaks open. Flexible cultures are developing, which are not linked to one territory, but still influence peoples' sense of belonging. People travel with their cultural patterns and meanings through space, so that geographical space and frontiers do not limit culture anymore. In general, one gets the impression that multicultural identities which are spread by the media, transfer of goods and international migration gain influence.

Even though this is probably true for big parts of the world's population, it does not mean that new ethnicity identities fade. On the contrary, new ethnicity identities grow just as quickly as multicultural ones, and therefore it is not sufficient to make the point that there are no "pre-given cultural-territorial entities"²⁶, especially since this is general knowledge today. It seems more

²¹ Homi Bhabha (1990) "The third place", in: Jonathan Rutherford (Ed.): *Identity: Community, Culture, Difference*. New York, p. 207-221.

²² Nina Glick Schiller/Linda Basch/Christina Szanton Blanc (1997) "From Immigrant to Transmigrant: Theorizing Transnational Migration", in: Ludger Pries: *Transnationale Migration*. Baden-Baden, p. 121-140.

²³ Pradeen Ajit Dhillon (1994) *Multiple Identities*. Frankfurt/ Vienna.

²⁴ Vgl. Homi Bhabha (1994) *The Location of Culture*. London.

²⁵ Vgl. Ulf Hannerz (1992) *Cultural Complexity. Studies in the Social Organization of Meaning*. New York.

²⁶ Akhil Gupta/James Ferguson (1997) *Culture, Power, Place. Explorations in critical anthropology*. Durham, p. 4.

important to emphasise that a global reference system for identity strategies is developing: "The new global culture system generates and strengthens differences, instead of suppressing them, but differences of a special kind. [...] Whilst different cultures are still different, they become increasingly different in a very similar way. The *dimensions*, between which they vary are more limited and therefore their differences are comprehensible from a lot of different perspectives. [...] The 'local', the 'ethnic' and the 'national' can not be interpreted as an opposition or resistance to a global culture, but is an essential part and expression of global culture. Like Fusco is pointing out, the intellectual discourses about aliens and foreigners have their function within the system of global culture and are not an external critique."²⁷ Correspondingly, the argumentation and stressing of a new ethnic identity from Ismet and Gabir is not to be interpreted as an opposition to Grace's representation of a multicultural identity. They are two faces of a reference system which is characterized by technological, economical, political and social networks around the globe *and* the local adaptation of these networks.

To sum up, the illegal status influences undocumented migrants' identity strategies in such a way that alternative identifications play a more important role in identity representations. This is because the definition from the state as being illegal – the passport identity – is perceived as being unattractive, so the migrants describe themselves as being illegal to name their situation, but also represent an own identity, which seeks to differ from the illegal status and makes place for ethnic recollection on the one side and multiple differentiation concepts on the other side. In addition, a global reference system influences identity strategies, and identification with a multicultural society is mostly argued by people who are the winners of globalisation; the ones who recognise cultural difference in varying colours of passports and easily consumed portions of different food, dance, music and lifestyles. Most undocumented migrants do not belong to this group. They are

²⁷ Richard Wilks (1996) "Learning the Local in Belize: Global systems of Common Difference", in: Daniel Miller (Ed.): *Worlds apart – Modernity Through the Prisma of the Local*. London, p. 110-133, S. 118.

not the winners of globalisation, but its losers. Through their migration practices, they might get in touch with hybrid concepts of multi and trans culture, but migration controls and a lack of resources stop them from living these concepts. Consequently, undocumented migrants choose representations of a new ethnic identity which strengthens traditions, home and cultural roots more often than a multicultural identity. Like a rejected asylum seeker states in an Austrian newspaper: "I need more home, more at least than a world of people who are at home in the world and in a cosmopolitical holiday can imagine."²⁸

7. Consequences on Policy Options

If I proceed from the assumption that identity strategies and their representations are influenced by the illegal status, it seems necessary to think about the question, which policies towards undocumented migrants should be followed to allow more identification with the receiving society in order to gain integrated subjects²⁹.

In general, the phenomenon of illegal migration demonstrates a "liberal paradox"³⁰: modern nations are built on pictures and imaginations about *their own people* versus *the others* (non-nationals) to create a sense of belonging, and at the same time they are obliged to protect some of these others, like refugees or certain kinds of foreigners. When nation states do not fulfil political agreements like the Geneva Refugee Convention or Human Rights, their sovereignty is threatened just as much as when they blur strict

²⁸ Austrian newspaper: *Die Presse*, 17.07.04, p. 7.

²⁹ The authorities would argue that undocumented migrants are not ment to become integrated, because they are not even supposed to be here. But I think it is absolutely necessary to integrate also „not wanted“ people to some extend, also to avoid discussed „parallel societies“, as they are a product of our societies, not the communities or people talked about. Plus, I do not assume that integration necessarily needs an identification with the receiving society, but it certainly helps to take part in social life.

³⁰ Cp. Matthew J. Gibney/Randall Hansen (2003) "Deportation and the Liberal State: The Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom", In: *New Issues in Refugee Research*, Vol. 77. UNHCR, Geneva.

borders between *us* and *them*. Giorgio Agamben describes the ambivalence of the modern law, which reflects the liberal paradox. He describes the inclusion of the “naked life” into the political area as the basic, but hidden, ground of sovereignty.³¹ According to Agamben, the current lawless twilight zone regarding undocumented migrants is not a new phenomenon. In the birth hour of law, in antiquity, there was already a differentiation which still develops its disastrous effect today: the differentiation between the pure existence and the political existence, between the lawless creature (*zoe*) and the good life (*bios*), between *that* one is alive and *how* one lives. The black holes of the world society without Human Rights are inherent in national systems. Law does not exist without lawlessness, and, according to Agamben, the consequence is that people who do not live well do to some degree not live at all or at least their lives are not worth much. Under these circumstances, it seems more than doubtful whether lawlessness can be abolished.

Moreover, if people without or with little national rights would be given more rights, in the theory of Agamben that would also mean to include their lives in the state order; they would not be freed from sovereign power, but slowly grow in its systems. From the ambivalence of the law, Agamben derives his main point: in the moment when the law is stripped of a person, only the body remains, and there is no political person left who can claim rights – sometimes not even for the naked life. And really, some undocumented migrants don’t seem to be more than their bodies: the fact that hundreds of them die every month in the Mediterranean and elsewhere gets public attention, but only a few bodies get saved. And if undocumented migrants survive the journey and keep their bodies, they are deprived of their political rights and the possibilities of a good life in the receiving countries by their illegal status. If one takes Agamben’s argument seriously it seems that undocumented migrants can either be given national rights and become a subject of the states’ hegemony, or be excluded completely, in which case they are left without any legal personality whatsoever.

³¹ Giorgio Agamben (2002) *Homo sacer. The Sovereignty of Power and the Naked Life*. Frankfurt, p. 16.

But, as undocumented migrants are not completely excluded – they are on the territory and do exist – it would be useful to break open this dichotomy. The logical consequence of the liberal paradox would be to question the self-understanding order of the inside and the outside; to expand rights and privileges to an additional group (like undocumented migrants), and to ask for the general validity of human rights. Which brings us to an additional problem of the liberal paradox. As Hannah Arendt pointed out over fifty years ago, the

“whole question of human rights was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one’s own people, seemed to be able to insure them.”³²

The fact that universal human rights can only be ensured by nations and nations base their legitimacy on giving rights to people they exclude by definition, is a fundamental problem. And as the tension between human rights and nationally bound ones is a critical point of contention in debates about the appropriate political and legal response to undocumented migrants, I would like to argue for human rights based policies *and* nationally grounded ones, as they are both very important to guarantee legal protection for undocumented migrants.

Three main points are important when it comes to policy options toward undocumented migrants. Firstly, the expansion of immigration possibilities by nation states and the European Union; secondly the reduction of migration causes in the sending countries; and thirdly the security of basic rights in the receiving countries, which can only be based on Human Rights for people who stand outside the states responsibility. If one listens to undocumented migrants, one will find that they don’t necessarily want to stay in the EU long-term, but they still want not only a recognition of their own identities, but a sense of belonging to the countries they visit. They want to be treated with respect and do not want to count on tolerance or kindness for that, but on a

³² Hannah Arendt (1951) *The Origin of Totalitarianism*. New York, p. 291.

minimum of regulated rights. These could be achieved by nationally or European wide given limited and unlimited working permits and a looser visa policy – for example the definition of family members in family reunions could be based on a wider family term, so that the family concept of some migrants is used not the one of the receiving country. There could also be a European wide amnesty in order to free long term undocumented migrants from their status; it is widely known that these migrants risk border crossing and the confrontation with authorities to get into a state that plans a legalization campaign, which seems unnecessary in the EU.

Concerning the sending countries, it is necessary to build up democratic political systems, working possibilities and to improve on money transfers. Even if migrants are undocumented they should have the possibility to send earned money back to their countries – we are all for development aid, so I can not see what should be wrong with that – and to invest in infrastructures like schools, streets and factories at home. Plus, the conditions for undocumented migrants who want to go back to their home countries voluntarily should be better as well, for example rejected asylum seekers should be able to migrate back without being accompanied by the police. Return migrations should be made more attractive by giving the possibility to re-migrate to Europe after some time. This policy would serve the aim to keep migration flows fluid and flexible, so the impact on migrants and receiving countries is positive for both sides.

As illegality is defined and produced by *our* states, I would also like to argue for a human rights based social inclusion of undocumented migrants. It seems very much necessary to improve on the social circumstances of those migrants who can not be legalised by an expansion of immigration possibilities. If undocumented migrants could have a right, which they could use in cases of injustice – like un-paid wages for performed work or bad treatment from the police – they would not only become legal, but social and political persons, who have a chance for *bios*, a good life. This right would need to be institutionalized and could be included in a European wide and international migrants right system. The main needs in the field of social inclusion are to improve on the access to health care and accommodation as much as to improve on working rights. For example some countries (like

the UK) have a national health system, which can be used anonymously and it is not necessary to tell the police where one lives, as it is in Austria.

Alongside these measures concerning the social inclusion of undocumented migrants, there should be a shift in the perception of undocumented migrants. To transform these "Strangers into Citizens"³³, identity should not be seen as a fixed quality, but the migrants should be able to have a positive identification with the receiving society in order to make them responsible visitors. To question the traditional borderlines between *us* and *them*, we need a cosmo-political understanding in Austria and Europe. We need a new discourse in which migrants (documented and undocumented) can position themselves in our societies and we should support an acceptance (and legal equality) of cultural differences, without stretching them or using them as a basis for unequal treatment.

³³ Strangers into Citizens' was a campaign in London claiming regularisation of undocumented migrants. On the 7th of May 2007, there was a rally, in which 8.000 people took part, as part of the campaign. URL: [http:// www.ncadc.org.uk](http://www.ncadc.org.uk).



BLURRING BOUNDARIES. "REFUGEE" DEFINITIONS IN POLICIES, LAW AND SOCIAL DISCOURSE IN ITALY

CHIARA MARCHETTI

The article intends to address the forced migration phenomenon in Italy within the scope of the changing nature of (forced) migration as a whole. We suggest that today we are not only facing a fragmentation of different forms of international protection, but also a more complex process of blurring the boundaries among distinct categories of the so-called forced migrants. For this purpose, we analyze not only the legal framework, but also the social discourse of those who decide the attribution of these labels and of the actors who interact day by day with these different migrants.

1. Introduction

In spite of its strategic position in the middle of the Mediterranean Sea, Italy did not comprehensively deal with asylum issues for a long time. As suggested by many scholars, even immigration is a fairly recent phenomenon for a country that on the contrary faced a long history of emigration.¹

¹ Cf.: VV.AA. (2006) *Le migrazioni. Radici storiche e problematiche attuali di un complesso fenomeno sociale*. Novara, Italy: Istituto Geografico De Agostini; Gil, Loescher (1993) *Beyond charity. International cooperation and the global refugee crisis*. Oxford, UK: Oxford University Press; Maria Immacolata, Macioti and Enrico, Pugliese (2005) *L'esperienza migratoria. Immigrati e rifugiati in Italia*. Rome-Bari: Italy: Editori Laterza; Saskia, Sassen (1999) *Migranti, coloni, rifugiati. Dall'emigrazione di massa alla fortezza Europa*. Milan, Italy: Feltrinelli.

Between the end of the Second World War and the beginning of the Nineties, asylum wasn't even mentioned in any legal instrument of ordinary law, though the Italian Constitution contains a very liberal provision on this matter. In 1954 Italy ratified the Geneva Convention relating to the status of refugees, but until the 1990 Martelli Law² it maintained the geographical limitation, entailing the recognition only of refugees coming from socialist countries in Eastern Europe. Hence, during the entire Cold War period, Italy for the most part ignored the forced migrants coming from Africa, Asia and Latin America: they could only request to be recognized under the UNHCR mandate, the Agency being present in Italy since 1953, but didn't receive any institutional recognition. This is one of the reasons why the refugee presence in the country settled on relatively low numbers: in December 1989, Italy hosted around 11,500 refugees, 7,500 recognized by the Italian government and 4,000 under the UNHCR mandate.³

It was the Martelli Law in 1990 that introduced the first provision for asylum procedure, which still is the main basis for asylum law in Italy. The Martelli law was later amended by the 2002 Bossi – Fini⁴ Law introduced by the then centre-right-wing government. The evolution of asylum in Italy is also related to its role in the European Union. The harmonisation process directly involves Italy not only because of the legal instruments to be adopted, but also because of its crucial position as one of the Southern frontiers of the European Union.

Despite all the political concerns about an instrumental use of asylum, the claims have not sharply increased in these last years, so that at the end of 2005 there were about 18,714 recognized forced migrants.⁵

² Law n. 39 of 28 February 1990.

³ Giovanni, Ferrari (1996), *Rifugiati in Italia. Excursus storico-statistico dal 1945 al 1995*. In the same year, in France for instance there were more than 130,000 recognized refugees.

⁴ Law n. 189 of 30 July 2002.

⁵ 9,042 are refugees under the Geneva Convention, the rest have a permit to stay on humanitarian grounds. See ICS (2006) *L'utopia dell'Asilo: il diritto di asilo in Italia nel 2005*. Turin, Italy: Ega.

This article⁶ intends to address the forced migration phenomenon in Italy within the scope of the changing nature of (forced) migration as a whole. I suggest that today we are not only facing a fragmentation of different forms of international protection, but also a more complex process of blurring the boundaries among distinct categories of so-called forced migrants.

2. Italian Legal Framework on Asylum

Since 1990, the history of asylum and forced migrants in Italy has developed in different directions. Due to the legal fragmentation and the political unwillingness to definitely deal with this issue, the picture of asylum has not become either consistent or comprehensive.

This confusion is partially due to the fragmentation of the Italian provisions and to the absence of an organic asylum law, but it also partly reflects a wider process of category redefinition, which transcends the national borders and cuts across the whole area of forced migration studies.

Because of this fragmentation, it is crucial to present the current situation, trying to give the most exhaustive picture of the different forms of protection a fleeing person can claim in the country and the different legal status depending on these conditions.

2.1 Asylum Seeker

From a formal and general point of view, an asylum seeker is a person who has left his or her country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on the application. According to the current Italian Law, an individual remains an asylum seeker from the initial filing of his claim until the notification of the result by the Territorial Commission for the Recognition of Refugee Status (*Commissione Territoriale*) in charge for his application.

The status of an asylum seeker in Italy is very delicate and

⁶ It builds on an empirical qualitative research carried out in Italy – mainly in the cities of Rome, Milan and Gorizia – between January 2006 and July 2007, in context of my PhD in Sociology, University of Milan.

precarious. Before the last reform, introduced by the 2002 Bossi – Fini Law, the situation of asylum seekers used to be conditioned by the extreme length of the procedure (an average of eighteen months, but in many cases even two years or more) and by the impossibility of gaining legal employment during that period. The Bossi – Fini Law⁷, while introducing many restrictions and limitations to the asylum right, also aimed at shortening the length of the procedure through the institution of the Territorial Commissions system and of the fast-track processing for all the detained asylum seekers. Since the implementation of the European Directive on reception,⁸ the asylum seekers are allowed to work if their application is still pending after six months of filing.

Accordingly, we can observe an improvement in the condition of asylum seekers, as far as the right to have a faster decision and the right to work are concerned. Nevertheless, the juridical and social situation of this category is still precarious – as in the past, if not even more.

The new procedure entails, for the first time in the Italian asylum system, the possibility to detain the asylum seekers inside the so called Identification Centres (*Centri di Identificazione, CI*) or in some special cases inside the Temporary Permanence and Assistance Centres (*Centri di Permanenza Temporanea e Assistenza, CPTA*). In that case, the asylum seeker is subject to an accelerated and simplified procedure (*procedura semplificata*) which has crucial consequences on the personal rights of the individual: for example, the Police Headquarters doesn't issue a regular permit to stay but a "nominative certificate proving the individual's qualification of person seeking refugee status, *present* inside the Identification Centre or inside the Temporary Permanence and Assistance Centre".⁹

From a juridical perspective, the detainee's right to a jurisdictional safeguard gets strongly reduced; from a political and symbolical point of view, the vulnerability of the person and the constant threat of irregularity – and then implicitly of deportability and *refoulement* – are highly stressed.

⁷ Implemented through the Presidential Decree n. 303 of 16 September 2004, regulating the procedures for the recognition of refugee status.

⁸ Implemented through the Legislative Decree n. 140 of 30 May 2005.

⁹ Art. 3, Par. 2, Pres. D. n. 303 of 16 September 2004 (emphasis added).

2.2 *Refugee Status According to the Geneva Convention*

The main goal of any asylum seeker remains to be recognized as a refugee, as defined by the 1951 Geneva Convention. In Italy, the Geneva Convention on refugees was implemented by the Law n.722 of 1954 and then referred to in many legal texts, though all contained within general immigration laws.

The refugee definition adopted in Italy is therefore the classical one, the same as in all the other countries signatories of the Convention. As provided by Article 1, the refugee is:

“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

This definition well clarifies how restrictive is talking about “political refugees” as if they could represent the whole category. And in Italy this is still happening very often. Nevertheless, despite the broad scope of the Geneva Convention – which also refers to racial, religious or membership grounds – that definition is highly exclusionary, too, as demonstrated by the fact that entire groups of forced migrants don’t fulfil those requirements: the most evident cases are the so-called environmental or development-induced refugees.

2.3 *Constitutional Asylum*

The Italian legal system is based on the 1948 Constitution. Interestingly, when talking about refugees and asylum right, the debate seldom focuses on the provision expressed by the Art. 10, Par. 3 of the Constitution itself:

“Foreigners who are, in their own country, denied the actual exercise of those democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law.”

Though almost ignored and not so often enforced, this definition should in theory represent the guidance and the premises to any

national legislation on asylum matters. According to this definition, therefore, the condition of a conventional refugee differs from the one of a person entitled to asylum under the Constitution. In the first case, the requisite is the *well-founded fear of a persecution*, while in the second it lies on the *impossibility to exercise the democratic freedoms* guaranteed by the Italian Constitution.¹⁰ It means that to be acknowledged as a conventional refugee further requisites are needed, which are not necessary for ascertaining the right to asylum under the Constitution.

The crucial importance of the Constitutional provision lies on the very nature of the asylum right put forth by that article: Constitutional asylum is an absolute subjective right to entry and stay in the territory of the Republic. This means that it can't be temporarily limited or geographically restricted. Any provision contradicting this spirit should be considered unconstitutional.¹¹

2.4 Humanitarian Protection

Humanitarian protection consists in an individual determination subsequent to the denial of refugee status. It is founded both on the principle of non-refoulement sanctioned by the Art. 33 of the Geneva Convention and on the prohibition of torture provided for by the Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Even if motivated by a condition of generalized violence or by the risk of torture in the country of origin, the decision to grant humanitarian protection is taken case by case, when it is impossible to determine the individual persecution or fear of persecution of the claimant. Until April 2005, the Central Commission could only recommend the Police Headquarters to issue a permit to stay on humanitarian grounds, while in the new procedure the Territorial Commissions assessment has become compulsory.

¹⁰ ICS (2006) *op. cit.*, p. 33.

¹¹ It is not by chance that already in 2004 the provisions put forth by the Bossi – Fini Law had received the highest number of objections on grounds of unconstitutionality (657) ever raised against an Italian law. Cf.: Amnesty International (2006) *Invisibili. Minori migranti detenuti all'arrivo in Italia*. Turin, Italy: EGA Editore, p. 33.

At the European level, humanitarian protection corresponds to the so-called subsidiary protection regulated by the Refugee Qualification Directive.¹² The word “subsidiary” well explains that it is a complementary form of protection to be applied when the Geneva Convention fails to protect the forced migrants.

2.5 *Temporary Protection*

Temporary protection is granted in case of humanitarian emergencies. In such a situation, the State can decide for a collective assessment and recognition, similar to the so-called *prima facie* refugee status in the South of the world. Unlike refugee status and humanitarian protection, granting temporary protection is not based on an individual determination by a Commission. On the contrary, it consists of an autonomous and sovereign decision by the State – in this case, Italy – to guarantee some rights for a definite period of time and to a particular homogeneous group of people, coming from the same country or territory affected by a conflict or a generalized crisis. Therefore, it is an exceptional procedure guaranteeing an immediate tutelage, above all in the situations where a massive inflow could hinder the normal asylum system.

Even if exceptionally used also in the past – for instance, between 1993 and 1997, 58,500 people coming from former Yugoslavia and 10,000 originating from Somalia benefited of it – it is a 1998 Legislative Decree¹³ that now provides for temporary protection measures in case of relevant humanitarian needs, on the occasion of conflicts, natural disasters or other particularly serious events occurring in non-EU countries.

At the European level, the 1997 Treaty of Amsterdam¹⁴ already mentioned the need to think of

¹² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

¹³ Legislative Decree n. 286 of 25 July 1998.

¹⁴ Treaty of Amsterdam, amending the treaty on European Union, the treaties establishing the European Communities and certain related acts, Amsterdam, 1997. Art. 73K, Par. 2/a.

“minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection”.

3. The Social Discourse upon Forced Migrants

As we have already seen, the institutional answer to the increasing complexity in the field of forced migration is addressed through a transformation of the refugee label by a fractioning, which produces new labels, in order to manage mixed and blurred migration flows.¹⁵

Moving from the institutional level to the asylum procedure and the integration process, we can investigate the different ways for dealing with the issue of defining and distinguishing the categories suggested by the laws. Any actor involved in this process assigns different meanings and boundaries to the categories he is confronted with. The institutional level is crucial in order to provide the official labels, but facing the same definitional problem from the point of view of those who decide the attribution of these labels or interact day by day with these different migrants enables us to draw a more complex picture, where the boundaries are maybe less precise and taken-for-granted, but at the same time more real and tailor-made on the specific cases we deal with.

3.1 *Clandestini or Asylum Seekers?*

The first crucial distinction to be explored is the one between undocumented migrants, the so-called *clandestini*, and asylum seekers. This analysis is particularly important because it determines whether the applicant is given access to the asylum procedure and eligible to apply for asylum. As is well acknowledged by international refugee law, a refugee should not be sanctioned because of its illegal entry or presence in the country of refuge.¹⁶ But in practice, they are.

¹⁵ With regard to this change, cf. Roger, Zetter (2007) “More labels, fewer refugees: remaking the refugee label in an era of globalization”, *Journal of Refugee Studies*, Vol. 20, N. 2, pp. 172-192.

¹⁶ Geneva Convention, Art. 31 (Refugees unlawfully in the country of refuge), Par. 1.

The paradox is that if the migrant is expelled before he can even submit his asylum claim, then nobody will be able to recognize him as a refugee, regardless of whether his claim was well-founded or not. Considering the Italian case, we can observe that if you look at all the migrants entering the country essentially from the point of view of the regularity of their access to the national territory, then the emphasis will be on the adequacy of their documents, more than on the potential need of protection.

The effects of this prejudice against undocumented migrants can have dangerous effects on the lives of the forced migrants who are not even able to submit their claim to the competent authority. Before realizing it, they can find themselves back in their country of origin or in the last third country they crossed. A serious risk faced by forced migrants coming to Italy consists in being deported to countries where the asylum right is not respected, such as Libya. Between October 2004 and September 2005, for instance, many irregular migrants have been expelled from Italy and deported to Libya, in the frame of the bilateral readmission agreement between that country and Italy, mainly after having been detained in the Lampedusa reception centre. According to Amnesty International, among the 2,778 deported migrants there might have been many refugees who, once in Libya, could have been detained again and finally sent back to their country of origin.¹⁷

At an institutional level, the policies towards migrants in general – and then necessarily also towards potential refugees – are impacted by security considerations. Since the priority is to control and fight against the so-called illegal migrants, then asylum, too, is incorporated into this area of interest and consequently subjected to the same controls and limitations.

The asylum provisions contained in the Bossi-Fini Law confirm this impression. A Jesuit Refugee Service (JRS) worker based in Rome tries to interpret the spirit of the legislator:

“Since I am fighting, I am talking about the need, I am trying to fight the clandestine arrivals, and since asylum can be a weak point of this policy of stricter control, then I put in two

¹⁷ Amnesty International (2005) *Lampedusa: ingresso vietato. Le deportazioni degli stranieri dall'Italia alla Libia*. Torino, Italy: EGA Editore, pp. 23-42.

articles [on asylum] not with a view to dealing with asylum as a whole, but with a view to facing the instrumental claims or the instrumental arrivals.”¹⁸

Also an interviewee working for the Italian Consortium of Solidarity (ICS) stresses the priority given to the security issue by the government:

“The current government has established politics on migrants in general, both economic migrants and refugees, mainly on security grounds. Therefore it is undeniable that in the last five years there has been a deterioration.”¹⁹

The detention²⁰ policy towards irregular migrants and asylum seekers can be interpreted in the same framework. Today the percentage of asylum seekers confined inside the centres is very high,²¹ so that it has become the rule, instead of an exception, as it was supposed to be. This contradicts even the provision set by the Law, which states that “an asylum seeker cannot be detained only in order to assess the asylum claim submitted”.²²

The widespread use of detention against asylum seekers, either inside the CPTA or inside the CI, shows the prejudice leading the legislator: the idea that most of the asylum claims are unfounded and fraudulent, and that the main goal is to facilitate a fast removal of the so-called bogus refugees, together with the other undocumented and irregular migrants. The physical and legal promiscuity among these different centres reveals the true priorities

¹⁸ Interview with a JRS worker, Rome.

¹⁹ Interview with a ICS worker, Rome; the reference is to the then centre-right Government led by Silvio Berlusconi.

²⁰ The Italian word used for detention is *trattenimento*, referring to an administrative injunction limiting the freedom of movement; it is juridically – though not substantially – different from the word *detenzione*, which would imply a penal provision decided by a judge. We decided to keep the word detention in English, since it reflects the real situation and is commonly used in the immigration literature.

²¹ In the first year of activity of the Territorial Commissions, that is from April 21, 2005 to April 27, 2006, more than 62 per cent of claimants have been detained. See ICS (2006) *op. cit.*, p. 118.

²² Art. 1 bis, Par. 1, L. 189/2002.

of the country, not consisting in the real respect of asylum rights, but more in a punitive and deterring policy towards all the migrants trying to enter Italy, regardless of the reasons determining their flight.

"It is obvious that the priority is given to throwing people out of Italy. It is a multifunctional vision of the CPTAs as one-size-fits-all CPTAs, in order to show that the State is strong and controls the migratory clandestine movements and at the same time to show that the State hosts these desperate people after the shipwrecks, the travels of despair. Therefore there is a double-faced behaviour, according to what is more convenient for politics, spending more money on these [the detention centres] than on the reception."²³

Somebody else explains the need for a policy of deeper control by arguing that if you don't prevent mass arrivals, the situation would worsen first of all for the genuine refugees. A strict interpretation of the Convention and an iron hand against undocumented migrants could act as a deterrent. Interestingly – in the words of a Prefect – this argumentation is based on *humanitarian* considerations:

"There is such a mass of people pushing to come that in some ways we must select, since it is the smugglers them-selves who exploit [the migrants]. The problem is that we need somehow, by a faster procedure and a faster answer to the claims, to dissuade those people who come thinking: 'there is a long time to wait, meanwhile I will work somehow, I will be able to recover the money spent for the trip and then it's worth it'. Since they spend between 2,000 and 8,000 Euros for a clandestine trip, and then it turns out that you have to go back to your country in one week, one month, then probably the number of claims decreases and so we can have a selection of the real refugees".²⁴

A firm asylum policy would fight against the smugglers and help genuine refugees to have a fair and fast procedure. But the risk

²³ Interview with a ICS worker, Rome.

²⁴ Interview with the Prefect, President of the Gorizia Commission.

that genuine refugees are caught in the net is always behind the corner. We could then suggest that maybe this is one of the unavowed goals of the Italian governments, even if the individual officers are not aware of it.

It could be read as part of a wider programme that may be called *preventive refoulement*,²⁵ meaning that Western governments are more and more inclined to prevent asylum seekers from having access to the territory and to the asylum procedure.

The attempt is to keep the forced migrants near the areas of crisis, maintaining in this way a direct or indirect control over refugee management. In any country, the border represents the last chance to remove people without transgressing the principle of non-refoulement. Obviously, it depends on the interpretation of the border and of the concept of refoulement, but by labelling all the undocumented migrants as *clandestini* their removal is eventually legitimated.

3.2 "Humanitarian" Protection

After the Bossi-Fini Law was enacted and seven decentralized Territorial Commissions for the Recognition of Refugee Status (*Commissioni Territoriali*) were established in 2005, there has been a great change in the field of protection. Since the very beginning, the number of people granted humanitarian protection exceeded by far the number of people granted refugee status. Accordingly, the approval rate of humanitarian protection rose from 7.32 per cent in 2003 and 26.82 per cent in 2004 up to 41.95 per cent in 2005. Last year, in 2006, out of 9,260 assessed claims, 46.80 per cent of people were granted humanitarian protection, as against 9.5 per cent who received a positive answer to their claim to obtain refugee status.

Interestingly, if we add the figure related to humanitarian protection to the one related to refugee status, we realize that more

²⁵ Chiara, Marchetti (2006) *Un mondo di rifugiati. Migrazioni forzate e campi profughi*. Bologna, Italy: EMI. The *preventive refoulement* consists in a long chain of policies, ranging from the militarization of the borders and the externalization of procedures, to the readmission and cooperation agreements with the origin or transit countries and to the protection zones, safe areas and refugee camps in the South of the world.

than half of the claims have to be considered as in some way successful, which means that the recurring emphasis put on the instrumentality of the asylum claims and on the possibility of an invasion of "fake refugees" is absolutely unfounded.

But we also have to investigate the other side of the coin. Is it positive that the number of refugees is so low as compared to the "humanitarians"? And, most important, how is this distinction established?

The Territorial Commissions are composed by four members each, headed by a Prefect supported by a Police Headquarters' official (*Questura*), a UNHCR's worker and a local administration's representative (*Enti Locali*). The interview of the asylum seeker can last from less than fifteen minutes up to more than an hour.

The Commissions are first of all called to assess the asylum claim on the grounds of Article 1 of the Geneva Convention. Only if the person doesn't fulfil the requirements expressed by the Convention and is accordingly denied refugee status, can the Commission then also consider the granting of the humanitarian protection. As a UNHCR Commissioner declares:

"The principle is that you should first of all consider the status, even in the face of a country where you can say that there is generalised violence, danger of torture in the case of return. But you have to start from the assumption of the examination of the requirements under Article 1."²⁶

But at the same time it is commonly acknowledged by the Commissioners and other interviewees that the practice goes in a slightly different direction:

"Then again, that about some countries we are more inclined to cut it short and give humanitarian protection, yes, I can't say it doesn't happen: the answer is yes. The luck is that these people are not repatriated, the mistake is that we know that there are big differences between humanitarian protection, B status, and the grant of the real status. There can be some mistakes."²⁷

²⁶ Interview with the UNHCR member of the Milan Commission.

²⁷ Interview with the UNHCR member of the Milan Commission.

"As far as I am concerned, I've always tried to distinguish well the two situations, the humanitarian and the status [...] But often, in the case of lack of credibility or of doubts, maybe we tend to grant the humanitarian protection instead of the status."²⁸

"It is the easiest way to be chosen: if UNHCR says that people coming from that country should at least not be refouled, then the humanitarian status is immediately granted, without even considering the possibility to grant refugee status."²⁹

According to the practice described by the interviewees, it seems that the decisional process often contradicts the general principles sanctioned by law and international conventions. The humanitarian status becomes much more common also because it is granted to people who would have had the right to become refugees *strictu sensu*.

"As far as the figure related to the refugee status recognition is concerned, the overall datum is under the average we expected, and so this fact needs to be assessed [...]. The high number of humanitarian protection measures could also be a sign of a restrictive approach to the Convention on which we will have to work, for sure."³⁰

A restrictive approach to the interpretation of the Convention may have negative effects on a wide number of asylum seekers. Paradoxically, asylum seekers coming from countries in which conflict and violence are widespread, and who should therefore be treated with particular care, are on the contrary examined perfunctorily and receive a verdict reflecting a prejudice instead of a careful evaluation. Migrants who should *at least* be granted humanitarian protection obtain on the contrary an almost automatic denial of refugee status and the consequent recognition of a B status.

²⁸ Interview with the UNHCR member of the Gorizia Commission.

²⁹ Interview with a UNHCR protection officer, Rome.

³⁰ Interview with a UNHCR officer, in charge of the supervision of the Commissions work, Rome.

From this point of view we can be satisfied with the high number of humanitarian protection measures only if we think that there are many critical situations all around the world where people are forced to leave, though not corresponding to the classical refugee type and therefore not fulfilling the requirements of the Geneva Convention, but this trend is only partially positive.

The main issue, at this level, is not about distinguishing people worthy of international protection from people who should be expelled and removed, according to the national legislation. A new problem arises when we are called to draw the boundary between people entitled to refugee status and people who can only claim a complementary form of protection. Today, it seems that humanitarian protection is something like a residual category, resulting from the exclusion of the full refugee status and the impossibility to repatriate the migrant. All the rest are *umanitari*, as they are in short called in Italy.

In this way there is no careful examination either of the deep changes occurring in the international forms of violence and conflict, or in the effects that this label produces on the bodies and the minds of the asylum seekers.

Both from a symbolic and a concrete point of view the two status categories are not equal. The word "humanitarian" in itself evokes a solution offered to people suffering due to a particular crisis, not on political but on humanitarian and passionate grounds. The State – Italy in this case – would just grant a temporary permit to stay until the peak of violence ceases. It strongly depends then on what we define as conflict, crisis and generalized violence. The risk is that, in spite of the supposedly non-political attitude as to this form of protection, the decisions are based on a highly political assessment.

That is what happened to people coming for example from Togo, from Turkey or even from Iraq, who were granted humanitarian protection only as long as the situation in their country was considered dangerous and were on the contrary denied any kind of protection overnight, mainly because of strategic and political considerations.

"Before, the Turkish Kurds were granted refugee status, then after Ocalan they started to get humanitarian protection. Now the decisions of the Central Commission – I don't know what

the decisions taken by the Territorial Commissions will be like – but the Central Commission, until last year, used to come out with documents saying, as motivations for the complete denial of refugee status, without any possibility to be granted humanitarian protection: Turkey is a country on the way for democratisation, for the rule of law. That's it.”³¹

From this point of view the vulnerability of entire groups of people increases – instead of decreasing – when they are assigned the humanitarian label. As they are granted humanitarian status with a fake individual assessment, which then proves to be based on general considerations, in the same way they can be all denied any form of protection, just because the political mood has changed.³²

3.3 “Refugees” vs. Immigrants

We should now consider a third stage, which though not having any effect on the juridical status of the migrants, is nevertheless crucial for understanding the common perception around the forced migration issues expressed through the definitions and the discourse of the social workers and of the volunteers who face daily these different categories of people.

First of all, as reported by many interviewees, refugees today are not perceived as belonging to a clear and consistent category. Lack of credibility of their stories is quite common, even among people working daily with them. As stated by a volunteer helping in a subsequent reception centre in Milan, “You should never trust them when they tell you some things.”³³ There is also a widespread confusion about their juridical status, as demonstrated by the perception that an asylum seeker or even a refugee is not really a migrant legally staying in the country. Alluding to some refugee recipients, another volunteer states: “Until a short time ago, if we just had the inkling that they were not regular, we would have frankly

³¹ Interview with a ICS worker, Rome.

³² The conditions of the *umanitari* are problematic in Italy also because they don't enjoy the same rights as the refugees. For instance, they can't ask for a family reunification and this contributes to the perception of being a second-class forced migrant.

³³ Interview with a social worker of *Centesimus Annus*, Milan.

tried not to take them."³⁴ Also the instrumentality of the claims is frequently addressed, as if asylum was to be interpreted as the only legal way to have access to the country and therefore commonly used by fraudulent claimants: "The impression is that now there are much more entries where the only way [to do it] is: submit your asylum claim."³⁵

Even the description of the itineraries and of the way of travelling seems to lump together the experience of the refugees with the experience of economic migrants. As reported by a social worker dealing with refugee families:

"We can say that there is less improvisation on their side, too, that is to say that a desperate flight is less and less frequent. There are more programmed immigration projects, caused by good reasons, valid for the permit to stay, but more programmed."³⁶

The overall perception is that all these actors bear in mind the classic figure of the refugee and that they automatically compare that typology to the people in the flesh they meet every day in their services. From this point of view, we can interpret their comments as an attempt to redefine the current refugee patterns. Accordingly, if they think that the classic refugee is the only "real", genuine refugee, then the ones they daily meet are perceived as less authentic.

"In my opinion, here they are not all in personal serious conditions to claim the *political* refugee status. It is a ruse. [...] We have three or four *real* refugees, not more: the difference is that you realize whether in front of you there is a person - and you notice it immediately - who really suffered, who would have a serious problem if he repatriates, who has his family (not the parents, but the wife, the children) on the other side. You immediately notice the *real political* refugee."³⁷

³⁴ Interview with a social worker of *Centesimus Annus*, Milan.

³⁵ Interview with a social worker of *Cooperativa Sociale l'Arcobaleno*, Lecco.

³⁶ Interview with a social worker of *Servizio Casa delle famiglie - Consorzio Farsi Prossimo*, Milan.

³⁷ Interview with a social worker of *Centesimus Annus*, Milan (emphasis added).

The “real” refugee claims asylum on political grounds, while it seems that present forced migrants have more often economic or humanitarian reasons to leave their origin country.

From this perspective, we can understand why so many interviewees make reference to four characteristics, which used to be the distinctive features of refugees in the past.

- **Credibility:** once, the personal story told by the asylum seeker referred to a wider and well acknowledged international context, such as the one of the Cold War. In that frame, the individual experience was recognized and legitimised as part of a larger credible picture.
- **Regularity:** Since in the past refugees were a quite rare exception and a well defined concept, it was almost natural to think of them as a special category among the other migrants, with an indefinite right to stay and a permanent status. The regularity of their entry and of their stay was not questioned.
- **Instrumentality:** The reasons for fleeing the origin country were almost self-evident. A refugee coming from Eastern Europe or the few coming from Latin America or South Asia were escaping from well known socialist or authoritarian governments. Their claim *could not* be instrumental or fraudulent.
- **Improvisation:** According to the common opinion, one of the elements differentiating a refugee from an economic migrant was that the refugee was forced to leave all of a sudden, because of the worsening of external conditions, independent from his will. Accordingly, the travel and the country of destination couldn't be programmed, either.

If these are the distinctive characteristics of real refugee, than we understand why there are so many doubts about the genuineness of current refugees.

Since the actual refugee experience doesn't seem so self-evident as many interviewees think it used to be, consequently also the boundary between refugee and humanitarian status becomes more blurred:

“They come from a difficult situation, for sure. But then [...] above all lately, being difficult to enter through other channels, the asylum claim becomes for many of them a way to have access

to the territory. Some nationalities certainly have difficult situations and internal tensions, but if I consider whether the asylum seeker has a personal situation, then not everyone has a personal situation, so that many are on humanitarian grounds instead of real refugees."³⁸

These descriptions also show that the distinction between refugees and economic migrants is becoming less clear-cut. The characteristics shared by these two categories seem to many observers more important than the ones separating them.

"I don't think that their problems are much different from the ones of other [migrants]. They don't receive any privileged treatment from the point of view of the law, they are completely equivalent, therefore not any particular aid."³⁹

"There is not a big distinction, in the meaning that [when] a person arrives, he enters the social context. The means of arrival, of insertion are exactly the same of any immigrants. [...] If a twenty-years-old girl has lived hard times, they are not different from those of another twenty-years-old girl from the same country who entered in a different way and has a different document. I'm convinced of this. Secondly: if this person is here and she is alone and she is a woman and alone, I need that she faces some things, she can't live in the cloud-cuckoo-land just thinking that she is an asylum seeker."⁴⁰

As we can see, though it is impossible to give an exhaustive account of the representations provided by the different actors involved with forced migrants from a non-institutional position, it is clear that a big change is in progress. The legal instruments offer fixed definitions, or at least it takes a long time and a harsh political negotiation before the changes occurring in the society become acknowledged by the institutions. The non-institutional subjects are more flexible and free, since they deal with real people with personal

³⁸ Interview with a social worker of *Cooperativa Sociale l'Arcobaleno*, Lecco.

³⁹ Interview with a social worker of *Servizio Casa delle famiglie – Consorzio Farsi Prossimo*, Milan.

⁴⁰ Interview with a social worker of *Cooperativa Sociale l'Arcobaleno*, Lecco.

histories and problems, instead of abstract categories. They need to find their own way to define and distinguish different categories of migrants, so that they can be oriented in the everyday choices and policies.

Therefore, we should not underestimate the ambiguity and the superimposition of the descriptions and of the labels used by social workers and volunteers: they may tell us something about the actual trends not only of the Italian asylum system but also of the changing nature of forced migration today.

4. Italian Asylum Policies in a Changing World

Over the past years, an important debate has been emerging about the changing world of forced migrations and the possibility to re-discuss the meaning and the boundaries of the "refugee" concept. Until some time ago, many scholars asserted a quite *essentialist* position, assuming the refugee category as an almost ontological entity, bearer of a specific experience and somehow recognizable and detachable from the other groups of economic and forced migrants.⁴¹ That was – and still mostly is – the official position maintained by the UNHCR, too.⁴² But lately a second approach – a more *constructionist* one – has emerged, according to which the refugee category is seen as a result of a historical, political, humanitarian process and thus susceptible to revisions and strongly influenced by operational considerations and policies.⁴³

⁴¹ Stephen, Keller (1975) *Uprooting and social change: The role of refugees in development*. Delhi, India: Manohar; Barry N., Stein (1981) "The refugee experience: defining the parameters of a field of study", *International Migration Review*, Vol. 15, N. 1/2, pp. 320-3; Michael G., Wenk (1968) "The refugee: A search for clarification", *International Migration Review*, Vol. 2, N. 3, pp. 62-69).

⁴² Erika, Feller (2004) *Are refugees migrants? A dangerous confusion*, SID lecture series "Migration and Development: Challenges for a World on the Move", Amsterdam, Netherlands: Vrije Universiteit, 27 January 2004; UNHCR (2006) *Addressing Mixed Migratory Movements. A 10-Point Plan of Action*. Geneva, Switzerland: UNHCR.

⁴³ Richard, Black (2001), "Fifty Years of Refugee Studies: From Theory to Policy", *International Migration Review*, Vol. 35, N. 1, pp. 57-78; Liisa, Malkki (1995b) "Refugees and exile: from 'refugee studies' to the national order of things", *Annual*

On the one hand, the emphasis is put mostly on the refugee category, the Geneva Convention being considered a landmark to be defended at all costs. A potential confusion among different labels is perceived as dangerous, since it could lead to a delegitimisation of the achievements labouriously accomplished in recent years. Obviously, nobody would claim that the other migrants have no rights and even the UNHCR has begun talking about "mixed flows",⁴⁴ but the assumption is that to better protect refugees, according to the UNHCR mandate, you should concentrate on their plight and stress the differences – more than the similarities – between them and other migrants. From this point of view, the blurred definitions of the Italian case presented in the article are necessarily a matter of concern.

On the other hand, starting from the pioneering work by Roger Zetter,⁴⁵ the labels – and so also the "refugee" one – have been criticized for their powerful impact on the lives of the individual migrants and for the stereotyping and controlling processes they entail. Although an inescapable part of public policy making, labels are far from neutral and they can have the paradoxical effect of increasing the vulnerability – instead of the protection – of people in need. From this perspective, the Italian context could be differently addressed: less powerful labels wouldn't be a problem *per se*.

Building on these remarks, there are at least two levels on which to analyse the Italian case. If we consider the institutional and legal framework, we realize that the fragmentation of categories can be read as a positive attempt to interpret a changing context, but it doesn't necessarily lead to a higher level of protection. By multiplying the forced migration labels, the intention seems rather to empty out the meaning of the refugee figure than to add new substantial rights

Review of Anthropology, Vol. 24, pp. 495-523; Giulia, Scalettaris (2007) "Refugee studies and the international refugee regime. A reflection on a desirable separation", *Refugee Survey Quarterly*, forthcoming; David, Turton (2003) "Refugees, forced resettlers and 'other forced migrants': towards a unitary study of forced migration", *New Issues in Refugee Research*, UNHCR Working Paper, n. 94; Roger, Zetter (1991) "Labelling refugees: forming and transforming a bureaucratic identity", *Journal of Refugee Studies*, Vol. 4, n.1.

⁴⁴ UNHCR (2006) *op. cit.*

⁴⁵ Roger, Zetter (1991) *op cit.*

to other categories of migrants. Paraphrasing a recent article, "more labels, fewer refugees",⁴⁶ but also "lower levels of protection".

At the same time, as shown by the words of the non-institutional actors, the world of migrations is on the move. It wouldn't be useful to be nostalgic of the refugees of the past, while the international scenario has changed so sharply in the field of migration flows, conflicts, persecution and international relations. We need to acknowledge that, even if we don't meet so many classic refugees anymore, there are more and more people in need of protection who don't find adequate answers on our territory, either because they don't fulfil the institutional requirements to be labelled as refugees, or because in daily practice they look too similar to the other migrants to deserve any special treatment.

Combining these two observations, we could say that institutions have well understood the call for differentiated forms of protection, but that the answers are insufficient or counterproductive, at least from the point of view of the migrants.

It is probably true that today it is almost impossible to segment in terms of vulnerability a population of migrants often bearing similar and overlapping characteristics in the modes of travel, in the reasons for flight, in the attitudes towards the host country. If we acknowledge that categories have actually become blurred, we can't but address the forced migration phenomenon together with the other forms of migration. Otherwise we risk indirectly and maybe unconsciously legitimize a restrictive regime towards mixed migration flows and paradoxically reinforce the use of asylum claims as a possible instrumental way for a legal stay in the country.

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⁴⁶ Zetter, Roger (2007), *op. cit.*

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REFUGEE CHILDREN IN EGYPT AND THE RIGHT TO EDUCATION: EXAMINING THE GAP BETWEEN THEORY AND PRACTICE

TAREK BADAUWY

This paper focuses on one of the rights around which confusion exists, that of access to primary education. The reservation that Egypt made to Article 22(1) of the Refugee Convention and its subsequent ratification of other human rights treaties that emphasize the compulsory nature of the right to primary education have left many questions unanswered. Is primary education a right enjoyed by refugees in Egypt or not? This paper will examine the reasons behind this confusion, and will attempt to provide few solutions to one of many problems refugees face in Egypt. The position of Islamic *Sharia* on the matter will also be considered. Perhaps it is worth mentioning that this is the first paper that examines the right of refugee children to education in Egypt from a legal point of view in a significant degree of detail. Its main purpose is to provide lawyers and academics with a starting point for further, and perhaps more detailed, writings on the subject. The major obstacle I came across while writing this article was the lack of information on the topic. Most papers written on education examined the subject from social and anthropological angles. In addition, there is hardly any jurisprudence that deals with this right as far as refugees are concerned, which aggravated the difficulty of the information gathering process. It is only through my position as a legal advisor for asylum-seekers and refugees that I found enough resources that enabled me to write this article.

1. Introduction

The tragic events that took place in Cairo on the eve of 30 December 2005 will remain enshrined in the minds of refugees

and human rights advocates for years to come. The forceful suppression of a three-month long demonstration led by Sudanese refugees after the failure of peaceful attempts left a significant number of deaths and many more injuries. The demonstration was reportedly caused by the increasing frustration that refugees felt and continue to feel in Egypt.¹ It is established that the rights to which refugees² may have access are significantly reduced due to,

¹ In September 2005, a group of refugees and failed asylum-seekers camped in front of UNHCR's Cairo office in order to protest their situation. By the end of December, their numbers had increased to approximately two thousand demonstrators. Though, predominantly peaceful, there were reports of illegal actions taken by some protest leaders against their countrymen gathered in front of UNHCR, in a busy Cairo neighborhood. The Sudanese demonstrators presented a list of demands, including, the resumption of Refugee Status Determination (RSD) procedures, the reopening of Sudanese closed files, the improvement of their security situation, and their resettlement to another country. During the demonstration, UNHCR suspended RSD interviews for all asylum-seekers, with the exception of emergency cases referred by NGOs. By December 2005, an agreement could not be reached and the Egyptian government intervened following the request of UNHCR and the people living in the neighborhood. The intervention led to an aggressive encounter between the Egyptian security apparatus and the Sudanese refugees, leading to the death of 27 demonstrators and the injury of many more protestors and security officers. Following the suppression of the protest, the demonstrators were taken to detention centers around the country. Shortly afterwards, they were released with the exception of approximately 600 undocumented asylum-seekers scheduled for deportation to Sudan. Africa and Middle East Refugee Assistance (AMERA), an NGO specializing in refugee legal aid, prepared two legal briefs in order to stop the deportation of the undocumented Sudanese asylum-seekers. Thanks to UNHCR's negotiations with the Egyptian authorities, the detained asylum-seekers were released and granted temporary residence permits. For more information, see Fateh Azzam (June 2006) "A Tragedy of Failures and False Expectations, Report on the Events Surrounding the Three-Month Sit-in and Forced Removal of Sudanese Refugees in Cairo, September-December 2005", The American University in Cairo, Forced Migration and Refugee Studies Program, http://www.aucegypt.edu/fmrs/documents/Report_Edited_v.pdf, accessed on 31 July 2007. Also see UNHCR RO-Cairo Report (June 2006) "Response to FMRS Report: 'A Tragedy of Failures and False Expectations'", Report on file with author.

² It is difficult to give accurate statistics on the exact number of refugees in Egypt. Annex 1 contains UNHCR's April 2006 statistics on the numbers, types, and nationalities of refugees in Egypt. Despite the available statistics, it is estimated that the number of refugees in Egypt exceeds the one given by UNHCR.

on one hand, the reservations that Egypt made to the 1951 Convention Relating to the Status of Refugees as amended by the 1967 New York Protocol (the Refugee Convention), and the treatment of refugees as foreign nationals who rarely have access to governmental benefits.

It is equally important to explain that compulsory education in Egyptian law (*marhalet al-ta'lim al-assassy*) covers grades 1 to 9. It is divided into a primary phase (grades 1-6) and a preparatory phase (grades 7-9). At the end of the compulsory phase a student may withdraw from school, enroll in the secondary phase that will prepare him or her for university studies, or apply for a technical or professional diploma.

2. Egypt's international obligations

2.1 *The Refugee Convention*

Egypt, Iraq, and Turkey were the only non-western states on the drafting committee of the Refugee Convention. Upon ratification in 1951, Egypt made reservations to Articles 12(1), 20, 22(1), 23, and 24. The reservation that Egypt made to Article 22(1)³ reads as follows:

2. Concerning Articles 20, 22 (paragraph 1), 23 and 24 of the Convention of 1951, the competent Egyptian authorities had reservations because these Articles consider the refugee as equal to the national.

We made this general reservation to avoid any obstacle which might affect the discretionary authority of Egypt in granting privileges to refugees on a case-by-case basis.⁴

Despite the devastating effects that the reservation has on the refugee communities in Egypt, one could argue that it does not

³ Art 22(1): ("The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education").

⁴ UN Treaty Collection, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapter V /treaty2.asp>, accessed on 6 September 2004.

violate international law. In addition, since the object and purpose of the Refugee Convention is to protect refugees from forcible return to countries where they risk being persecuted for reasons of nationality, race, religion, political opinion, and/or membership of a particular social group, the reservation is arguably in accordance with the Vienna Convention on the Law of Treaties (The Vienna Convention) because it is neither prohibited by the Refugee Convention nor defies its object and purpose.⁵ Furthermore, no other contracting state objected to the reservation formulated by Egypt.⁶

2.2 *Other Relevant Conventions:*⁷

Although the reservation is legally valid, its effects should at least in theory, be overturned by other treaties that Egypt ratified subsequent to the Refugee Convention. The International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the African Charter of Human and Peoples' Rights (the African [Banjul] Charter), all ratified by Egypt, stipulate that children should be provided with education.⁸ All the relevant articles in the said instruments were immune to an Egyptian reservation.

In 1982, Egypt ratified the ICESCR.⁹ This Covenant addresses education as stipulated in Articles 10 and 13. According to Article 10:

⁵ Vienna Convention on the law of Treaties (1969), <http://www.un.org/law/ilc/texts/treaties.htm>, accessed on 15 September 2004. Article 19; and ICJ Advisory Opinion on The Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory Opinion on The Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (28 May 1951), <http://www.icj-cij.org/icjwww/idecisions/isummaries/ippcgsummary510528.htm>, accessed on 18 September 2004.

⁶ Vienna Convention, *ibid*, Article 10; and ICJ, *ibid*.

⁷ The list of conventions ratified by Egypt that emphasize primary education and are discussed in detail in this paper is not exhaustive.

⁸ Article 17 of the African Charter is more general and applies to everybody, not just children.

⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), Status of Ratifications of the Principal International Human Rights Treaties, as of June 2004, <http://www.unhchr.ch/pdf/report.pdf>, accessed on 7 September 2004, p.4.

The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and *education of dependent children*. Marriage must be entered into with the free consent of the intending spouses.¹⁰

In addition, Article 13 confirms that:

1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

a. Primary education shall be *compulsory and available free to all*...¹¹

Egypt is bound by this Covenant by virtue of its ratification in 1982. As the ratification followed that of the 1951 Convention, the effects of the reservation made against the right of refugees to primary education should be obliterated. Nevertheless, one must not be hasty on his conclusions for the ICESCR itself gives all member states a significant degree of flexibility in evaluating which rights they could offer, and which, due to constraints upon the availability of their resources, they may not guarantee.¹²

¹⁰ International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966), http://www.unhchr.ch/html/menu3/b/a_ceschr.htm, accessed on 5 September 2004. [Emphasis added].

¹¹ *ibid.* [Emphasis added].

¹² Article 2(1): ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially

Egypt is a developing country with a population of 80 million citizens and a *per capita* income of US\$ 4,200.¹³ 20 percent of Egyptians live below poverty line.¹⁴ The illiteracy rate is as high as 28.6 percent and it is recorded that 32.2 percent of the population are below the age of 15.¹⁵ In other words, a significant segment of the population is of elementary school age. In 2001, 42.7 percent of Egyptians resided in urban areas where refugees live,¹⁶ and the numbers of urban dwellers is undeniably on the rise. Every year, more than one million Egyptian students enroll in primary schools.¹⁷ This number coupled with the overcrowding of public schools raise concerns as to the physical capacity of these schools to accommodate non-Egyptian students.

According to the given statistics, it is apparent that Egypt, as a developing country, needs time and resources to be able to meet the educational needs of refugee children due to the burden they might allegedly pose on the Egyptian economy. Therefore, it could rightly be argued that even though it is failing to provide education to refugee children, Egypt is still in compliance with its international obligations under the ICESCR given that education is a progressively realized right as confirmed by the Covenant.

Thankfully, such problems do not arise with the CRC, which Egypt ratified nine years after the Refugee Convention and eight years after the ICESCR.¹⁸ Unlike the ICESCR, the CRC does not give states parties the same degree of flexibility in choosing which

economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"). [Emphasis added].

¹³ CIA World Factbook, Egypt (2007), <https://www.cia.gov/library/publications/the-world-factbook/print/eg.html>, accessed on 24 August 2007.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ UNDP website, 1990-2001, http://www.undp.org/hdr2003/indicator/cty_f_EGY.html, accessed on 16 September 2004.

¹⁷ Interview with Egypt's First Lady, Mrs. Suzanne Mubarak. News on Channel 1, Egyptian television. On 9 September 2004.

¹⁸ Egypt ratified the CRC in 1990, see OHCHR, *op.cit.*, p.4.

provisions to implement. It applies equally to every child within the jurisdiction of a contracting state.

Of particular concern in the CRC are Articles 2(1), 28(1)(a), and 22(1), where the former, dealing with non-discrimination, affirms that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction *without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*.¹⁹

Regarding the right to primary education, Article 28(1)(a) reiterates the following:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education *compulsory and available free to all*...²⁰

Moreover, Article 22(1) of the same Convention deals explicitly with refugee children and instructs:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance *in the enjoyment of applicable rights set forth in the present Convention* and in other international human rights or international humanitarian instruments to which the said States are Parties.²¹

¹⁹ Convention on the Rights of the Child (CRC) (1989), <http://www.unhchr.ch/html/menu3/b/k2crc.htm>, accessed on 12 September 2004. [Emphasis added].

²⁰ *ibid.* [Emphasis added].

²¹ *ibid.* [Emphasis added].

Reading the Articles cited above, one concludes that, by ratifying the CRC without entering any reservation,²² Egypt committed itself to providing compulsory and free education to all children within its jurisdiction without any distinction whatsoever. Hence, the right should be enjoyed by citizens, refugees, and foreign residents alike.

Article 28(1)(a) of the CRC is almost identical to Article 13(2)(a) of the ICESCR. However, unlike the ICESCR, the CRC goes one step further as it establishes an instant obligation upon member states to implement the provisions of the Convention regardless of the availability of resources. In addition, Article 22(1) of the CRC explicitly mentions refugees and their right to enjoy the *applicable rights set forth in the Convention*, which include access to primary education.

The use of the word *progressively* in Article 28(1) of the CRC should not be confused with that of Article 2 of the ICESCR. Unlike the ICESCR, the CRC imposes an instant obligation to provide education, yet the full achievement of this right should be reached *progressively*. Alternatively, the ICESCR does not stipulate an immediate duty to guarantee any right and leaves the provision of the relevant rights contingent upon the availability of resources. In other words, while the CRC compels states to provide everybody with primary education as soon as they ratify the Convention, yet the ICESCR orders states to take steps in order to make education available to everybody.

On a more regional level, Article 17(1) of the African [Banjul] Charter calls for the right to education by stating that "*Every individual shall have the right to education...*"²³ The words *every individual* clearly include refugee children. The other provisions

²² Egypt made a reservation to Articles 20 and 21 before withdrawing it. "On 31 July 2003, the Government of Egypt informed the Secretary General that it had decided to withdraw its reservation made upon signature and confirmed upon ratification in respect of Articles 20 and 21 of the Convention". For more information see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partIV/treaty19.asp#N22>, accessed on 7 September 2004.

²³ African [Banjul] Charter on Human and Peoples' Rights (1981), <http://www1.umn.edu/humanrts/instree/z1afchar.htm>, accessed on 13 September 2004.

of this Charter, including the Preamble and Article 2, support this stipulation.²⁴

One could infer from all of the above that the ratification of the ICESCR, the CRC, and the African [Banjul] Charter committed Egypt, in international law, to provide free and compulsory education to all children present within its jurisdiction.

3. Domestic Law

A treaty binds Egypt in international law by virtue of its ratification. Nonetheless, it does not automatically become part of domestic law until the proper procedures are followed. This requirement is intended to guarantee that domestic instruments are put in place to enable national courts to have jurisdiction over cases involving the application of the international agreement. Article 151²⁵ of the Egyptian Constitution outlines the procedures that deal with the ratification of international conventions and their incorporation into domestic law; it explains that:

The President of the Republic shall conclude treaties and communicate them to the People's Assembly, accompanied with suitable clarifications. They shall have the force of law after their *conclusion, ratification* and *publication* according to established procedures.

²⁴ The ninth paragraph of the preamble states that "*Conscious of their duty to achieve the total liberation of Africa, the peoples' of which are still struggling for their dignity and genuine independence, and undertaking to eliminate ... all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions*". [Emphasis added]. *All forms of discrimination* include discrimination based on nationality. Moreover, Article 2 of the African [Banjul] Charter states that "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, *national and social origin*, fortune, birth or *other status*". [Emphasis added]. The *national origin* and *other status* could also include nationality.

²⁵ In March 2007, after this paper was approved for publication, the Egyptian Constitution was amended following a public referendum. Unless I indicate

However, peace treaties, alliance pacts, commercial and maritime treaties and all other treaties involving modifications in the territory of the State or having connection with the rights of sovereignty, or which law upon the treasury of the State certain charges not included in the budget, must acquire the approval of the People's Assembly.²⁶

To be adopted as the law of the land, an international treaty must be ratified and published in the Official Gazette. Thirty days after its publication, the international instrument becomes part of domestic law.²⁷ Failure to publish a treaty in the Official Gazette prevents it from binding local courts despite its ratification by the Parliament (People's Assembly).

This position was also confirmed in a famous case known as the *Railway Workers Case*. In 1986 railway workers went on strike. Many of them were consequently arrested for having breached Egyptian law, which puts restrictions on demonstrating or going on strike. Judging the case, the Supreme State Security Court of Cairo issued a dictum explaining that:

The national judge does not implement an international treaty based on the fact that his country committed itself to implementing it internationally. He implements it as it constitutes part of domestic law if it follows the procedures required for its application domestically ... according to Article

otherwise, articles cited in this paper were in the Constitution prior to the 2007 amendments. The amendments have no effect on the arguments made in this paper and will only apply to international conventions ratified after the new Constitution came into force. The new amendments were published in the Official Gazette on 31 March 2007 (The Official Gazette, 31 March 2007, 13th Edition *bis*), pp. 2-12.

²⁶ The Constitution of the Arab Republic of Egypt, as amended in 1980, prior to the 2007 Amendments. For the English translation of the Constitution see, http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/rsddocview.htm?CATEGORY=RSDLEGAL&id=3ae6b5368&page=research#_ftn2, accessed on 5 September, 2004. [Emphasis added].

²⁷ Unless another number of days is explicitly specified in the publication. For example, the National Law on the Rights of the Child (Law Number 12 of 1996) came into effect the day following its publication in the Official Gazette.

151 of the Constitution of Egypt mentioned above. According to what jurisprudence has agreed on, international instruments issued following the established constitutional principles, and were published in the Official Gazette in accordance with the means proscribed by law constitute part of domestic law and courts must implement them as such.²⁸

The railway workers were acquitted as Egypt had ratified and published an ILO agreement that recognized workers' right to strike.

3.1 *The Refugee Convention*

The status of this Convention in national law is interesting. As noted earlier, when Egypt ratified the Refugee Convention in September 1981, it informed UNHCR that it accepted its provisions with the exception of the articles to which it made a reservation.²⁹ When the Refugee Convention was published in the Official Gazette in November 1981, the reservations that Egypt had formulated were not explicitly written in the text of the published instrument.³⁰ Does this mean that the Convention became part of domestic law without reservations two months after Egypt had informed UNHCR of its reservations?

It is important to note that reservations made to international treaties are explicitly written in the text of the instruments when they are published locally following a standard sentence that usually reads as *105 after taking into account the reservations made to the treaty*'. When the Refugee Convention was published in the Official Gazette, the sentence was kept, yet there were no

²⁸ General Prosecution case number 4190 of 1986, Judgment issued on 16 April 1987, Author's translation. Judgment on file with author.

²⁹ UN Treaty Collection, *op.cit.*

³⁰ The 1951 Convention was published as a national law in the Official Gazette on 26 November 1981 (The Official Gazette, 26 November 1981, 48th Edition). The 1967 Protocol was published as a national law on 5 November 1981 (The Official Gazette, 5 November, 45th Edition), and on 26 November 1981 (The Official Gazette, 26 November 1981, 48th Edition).

reservations either in the introduction or in the text of the Convention as published.³¹ Consequently, one could argue that Egypt is internationally not responsible for providing primary education to refugees, as far as the 1951 Convention is concerned, but is committed in accordance with its own national law on refugees, to make it available to them. A second view calls for considering the standard sentence enough on its own to include the reservations in domestic law. Accordingly, the judge would be required to look into the international Convention before it was published. Although the second view is legally sound, there are indicators that favor the former. For example, the Official Gazette contains numerous human rights treaties whose texts, as published locally, include the standard sentence and the actual reservation. Additionally, requiring the publication of a treaty in order for it to become part of domestic law serves two purposes. First, it makes the public aware of domestic law. Second, it facilitates the work of judges and legal practitioners who only have to refer to laws published in the Official Gazette in accordance with Article 151 of the Egyptian Constitution mentioned above. Referring to unpublished documents defeats the purpose of making the laws' publication mandatory.

The majority of scholars and practitioners have focused on Egypt's reservations to the Convention without paying attention to its status in domestic law. This might be due to the fact that the Egyptian government does not perform refugee status determination functions (RSD), leaving this task to UNHCR, following a Memorandum of Understanding signed in 1954.³²

³¹ I knew about this observation during an informal conversation with a First Instance Court Judge in the Delta Region of Egypt. Following the discussion, I developed and advocated the argument explained in the text above, yet the initial credit goes to the judge. It was later used by authors such as Barbara Harrell-Bond (January 2006) "Refugees in Egypt, Between a Hard Rock and a Hard Place", <http://www.islamonline.net/English/Views/2006/01/article06.shtml#14>, accessed on 31 July 2007. However, Egyptian courts have yet to deal with this argument.

³² Agreement between the Egyptian Government and the United Nations High Commissioner for Refugees (10 February 1954), Unofficial Translation, Agreement on file with author.

3.2 *Status of Other International Obligations in National Law*

Similar to the Refugee Convention, the ICESCR,³³ the CRC,³⁴ and the African [Banjul] Charter³⁵ were incorporated into national law after the necessary procedures were followed. As demonstrated above, these treaties advocate non-discrimination and equal treatment for nationals and foreigners, including refugees, in the provision of primary education. Refugee advocates may use these treaties, as part of national law, to demonstrate that the Egyptian legal system provides refugees with a variety of laws that uphold their right to primary education.

3.3 *Law No. 12 of 1996 (National Law on the Rights of the Child)*

The new National Law on the Rights of the Child³⁶ and its Executive Charter³⁷ were enacted in order to improve the conditions of children in the country. Both the Law and the Executive Charter are divided into sections which cover various relevant issues such as child healthcare, registration and documentation, education, nutrition, social assistance and foster families. The coming into force of the Law after the ratification of the CRC indicates that there is a possible link between the Convention and the Child's Law, yet this connection is not explicitly documented anywhere.

Against this background, it remains unclear whether the National Law on the Rights of the Child covers Egyptians only,

³³ Published in the Official Gazette on 8 April, 1982 (The Official Gazette, 8 April 1982, 14th Edition).

³⁴ Published in the Official Gazette on 14 February 1991 (The Official Gazette, 14 February 1991, 7th Edition).

³⁵ Published in the Official Gazette on 23 April 1992 (The Official Gazette, 23 April 1992, 17th Edition).

³⁶ Law No. 12 of 1996, Published in the Official Gazette on 28 March 1996 (The Official Gazette, 28 March 1996, 13th Edition *bis*).

³⁷ Prime Minister's Decree Number 3452 of 1997, Published in the Official Gazette on 27 November 1997 (The Official Gazette, 27 November 1997, 48th Edition *bis*).

or Egyptians and foreigners alike. Three different possibilities exist:

- The Law covers Egyptians only:

Should this be the correct interpretation, refugee children must not be affected by their exclusion from the benefits of the National Law on the Rights of the Child. The Refugee Convention, as published in the Official Gazette, in addition to other Conventions that deal with education, including the CRC, became part of domestic law after their publication. It follows that the National Law on the Rights of the Child could not override other domestic laws that cover the right of Egyptian and foreign children to primary education because they benefit different categories of people. In other words, the National Law on the Rights of the Child, if it only applies to Egyptians, could only override preceding laws insofar as Egyptians are concerned. It has no effect on foreign children as the subjects of both laws are different.

- The Law covers Egyptians and foreigners:

This recognizes the rights of refugee children to primary education and emphasizes Article 54 of the Law, which states that "Education is a right for *all* children in state schools for free...".³⁸ The use of the word *all* could arguably mean Egyptians and foreigners, including refugees.

- Some provisions of the Law cover Egyptians, and others benefit foreigners -including refugees- and Egyptians:

This, in my opinion, is the most probable scenario as some provisions could only bind Egyptians. For instance, Article 19 states that

³⁸ Author's translation. Law No. 12 of 1996, *op.cit.* [Emphasis added]. Law No. 139 of 1981, on the other hand, deals with education for Egyptian children only. See Law No. 139 of 1981, 7th Edition, Amiriya Publishers, Cairo 1999.

"If the act of birth occurs while traveling abroad, it must be reported to the nearest Egyptian consulate....".³⁹ There is no obligation on non-Egyptian residents to inform the Egyptian consulate of the birth of their child abroad, for the government is under no obligation to provide them with a birth certificate, other documents, or protection. The situation is unclear in the case of refugee children because their parents cannot be asked to approach their consulates when they are outside their countries of asylum. Moreover, the Refugee Convention is inconclusive on whether or not refugees should approach the consulates of their countries of asylum in the event that they give birth abroad, particularly given that these states are the ones that provide them with Convention Travel Documents (CTDs). Exploring this point further is beyond the scope of this paper.

Article 5, on the other hand, benefits Egyptians and foreigners, including refugees. It stipulates that "Every child has the right to have a name that distinguishes him from others; this name should be registered at birth in the registry of births in accordance with this Law".⁴⁰ It is unquestionable that foreigners cannot be excluded from the benefits of this article, as they must be issued with certificates after birth.

What remains unclear however, is whether the use of the words *all children* in Article 54 refers to all Egyptian children or all children irrespective of their nationality. Such ambiguity is strengthened by the fact that foreigners rarely enroll in public schools. Despite this lack of clarity, it is submitted that there are compelling reasons to believe that such right benefits Egyptian and foreign children. First, Egypt has ratified many conventions that stipulate the right to primary education without making any reservations to the Articles sanctioning this right. Second, despite Egypt's reservation to Article 22(1) of the 1951 Convention, it is arguably inapplicable in domestic law. Third, conventions and laws should be interpreted in good faith, and it would be inconsistent to interpret domestic laws in a way that contradicts the international obligations voluntarily acceded to by Egypt. Fourth, all other

³⁹ Law No. 12 of 1996, *op cit.*

⁴⁰ *ibid.*

instruments that Egypt ratified and that emphasize the right to primary education became part of domestic law by virtue of their publication in the Official Gazette. Fifth, offering education to all is consistent with the Islamic *Sharia*, which, as demonstrated below, is *the principal source of legislation* in the country.

4. The Position of the Constitutional Court

The Egyptian Constitutional Court plays an important role in clarifying the ambiguities left by various legal texts. Fortunately, the Court's stance with regards to international human rights treaties leaves no room for questions. Commenting on the position of the Constitutional Court on the right to education, Nathalie Bernard-Maugiron explained:

Ce droit à l'éducation ne doit pas être restreint par des mesures législatives ou administratives qui discrimineraient de façon illégale dans l'accès à l'éducation, dans son coût, ou dans d'autres domaines, à moins que cette discrimination ne soit justifiée par les qualités et les exigences des écoles. La protection constitutionnelle⁴¹ doit s'étendre à tous les établissements scolaires, quel que soit leur propriétaire ou leur administrateur. De nombreux textes internationaux affirment ainsi que le droit à l'éducation doit être exercé de façon non discriminatoire et que chacun doit avoir les mêmes chances d'accès aux services et facilités scolaires... Les étudiants doivent être égaux dans tous les domaines: [Quoting the Constitutional Court], Leur égalité en ce qui concerne les conditions objectives fixées pour leur accès au cycle éducatif lui-même implique nécessairement leur égalité dans la jouissance des commodités et services liés aux aspects pratiques de l'enseignement et qu'offrent à leurs collègues les établissements auxquels ils appartiennent.⁴²

⁴¹ Referring to Article 18 of the Constitution of the Arab Republic of Egypt prior to the 2007 amendments, *op.cit.*

⁴² See the Constitutional Courts Dictum of 2 September 1995, no. 40/16th. Cited in Nathalie Bernard-Maugiron (2003) *Le Politique à L'épreuve de Judiciaire : La Justice Constitutionnelle en Egypte*, Brussels, Bruylant, p.331.

There is no doubt that the Constitutional Court supports the view that Egypt's education laws should not discriminate against foreigners. Consequently, it is right to argue that Article 54 of the National law on the Rights of the Child covers all children irrespective of their nationality.

5. Education in the Islamic *Sharia*

According to Article 2 of the Egyptian Constitution, "Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (*Sharia*)".⁴³ Although most laws in Egypt seem secular on the surface – with the exception of personal status laws –, they must always conform to the basic principles of Islamic Jurisprudence. Islamic law has many sources. With the Koran and the *Sunna* - Prophet Mohamed's recorded sayings and actions- as the most important sources of Islamic law, one needs to examine, albeit briefly, the position of Islam concerning the right to education.

Various passages in the Koran and the *Sunna* demonstrate the importance of education in Islam. The first Koranic verses revealed to Prophet Mohamed were:

- [1] Read: In the name of thy Lord who createth,
- [2] Createth man from a clot,
- [3] Read: And thy Lord is the most bounteous,
- [4] Who teacheth by the pen,
- [5] Teacheth man which he knew not.⁴⁴

The repeated use of *read* and *teacheth*, and the addition of *by the pen* after *teacheth* in the fourth verse, demonstrate the importance of literacy and education in Islam. Other verses in the Koran confirm the importance of seeking knowledge. For instance, *Surat Al-Mujadala* affirms that "...Allah will exalt those who

⁴³ Constitution of the Arab Republic of Egypt prior to the 2007 amendments, *op.cit.*

⁴⁴ It is noteworthy that no translation of Koranic verses could be as accurate as the Arabic version. In the case of doubt, one should always refer to the Arabic version of the Koran. *Surat Al-'Alaq*, Chapter 96, verses from 1 to 5, <http://www.islam.tc/cgi-bin/quran/qsearch.pl?surah=96>, accessed on 5 September 2004.

believe among you, and *those who have knowledge*, to high ranks..."⁴⁵

Moreover, many of Prophet Mohamed's sayings reflect the importance of education for the purpose of religious reward. Examples include, "Whoever follows a path by which he seeks knowledge, God will accompany him through a path towards heaven..."⁴⁶

The actions of Prophet Mohamed further corroborate this argument. This is perhaps best demonstrated in the first battle - the Battle of *Badr* - between the Muslims and the unbelievers in March 624 AD, when after victory of the Muslim Army, Prophet Mohamed ordered the release of every prisoner of war who taught ten illiterate Muslims how to read and write. Having established the importance of education in the Islamic *Sharia*, it could be argued, from a moralist perspective, that a state alleging to have *Sharia* as its principal source of law cannot contradict the teachings of the Koran or Prophet Mohamed.

Those who oppose this view may argue that in the Islamic *Sharia*, some laws only apply to Muslims and others cover non-Muslims. I submit that this is only true for some religious obligations, such as praying, in addition to some responsibilities towards the Islamic state that included the payment of *zakat*⁴⁷ and military conscription. All other fundamental rights such as the right to life, the right to be free from cruel, inhumane, and degrading treatment or punishment, and the right to the safety of the person are to be enjoyed by Muslims and non-Muslims alike.

I believe that education is one of these fundamental rights in the context of the *Sharia* and should be enjoyed by all. First, the Koranic verses referred to⁴⁸ were revealed at a time when there were no Muslims at all. The fact that the word *read* was the first word of the God's message to Prophet Mohamed demonstrates how valuable it is for humanity in general. Second, it is agreed by all Islamic scholars that the main purpose of *Sharia* is public interest (*al-maslaha al-*

⁴⁵ *Surat Al-Mujadala*, Chapter 58, verse 11, <http://www.islam.tc/cgi-bin/quran/qsearch.pl?surah=58>, accessed on 5 September 2004. [Emphasis added].

⁴⁶ Author's translation. *Sunan Al-Termezy* (The Termezy Collection of Ahadith), Hadith Number 2823.

⁴⁷ A yearly tax paid by Muslims only. It is also considered one of the five pillars of Islam.

⁴⁸ See footnote 44 and accompanying text

'*amma*). In this vein, any act or omission whose purpose is to achieve public interest is rendered legitimate in Islamic legal thought. Denying residents of a certain state the right to education will lead to a rise in unemployment and crime rates and will trump the principle of *al-maslaha al-amma*.⁴⁹ As such, Muslims and non-Muslims must have access to education as this is one way of achieving the public interest of an Islamic state. By analogy, non-Egyptian residents of Egypt, regardless of their religion or their status should have access to education for this will contribute to the betterment of conditions in the state. Third, mere adherence to international instruments that promote the right to education is enough, from a *Sharia* perspective, to impose an obligation upon states to provide education to all children on their territories.

Conventions are a form of contracts between states, and legal persons must honor their obligations to which they voluntarily accede. *Surat Al-Maeda* starts with the Godly order, "O ye who believe! Fulfil your indentures....".⁵⁰ A violation of this verse constitutes a breach of *Sharia* law. Having *Sharia* as its principal source of legislation, and having ratified many conventions stipulating the provision of free primary education to all without any discrimination, Egypt must uphold these treaties.

6. Barriers to achieving the Refugees' Right to Primary Education⁵¹

6.1 Public Schools

If the law recognizes the right of refugee children education, the existence of administrative, linguistic, financial, socio-cultural,

⁴⁹ In 2006 those who work with refugees in Egypt noticed a rise in gang violence among young Sudanese refugees. This phenomenon is due to the increasing alienation refugees face in Egypt. Giving them easier access to education will contribute to their integration in Egyptian society and a gradual disappearance of the gangs.

⁵⁰ *Surat Al-Maeda*, Chapter 5, verse 1, <http://www.islam.tc/cgi-bin/quran/qsearch.pl?surah=5>, accessed on 12 September 2004.

⁵¹ Information used for this section is based on knowledge acquired through working with refugees in Cairo and two reports by Esther Dingemans (February 2002)

and bureaucratic barriers often renders the actual fulfillment of such right difficult if not impossible.⁵² Few foreign residents apply for public schools, leaving the monopoly over this privilege to Egyptians. As demonstrated earlier, Egyptian laws allow refugees to enroll in public schools. Unfortunately, procedures governing how they can access these schools are unknown to the public.⁵³ In addition, those who work in schools are unfamiliar with the laws that cover refugees, which adds a hurdle to their access to schools.

The documents required from refugees make it hard for them to apply. Such documents include – but are not limited to – a birth certificate, a letter from their embassy, a residence permit, and a certificate from the previous school in the country of origin. While it might seem logical to ask for the residence permit, it is hard to imagine that 1969 OAU Convention refugees fleeing civil war or 1951 Refugee Convention refugees fleeing persecution could think of bringing all their documents before they arrive in Egypt. Refugees usually flee their countries as soon as the first opportunity comes their way and only carry things that fulfill their basic

“Educational Need and Priorities for South Sudanese Refugees in Cairo”, Field Report; and Wesal Afifi (August 2003) “Preliminary Investigation of Educational Opportunities for Refugee Children in Egypt”, Field report. A copy of the articles can be ordered from the Forced Migration and Refugee Studies Program (FMRS) at the American University in Cairo (AUC). For more information see <http://www.aucegypt.edu/academic/fmrs/>.

⁵² For details, see Dingemans, *ibid*, Chapter 3.

⁵³ In 1992, the Minister of Education issued a decree outlining which categories of foreigners (including refugees) that had the right to enroll in public schools. In order to be admitted in an Egyptian school, an applicant need to present a valid passport, a valid residence permit, a birth certificate, an original school certificate from his previous school, in addition to other documents. Article 5 of the decree stipulates that non Egyptians must enroll in private schools unless they are from Libya, Jordan, or Sudan, or fulfill some other requirements. See the Minister of Education’s Decree No. 24 of 1992. The decree was published in the Egyptian Proceedings on 3 March 1992 (54th Edition). On 13 December 2000, the Minister of Education decided to extend the application of the decree to other refugees, yet some conditions must be fulfilled. For more information see Dingemans, *ibid*, Appendices 2 and 3. Another decree calling for the extension of the 1992 decree and its application to other refugee children was issued on 17 May 2000. Neither of the two decrees issued in 2000 was published, see UNHCR RO-Cairo Report, *op.cit*.

necessities. Fortunately, what seemed to be an ironic requirement was waved, and refugees no longer need to obtain a letter from their embassies; a UNHCR letter should suffice.⁵⁴ However, *Al-Azhar* schools still request embassy letters, which only Somali refugees are able to provide.

The administrative barriers mentioned above are further compounded by linguistic and socio-cultural ones. With the exception of refugee children from Arab countries, other children have to learn in a language other than their own, which makes them trail behind their classmates from the start. Attending public schools requires that refugee children sit for examinations conducted entirely in Arabic. Being totally or partially unexposed to the language, refugee children have very slim chances of passing the exams without extra tuition. If, on the other hand, refugee children join language schools that fall under the supervision of the Ministry of Education, they can be exempted from Arabic; however, few refugees enroll in these schools because the cost of education is significantly higher.

In addition, there are reports that African refugee children often face harassment at the hands of their Egyptian classmates because of their skin color. Although this phenomenon will probably decrease as children become accustomed to one another, it currently represents a psychological barrier to the refugee children's access to public schools. Interacting within the Egyptian social environment is a challenge for these children, as they are continuously vulnerable to harassment on the way to school because of their skin color.⁵⁵

All children in Egypt must overcome physical barriers that pose additional obstacles to realizing the right to education. State schools in Egypt are generally overcrowded; administrations are often compelled to adopt a shifts system whereby a group of students attends school in the morning, leaving the afternoon for another

⁵⁴ Dingemans, *ibid*, p.10.

⁵⁵ I met various asylum seekers and refugees that complained about being harassed, mugged, and sometimes beaten by members of the local population because of the color of their skin. They complain about being referred to as *samara* and *chocalata*, which in Egyptian Arabic mean *dark* and *chocolate* respectively.

group. This ingenious idea has not completely solved the problem. When children first apply to a primary school, they sometimes have to be on the waiting list for periods of time that can extend up to two years. Priority is always given to older applicants and those who are on the waiting list from previous years.⁵⁶

There are no known laws that explain all the procedures that refugees must follow to enroll in a school. Instead, refugees must sail through a mosaic of laws and administrative directives in order to have their children admitted in a state owned school. As explained above, the National Law on the Rights of the Child stipulates that every child be allowed to join a public school. Nevertheless, practice indicates that reality is different from what the law states. In light of the lack of legislation explaining the procedures necessary for school access, unless the contrary is established, schools' administrations have the ultimate say regarding who to accept without being held accountable to any authority for potential abuse of power. Against this background, considering that schools are overcrowded and that children compete for available places, refugees are particularly disadvantaged given that Egyptians will be favored should the school administration have to choose between accepting an Egyptian or a refugee.

The last problem has fortunately been overcome in the Governorate of Alexandria where the Governor ordered that refugee children be accepted in public schools. The integration of refugee children in Alexandrian schools was easy due to the fact that schools there are less crowded than the ones in Cairo. Although it is a step that calls for optimism, one must remember that most refugees in Egypt live in Cairo, a city that suffers from overpopulation. Perhaps if UNHCR were moved to another city, more refugees would move there.⁵⁷

⁵⁶ An Egyptian colleague decided to enroll his son in a private school after failing to register him in a public school due to lack of places. Older applicants were given priority. Also see Afifi, *op.cit.*, p.13.

⁵⁷ In June 2007, UNHCR moved its office from downtown Cairo to 6 October City, a satellite city serving as a suburb of Cairo. It is too early to speculate whether this would have an effect on the movement of refugees out of downtown Cairo to the satellite city of 6 October, already known for its significant Iraqi population.

6.2 Private schools

Since the majority of refugees hardly have access to the labor market, they cannot afford to pay private school fees, which range from hundreds of Egyptian pounds to thousands of US dollars. Despite this obstacle, scholarships are one option that might help refugees overcome the financial burdens caused by their children's education. Based on the little research that was conducted on scholarships, it is apparent that private schools are generally unwilling to exempt refugee children from paying the fees. If they want to go to private schools, they should simply pay.⁵⁸

6.3 State-run and Private Religious Schools⁵⁹

There seems to be more hope in realizing the right to primary education in religious schools. These schools are either public, such as the ones that follow the *Al-Azhar* Institution, or private, such as other Islamic and Christian schools.⁶⁰ After contacting The Jesuit School (*Collège de la Sainte Famille*) in Cairo, I was informed that they were ready to provide scholarships to refugees on a case-by-case basis. Islamic schools such as the *Farouk*, *Nozha*, and *Sayyeda Aicha* wanted to meet with the refugee in person prior to making a decision, yet the door was not closed. The *Al-Azhar* schools accept refugee children, and scholarships are available to some of them. However, they must obtain a letter from their embassies.

6.4 NGO Operated Schools

Most schools that cater for refugees are managed by NGOs,⁶¹ many of which are affiliated with churches. They employ teachers,

⁵⁸ Afifi, *op.cit.*, pp.16-20.

⁵⁹ The word *religious* refers to schools that refer to themselves as Islamic or Christian.

⁶⁰ Although these schools are religious by nature, they follow the Egyptian curriculum. Some of them offer education in French and English and are a good alternative for refugee children who originate from English and French speaking countries. Moreover, their degrees are recognized by the Egyptian government as their students sit for the Egyptian Diploma Exams known as the *Thanaweya 'Amma*.

⁶¹ These schools include Sakakini/Luwanga, Saint Joseph, Saint Bakhita, African Hope, Adventists, All Saints Cathedral, Sudanese Children Learning Center,

administrators, and headmasters from the different refugee communities. Unfortunately, they are not devoid of problems that prevent some refugees from applying. First, the Egyptian government does not recognize them. Although they teach children how to read and write, and although some of them copy the Egyptian curriculum,⁶² children will not be given a formal diploma upon completing their primary education.⁶³ Second, although the fact that most teachers are refugees comforts some parents, it also raises concerns with others who are not sure about the teachers' level of dedication as well as their mental and emotional well-being. This is portrayed in Esther Dingeman's field report on the "Education Needs and Priorities for South Sudanese Refugees in Cairo", in which she stated:

The fact that the teachers themselves have a history of loss – and possibly trauma – exacerbates the challenge. Just like many refugee parents and children, many of the teachers do not feel secure about their future, which may lead to frustration and a drop in motivation and morale. Some parents express their concern about teachers themselves being preoccupied by problems related to the protracted refugee situation.⁶⁴

Third, due to the high number of applications, hundreds of refugee children are put on waiting lists for years before they can finally start school. Fourth, children are required to pay tuition fees, which place a burden onto the parents. They also need money for transportation and risk harassment on the way to and back from school. The Catholic Relief Services (CRS) organization provides financial assistance to some refugees to help them pay for tuition, transportation, and supplies. Nonetheless, until recently this assistance was only available to refugees recognized by UNHCR as opposed to asylum-seekers. The CRS offers approximately US \$

Sudanese Development Initiative (SUDIA), and the Somali Community Home Schooling Program.

⁶² Such as the Sakakini School.

⁶³ The only exception is the Sakakini School (the largest one) where students can sit for the national examinations. See Dingemans, *op.cit.*, p.23.

⁶⁴ Dingemans, *ibid.*

200 to schools per student and LE 400 to each student. However, it is reported that CRS does not provide any financial assistance to refugees enrolled in public schools, restricting such aid to those in private and NGO run schools. On another note, CRS started providing assistance to asylum-seekers who have not been recognized by UNHCR yet. This change of policy is probably due to UNHCR's decision in June 2004 to grant provisional protection to all new asylum-seekers from Sudan, and to freeze RSD interviews for Sudanese asylum-seekers until further notice.⁶⁵

Unfortunately, there are allegations that some NGO operated schools discriminate between refugees on the basis of their religion. This phenomenon sometimes places refugees in a precarious situation both personally and in relation to their communities, and forces them to choose between keeping their faith and not sending their children to school, or converting and facing retaliation from members of their communities such as physical violence and death threats.

7. Conclusion and Recommendations

Much remains to be done to help refugee children access schools. Although Egyptian law promulgates the right of refugee children to primary education, numerous barriers prevent them from achieving this end, which raises questions about the efficacy of such laws absent a follow-up mechanism that guarantees their implementation. As a developing country with other priorities on its national agenda, Egypt is in a situation where it has deemed it necessary to sacrifice some rights at the expense of others for the sake of its citizens' interests. Nevertheless, refugees also have rights that are stipulated in the law, and it is the responsibility of the state to make sure its laws are applied properly.

The role of NGOs is also vital in order to facilitate communication between refugees, UNHCR, and state officials. Specialized institutions have taken few – but positive – steps to organize conferences and workshops aimed at the sensitization of

⁶⁵ RSD interviews for Sudanese asylum-seekers were partly resumed in 2006. It is unclear whether CRS's policies *vis à vis* the Sudanese will change.

judges, lawyers, prosecutors, and other state officials about the problems faced by refugees in Egypt. Regrettably, there has not been any comprehensive and large-scale initiative to inform the local population of the problems faced by refugees. As a result, the majority of Egyptians, out of lack of knowledge, think of refugees as foreign workers who threaten their access to the labor market. If this perception persists, racist and xenophobic movements will rise, leading to the destabilization of public order. As such, proactive steps need to be taken by state and non-state actors in order to alert the local population about the refugee crisis. These steps can be started by minimal efforts that can be summarized in the following points:⁶⁶

- Efforts should be made by all parties concerned to target the media in order to inform the local population about refugees and their problems. This campaign can also be made more effective if *sheikhs*, *imams*, and priests got involved.
- UNHCR and NGOs should organize more workshops and conferences to inform state officials about their country's duties in national and international law insofar as the right of refugee children to education is concerned.
- There needs to be a follow-up mechanism that ensures that laws are being implemented to facilitate the access of refugee children to primary education.
- A supervisory mechanism must be established to monitor the selection process in public schools.
- A network of lawyers should be formed, in collaboration with UNHCR, NGOs, and the Lawyer's Syndicate, to provide free legal clinics to refugees where they can be informed of their rights.
- Advocates must use national courts to represent refugees who were denied their right to primary education.
- Contacts with the Egyptian Ministry of Education should be made in order to facilitate the recognition of schools that cater for refugees, and to ensure that directives for

⁶⁶ This list is not exhaustive; it rather provides guidelines on what must be done to facilitate the refugees' access to education.

registering refugee children are created and distributed to public schools.

- There should be demands that school curricula include information about refugees and refugee-generating situations, and how Egyptians are legally and morally obliged to host refugees and treat them humanely.

These steps will not fully eradicate the obstacles faced by refugees in Egypt. However, they will enable refugees to live in a less hostile environment, and will facilitate their integration process and promote greater awareness of how Egypt can benefit from refugees living within its jurisdiction.

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ANNEX 1 (UNHCR DOCUMENTS ATTACHED)

**UNHCR**United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés**Refugee Population in Egypt - April 2006**

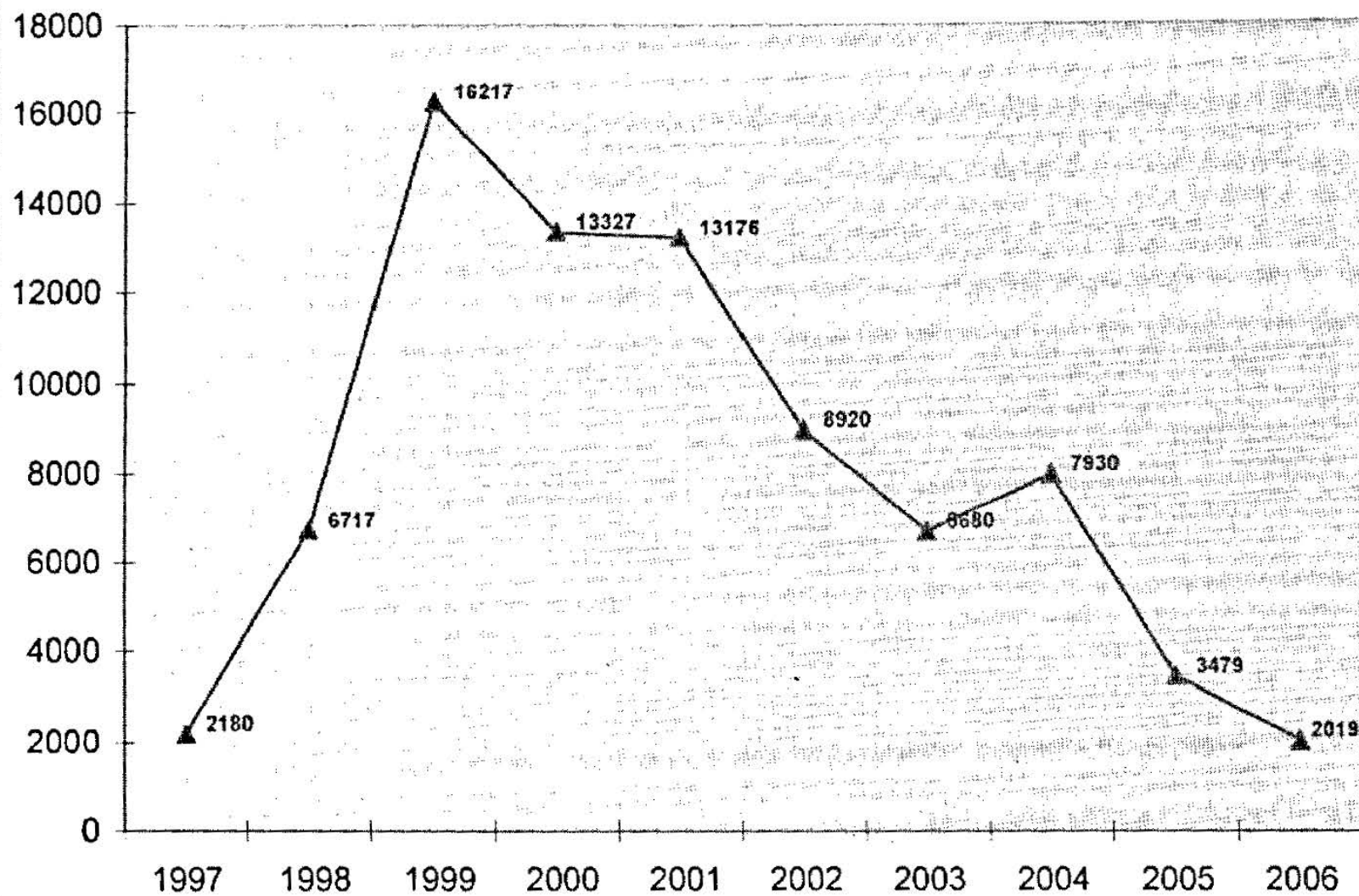
Country of Origin	Population Dec-2005	Increases during Jan - Apr 06	Decreases during Jan - Apr 06				Population Apr 2006
			Repatriation	Resettlement	Others	Total	
Afghanistan	31	-	-	-	-	-	31
Algeria	4	-	-	-	-	-	4
Angola	1	-	-	-	-	-	1
Burundi	59	-	-	-	8	8	51
Cameron	1	-	-	-	-	-	1
Central Africa Republic	1	-	-	-	-	-	1
Chad	8	-	-	-	-	-	8
Congo Brazzaville	1	-	-	-	-	-	1
Congo Democratic	14	-	-	-	-	-	14
Djibouti	5	1	-	-	-	-	6
Eritrea	205	18	-	-	9	3	211
Ethiopia	516	9	-	-	9	3	513
Gaza Stripe	255	1	-	-	63	63	195
Guinea	1	-	-	-	-	-	1
Iran	1	-	-	-	-	-	1
Iraq	35	-	-	-	1	1	34
Ivory Coast	71	2	-	-	-	-	73
Kuwait	9	-	-	-	-	-	9
Liberia	15	-	-	-	-	-	15
Libya	4	-	-	-	-	-	4
Myanmar	2	-	-	-	-	-	2
Nigeria	5	-	-	-	-	-	5
Russia	4	-	-	-	-	-	4
Rwanda	16	-	-	-	1	1	14
Saudi Arabia	1	-	-	-	-	-	1
Sierra Leone	61	-	-	-	-	-	61
Somalia	3,040	230	1	121	29	151	3,019
Sri Lanka	2	-	-	-	-	-	2
Sudan	13,446	193	25	269	174	468	13,171
Syria	2	-	-	-	-	-	2
Togo	1	-	-	-	-	-	1
Tunisia	1	-	-	-	1	1	-
Uganda	11	-	-	-	-	-	11
Yemen	209	1	-	-	-	-	210
Yugoslavia	8	-	-	-	-	-	8
Total	18,946	435	26	418	274	718	18,683

Other persons of concern to UNHCR

Stateless	113	-	-	-	17	17	96
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[illegible]

Number of asylum seekers from 1997 to 30.04.2006



AFRICAN REFUGEES IN AFRICA: PERSPECTIVES, CHALLENGES AND PROSPECTS

MICHELO HANSUNGULE¹

With a generally deplorable record of governance, the refugee phenomenon is natural to Africa. Ironically 'independence' in the sixties and seventies exacerbated the problem. However, ground-breaking elections have been held in several African countries bringing hope to the millions. Although natural and particularly man-made factors continue to produce refugees in a number of countries, the trend generally is towards more stable societies. At the height of the problem in 1969, Africa responded with an African-tailored Convention. This Convention was intended to complement the UN Convention as well as to underscore the seriousness of the problem in the region. However, this was not replicated with equal energy in most local systems. African refugees and migrants in Africa continue to suffer from lack of protection. This article is an overview of refugee law and to an extent practice in relation to Africa. Previous writings on the subject have mostly focussed on African refugees in Europe and other places. The article is an attempt to focus the subject on refugees and migrants in Africa. Its conclusion is that while on paper Africa has done a lot to protect refugees within its borders at least judging by the two conventions, reality shows quite the contrary.

¹ The views in this article are those of the author and do not reflect the views of the organization the author works for. I would like to extend my sincere thanks to the following students for their various contributions towards the development of this article: Serge Alain Djoyou Kamga; Virginia Njeri Kamau; Grace Kamugisha and Rose Sangandu. Serge is an LL.D (Ph.D) student in the Centre while the rest are LL.M students in Human Rights and Democratisation in Africa. Without their contributions, this article would not have been possible. However, I take full responsibility for the outcome of the article.

1. Introduction

The *raison d'être* for seeking refugee protection is individual fear of persecution. Fear from persecution and therefore desire for protection are the principal reasons a person would skip his country of birth to another.² Few people when faced with danger will remain put and not even seek to protect themselves. But this is not the only reason for leaving one's beloved country. Another is desperate search for a better life.³ Again, given the opportunity, a person would leave his home or country to another in search of opportunities. While the latter is manifestly voluntary, the former is involuntary. In itself, the latter is not yet recognised ground for granting asylum while the former is. The difference between the two is that though it may be refused, one who flees in fear of persecution has an automatic right to request for protection but a 'voluntary' or 'economic migrant' as the latter is despicably referred to is expected to have prior permission to enter the host country legally. Again, the automatic right to seek asylum does not mean 'automatic right asylum or refugee'. The State of refugee must still be afforded opportunity to grant or refuse it. The two i.e. seeking and obtaining the status are as different as day from night. Refugees know this better. The host state will often consider the request for asylum taking into account especially the reasons advanced in support of the claim of course and simultaneously decide whether the request complies with the minimum dictates set out in international law of refugees. In the determining the application, the State must ensure that it observes international law. For example, international law forbids States from discriminating against refugees. Similarly, once status has been granted, international law forbids the host State from sending the refugee back straight into the danger he or she is running away from.

² See generally, Karen Musalo, Jennifer Moore and Richard A. Boswell (2002) *Refugee Law and Policy. A Comparative and International Approach*, Second Edition, Carolina Academic Publishers

³ Migration Information Source – Interview with Antonio Guterres, UN High Commissioner for Refugees, <http://www.migrationinformation.org/Feature/display.cfm?>, date accessed 2008/02/07

But, it is important to underline that refugee phenomena is not new to Africa as to the rest of the world. Of course Africa produces one of the largest refugee and Internally Displaced Persons (IDPs) in the world. Nevertheless, this is not new to Africans. Ever since Jesus Christ, the most famous refugee, was brought to Egypt by his fleeing parents (Joseph and Mary) to hide him from King Herod who was after his life,⁴ Africa, besides exporting refugees, has hosted some of the largest African refugee populations.

Pre-colonial African society already practised the concept of refugee. Nelson Mandela⁵ and earlier Marwick⁶, for example, documented some of the pre-colonial refugee situations. Mandela described how the *Ama Mfengu* one of the tribes in his village were stereotypically known as 'refugees' who previously fled the ruthless wars imposed on them by warrior-King Shaka Zulu. This particular issue – Shaka Zulu and his brother and successor Dingane's wars and consequent displacements and refugees – has been discussed in detail by Peter Becker, in his book appropriately entitled 'Rule of Fear'.⁷

Nevertheless, Africa simply has too many refugees and Internally Displaced Peoples (IDPs). One would have thought that this would not be the case after the wind of democratization since the early 1990s but look at what is happening in Chad and now Kenya, etc. Africa's refugee and IDPs population is disproportionate to the rest of the world relative to Africa's resources. Though notorious, this fact has repeatedly been documented. For example, the UN refugee watchdog, the UN High Commission for Refugees (UNHCR), reported that of the world's 9.5 million refugees at the beginning of 2005, Africa's refugees constituted 2.7 million or 12

⁴ '..... behold, an angel of the Lord appeared to Joseph in a dream saying, take the young child and His Mother, flee to Egypt, and stay there until I bring you word, for Herod will seek the young child to destroy Him' (Matthew 2:13); Also see Jesus Visions, Signs and Wonders in the Muslim World, www.jesusvisions.org

⁵ Nelson Mandela (1994) *Long Walk to Freedom*, Abacus, London, p. 14

⁶ B.A. Marwick (1966) *The Swazi. An Ethnographic Account of the Natives of the Swaziland Protectorate*. Frank Cass & Co Ltd, London The BaThonga people in Swaziland were and still known in legend to have settled in the Kingdom of Swaziland as foreigners or refugees who were fleeing conflict and war from their countries of origin.

⁷ Peter Becker (1972) *Rule of Fear. The bloody story of Dingane, King of the Zulu* Granada Publishing.

percent.⁸ According to the UNHCR, five of the ten-top refugee producing countries globally are in Africa – Sudan, Burundi, Democratic Republic of Congo (DRC), Somalia and Liberia.⁹ Similarly, three (Tanzania, Uganda and Chad) of the world's top-ten refugee receiving states are African. For a continent as poor as Africa, this is a deplorable situation. But it is still far much 'better' than during the worst of times. For example, a single act of genocide in Rwanda triggered a wave of over two million mostly Hutu population who fled to the thickest of eastern DRC to hide from the new Tutsi government.¹⁰ Another more or less similar number just forced its way to Tanzania. This is usual in Africa.

In a rare introspective comment, African Parliamentarians identified the source of protracted refugee situation in Africa as stemming from:

'...continuing political instability or armed conflict in some countries of the region; growing presence of armed elements in refugee camps; serious violations of universally recognised principle of non *refoulement*; growing xenophobia against refugees.....'

The first of these – continuing political instability per armed conflict in some countries of the region – is the main reason for driving Africans into refuge. Beneath this are various factors including poverty, bad governance and especially lack of participation, discrimination, corruption, etc.

2. International Refugee Law

Since the Second World War, the international community has tried to provide for the refugees. It is sad of course that the world has to wait till after a catastrophe like the Second World War for

⁸ Jeff Crisp, *Forced displacement in Africa: dimensions, difficulties and policy directions*, New Issues in Refugee research, Research Paper No. 126, UNHCR, July 2006

⁹ Ibid.

¹⁰ For a general discussion, see one of the UN High Commissioner for Refugees report based on an assessment conducted during one of the peak periods of the 'voluntary repatriations' the UNHCR conducted in southern Africa in mid-1990s: <http://www.un.org/documents/ga/docs/50/plenary/a50-12.htm>

brilliant ideas on how to protect people. However, in 1951, the UN adopted the Refugee Convention principally in order to provide for refugees triggered from the Second World War. That the Convention was a result of the war is clear from the fact that it was intended to be temporary i.e. to last only until after the post-war situation had stabilised. Therefore, it had to have its tenure renewed from time to time.¹¹ But more than fifty years later, it is probably more relevant today than at the time of its inception. Proof of this is in the fact that as of 5 February 2002, nearly all African states acceded to the Convention.¹² Thirteen have ratified the 1967 Protocol relating to the status of refugees.¹³

Apart from the UN Convention, Africa decided to introduce its own Convention in 1969. Among other things, this was found necessary in order to respond to the specific situation of the African refugee problem but also to make the problem visible. The OAU Convention on the Specific Aspects of Refugee Problems in Africa, as the African Convention is called, was adopted by the Organization of African Unity (OAU), the forerunner to the present African Union (AU).¹⁴ Like it reads, it addresses 'specific aspects of refugee problems' stated in the Convention.¹⁵ Consequently, both the UN and the African Conventions constitute the normative framework for refugee protection in Africa. Therefore, Africa brings to the international scene a *dual* system for the benefit of her refugees. This is not mere academic dressing. It is a practical response to a practical problem. It came out of realisation that while the UN Convention is an important tool to Africa, it does not cover the African refugee problem in its entirety. Apart from individual

¹¹ Facts and Figures, UNHCR Global Appeal, 2003

¹² These are: Angola, Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Morocco (Not member of the AU), Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

¹³ See: www.unhcr.ch/refworld/legal/instrume/asylum/proteng.htm

¹⁴ See: www.africa-union.org

¹⁵ Some of these aspects include natural calamities, liberation wars,

fear, Africa's other problem is generalised fear. This needed special attention and the AU Convention does this. Of course Africa could have tabled a motion in the UN General Assembly for the review of the Convention to accommodate its peculiar situation. But this might not have been successful. States without the African experience would not have seen the need to revise the Convention to accommodate African problems. Therefore, the route taken by Africans to adopt their own treaty was the most practical. Though it has not attracted the same number of States as its counterpart at the UN, the OAU Convention has garnered a total of 45 ratifications.¹⁶ It is a good question, of course, why Africans would rally around a 'foreign' Convention much more than their own.

2.1 Aspects of the OAU Refugee Convention¹⁷

Faced with the unending influx of refugees post independent Africa, African leaders decided to have their own Convention to deal with the problem. What they wanted was something more practical than the UN Convention to deal with problems in their backyards. As an aside, it can be said that this bold decision constituted admission for the first time at the level of the OAU that the problem of refugees was African.

In fact, desire to grapple with the issue of African refugees coincided with 'independence'. Already, even before the euphoria of independence had dissipated, things were getting bad for the African in various countries. Misgovernance in Africa begun immediately after independence. This is when people started to run away to other countries for their lives. Except for a handful of States, most instead of protecting their people became the greatest threats to their security and life. In 1965, the African Heads of

¹⁶ States that have not yet ratified the OAU Convention are: Djibouti, Equatorial Guinea, Madagascar, Mauritius, Namibia, Sahrawi Arab Democratic Republic (in international law not yet a state though fully recognised by the African Union), Somalia and Sao Tome & Principe. Of these, the most surprising is Namibia whose current leaders lived in exile as refugees during colonial rule till independence in 1990! See: <http://www.africa-union.org>

¹⁷ www.africa-union.org/Official_documents/Treaties_%20Com

State and Government meeting in the Ghanaian capital city Accra adopted the first Declaration on the Problem of Subversion *and the Resolution on the Problem of Refugees* (sic).¹⁸ This was followed two years later by Resolution 2312 (XXI) of 14 December 1967 of the United Nations General Assembly relating to the Declaration on Territorial Asylum which emanated from both the Charter of the United Nations and the Universal Declaration of Human Rights. Both the two instruments categorically affirmed the foundational principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

In paragraph 1 of the preamble to the Convention, States 'noted with concern the constantly increasing number of refugees in Africa' and 'expressed their desire to find means and ways 'of alleviating their misery and suffering as well as providing them with a better life and future'. This puts to rest the question why Africans decided on a separate Convention from that of the United Nations.

The first distinct contribution the Convention brings to the subject of refugees is in Article 1 itself which provides for the definition of the term 'refugee'. Besides adopting the UN definition *mutatis mutandis*,¹⁹ the African Convention in paragraph 2 of the same Article 1 introduces a specifically African definition which states:

¹⁸ Problem of refugees in Africa, Accra, AHSG 21-25 October 1965. In part, the resolution read: 'Considering the gravity of the refugee situation in Africa and the complex problems it causes to the country of origin as well as the host countries; Reaffirmed desire to give all possible assistance to refugees from any Member State as a humanitarian and fraternal basis; Requests all Member States not to allow the refugee question to become a source of disputes amongst them; Asks Members of the Refugee Commission established by resolution CM/Res.19(1) to provide legal experts at the highest level possible to re-examine the draft OAU Convention on the status of refugees having regard to the views expressed by the Assembly at its present session and to report back'.

¹⁹ Paragraph 1 Article 1 reads: 'For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, unwilling to return to it'. See Article 1 (a) (2) of the UN Convention which reads exactly the same as in above.

"The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

As can be seen, this does not aim at providing for subjective fear. The called for situation is to be determined objectively. It is what has become known as 'generalised fear' and it captures the African scenario very well. Unlike the UN Convention which requires proof of subjective fear in order for an individual to be granted protection and is strictly 'individual' focused, the African Convention is objective and therefore aims at situations of generalised breakdown of social order as the source of fear. Most African refugees are individuals who may have no proof of political or other connections anticipated in the UN Convention but who notwithstanding need protection. The difference between the two quite clearly shows during determination process. Under the UN Convention, an officer is assigned to conduct the determination of the asylum seeker's fear on a case by case basis. On the other hand, *prima facie* determinations are conducted based on the OAU Convention.

It must also be realised that at the time the African Convention was mooted, Africa was not yet *all* independent. Parts of Africa such as Angola, South Africa, Namibia, Mozambique, and Zimbabwe were still under colonial rule which sent scores of people from these countries fleeing to other African especially neighbouring countries to seek refugee. The specifically European principles based on individual fear under the UN Convention would not adequately cater for an essentially African problem such as this.

However, the OAU Convention may be withdrawn, and therefore, it is not an absolute means of protection. The Convention may be withdrawn on any of the following factors:

- (a) that there is information that the refugee has committed a crime against peace, a war crime, or crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) the refugee has committed a serious non-political crime

outside the country of refugee prior to his admission to that country as a refugee;

- (c) he has been adjudged guilty of acts contrary to the purposes and principles of the Organisation of African Unity;
- (d) he has been found guilty of acts contrary to the purposes and principles of the United Nations

Article 2 of the Convention deals with the issue of asylum. While the article does not oblige States parties to grant asylum to anyone seeking it, nevertheless, it states that 'Member States of the OAU shall use their best endeavours consistent with their legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality'. Concerned that the act of granting asylum could easily be misunderstood as an unfriendly act, paragraph 2 of this article clarifies that 'the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State'. More importantly, paragraph 3 of this same article states a crucial principle of *nonrefoulement* to the effect that

'no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2'.

Particularly important is reference to the African principle of *solidarity* which is enshrined in Article 2 (4). This states that

'where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum'.

Most African States find it hard to 'continue to grant asylum to refugees' due to the high cost this entails as these countries are poor. It is not easy for an African country to extend its services already overstretched beyond limits to persons not its national

Paragraph 4 of this article tries to resolve this problem through the principles of 'African solidarity' and 'international co-operation', the latter being a reference to the international cooperation through the United Nations particularly and other forums in general. This is an implicit reference to the principle of 'burden sharing'²⁰ set out in paragraph 4 of the preamble to the UN Convention which

²⁰ The principle of 'burden-sharing' was subject of elaboration by the United Nations General Assembly (UNGA) at its Forty-ninth session in September 1998. Under the theme 'International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International. Responsibilities for Refugees', the UNGA explained the basis for international solidarity and burden sharing, consequences of refugee and returnee movements, national responsibilities in refugee situations, regional and international approaches as well as how to strengthen international solidarity and burden-sharing. Among other things, the report explains the meaning of paragraph 4 of the preamble to the 1951 UN Covenant especially the word 'solidarity' in relation to the administration of refugees including the granting of asylum which it says requires international cooperation. It further refers to the importance of 'solidarity', 'responsibility-sharing' and 'burden-sharing' which, in a nutshell refers to the obligations on countries to share the burden of protecting refugees and asylum seekers and not leaving this to the particular countries involved. Furthermore, though the General Assembly recognizes the fact that the primary burden of looking after refugees is usually borne 'by the countries and communities directly concerned', it explained the importance of viewing this burden beyond those countries and beyond the region because in any case the impact of an influx in all its various dimensions goes beyond those physically facing the challenge. An important observation in this respect is that 'burden-sharing' should not only be understood in terms of extending material assistance to the countries involved but sharing in the 'burden' a refugee situation entails in all its aspects including its consequences on the environment, the issue of skills required to address the problem, cultural factors, material, political, etc. In other words, practicing the principle of 'burden-sharing' in all its various manifestations and not just providing money to the country or countries at the centre of the storm, is what was being recommended in the GA report. This is a dynamic interpretation of 'burden-sharing' Based on this and other factors, Europe, for example, picked up the concept and are now using it to meet situations like sharing the asylum seekers among European countries to try and have an even spread of hosting the asylum seekers and refugees as well as sharing them evenly 'within' their countries i.e. making sure that east Germany, for example, does not bear the burden of hosting asylum seekers at the expense of other regions in that country so that social services and other needs in one region are over burdened than in other regions (Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International. Responsibilities for Refugees. Executive Committee of the High Commissioner's Programme. Forty-ninth session,

refers to 'the grant of asylum may place unduly heavy burdens on certain countries' and, therefore, the preamble refers to the need for 'international cooperation' to alleviate the problem.

Article 4 enshrines the principle of non-discrimination in the application by Member States of the provisions of the Convention. Based on this, the Convention is required to be applied 'without discrimination as to race, religion, nationality, membership of a particular social group or political opinions', which is particularly important to the refugee given that she would be viewed as different from the host population and therefore likely to be treated differently. Similarly, the Convention embraces the principle of 'voluntary repatriation' in Article 5 and stresses the fact that the refugee shall not be repatriated against his will but shall be on the basis of refugees who request to be repatriated. There is need for both the host and country of origin to cooperate in this and particularly in order to make arrangements for the safe return of refugees. The country of origin is required to receive back refugees who request repatriation and therefore not harbour vengeance on them, facilitate their resettlement and 'grant them their full rights and privileges of nationals of the country.....'. Paragraph 4 of this Article 5 states expressly that 'refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations'. Finally, it is important that Article 6 provides for the duty on Member States to 'issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees.....for the purpose of travel outside their territory.....'.

It is not clear, however, whether African States apply both the OAU and UN Conventions or only the latter. A number of them disregard their own OAU Convention in preference to the UN Convention. Therefore, the OAU Convention though practical to

A/AC.96/904, 7 September 1998); Eiko R. Thielemann, *Towards Refugee Burden-Sharing in the European Union State Interests and Policy Options*, Prepared for the Ninth Biennial International Conference of the European Union Studies Association (USA), March 31-April 2, 2005, Austin, Texas.

Africa is in fact in limbo in most African countries. Below is an account of refugee protection practices from randomly selected African States.

3. Refugee Protection in national jurisdictions

3.1 Refugees and the legal framework in Kenya

The largest caseload of refugees in Kenya is from Somalia and Sudan. Most of them came to Kenya in the early 90s when in both of these countries there were conflicts. Other refugees come from Northern Uganda, Burundi, Rwanda, Eastern DRC, Tanzania, Ethiopia and Eritrea. By January 2007, Kenya was hosting up to 350,000 refugees.

There being no refugee legislation in Kenya until December 2006,²¹ the government of Kenya did not conduct 'refugee status determination' for the incoming refugees. This role was delegated to UNHCR. UNHCR while carrying out its mandate to protect refugees applies both the 1951 Convention on the Status of Refugees together with the Protocol and 1969 OAU Convention.

All the asylum seekers received in Kenya are registered at the UNHCR reception centres located near the borders of Kenya with Somali (Liboi), Sudan (Lokichogio) or in Nairobi. The Kenyan government has an encampment policy and this means all the asylum seekers and refugees primarily stay in designated camps located in Dadaab and Kakuma near the borders of Somalia and Sudan respectively. However, refugees with protection problems are allowed to stay out of the camps. This is also applicable to refugees pursuing education in institutions located away from the camps. Upon registration they are given an asylum seekers' card but for the Somali and Sudanese refugees they are given a refugee card. This means that until granted the asylum seeker card, which can take very long, an intending refugee has no status.

For the Somali and Sudanese in Kenya UNHCR does not conduct individual status determination. This is because of the large

²¹ Government of Kenya, Nairobi: The Refugee Act, 2006.

caseloads from these two countries. However concerning asylum seekers from other countries the organisation applies either the 1969 Convention or the 1951 Convention depending on the country of origin. For the asylum seekers from Northern Uganda and Eastern DRC UNHCR recognises them under the 1969 Convention due to generalised violence in the area. This means that they do not have to fulfill the criteria under the 1951 Convention of individual well-founded fear of being persecuted. Instead one is only required to convince the organisation that they come from that region. For asylum seekers from Rwanda, Burundi, Eritrea, Ethiopia, Tanzania and other parts of DRC (apart from Eastern part) and Uganda (apart from Northern Uganda) they undergo a rigorous individual status determination. They have to prove that they have well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In other words, authorities do not apply 'generalised fear' determination for individuals in one case which they do for individuals from the other. Reasons for the different approaches are not clear.

If they are found to fulfill the above criteria, they are recognised, assisted and protected by UNHCR. Assistance includes being given food rations, access to education, water, housing, firewood, health services and other services. This assistance is given with cooperation from implementing partners i.e. other organisations working with UNHCR.

If an asylum seeker is rejected at first instance he is given a chance to appeal and is again interviewed by eligibility officers. However, this is the last and final chance for an applicant. If they do not qualify at the second chance, their names are handed over to the Government of Kenya for further action. Normally, no punitive action is taken by the government against the unsuccessful applicant. However, the UNHCR would cease their support to the rejected case.

Besides the support given by UNHCR, refugees may also be voluntarily repatriated back to their country or resettled. These are the only durable solutions available for refugees since there is no option for local integration. Refugees are repatriated back to their country of origin voluntarily when the circumstances that made them flee have changed. Repatriation is often done in groups and in rare cases individually. Resettlement as a viable option is not

available to all refugees. Most resettlement countries give annual quotas for the refugees they would like to be resettled. UNHCR has clear criteria in this respect and for a refugee to be resettled they have to fulfill these criteria. A refugee can be resettled for medical reasons, to be reunited with family members abroad, if they have physical and security concerns in the camp, for the best interest of children, elderly refugees and if there are no local integration prospects.

UNHCR works closely with the government to ensure that persons registered as Kenyan citizens do not also register as refugees. This is done through fingerprinting and comparing the finger prints with those in the government records. With the generous and weak administrative systems coupled with Africa's porous borders, registration both as citizen and refugee is not a real possibility.

3.1.1 Refugee problems in Kenya

Refugees in Kenya are required to stay in the camps this means that they cannot access employment in wider society. Life in the camps is also difficult as the camps are located in hardship and climatically hostile areas.

There is a large protracted caseload (those who have stayed in Kenya for more than 20 years) of pending applications without any solution in sight. Such persons often become frustrated and sometimes spontaneously repatriate without the assistance of UNHCR.

Refugees who are not available during the time UNHCR is carrying out a 'census' for the purposes of database and planning are deactivated from the database and they do not receive assistance. One has to show a good reason for not being available during these exercises.

Refugees are always harassed by the police for lack of identification papers and sometimes because some policemen are just corrupt and want to extort money from the refugees. This is also the case with the rejected asylum seekers who instead become illegal immigrants roaming the streets mostly in Nairobi.

For refugees to move out of the camps they require movement passes (travel documents) from UNHCR. This is often viewed as a violation of their right to movement. Further movement passes are only offered once a week and therefore refugees have to wait for

that one day in the week which naturally frustrates them. However emergency travel documents are issued for medical purposes.

The location of the camps makes them susceptible to insecurity. These locations are classified by the UN as 'phase three' and therefore movement is only done with armed escort. The areas are further marginalised and with little or no infrastructure.

3.2 Refugee law and the situation in Tanzania

This section only illustrates the activities of the UNHCR field office in Kasulu which is in the North Western part of Tanzania, and most certainly not the refugee situation in the whole of Tanzania. This area hosts refugee camps at Mtabila I & II, Muyovozi and Nyarugusu. The first three camps are for Burundian Refugees and Nyarugusu for Congolese Refugees. However, attention will mostly focus on Burundian Refugees though aspects of Congolese refugees will also be discussed. Through this, however, it is hoped the section will enable appreciation of the entire situation facing refugees in Tanzania.

3.2.1 Tanzania Refugee Law

Principles of the 1951 Refugee Convention are to a large extent incorporated in the domestic legislation²² in Tanzania. However, in practice refugee workers in Tanzania rarely refer to law but to general practices which comply with the law.

By way of introduction, it is interesting that refugees in Tanzania, during the planting season, willingly register to repatriate to their home countries or simply pack and go if the registration formalities prove cumbersome. Besides the desire to be self-sustaining in food supply, this keeps them in touch with their home countries which is a peculiarity of African refugee. Similarly, education presents a challenge to refugees. Refugee education system in Tanzania is based on the country of origin's education system. Instead of applying the Tanzanian education system and cycle to refugees, authorities apply the education system of the

²² Government of the Republic of Tanzania, Dar-es-Salaam: Refugees Act No. 9 of 1998.

refugee in his or her home country. This is because the French based education system in Burundi is different from the Tanzania system. But notwithstanding this, the commencement of a school term sees increased numbers of refugees repatriating to their home countries to get their children registered in Burundi schools to guarantee education under their native system. Therefore, periods in which many refugees registered for repatriation were from July to the end of September or beginning of October. Another season is from the beginning of the year though not in large numbers like in the first-mentioned season.

During the periods when many refugees registered to be repatriated, UNHCR experiences a number of problems. Repatriation is a very difficult process. Some of the challenges experienced when repatriating Burundian refugees have to do with family reunification. This is a highly emotional event. There would be children who want to repatriate with adults who were not their parents. These could be real strangers, but in most cases, parents wanted either to send or to leave behind minors with grand parents (or other adults). In UNHCR's view this was not acceptable.²³ First based on the family unification principle and the consideration that parents have the primary duty for the upbringing of children, secondly, it is considered as UNHCR policy that elderly grandparents were not best suited to provide for the minors especially when grandparents wanted to repatriate with minors where UNHCR could have to lose contact with minors and hence be unable to monitor their situations in Burundi.

However, family division is at times allowed even under UNHCR practices. For example, it is a reasonable ground for family division in instances where minors proposed to remain behind with let's say, brothers/sisters of over eighteen years for school reasons when parents were intending to repatriate in the middle of a school term.

²³ UNHCR prefers the European family concept in administering refugee camps as opposed to the African family concept. This was made clear in a critique it prepared on Uganda Refugees Act. The Refugee Law Project which conducted the critique of the Ugandan legislation that provided for adoption of the African family complained that the African family was not easy to apply in practice. See section on Uganda in the article.

Refusal by refugee authorities to split an African family so as to entrust children to the care of grandparents and other relatives was generally viewed as contradicting African traditions by refugees and there was a time when UNHCR had to rethink its position as to whether it was not imposing western values on them. The African institution of extended family in fact acknowledges the important role the family plays in its wider context including the role grandparents play in child minding, raising, maintenance, development and protection. Nevertheless, there were large numbers of unaccompanied refugee children who had fled without their parents. This presented a serious challenge.

For example, there were two children of Tutsi origin who fled with a Hutu woman (foster parent). Their mother had passed away before they fled and their father was imprisoned in Burundi allegedly for killing the Hutu. The Hutu woman they fled with used to mistreat them on the basis of their Tutsi ethnic belonging.

While in the camp, they managed to locate their paternal uncle. But contrary to the African extended family principle, the uncle claimed he was unable to take them under his custody as he had a large family. Subsequently, the male child who was older than his sister simply could not put up any more with the Hutu woman guardian and had to move to the uncle.

Sometime later, the foster parent wanted to repatriate. She planned to repatriate with the female child after she promised the young girl to trace her father for her when in Burundi. UNHCR asked the girl about her experiences with the foster parent to which she stated that the guardian used to persecute them, call them "Tutsi", and would overwork them with domestic and other work. But she said she was willing to go with the guardian because she promised her to locate her father. The boy did not want to go with the woman, in fact stated that he hated her. Consequently, the issue for the UNHCR was, should they separate the two children, or should they seek to reunite them with the father back in Burundi? The problem was, the father was imprisoned! The possibility was also considered to allow the guardian Hutu woman to go back but leave behind the two minors. The girl cried, as she wanted to go with the guardian so that she joins either her ('imprisoned father') or other relatives! When UNHCR asked the two children whether they were willing to separate (that the mother goes with the girl, and the boy remains in camp with the uncle), both of them broke down and cried. However, before any of this could happen, their father was released from prison in Burundi and he came for them in Tanzania.

Source: Grace Kamugisha, Dar es Slaam, 2007

The above case illustrates the importance of not only refugee law but also human rights, international law as well as African values combined. It is important for the UNHCR to understand that the notion of 'family separation' may not have the same meaning in Europe as in Africa. Relatives in African society play an important role in child-raising and child-upbringing that a child who is placed in their custody cannot be said to be 'separated' from family. Relatives are family and UNHCR should make efforts to trace relatives of the child in the absence of parents to place such child in their custody. Similarly, international law on the rights of the child does not aim to disregard certain non-Western African notions like extended family institution because if so, African States would not have taken part in bringing them about.

3.2.2 Other repatriation related challenges

According to WHO standards, a pregnant woman is not allowed to travel after 7 months (28 weeks) of pregnancy. Normally refugees registered to repatriate about one to three weeks before the scheduled date for repatriation. At this time, they go through various screenings including ensuring that no minor or wife is abandoned in camp, and that there is no pregnant woman allowed to travel within the scheduled time, and so on.

Refugees would sometimes be forced to remain in camps beyond their wishes before they could be allowed to repatriate especially when numbers dropped down. Taking into account the cost implications of a repatriation exercise, some of them had to wait for the numbers to accumulate before repatriation which, of course, affected refugees resented.

The basic elements of repatriation are that it must be voluntary and conducted in safe and dignified conditions.²⁴ Postponement of a convoy for repatriation is a very sensitive matter. In one occasion an officer, focal point for Burundian Repatriation, received wrong instructions from the Associate Field Officer to cancel a Convoy, which she did by sending an email. The email went to all offices in Dar-es-Salaam, Burundi and all UNHCR Offices misrepresenting

²⁴ For an example of governing manual for repatriation, see Annex 1 detailing applicable procedures for the repatriation of Congolese refugees in Uganda.

that owing to low numbers the scheduled repatriation had been cancelled. Cancelling a Convoy is a political issue and the host Government must be involved. Similarly, the hosts had to be involved after a repatriation had been scheduled, if such schedule was to change.

3.2.3 *Congolese Refugees in Tanzania*

One of the striking features of Congolese refugees was the issue of "bride wealth" and how it impacted on refugee women and children.

First of all according to the Tanzanian Refugee Act, save for the educational system, refugees are subject to the laws of Tanzania. However, when it comes to customary law, refugees invoked the customary law of their country of origin, which is similar to the education system.

For example where a man had not paid bride wealth, he had no right to (custody) of the children. The meaning of this custom is not clear for example whether it meant that children do not belong to the man at all. The custom is prevalent even in Tanzania, but in Tanzania, it operated only to deny a father certain rights such as use of his surname by children. For him to access his children, he may be required to compensate the parents of the mother of the children. But for Congolese at least as portrayed by refugees the custom meant more than that. Basically, it excluded the father from having access to them until after dowry or bride wealth had been settled.

Therefore, if for example a refugee woman wanted to repatriate, leaving behind the man/husband, but the wife wants to go with a minor, the issue of family split would arise! Three issues were to be considered in such a scenario.

- a. Whether the wife should be allowed to leave her husband behind (when it could be said they are not husband and wife because he never paid bride wealth).
- b. Who is best positioned to have custody of the minor(s) (then the woman could say, the man has no right of custody because he never paid bride wealth).
- c. Whether the woman was in a position to be given custody of the minor?

Normally, UNHCR considered the best interests of the child. The

determination involved recommendation of the community service staff from the Implementing partner such as International Rescue Committee (IRC) and World Vision. These could visit the families and study the situation before they made their recommendation to UNHCR (staff). In one case for example, the woman had proved to be irresponsible in the camp. It was established that she wanted to go back to DRC and get married to another man while leaving the minor (under seven years) with her grand parents. Under normal circumstances, you would expect the father who in this case was well established, to be given custody! But owing to unpaid bride wealth, this was held to be against Congolese customary law!

The impact of this on women was negative. According to customs, if a man paid bride wealth to his wife's parents, for there to be effective divorce the wife's parents had to pay back the bride wealth to the man. In one occasion, spouses had marital problems and had in fact separated for sometime. But the wife's parents were unable to pay back the bride wealth to the man. Meanwhile, the wife, found another man whom she wanted to marry and repatriate with to the DRC. When she came to register for repatriation the first man found out and raised objections that she should not be allowed to repatriate because she is still his wife! The objection was upheld based on Congolese customary law.

3.2.4 Other general protection problems

Refugees in Tanzania have no right to work. The food they get from WFP is not enough especially because, it is difficult for them to maintain the same family size to register with UNHCR/WFP. Sometimes other people come in the camps outside proper procedures. Others spontaneously return to their home countries and sell the ration cards to new refugees and so on. Some times men abandon their families, which forces the latter to follow them wherever they go in order to benefit from the food ration issued to the man as family head. This is compounded by the 'no work' policy for refugees which applies to family members as to the family head. Therefore the fact that they cannot supplement whatever they get from WFP/UNHCR through other means is a big problem for them.

Refugees' freedom of movement is limited to within four (4) Kilometers. Beyond that they must get a permit from the camp commandant. Of course men do leave their families and go outside camps but do so illegally which first make them vulnerable to arrest

and persecution, while at the same time leaving their families without their support.

Refugees have to travel long distances to collect firewood. There was a time when this perpetuated rape. UNHCR through implementing partners had to organise transport for them especially single women.

In respect of education, UNHCR pays fully both for primary education and for secondary education. However, this is only with regards to the tuition. For other expenses, refugees are required to contribute which is not easy for a person who does not work.

3.3 Refugees in South Africa²⁵

South Africa faces a huge influx of migrants and asylum seekers most of whom are from Africa. In a sort of reversal of fortunes, South Africa which before freedom produced one of the largest refugee populations in the world of people fleeing from apartheid, the reverse is now true. However, some of the non-African immigrants include the Chinese and eastern Europeans but also Asians generally. Already, South Africa has been hosting large numbers of immigrants from her neighbours through historical ties which go back to colonialism and even before. It is estimated, for example, that of the roughly four million population of Swaziland, about half is resident in South Africa. Similarly, Basutu people from Lesotho which due to colonial history is completely surrounded by South Africa, 'freely' inhabit both sides of the border between the two countries. Mining drove several hundreds of thousands of job-seekers from as far Malawi, Mozambique and Zambia besides those from adjacent countries as already indicated.

One of the largest post-apartheid African immigrant population in South Africa are Zimbabweans. Numbering an estimated three million, scores of Zimbabwean young men and women defy the border by the day to escape the fast deteriorating social and economic conditions in Zimbabwe. There are harrowing stories in the media about how Zimbabweans try every means to reach South Africa

²⁵ For an excellent account on refugee law in South Africa, see: Klaaren, Jonathan (1999) *A Guide to South African Refugee Law*, School of Law, Wits, South Africa

including risking their precious lives by swimming across the crocodile-infested Limpopo river which serves as the boundary between the two countries. However, it is not clear in the absence of a proper population audit whether the Congolese immigrants do not in fact outnumber Zimbabweans. Predictably, there are as many Nigerians in South Africa as in any other country in the world. The joke is that Nigerians are found everywhere on earth! As indicated, scores of mostly young Africans from different African countries legally and mostly illegally immigrate into South Africa every other day.

However, most African immigrants to South Africa all too often find themselves on the streets unwanted by the host population. Because South Africa is not enthusiastic about applying the OAU Refugee Convention, to which it is a party, even immigrants fleeing from situations of generalized insecurity and violence like in Zimbabwe or the DRC are ignored by the pro-Western South African refugee administration system applying only the 1951 UN Convention and its protocol. Though paragraph 2 of the 1969 OAU Convention refers to the duty on the part of African States to 'recognise the need for an essentially humanitarian approach towards solving the problems of refugees', South Africa does not grant asylum on humanitarian grounds. Therefore, most of them 'illegals' as they are mockingly called, are rounded up, dumped at camps like Lindera outside Pretoria and are forgotten by the system!

Refugees in South Africa form a relatively new category in terms of state policies and procedures. This category first emerged during the country's political transition in relation to returning exiles in the early 1990s. In 1993, as the political transition became a reality, the South African government reached an agreement with the UNHCR regarding the return of exiles to the country. Alongside procedures for returning exiles, the agreement also defined criteria for determining refugee status. In this way, the foundations for refugee reception in South Africa were set. In 1995, South Africa ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. In 1996, the 1951 United Nations (UN) Convention Relating to the Status of Refugees and the United Nations Protocol of 1967 were also acceded to²⁶. This international

²⁶ Human Rights Review, 1999.

legislation underpins the current definition of a refugee in the 1998 Refugee Act,²⁷ an act developed from recommendations in the 1997 Green Paper on International Migration to deal specifically with refugees in South Africa.

South Africa was elected to serve on the Executive Committee of the High Commissioner's Programme in February 1997.²⁸ The membership is for an indefinite period, for as long as South Africa wishes to be a member. The Executive Committee determines the general policies under which the UNHCR plans, develops and administers refugee projects.

South Africa does not have enough jurisprudence to guide refugee administration.²⁹ Most of the framework is found in policy

²⁷ Refugee Act, No. 130 of 1998.

²⁸ United Nations High Commissioner for refugees (UNHCR), Office in South Africa, www.dfa.gov.za/foreign/Multilateral/inter/unhcr.htm.

²⁹ The few cases on refugee issues from South African courts include *Kabuika v. Minister of Home Affairs*, 1997 (4) SA 341 (C). In this case, the High Court found that the Appeal Board for Refugee Affairs had *prima facie* misinterpreted facts before it to such an extent that the applicants should be granted temporary relief pending the outcome of review proceedings. This case is evidence of the fact that the internal systems and mechanisms for the effective administration of refugees in the Department of Home Affairs lacks capacity for efficient and effective discharge of its functions. In *Baramoto and Others v. Minister of Home Affairs and Others* 1998 (5) BCLR 562 (W), the court rejected an application by a group of Zairean generals to have the court declare them to be refugees, and not the administrative organs. The generals turned to court for the relief after waiting for a long time without the internal processes resolving their case. But the court while acknowledging the domestic legal status of the refugee regime as binding on South Africa, nevertheless, rejected the claim that a decision by the Standing Committee for Refugee Affairs and the Appeal Board for Refugees would not be fair. In *Muhire v. Minister of Home Affairs* Case No. 4259/96. CPD.20 May 1996), the Standing Committee for the Refugee Affairs recognised the applicant as refugee but rejected his request for asylum in South Africa and gave him 21 days to leave the country. His Appeal was rejected by the Appeals Board for Refugee Affairs. But after he brought an application for review, the Department of Home Affairs allowed him to stay in the country pending the review proceedings but refused to grant his request to seek employment. The Department cited the state's 'absolute discretion to decide which prohibited persons may enter or remain in the territory over which it exercises sovereign powers'. The Department based this on an earlier case of *Xu v. Minister Van Binnelandse Sake* 1995 (1) SA 185 (T). Finally, in a 'land-mark case' (*Pembele and Others* (No. 15931, CPD, 10 December 1996) which dealt with the rights of both refugees

or statute. In terms of the Refugee Act, a refugee is defined as a person who,

- (a) owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable, or owing to such fear, is unwilling to avail himself [sic] of the protection of that country, or who, not having a nationality and being outside the country of his or her former habitual residence is unable or owing to such fear, is unwilling to return to it;
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality.³⁰

On paper, therefore, South Africa enshrines both the UN and African definitions as seen in the above definitions. In practice, the African definition is neglected. As indicated, freedom in South Africa and misgovernance in a number of African countries have led to economic melt-down which has triggered unprecedented flows of young men and women from various African countries to South Africa seeking opportunities and security there. Consequently, the refugee administration system in South Africa is experiencing extreme capacity problems unable to efficiently process the various applications before it. In 1999, for example, there was a backlog of approximately 50,000 asylum seekers awaiting decisions on their refugee status claims. Of the applications that had been processed then, just over 8,000 had been granted refugee status.³¹ More recent

and asylum seekers, Government, through the Director-General of the Department of Home Affairs, undertook to ensure that 'asylum seekers are given the reasons in writing for any adverse decisions by the Standing Committee for Refugee Affairs'. This effectively cut the discretion to reject a request without assigning any reason (s).

³⁰ Draft Refugee White Paper, 1998, p. 24.

³¹ These figures were supplied by the Department of Home Affairs, Pretoria, August 2007.

figures suggest that 'there are currently about 68,000 asylum seekers in South Africa – most of them from other African countries, but also people from Pakistan. Only about 16,000 have official refugee status'³²

3.3.1 *Refugee determination in South Africa*

At an official level the Department of Home Affairs (DHA) is bound to determine status on the basis of individual merit. However, it appears in practice that many decisions rest on whether a nation of origin of the refugee is considered to be a refugee producing one or not. This results in a number of arbitrary decisions, with individuals from a certain country attaining refugee status in one month, but not the next. For example, during early 2000, a number of Ethiopians who had originally been granted refugee status, were refused renewals on a decision contained in a blanket letter that went out to all applicants – on the grounds that there was 'sufficient protection' in their home country. All these letters referred to a judgment from British jurisdiction regarding an application for asylum from Ghana. The Department of Home Affairs (DHA) letter in the Ethiopians' case indicated that the DHA does not always practise individual assessments. Blanket refusals of this kind do not consider the changing nature of conflict in home countries.

Prior to implementation of the Refugee Act in April 2000, refugee status in South Africa was accorded through a Section 28 permit. This permit pertained solely to recognised refugees and on paper it brought with it, much to the advantage of the holder, a number of legal rights, including rights to:

- freedom and security of the person;
- human dignity;
- freedom from arbitrary arrest and detention;
- freedom from torture and other cruel inhuman and degrading treatment;
- protection from abusive use of state power or authority;
- freedom of movement and settlement;
- freedom of religion and belief;
- freedom of opinion and expression;

³² Thiomelang, cited in *The Star* (newspaper) July 12, 2001.

- the right to be considered as a person before the law and to have access to courts of law, and
- administrative action (UNHCR, 1998, p. 4).

In addition, there are particular rights accorded to recognised refugees in the country. These include the following rights:

- not to be deported to the country of origin (*non-refoulement*);
- to associate in non-political and non-profit making associations and trade unions;
- to acquire movable and immovable property, leases and other contracts;
- to engage in wage-earning employment, self-employment and liberal professions;
- to have access to primary, secondary and tertiary education;
- to have access to primary and emergency health care, and referral for further medical treatment;
- to an identity card and a travel document, and
- to pursue the unity of the family (UNHCR, 1998, p. 4).

Asylum seekers in South Africa are also granted certain rights as they await a decision on their status. Until April 2000 (with the enactment of the new Refugee Act), their position in the country was governed by a Section 41 permit. This entitled them to the same basic human rights as listed above, as well as the following specific rights:

- right to have the asylum application processed and decided upon in a fair and transparent procedure, including the reasons for rejection;
- right not to be deported to the country of origin pending a decision on the asylum application (*non-refoulement*), and the
- right to be treated according to basic humanitarian standards, including right to work, primary education for children, primary and emergency health care (UNHCR, 1998, p. 4).

Alongside these rights, refugees and asylum-seekers are bound by South African law and 'if they engage in illegal activities or commit a criminal offence they will be prosecuted [accordingly]'.³³

³³ Report of the UN High Commissioner for Refugees (UNHCR), 1998, p. 5.

In spite of these mechanisms, however, both asylum seekers and refugees have it tough in South Africa. Like all immigrants, asylum seekers and refugees are subjected to extreme forms of abuse by the general public, orchestrated by fringe politics in which they are called '*makwerekwere*', a pejorative and emotionally-laden term intended to mock and prejudice their dignity. Originally used to signify 'people from afar' in Nguni languages, *makwerekwere* is now used to insult foreigners particularly Africans who are frequently accused of anything from responsibility for the high crime rate, depriving locals of job opportunities, marrying local women, etc. Everything wrong or perceived to be wrong is blamed on *makwerekwere*.³⁴ There have been several instances of targeted forms of violence meted out against members of the Somali community in both Eastern and Western Cape. A successful entrepreneur class, Somalis running shops in townships have frequently been targeted by local communities for arsonist attacks and plain murders on account of their being different and successful. Many of them have lost their lives in these attacks. As South Africa does not operate refugee camps, both asylum seekers and refugees live with local people in townships which exacerbate animosity towards them.

Since the enactment of the Refugee Act in April 2000, asylum seekers and refugees are governed by a Section 22 permit. Unlike the Section 41 permit of the Aliens Control Amendment Act, Section 22 does not allow refugees to work or study until their applications have been approved (although in cases where adjudication exceeds 180 days, asylum seekers can apply for work and study permits). As the process of approval can take many months and as neither the government nor the UNHCR provides basic services for asylum seekers during this period, those people seeking refugee status have no safety-net for material support whatsoever. This is compounded by the enormous backlog in applications that the DHA currently

³⁴ At least this has been condemned by the South African Congress of Trade Unions (COSATU) as barbaric. The organization expressed disgust at the hatred directed at the immigrants in South Africa noting that most of the victims targeted by racial abuses happen to be black. See: COSATU Statement on Xenophobia, 8 February 2001.

faces. In some instances, asylum seekers have been waiting for more than six years to get their applications processed.³⁵

Meanwhile, during that time, asylum seekers cannot access healthcare, education and employment. In August 2007, refugees told UNHCR head Antonio Guterres that in spite of their having all the necessary documentation, they still did not have access to employment,³⁶ access to primary education for their children and did not have the right of access to basic health care. It is also important to recognise that refugee status is granted under specific circumstances linked directly to conflict and that many other circumstances, for example, poverty and socio-economic hardships (often connected to conflict), are excluded from status determination. As the already cited 1998 Draft Refugee White Paper indicates:

'The government ... does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships ... the task team does not accept that economic migrants should be able to use the refugee determination process in order to obtain residence, employment, the opportunity to carry out business, or to avoid the consequences of the law concerning illegal migration'.³⁷

³⁵ See: <http://www.csvr.org.za/papers/papvtp5.htm#note2#note2>

³⁶ See *Union of Refugee Women & Ors v. The Director: The Private Security Industry Regulatory Authority & Ors* (Case CCT39/06). In this case, the applicants were refugees who either had their registration as security service providers withdrawn or had been denied registration as security service provider by the respondents on the sole ground that they are refugees and not qualified to provide security services pursuant to section 23 (1) of the South African Security Act. The applicants sought judicial review of the respondents action at the High Court after the Appeal Committee established by the Security Act dismissed the applicant's appeal. The High Court held that the applicants were discriminated against but that such discrimination was justifiable on the ground of public safety and security. The applicants applied and obtained leave to appeal to the Constitutional Court. Leave was granted, appeal heard and dismissed.

³⁷ Analysis of the Draft White Paper on International Migration, South Africa Migration Project. (30th November 1999) Presented to the South African Department of Home Affairs, 30th November 1999 & Portfolio Committee, May 2000, www.quoensu.ca/samp/comments/analysis.htm.

At the level of the law, there is thus a clear divide between refugees and economic migrants.

This practice has been criticised as a new form of apartheid because it effectively forces foreigners to carry documented proof of their legal status, in much the same way as black South Africans were obliged to carry Pass books³⁸ to prove their status during the apartheid era.³⁹

Even if suspects are able to identify themselves, this is no guarantee that they will not be arrested. HRW (1998) and HRC (1999a) report that documents are regularly destroyed by enforcing officers.

3.3.2 *The local government context*

The Refugee Act states that all refugees are entitled to health care, to seek employment and to education; in the same way as South African citizens. It also states that all people in the country are entitled to the rights enshrined in Chapter 2 of the Constitution, with the exception of political rights and the rights to freedom of trade, occupation, and profession, which do not apply to non-citizens. Legal immigrants and refugees should, therefore, be entitled to services offered at municipal level such as safety, housing, clinic services, libraries etc. Not only is there a lack of awareness at local government level of the rights of refugees, but there appear to be no plans for ensuring that services are extended to refugees. Indeed, in some instances, non-nationals are actively denied these services. Local government officials interviewed for this research felt that provision of services for refugees should be the responsibility of the Department of Home Affairs at national level. As one city official stated:

There is no land for these immigrants ...

They're taking every piece of land they can get and occupying it ... If you go to town on the N1, there's a piece we call the

³⁸ For the dreaded practice of Pass book, see: Frances Baard (1986) *My Spirit is not Banned*, As told to Barbie Schreiner, Harare, Zimbabwe Publishing House.

³⁹ Human Rights Watch (1998) *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa*, www.hrw.org/reports98/sareport.

Valley where we have about 50 to 60 immigrants living there, under cardboard boxes, in the open, making fires against the bridges and all that ... They occupy city-owned land illegally. So we take action against them.

We're trying to get central government to take full responsibility for this, because the city does not have the resources or the manpower to deal with this. Tonight I've got to go again, go deal with the immigrants'.⁴⁰

In August this year, UN High Commissioner for Refugees Antonio Guterres, visited South Africa on his African tour which also took him to Mozambique and Zambia.⁴¹ Speaking at a meeting co-hosted by the Ministry of Home Affairs and attended by Minister Nosiviwe Mapisa Nqakula, Mr. Guterres praised the South African Government policy on Refugees saying:

'If you look at the policy and legal statutes of South Africa, refugees enjoy one of the most advanced and progressive system of protection in the world'.

He said the South African Government was committed to opening services such as health and education to refugees though authorities did face challenges in that direction. South Africa, which a decade ago was a refugee producing country, was now struggling with the challenges of increased in-flow of huge numbers of refugees. In 2006, South Africa received 53,000 applications for asylum, more than any other country in the world. Human Rights watch (HRW) has reported that 18,800 applications for asylum were filed in three (3) months between January and March 2007.

At the same meeting, refugees told Mr. Guterres that they were concerned about obstacles to integration in society despite documentation that entitles them virtually to all the rights of citizens in the country including the right to work and access to primary education and basic health services.

⁴⁰ <http://www.csvr.org.za/papers/papvtp5.htm#note2#note2>.

⁴¹ UN News Centre, www.org/apps/news, 27 August 2007.

4. Conclusion

We have tried above to shed light on refugee law both local and international and the situation of the refugee in selected African countries. The theme of our chapter is to demonstrate that while refugee flows have a long history in the continent, very little has changed in Africa to ensure full and effective protection of the refugee. Local intervention mechanisms in recent times such as certain statutory provisions in the countries under study have however not resulted in radically changed situations for the refugee. Similarly, the prospect of double-protection in Africa by both the AU Convention and the UN Convention nevertheless does not do anymore justice to refugees in African countries who remain solely at the mercy of authorities in receiving or host States.

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BEYOND THE 21ST CENTURY HADRIAN'S WALL: THE EXTERNALISATION OF IMMIGRATION AND BORDER CONTROL POLICY BY THE EUROPEAN UNION

MASSIMO FRIGO

The European Union is actualising a policy aimed at externalising its border control and migration management policy towards Maghreb countries, by financing through its development programmes the enforcement of these countries' counter-migration facilities. This article studies the enactment of this policy towards Libya. It will be demonstrated that the human rights record of this country is very poor. It will be shown that the European Union and its Member States risk breaching their international obligations in the domain of human rights by enacting this policy, without introducing strong and enforceable human rights conditionalities.*

1. Introduction: A Secure Europe in a Better World

On the 12th December 2003, the High Representative for the Common Foreign and Security Policy (CFSP), Javier Solana, released his European Security Strategy Paper named "A Secure Europe in a Better World". There he analysed challenges and threats to the European Union (hereinafter EU) security in the decades to come and made some reference to the policy the EU should adopt towards its neighbouring countries: "it is in the European interest that countries on our border are well-governed"¹. He advanced a strategic solution by announcing that

* The opinions expressed in this article are done in a private capacity and they do not reflect in any way the position of the International Commission of Jurists.

¹ Javier Solana, (2003) *A Secure Europe in a Better World, European Strategy Paper*, Brussels, Belgium, EU Ref: SP03-234EN, p. 7.

"our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations"² and, for doing this, "we need to extend the benefits of the economic and political cooperation to our neighbours (...) while tackling problems there"³.

The cooperative and optimistic approach of the High Representative resulted in more operative measures adopted by the European Union in the years to follow. This paper shows how this approach resulted in the externalisation of the border control policy of the EU to countries with less human rights protection mechanisms, without any effective conditionality on human rights respect. This will be demonstrated in the light of the measures adopted towards Libya. We will see the enactment of this policy in the Italian example. After having clarified the human rights record of the Libyan State, this paper will analyse which international obligations of the EU and of its Member States these practices breach. These measures, moreover, mix character and competence of the second and third pillars of the EU, creating no few confusion on the nature of their normative acts, on the jurisdictional competence of the European Court of Justice and on the apportionment of international responsibility between the Supranational organisation and its Member States. This chaotic approach seems to be deployed in order to avoid the human rights obligations of the same State Members towards the new-coming migrants.

2. The Externalisation of Migration Policy: the Libyan Example

The definition of externalisation has been provided by Onia Doukouré and Helen Oger as:

"the reproduction of the internal migration European policy at the external level, which implies burden-sharing of the European borders with bordering countries, and the set-up of

² *Ibid.*, p. 8

³ *Ibid.*

migration management policies in the countries of origin, and especially illegal migration, following European interests. This implies a downgraded interest for development and cooperation for legal migration.”⁴

The EU attitude towards Libya was part of an overall strategy towards Maghreb countries that started in 1995 and is known under the name of the Barcelona Process, in which migration control became over the years one of its major pillars. Unfortunately, Libya has not been included into this process. At its beginning the country was internationally isolated and subject to sanctions on trade – and, concerning the EU, particularly on arms trade – following the Lockerbie Case and the Berlin Disco Bombing. Nevertheless, starting from the increase exigency by the EU of controlling migration channels, a position of observer into the Barcelona Process⁵ was granted to Libya and approaching passes had been made in order to get to a precise Action Plan and towards its membership.

On 11 October 2004, the Council of the European Union decided to lift the embargo that followed the UN Security Council Resolutions 748 (1992) and 883 (1993) and the block on arms’ trade⁶. Interestingly enough, in the same document the EU Ministers declared that “co-operation with Libya on migration is essential and urgent”⁷ and that

“the loss of life at sea, maintenance of public order at the ports of entry and the burden of illegal immigration from, or via, Libya now require effective action by Libya. In this context, the Council also underlined that Libya should respect its international obligations. The Council considered important to the development of relations with Libya that co-operation

⁴ Onia Doukouré and Helen Oger, (2007) *The EC External Migration Policy: The Case of the MENA Countries*, Research Report, Florence, Italy: CARIM-RR, European University Institute, p.2.

⁵ On the Barcelona Process, see Sinem Akguel Acikmese, (2005) “Management of Security in the EU’s Neighbourhood: Union’s Tactics Revisited”, *Perceptions*, Autumn 2005; Marise Cremona, (2004) “The European Neighbourhood Policy: Legal and Institutional Issues”, *CDDRL Working Papers*, No. 25.

⁶ EU Council Conclusions on Libya, Brussels, 11 October 2004, 13372/04, PESC845/COMAG20/LIBYE8, para.7.

⁷ *Ibid.*, para.6

materialises in areas where remedy is beyond Libyan capabilities or capacities”⁸.

The lifting of the embargoes is a clear direct consequence of the EU’s need to cope with migration and to extend its border control policy in Maghreb countries. Particularly, the cancellation of the arms embargo can be considered as a diplomatic leverage for collaboration and as a chance to get Libya equipped for the task of borders’ guardian. This is even more apparent in the light of the Hague Programme:

“the EU should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return”⁹.

This attitude has been confirmed in the Conclusions of the Council on 6 June 2005, where the Council invited

“the Commission to engage, on the basis of the suggestions contained in the Annex and as soon as possible, in exploratory discussions with the Libyan authorities to identify practical measures to tackle illegal migration in areas such as training, reinforcement of institution building, asylum issues and increasing public awareness of the danger of illegal migration, and to discuss the conditions under which such cooperation could take place”¹⁰.

Among the actions suggested in the Annex, there is the project of strengthening the external border control of Libya¹¹. It was recommended that the actions depend on the commitments on fundamental rights, but at the same time the Council stressed “that

⁸ *Ibid.*

⁹ Presidency Conclusions, 2004, 14292/1/04 REV 1, Brussels, 8 December 2004, Chap. 1.6.1.

¹⁰ Council Conclusions on initiating dialogue and cooperation with Libya on migration issues, 9796/05 LIMITE, Brussels, 6 June 2005, p. 5.

¹¹ See *Ibid.*, Annex, p. 8-9.

as long as Libya does not fully integrate into the Barcelona process, any cooperation with Libya can only be limited in scope and take place on a technical ad hoc basis"¹². This expression implies the subordination of the respect of fundamental rights to the need of building up counter-migration technical projects. The same language, objectives and limitations contained in the conclusions of the Hague Programme have been transferred into Regulation (EC) No 1905/2006, article 16, providing for criteria for funding programmes directed to tackle illegal migration¹³. Finally, the European Council of Brussels of December 2005 mandated the Commission to

"conclude the work to agree the EU-Libya Action Plan on migration as early as possible in 2006, in accordance with the Council Conclusions of 3 June 2005¹⁴ on initiating dialogue and cooperation with Libya on migration issues, and implement projects as soon as possible thereafter"¹⁵.

The preoccupation for the lack of implementation of human rights safeguards within the technical assistance programmes has been also supported by a report released in September 2006 by Human Rights Watch. In its analysis the international NGO stressed:

"the E.U. rhetoric on the importance of human rights standards as a condition for migration cooperation is not supported by the cooperation that is taking place"¹⁶.

By quoting the Conclusions of the Council on Justice and Home Affairs of June 2-3, 2005, Human Rights Watch remembered that the document poses as a conditionality the respect of fundamental rights and of the Geneva Convention on Refugees, but, up to now,

¹² *Ibid.*, p. 5.

¹³ See Regulation (EC) no. 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, art. 16, published on OJEU on 27 December 2006.

¹⁴ Justice and Home Affairs Council Press Release, 8849/05 (Presse 114), Luxembourg, 2-3 June 2005, with identical content of the EU Council Conclusions of 6th June 2005, see footnote no. 10.

¹⁵ Presidency Conclusions, 2005, 15914/05/CONCL 3, Brussels 17 December 2005. annex 1, p. 13.

¹⁶ Human Rights Watch, (2006) *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, Vol.18 No.5, p. 94.

no mechanisms exist to ensure these rights will be actually protected and will perform the true role of a conditionality by blocking cooperation when they would be violated.

Between 27 November and 6 December 2004 a Committee of Experts sent by the European Commission performed a technical mission in Libya on illegal immigration¹⁷. They visited the detention centres for migrants provided for in Libya and assessed the way Libyan officers deal with migration. Since the report's release, the relationship between the EU and Libya accelerated and the main focus stayed on the migration control issue more than on the effective implementation of human rights safeguards. On 7 March 2006, the EU Commissioner for Justice, Freedom and Security, Franco Frattini, declared in front of the French Senate that, for what concerns the collaboration with neighbouring countries in the migration domain, "pars des instruments financiers de l'UE affectés aux relations extérieures sera consacrée aux questions liées aux phénomène migratoire"¹⁸.

The last act of the European strategy came out of the negotiations for the release of the Bulgarian nurses condemned to death by the Supreme Court of the Libyan Arab Jamahiriya. In the agreement, dated 23 July 2007, between Libya and the EU Commission, the latter agreed to submit to the European Council the following engagement:

"fournir et monter un dispositif pour la surveillance des frontières libyennes par terre et par mer pour faire face à l'émigration clandestine, pour le compte de l'UE"¹⁹.

This document, sourcing from negotiations where allegedly Libya played the position of force, makes us understand that the

¹⁷ European Commission, *Technical Mission to Libya on Illegal Migration*, 27 Nov – 2 Dec 2004, Report, 7753/05.

¹⁸ « a part of the EU financial instruments dedicated to foreign relations will be deployed for issues related to the phenomenon of migration » (unofficial translation), Vice-President Franco Frattini, *Immigration illégale : mesures récentes et futures*, Paris, 7 March 2006, SPEECH/06/146, p.4.

¹⁹ "to provide for and build up a mechanism for the surveillance of the Libyan borders via earth and sea in order to face illegal migration on behalf of the EU" (unofficial translation), *Memorandum sur les Relations entre la Libye et l'Union Européenne*, Tripoli, Libya, 23 July 2007, art. 5 (3).

contracting power of the European Union towards the Maghreb State is very strong and that it is also in Libya's interest to act as the police guard of the European Union borders. In fact, Libya did not have any embarrassment in accepting into the agreement the reference of its acting "*pour le compte de l'UE*". While on the level of international relations this fact reveals what is stated above, it also shows that Libya is playing some kind of subordinate role in respect to the EU policies. More importantly, human rights are neither mentioned nor considered in the agreement. It is explicit that Europe – if it will implement this Memorandum of Understanding – will be delegating to Libya the power to act on its behalf on border control policy, while at the same time it will not devolve to it the same screening level in respect of human rights obligations. An evidence of this intent comes from the programmes of the German, Portuguese and Slovenian Presidencies (January 2007 – May 2008) where it was announced that they will focus

“on extending cooperation with all those countries covered by the European Neighbourhood Policy in order to help combat illegal immigration, drug and arms trafficking, terrorism, organised crime and corruption”²⁰.

3. The Italian Pilot Project

In the enactment of this policy, Italy was a forerunner. Italy is one of the largest EU frontiers in the Mediterranean Sea and it is one of the most affected countries by the migration coming from Maghreb countries, both as a country of transit and of destination. Since the beginning of the 1990s, Italy began to enforce its measures against illegal migration and endorsed the policy of migrants detention camps built up in various parts of the country since 1996. Because of this policy, Italy encountered criticisms by NGOs, international organisations²¹ and has now a pending case

²⁰ *18 Months Programme of the German, Portuguese and Slovenian Presidencies*, 17079/06, p. 59.

²¹ See European Committee for the Prevention of Torture, (2007) *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie du 16 au 23 juin 2006*, Strasbourg, France: Council of Europe, CPT/Inf (2007) 26.

at the European Court of Human Rights²². As a consequence, the Ministry of the Interior commissioned an enquiry to an independent commission, headed by Mr. De Mistura, in order to have objective findings of the violations occurring there. The final report, released in 2007, confirmed the grave violation in that system²³.

Both politically and legally, migration flows are one of the main concerns of Italian politics and of its public opinion. It is in this environment that on the 13th December 2003 Italy reached an agreement with Libya “to combat terrorism, organised crime, drug trafficking and illegal migration”²⁴. In 2003 it also started the funding of one migrants detention camp – so-called “reception centre” – in Libya and it is planning to finance other two in Kufra and Sebha. It has already begun to provide technical materials and promised to send cars and trucks for migration management policies²⁵. The Italian Press Agency (ANSA) reported on 15 August 2005 that in the 2005 report on Security in Italy of the Ministry of Interior, it was stated that there existed a collaboration between Italy and Libya for the construction of three migrants detention centres: “the first, with a 1,000 places capacity, will rise in Garyan, not far from Tripoli. [...] the other will be realised in the city of Sebha”²⁶. At present, the Italian Government is revising its internal migration legislation, in order to make it more respectful of its human rights obligations²⁷, but no news is to be found on a change of its policy towards the externalisation of border control.

²² *Salem and others v. Italy*, ECtHR, Admissibility Decision, Application no. 10171/05 – 10601/05 – 11593/05 – 17165/05.

²³ See Commission De Mistura, *Final Report*, available on http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/notizia_23602.html (in Italian).

²⁴ Human Rights Watch, (2006) *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, Vol.18 No.5, p. 100.

²⁵ European Commission, *Technical Mission to Libya on Illegal Migration*, 27 Nov – 2 Dec 2004, Report, 7753/05, p. 59.

²⁶ ANSA, *Immigrazione: in Libia 3 centri trattenimento targati Italia*, 15 August 2005 (unofficial translation).

²⁷ The text of the bill is available in Italian at the Ministry of Interior website: http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/2007_04_24_Modifiche_alla_disciplina_sull'immigrazione.html_1508555624.html

4. The Libyan Human Rights Record

Libya is party to several international instruments concerning human rights protection. Nevertheless, it is neither a party to the Geneva Convention on Refugees nor of its Protocol of 1967, but it is part of the OAU Convention on Refugees. This notwithstanding, its human rights record is quite poor.

Concerning the management of illegal migration, the mission of the European Commission recalled above, reported interesting findings. The experts found out that

“the main focus of the management of illegal immigration is on organising repatriation operations. No information on specific procedures and criteria for detaining individuals was provided by Libyan authorities. Many of the illegal immigrants met in the centres seem to have been arrested on a random basis. The decision to return illegal migrants to their countries of origin seems to be taken for groups of nationalities rather than after having been examined individual cases in detail”²⁸.

This would already be a violation of the Geneva Convention on Refugees, of which anyway Libya is not a party and it is therefore not bound by its provisions. Nevertheless, this is also a violation of the prohibition of *non-refoulement* contained in the jurisprudence of the Human Rights Committee²⁹. It has to be noted that Libya does not recognise the figure of refugee according to the definitions furnished by the UN High Commissioner on Refugees, because, as Libyan authorities maintain, this could foster major arrivals of migrants into the country's territory³⁰. In particular, the mission focussed on the visit of some detention centres for migrants and asylum-seekers. To summarise some of the findings of the experts, it is possible to say that:

- In many centres hygiene standards were at a minimum;
- Some of the detainees do not understand the reasons of their staying in the centre;

²⁸ European Commission, *Technical Mission to Libya on Illegal Immigration* : 27 Nov – 6 Dec 2004. Report, 7735/05, p. 14.

²⁹ See Human Rights Committee, General Comment no. 31, para.12.

³⁰ See European Commission, *Technical Mission to Libya on Illegal Immigration* : 27 Nov – 6 Dec 2004. Report, 7735/05, p. 13.

- The detainees, when not in presence of the Police guards, complained about the arbitrary character of their detention;
- None of the detainees knew what the maximum duration of detention in the centres was nor had any information on the legal procedures and conditions for repatriation.

In December 2003, an Italian journalist, Fabrizio Gatti, experienced the travel along the routs of migration from Senegal to Italy, via Niger and Libya, together with the migrants. This is one of the best testimonies of the real conditions of these travellers during their journey and, particularly, when reaching Libya. The official component of the international missions is absolutely absent. There was no warning and the authorities did not know his identity³¹. Gatti reports that Libyan soldiers regularly seize money from migrants and beat them up at the border. Moreover, he witnessed the closure of the border by Libyan authorities whenever there is a bank holiday or strong protests by the Italian government, leaving the migrants exposed to 0 degrees at night and 42 during the day, without the minimal assistance.

With this reality having been depicted, the alarm of Amnesty International is understandable when it warns that "detention conditions of "illegal immigrants" are reported to be deplorable and expulsions of large numbers of "illegal immigrants" are carried out on a regular basis with no attention paid to protection needs"³². It is evident and most likely that when the migrants are expelled they are left to face their destiny in the desert without aid and support. According to Fabrizio Gatti, only in February 2005 the aliens expelled in the desert were 14,000 on 72 trucks³³.

The then chief of the Italian Secret Services Agency (SISDE), Mario Mori, travelled to one of the Libyan camps – allegedly the one built up with Italian funds – and "described the awful

³¹ see Fabrizio Gatti, Reportages on the *Corriere della Sera*, 24, 27, 29, 31 December 2003 and 2 January 2004.

³² Amnesty International EU Office, *Role of human rights concerns in EU-Libya relations: Letter to EU Commissioner Benita Ferrero Waldner*, Brussels, 27 July 2007.

³³ Fabrizio Gatti, *L'ultimo viaggio dei dannati del Sahara*, *L'Espresso*, 24 March 2005.

conditions of the Libyan detention centres. [He] reported having seen the North-African government's pick-ups furnished with cages – “like those for dogs” –, overcrowding of people – possibly found in the desert. The migrants were then left in the centre, “with no assistance”.³⁴

The fragile human rights situation of Libya was also certified in a judicial case. In *DD and AS v. Secretary of State for the Home Department*³⁵, three UK judges dealt with a case of *non-refoulement* towards Libya. In order to assess whether a violation existed and the expulsion of the applicants had to be blocked, the Court had to consider the human rights record of the Libya Jamahiriya Republic. The judges referred to the Operational Guidance Note issued to decision-makers within the Home Office in October 2006 that states:

“The following human rights problems were reported in 2005: inability of citizens to change the government; torture; poor prison conditions; impunity; arbitrary arrest and incommunicado detention; lengthy political detention; denial of fair public trial; infringement of privacy rights; severe restriction of civil liberties-freedom of speech, press, assembly, and association; restriction of freedom of religion; corruption and lack of government transparency; societal discrimination against women, ethnic minorities and foreign workers; trafficking in persons and restriction of labour rights.”³⁶

In June 2007, Amnesty International sent a briefing to the Human Rights Committee on the human rights situation of the Libyan Arab Jamahiriya. The international NGO stated that

“between February and May 2007, the organisation received reports concerning several hundred foreign nationals, including dozens of minors, who were held in detention centres in Misratah, some 200 km east of the capital Tripoli, and al-Marj, some 1,000 km east of Tripoli. Sources from inside the centres alleged that conditions did not meet international human rights

³⁴ *Mori critica i CPT libici*, Il Manifesto, 04/02/2006 (unofficial translation).

³⁵ *DD and AS v Secretary of State for the Home Department*, SIAC, Appeal No. SC/42 and 50/2005, 27 April 2007.

³⁶ *Ibid.*, para. 137 (italics in the original text).

standards, with reports of poor hygiene and a shortage of food and medical treatment"³⁷ (and) "those suspected of entering the country illegally are deported collectively without access to a lawyer or adequate translation facilities, without an assessment of their individual cases and without the opportunity to appeal the decision to deport them"³⁸.

The same European Union recognised in its Communication from the Commission to the Council of August 2005 that

"the migration control measures practised by the Libyan authorities currently appear more or less limited to mass expulsion triggered by upsurges in numbers. When the authorities decide to take action, roundups are organised by the police and migrants are sent to camps in South Libya"³⁹.

5. What obligations? A Legal Analysis

The human rights situation of the Libyan State and the policy the European Union and its Member States are creating with the aim of externalising border control and migration management are clearly established. As evidenced by the EU documentation, the reports of international NGOs and the Italian pioneering experience, this policy, although formally granting some protection of fundamental rights, does not put them in the first place as a strong conditionality. Neither does it provide for a control mechanism for this rights implementation. Finally, the technical assistance programmes are included in the vast projects funded and sponsored in the framework of the EU's development and foreign policy.

After the conclusion of this factual analysis, the paper is concerned in finding whether the European Union and its Member States are in breach of their international obligations by enacting this policy. The author will describe their commitments to human

³⁷ Amnesty International, (2007) *Libya Arab Jamahiriya: Briefing to the Human Rights Committee*, AI Index: MDE 19/008/2007, p. 3.

³⁸ *Ibid.*, p. 6.

³⁹ Communication from the Commission to the Council on the monitoring and evaluation mechanism of third countries in the field of the fight against illegal immigration, 11614/05 ADD1, Brussels, 1 August 2005, p. 13

rights under the UN Charter and the International Bill of Rights. The EU is bound by them, because they constitute customary international law. This study will then pass on to analyse if the EU approach towards migration is consistent with EU law and whether it can be challenged in courts.

5.1 *The UN Charter*

The constitutional and *jus cogens* nature of the UN Charter makes it binding for all the States and international organisations. Art.1 (3) of the Charter establishes the principles of the United Nations. According to it, both the member States and the European Union must work

“to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”⁴⁰.

As it is recalled in art. 2(2) of the UN Charter⁴¹, member States shall perform and realise their obligations and the principles and purposes of the United Nations “in good faith”. Many commentators recalled that this is a general principle of law⁴². As Elisabeth Zoller pointed out,

“[l]e devoir pour les Membres de l’Organisation de remplir de bonne foi les obligations qu’ils ont assumées aux termes de la Charte a pour but « d’assurer à tous la jouissance des droits et avantages résultant de leur qualité de Membre »”⁴³.

⁴⁰ United Nations Charter, art. 1 (3).

⁴¹ “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter”, United Nations Charter, art. 2(2).

⁴² See Elisabeth Zoller, (2005) “Article 2(2)” in Jeanne-Pierre Cot and Alain Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd edition, CEDIN, Ed. Economica, 2005.

⁴³ “The duty for the Members of the Organisation to accomplish in good faith the obligations they assumed according to the Charter has the purpose « of assuring to all the enjoyment of the rights and the privileges sourcing from their quality of Member »” (unofficial translation), *Ibid.*, p. 422.

Moreover, the principle of good faith in international law – and, particularly, in the UN Charter – does not have to be seen as a reflex of the subjective school of international law that gives to State interpretation and opinion a primary role. As Bruno Simma rightly highlighted, “the principle of good faith is (...) objective in nature”⁴⁴. The inherent rationale of a State’s decision or programme is therefore not important. What counts is whether the country has performed its policy or action in the respect of the framework of its international obligations. Enacting policies and actions that are deemed to avoid the respect of that particular country or international organisation’s obligation is therefore a violation of the principle of good faith. As Jiménez de Aréchaga clarified in relation to the General Assembly’s Resolutions,

“article 56 implies, at least, the obligation not to do any act to hinder the achievement of said purposes or individually take steps contrary to the ones recommended by the General Assembly”⁴⁵.

Article 18 of the Vienna Convention on the Law of Treaties 1969⁴⁶ leads us to the same conclusion. If it is forbidden to take steps contrary to the object and purpose of the treaty in the stage between adoption and entry into force of the treaty, it should as a logical consequence be even more contrary to international law to avoid the treaty and customary law obligations of the State and/or

⁴⁴ Bruno Simma, (2002) *The Charter of the United Nations: A Commentary*, Muenchen, Germany: Verlag C.H. Beck, p.100.

⁴⁵ Jiménez de Aréchaga, *El Derecho internacional contemporaneo*, 44 ff, as quoted in Jorge Peirano, “International Responsibility and Cooperation for Development”, pp. 192-193, in Maurizio Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter*, Leiden, Netherlands: Martinus Nijhoff Publishers, 2002.

⁴⁶ “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

Article 18, VCLT 1969. The parallel art.18 of VCLT 1986 expresses the same obligation.

Organisation by externalising its activities – potentially damaging of international human rights law obligations – to third States not subject to the same degree of control for the performance of these obligations.

This is a behaviour that goes against the respect of the principle of good faith in international cooperation and relations. Hiding the externalisation of border control in development programmes, without providing for adequate and effective safeguards that the rights assured in the externalising country will be granted at the same level in the receiving country, is clearly an attempt at hindering the respect and performance of the State obligations. The General Assembly has repeatedly warned that “States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter”⁴⁷ and that

“the realisation of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among the States in accordance with the Charter of the United Nations”⁴⁸.

Special Rapporteur Sengupta underlined this principle too, by recalling the provision of the Vienna Declaration and Programme of Action of 1993, when he said that

“all such activities (directed to the right to development)⁴⁹ will be carried out while maintaining full respect for civil and political as well as economic, social and cultural rights”⁵⁰.

Particularly, the European Union and its Member States should remind themselves of the General Comment no. 2 of the Committee on Economic, Social and Cultural Rights:

⁴⁷ General Assembly Resolution no. 2625 (XXV), (1) (d).

⁴⁸ General Assembly Resolution no. 41/128 (Declaration on the Right to Development), art. 3(2).

⁴⁹ Added by the author.

⁵⁰ *Study on the current state of progress in the implementation of the right to development*, submitted by Mr. Arjun K. Sengupta, independent expert, pursuant to Commission resolution 1998/72 and General Assembly resolution 53/155, UN Doc no. E/CN.4/1999/WG.18/2, 27 July 1999, para. 45 (f).

“development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of “development” have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.”⁵¹

Within these activities lie also the technical assistance programmes aimed at reinforcing migration control. In order to respect the obligations enshrined in the International Convention of Economic, Social and Cultural Rights, States and International Organisations must assure that their programmes will be implemented and lead to results respectful both of economic, social and cultural rights and of civil and political rights. This goal cannot be achieved by inserting general clauses of respect for human rights as a conditionality to aid and projects. The creation of a legal or diplomatic mechanism with effective enforcement decision powers seems to be the only option to assure that standards be respected in the world of international bilateral cooperation.

5.2 General Comment no. 31

Both the EU Member Countries and Libya are bound by the International Convention on Civil and Political Rights. The European Union is bound too, since these treaty norms to be considered as part of the UN Charter. It is therefore important to recall the character of these obligations as stated by the Human Rights Committee in its General Comment no. 31:

“Every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect

⁵¹ CESCR, General Comment no. 2 on art. 22 ICESCR, para. 7.

for, and observance of, human rights and fundamental freedoms.”⁵²

“A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction [...]. Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.”⁵³

It follows that EU Member States and the European Union cannot simply delegate their obligations under the Convention to other States or entities and escape any responsibility. They can give aid to the Libyan authorities in order to reinforce their border controls, but at the same time, by doing so, they avoid their obligations vis-à-vis the migrants and refugees that potentially – or, at least statistically, definitely – would have reached the European jurisdictional zone and would have been granted the protections mechanisms assured there. In order to externalise its activities in the full respect of human rights, the European Union and its Member States need to establish, in parallel with the technical aid and missions, a mechanisms that will investigate periodically into the human rights violations committed in Libya, that will establish whether and how the same human rights protection enjoyed in the EU can be granted in that country and, most importantly, with adequate and effective powers of sanction and blockage of the international assistance, whenever it will ascertain that no progress occurred or the commitment has not been respected.

5.3 *The Draft Articles on States and International Organisations Responsibility*

The action of the European Union and its Member States – Italy in particular, as in the example above – could also entail a State’s or International Organisation’s responsibility for international wrongful acts. As has been previously examined, it is proved that

⁵² HRC, General Comment no. 31, para. 2.

⁵³ *Ibid.*, para. 3.

in the case of Libya the management of border control is conducted through violations of the human rights of migrants and refugees. The European Union and Member State cannot be deemed to be direct actors in the wrongful act. Nevertheless, the Draft Articles on State Responsibility for Wrongful Acts, approved in 2001, contain in article 16 a rule providing for indirect responsibility of States for aiding or assisting in the commission of the wrongful act.

In order to incur liability the State must provide aid or assistance “with the knowledge of the wrongful act”⁵⁴ and the act should be “internationally wrongful if committed by that State”⁵⁵. As Special Rapporteur James Crawford pointed out, “such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question”⁵⁶. In his Commentary, James Crawford established the essential criteria in order to claim indirect responsibility ex art. 16:

- (1) The aiding or assisting State must be aware of the circumstances making the aided State’s conduct wrongful.
- (2) The aid and assistance has to be given with the view to facilitate the act and it must aid it in an actual way.
- (3) The act would have been wrongful also if it was committed by the aiding State.⁵⁷

The assistance must not be essential to the accomplishment of the internationally wrongful act. It just needs to contribute to it in a significant way. For what concerns the third requirement, while this can origin differences in general international law, it does not limit responsibility in the domain of human rights. The main core of human rights, encoded in the International Bill of Rights (UDHR, ICCPR and ICESCR), pertains universal obligations that are

⁵⁴ Draft Articles on State Responsibility for Wrongful Acts (2001), art. 16(a).

⁵⁵ *Ibid.*, art. 16 (b).

⁵⁶ International Law Commission, (2001) *Commentary on the Draft Articles on State Responsibility for Wrongful Acts*, available on http://untreaty.un.org/ilc/texts/9_6.htm, p. 155, para 1.

⁵⁷ See, *ibid.*, p.156, para.3.

binding on all States, whether signatories of these treaties or not, because they are part of international customary law through the disposition of art.1 (3) of the UN Charter. Therefore, all States are bound to respect the rights enshrined in them. As a consequence, an international wrongful act concerning the violation of a human right involves both the responsibility of the violating State and of the aiding one. This is also confirmed by Crawford when he states that

“a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council or provides material aid to a State that uses the aid to commit human rights violations”⁵⁸.

Moreover, article 16 has been declared to be “among the customary rules constituting the law of State Responsibility”⁵⁹ by the International Court of Justice. It is therefore binding upon all States, regardless of the fact that it is not contained in any treaty, because it is part of international customary law.

Even if the European Union or the Member States do not know of the actual wrongful act committed, they have more than a *reasonable suspicion* that, by financing border control management in Libya without appropriate and effective human rights conditionalities, they are aiding and abetting the violations of the human rights of the migrants. Ruling out this possibility would leave a gap in the international law of State responsibility. The aiding State is not occurring in an actual violation, but in a potential one. Once migrants will face the violations of the prohibition from torture and ill-treatment, once they will get detained or refouled from facilities built up or by personnel trained and equipped by European Union development funds, Brussels or Rome will not be able to declare that they did not know a violation would have occurred, when they did not care to link their aid to strict and enforceable human rights conditionalities.

⁵⁸ *Ibid.*, p. 159, para. 9.

⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment of 26 February 2007, para. 419.

5.4 *The Law in Europe*

The European Union is not part of the European Convention on Human Rights and the European Charter of Fundamental Rights is not a binding document enforceable in court. Nevertheless, the European Court of Justice developed an interpretative approach that includes human rights in the Community system via the general principles of law as envisaged by the Constitutional traditions of its members, one of the main interpretative canons of the Court.

The process started already in the 1970s. In the judgment *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fuer Getreide und Futtermittel*⁶⁰ (1970) the Court stated that

“respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the members States must be ensured within the framework of the structure and objectives of the Community”⁶¹.

Four years later the Court specified that

“international treaties for the protection of human rights on which member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of the Community”⁶².

In the 1990s the doctrine assumed its final and actual version:

“la Cour et le Tribunal s’inspirent des traditions constitutionnelles communes aux Etats membres ainsi que des indications fournies par les instruments internationaux concernant la protection des droits de l’homme auxquels les Etats membres ont coopéré et adhéré. La convention

⁶⁰ *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fuer Getreide und Futtermittel*, ECJ, Reference for a preliminary ruling – Case 11-70, Judgment of 17 December 1970.

⁶¹ *Ibid.*, para.4.

⁶² *J. Nold, Kohlen und Baustoffgrosshandlung v Commission of the European Communities*, Case 4-73, Judgment of 14 May 1974, para.13.

européenne des droits de l'homme revêt, à cet égard, une signification particulière. Par ailleurs, aux termes de l'article F, paragraphe 2 du traité sur l'Union européenne (devenu article 6, paragraphe 2, UE), « l'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la [convention européenne des droits de l'homme] et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, en tant que principes généraux du droit communautaire ».⁶³

This rule was upheld in several judgments⁶⁴. Moreover, as highlighted by the decision reported above, the last version of the treaty included this principle within its own written clauses, at article 6, paragraph 2 of the European Union Treaty. The EU policy on externalisation of border control, without the pertinent and enforceable human rights safeguards would not then be consistent with the general principles of law the Union is deemed to respect in its activities.

Once established that EU acts must be consistent with the human rights obligations enshrined in the European Convention of Human Rights, it is essential to ascertain whether the Court has

⁶³ "The Court and the Tribunal take their inspiration from the common constitutional traditions of the Member States as well as from the indications provided for by the international instruments on human rights protection to which the Member States have cooperated and adhered. The European Convention on Human Rights has, in this discourse, a particular meaning. Indeed, according to article F, paragraph 2 of the European Union Treaty (now article 6, paragraph 2, EU) «the Union respects the fundamental rights as they are granted by the [European Convention on Human Rights] and as they result from the common constitutional traditions of the Member States, as general principles of Community Law »" (unofficial translation), *Mannesmannroehren-Werke v. Commission*, Judgment of 20 February 2001, T-112/98, Rec._p._II-729, para. 59-60.

⁶⁴ *F v Council*, Judgment of 23 February 1995, T-535/93, RecFP_p._II-163, para. 32; *K v Commission*, Judgment of 13 July 1995, T-176/94, RecFP_p._II-621, para. 29-30; *Aristan v Commission*, Judgment of 11 March 1999, T-156/94 Rec._p._II-645, para. 99-100; *Mayr-Melnhof Kartongesellschaft v. Commission*, Judgment of 14 May 1998, T-347/94, Rec._p._II-1751, para. 311-312; *Enso Espanola v. Commission*, Judgment of 14 May 1998, T-348/94, Rec._p._II-1875, para. 55; *LVM v. Commission*, Judgment of 20 April 1999, T-305/94, T-306/94, T-307/94, T-313/94 until T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, Rec._p._II-931, para. 120; *General Electric v Commission*, Judgment of 14 December 2005, T-210-01, Rec._p._II-5575, para.725.

jurisdiction on the acts that concern our analysis. Up to now, the acts related to the construction of the externalisation of border controls' policy relatively to Libya are Communications between the Commission and the Council and Council's decisions or, better, framework decisions. Depending on the acts bringing concrete actions that the Council and Commission may adopt on the basis of these framework documents, they could fall within the domains of the second pillar (CSFP) or of the third pillar (JHA). In this regard the Tribunal of First Instance delivered in 2006 a decision that clarified the jurisdictional competence of the EU judicial organs. The judges affirmed that

“Le Tribunal n'est pas compétent pour connaître d'un recours en annulation dirigé contre une position commune adopté au titre des articles 15 UE, relevant du titre V relatif à la politique étrangère et de sécurité commune (PESC), et 34 UE, relevant du titre VI, relatif à la coopération policière et judiciaire en matière pénale (JAI), que dans la stricte mesure où est invoquée, à l'appui d'un tel recours, une méconnaissance des compétences de la Communauté »⁶⁵.

In the same judgment the Tribunal affirmed its competence in cases of validity and cancellation of decisions, framework-decisions, and measures implementing international conventions. For what concerns the third pillar only the Court reaffirmed its competence to appreciate the validity of all the acts, whatever their nature, “which are intended to have legal effects in relation to third parties”⁶⁶. In the same decision it remembered that the claim may come through the challenge of the norm by a State or a EU organ or via the prejudicial channel through national courts.

⁶⁵ “The Tribunal does not have the competence to know a claim for annulation against a common position adopted according to article 15 EU of Title V on foreign policy and common security (FPCS), and article 34 EU of Title VI on police and judicial cooperation in criminal matters (JAI), unless a misunderstanding of the EU competences is claimed as a ground for the claim itself” (unofficial translation), *Organisation des Modjahedines du peuple d'Iran c. Conseil de l'Union Européenne*, Judgment of 12 December 2006, T-228/02.

⁶⁶ *Gestoras Pro Amnistia and others v. Council of the European Union*, Judgment of 27 February 2007, C-354/04 P, para. 53.

The acts released by the Council and the Commission on the externalisation of their border control policy are within their competences. Therefore, they cannot be challenged at the ECJ in their form as Common Positions or Communications. Nevertheless, decisions and implementation of international agreements can be appreciated by the Court. The implementation of the EU-Libyan agreement – that looks more like a treaty than a memorandum of understanding – can be claimed to Luxembourg for violations of the general principles of law. More importantly, any implementation act of the externalisation policy will create legal effects towards third parties – the migrants –, and will therefore be challengeable before the European Court of Justice. The problem is of *locus standi*. The migrant should challenge the act in EU national courts in order to ask for the decision of the EU High Panel, but he/she is out of their territorial jurisdiction. Only the States and the EU organs have some effective *locus standi*. It is highly unlikely that these subjects will challenge the acts' validity. Perhaps only the EU Parliament could have this will, but it is too excluded by the process for being able to claim the *locus standi*.

If the issue is discussed from the perspective of the European Convention of Human Rights, the case of *Matthews v United Kingdom*⁶⁷ shows the Strasbourg Court perspective vis-à-vis the European institutions. The European Court of Human Rights is well conscious that Brussels is not part of the Convention, but also that all its members are already bound by the international agreement. In this framework the Court stated that

“the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer”⁶⁸.

It is clear that, if Member States transfer their competence in migration management and border controls, they cannot delegate in a definitive way their responsibilities in these domains

⁶⁷ *Matthews v United Kingdom*, ECtHR, Judgment of 18 February 1999, Application no. 24833/94.

⁶⁸ *Ibid.*, para. 32

towards their human rights obligations as sourcing from the European Convention. Therefore, if the European Community violates human rights in the deployment of these delegated competences, Member States can still be held responsible by the European Court on Human Rights. Nevertheless, the problem in the application of the ECHR rules for what concerns our analysis on externalisation concerns the Court's jurisdiction: the migrants that would be concerned by this policy will never enter into the territorial jurisdiction of the Court. They will find themselves in a legal black hole pending between the *Bankovich* doctrine and an eventual further development of the *Matthews* jurisprudence. This last approach would extend the doctrine also to policies that try to defy members' obligations by externalising their policies out of the ECHR borders. While this last development would be welcome and coherent with the conception of the Convention as a living instrument within the European Public Order, the recent tendencies of the Court's case law do not leave much space for this perspective.

6. Conclusions

The historical period we are living in is a moment of disillusion. Violations to human rights always existed and are still present, but the present moment is quite unique in the fact that the same human rights paladins are trying to defy their respect behind the curtains. This is why this is the moment of the legal black holes. The first time this term was coined, it referred to the legal framework of Guantanamo Bay built up by the US Government in the fight against terrorism. The process of externalisation by the EU of its border control policy – although different in substance – highlights another legal black hole in the protection of human rights and another human rights guardian that is trying to avoid the obligations that it is claiming to protect and export in the world.

This paper has shown that this policy is in violation of the international obligation of the European Union and its Member States, because it does not respect the principle and purposes of the UN Charter, because it defies the human rights duties contained in the International Bill of Rights, because it can give rise to international responsibility for wrongful acts and, finally, because it is not consistent with EU basic law. This notwithstanding, there

is no mechanism for enforcing these obligations, if not the use of shame and blame policy. This can well be done by NGOs and by the United Nations, but human rights without enforcement are like a gun without bullets: once someone realise that the weapon is empty and he does not risk any harm, he does not fear the gun and its attacker anymore. And this is exactly the case. Counter-migration is, like counter-terrorism, an issue that encounters ample support by the public opinion. And Governments are much eager to ride the waves of public opinion than to respect non-enforced human rights norms and policies. We are assisting to a new wave of communitarianism facing human rights in the field of these policies and creating legal black holes. Without a proper system enforcing human rights where they are not popular the fight for human rights' respect will be difficult to win.

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THE EU'S ASYLUM HARMONIZATION PROCESS AND TURKEY'S EFFORTS FOR INTEGRATION

ATILLA GÖKTÜRK AND GÜLER ÜNLÜ

Leaving aside two world wars and ethnic clashes, the last century has witnessed millions of human displacements in every corner of the world. While every nation has adopted different attitudes to these displaced groups, the majority of countries have chosen to close the "doors". As a regional formation, the EU has chosen to restrict the entrance of asylees, from Schengen to Amsterdam. In this process Turkey has been directly affected by Europe's common immigration and asylum policy efforts as a result of its closeness to the region. As a sending, receiving and transit country, Turkey has been affected by these policies in a multi-dimensional way. In this paper, the EU's harmonisation policy on asylum and immigration issues and its reflections on Turkey will be observed.

1. Introduction

The last century has witnessed two world wars, ethnic clashes, armed conflicts, human rights violations and, as a result, millions of displaced people in every corner of the world. Particularly after the Cold War era, refugees became a permanent presence in some regions. Although migration is one of the oldest notions in human history, the refugee concept has been shaped after World War I. When millions of people became displaced, international organizations tried to take measures. However considerable results could not be achieved. Then World War II broke out, with much more people being displaced around the world. As a result, the United Nations has established a high commissioner for refugees and states which experienced the refugee movements have signed the first international convention on refugees.

The regime established during the Cold War was European-centric and considered the needs of Western Countries against

communist regimes. However, after the 1960's the decolonization process had been accelerated and the "refugee matter" became international. Many people in Asia, Africa and Latin America became displaced by the ethnic conflicts in the regions. So, for the Western countries, there was one more fear apart from the communist regimes: the refugees. In the 1970's the economic crisis reinforced that fear and added xenophobia issues onto the agenda. Finally, the collapse of the Soviet Bloc, gave new impetus to population movements and led states to take more restrictive measures against the "unwanted".

Being the first target region of refugees, Europe has revised asylum policies not to take the "refugee matter" in. Finally, after the 9/11 attacks, security concerns have become the priority issue and member states have accelerated the common policy process. On the other hand, new measures have been introduced for ensuring that: "the doors were completely closed to refugees". Then the EU turned its face to periphery zones. The security of surrounding states was also important for EU policies. If there were a security circle around, the Union would be safer. So, the Union granted that ambition with the "Europeanization" process of neighbouring countries such as Turkey.

Turkey had a special position as being the neighbour and candidate state to EU. She was also in a critical position for being a transit country. Many migrants from various regions were passing through Turkey to reach the West and most importantly she was the neighbour of the "refugee producing countries" in the Middle East. So, controlling Turkish asylum and immigration movements would be important for EU's security. Finally the EU has accelerated the Turkish harmonization and adoption process with the EU. But, in that process debates on critical issues like the geographical limitation and burden sharing have persisted. The probable violation of these notions is jeopardising Turkish national security with the result of becoming a buffer zone for returnees from European borders.

In this paper, first the development of EU's asylum policy and its legal background will be explained, then Turkish historical experiences on asylum issues and her efforts for adopting an asylum system harmonized with the EU *acquis*, the opportunities and challenges, will be observed.

2. The Refugee definition and its historical roots

The most important point that distinguishes refugee status from other types of population movements is its "forced" character. It is not easy for a person to leave his/her homeland without anything. That process usually continues with economic and social troubles and psychological burdens on individuals.

Placed in its historical context, World War I has shaped the refugee concept at the international level. At the dawn of the war, millions of people were displaced and made their ways to European countries to find a safer place. Most of these displaced people were women and children that needed special attention. That process resulted in the establishment of a High Commissioner for Refugees under the League of Nations framework. It was for the first time that the necessity of an international protection system was perceived. But there was still no definition of "who was the refugee."

The end of World War I has caused new refugee movements. The collapse of the Ottoman and Habsburg Empires led to new formations in South, Central and East Europe. In this process new ethnic minorities have emerged. While some of these groups became stateless, some were subjected to population exchanges. It was estimated that forced movements between 1918-1939 were 8.6 millions.¹ In this term, especially after the 1929 Great Depression, although generally migration movements had stopped, refugee movements continued and in most of the European countries the refugees were seen as burdens on national economies.

Between two world wars, the efforts for helping refugees continued. However, the protection system did not work because of the rising fascist regimes. The displacement of particular ethnic groups started in Germany against the Jews and continued with Spain and Italy. Everyday much more people became displaced and most of them were killed. According to Loescher², xenophobia had arisen particularly with the Great Depression in industrialized countries. During these years, the best way of serving national

¹ Gülay Toksöz (2006) *Uluslar arası Emek Göçü*, İstanbul: İstanbul Bilgi Üniversitesi Yayınları, p.129.

² Gil Loescher (1993) *Beyond Charity: International Cooperation and The Global Refugee Crisis*, Oxford:Oxford University Press, p.41.

interest was seen as restricting migration movements sharply. And states preferred to use their financial resources for their own nationals rather than using such resources for humanitarian assistance to refugees.

The harsh treatment against refugees continued during World War II. The displacement of people became more dramatic. But it was observed that the xenophobia against refugees had changed by the end of the war. The communism fear of Western countries had shaped the refugee policy of the period and that policy continued during the Cold War. As a result, most of the refugee assistance programmes towards Jews and particular refugees escaping communist regimes were implemented in this period. In most of the Western countries, refugee issues were considered under the "national security" heading and refugees were defined as people who escaped from communist regimes. By that mean, refugees became the policy tools of Cold War era and were seen as a symbol of ideological incompatibility between Western and communist regimes.

Under those conditions, the United Nations changed the context of the High Commissioner for Refugees and established the United Nations High Commissioner for Refugees (UNHCR) in 1950. In spite of the similar name, the mission of UNHCR was different and it has served refugees coming from the communist regions. UNHCR was funded by America. But in the future times, its role changed and it has served refugees from all over the world.

Under those conditions the United Nations prepared a convention to ensure more states accepted the Western point of view. Finally the first international instrument, the Convention Relating to the Status of Refugees, was signed. The most comprehensive refugee definition was made in the "Convention Relating to the Status of Refugees (1951 Geneva Convention)" stating that a refugee is a person who:

"As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”(1951 Geneva Convention Article 1(A))

Also in the same article, a distinction was made between European and non-European refugees and it was made discretionary to accept refugees from non-EU states. In 1967, with an additional protocol, some signatory states lifted their geographical and historical reservations, which meant that non-Europeans could apply for refugee status under the Geneva Convention.

The Western-centered asylum policy continued up till the 1960s. After the decolonization process in the 1960's, political rebellions have become common in Asian, African and Latin American countries. The withdrawal process of Western powers like France and, England from these regions led to a process of re-formation of state borders. That re-formation process meant the creation of new states, new ethnic minorities and new refugee movements.

As the refugee “matter” became internationalized, UNHCR extended its working area and the refugee definition of the anti-communist period became insufficient for explaining the complex relation of South regions of the world. Thus, new definitions were drawn up by regional organizations such as the 1969 Organization of African Unity. The Organization's convention has met that necessity for the region. While re-stating the UN definition, it added some new conditions like “external aggression, occupation, foreign domination and events seriously disturbing public order” for applying refugee procedures. Also the 1984 Cartagena Declaration of Refugees, which belongs to America, has re-defined the refugee status as a result of the civil wars in Central America in the 1980's.³ With the Declaration “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” conditions were added to the refugee definition.⁴

³ Sema Buz (2004) *Zorunlu Çıkış Zorlu Kabul: Mültecilik*, Ankara: Sığınmacılar ve Göçmenlerle Dayanışma Derneği Yayınları, p.13.

⁴ David Turton (2003) “Conceptualising Forced Migration”, *Refugee Studies Centre Working Paper No.12*, Queen Elizabeth House International Development Centre, University of Oxford, p.13.

In the mid-1970's, new displacements were shaped by ethnic or revolutionary independence efforts in developing countries. Mass exodus from Indochina, the mass movements of refugees in Central and South America are examples of such events.⁵ As countries realized that the "refugee matter" was not an isolated issue and it could spread into every country in the world, states introduced restrictive measures not to take the "matter" in. Furthermore in the 1973 economic crisis, refugees were considered as scapegoats and those restrictive policies have transformed to extreme-right and anti-refugee reactions.

During the 1980's and the 1990's - that is before the end of the Cold-War - the refugees which were seen as potential allies for struggling against communist regimes, lost their "previous value", and shifted to underdeveloped countries passed over by globalisation and its components. These underdeveloped countries also became the countries of high unemployment and high population.⁶ From the European view, refugees were sent to places where they would be "safe". Moreover, Europe had established "humanitarian camps" for refugees and transferred "humanitarian assistance" to these regions. From the refugees' view, it was a policy of keeping refugees away from EU borders, where they were confronted with famine, AIDS, poverty, torture and ethnic conflicts.

As Zolberg, Suhrke and Aguado mention, the causes of refugee movements in underdeveloped countries were not only famine, poverty or something else. On the contrary, these reasons were the rapid decolonization process under the conditions determined by developed countries and the violence which became common by the globalization process. The final result was weak states, underdeveloped economies, and insufficient social conditions.⁷

⁵ Astri Suhrke (1994) "Towards a Comprehensive Refugee Policy: Conflict and Refugees in the Post-Cold War World," in W.R. Böning, M.-L. Schloeter-Paredes eds. *Aid in Place of Migration? Selected Contributions to an ILO-UNHCR Meeting*, Geneva: International Labour Office, pp.14-15.

⁶ Jeff Crisp (2003) "A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime", UNHCR Evaluation and Policy Analysis Unit, Working Paper No.100, Geneva, p.5, <http://www.unhcr.org/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3fe16d835>

⁷ Stephen Castles and Mark J. Miller (1998) *The Age of Migration: International Population Movements in the Modern World*, 2nd edition, New York: Palgrave, p.88.

Moreover, these countries are known as "refugee producing countries". As they have been seen as a burden on receiving countries, new concepts like "safe third country" were coined to keep the refugees in their own regions.

At the end of the 20th century, the scene did not change, but security concerns were given the priority in policy making processes. The September 11 events led countries to take new restrictive measures. After that date, the security of a state and the existence of refugees were perceived as opposite notions. According to Gibney after 9/11, with the more intensive fear of being an attractive state for refugees, states have blamed refugees for not being able to integrate in the host community. And some states that had followed liberal migration policies until then introduced new restrictive measures for closing the borders to refugees. And particularly in Europe, producing a "common EU policy on asylum and immigration issues" has become the main target including old member, new member and non-member states. So as a regional process, it is important to monitor the EU's policy transformation and its reflections upon other states. If we think of the EU as a policy exporting institution to the rest of the world, the necessity of monitoring policy change in the EU becomes more important as it will cause new effects to spread spread over in the rest of the world.

3. Why was there a need for a common policy on asylum in the EU?

The common immigration and asylum policy of the EU, has been the most debated issue recently on the international agenda, since it is bringing new regulations on sensitive issues like border controls, acceptance of refugees, integration of refugees. Issues of admission and treatment of non-nationals also have a direct impact on welfare systems, employment, ethnic relations and even national security.⁸ So, the question arises, why are states struggling for combining their authorization requirements on such sovereign issues?

⁸ Christina Boswell (February,2002) "EU Immigration and Asylum Policy: From Tampere to Laeken and Beyond", The Royal Institute of International Affairs, European Programme, Briefing Paper No:30, p.1.

The first attempt at explaining such struggle starts from the Cold-War period. The Cold-war era has shaped most of today's economic, social and political policies. Such a comprehensive war which has left serious catastrophes behind, led states to take measures first inside their territories then within their regions. As a regional formation, the EU first decided to launch restrictive policy measures, under the challenge of security concerns. So, the security concerns of member states can be seen as the first accelerator of the communautarisation of the EU's asylum and immigration policy.

The other accelerator should be observed at the beginning of the Europeanization process. The Single Market needed the free movement of goods, capital and people within the EU borders. When Schengen lifted the internal borders, the internal borders have shifted to external ones which led the EU countries to take more effective measures. That process made the EU more unreachable for the other parts of the world. Such a "fortress Europe" policy needed more difficult conditions not to take the refugees in. Thus, the creation of buffer zones around the EU has been seen as an effective way of keeping the "unwanted" away from EU territories.

Another reason could be sought in the necessity of sharing expertise to combat common problems such as illegal migration, as countries realized that, in spite of having troubles on some policies, the common refugee system would be more effective in the regulation of immigration rather than individual struggles.⁹

Moreover, following the recent developments in EU legislation, it is important to guess what will happen in other states's refugee policies. Today most states are "importing" the policies of the EU. Furthermore, the EU's legislation has impacts on neighbour countries and transit zones. So, before explaining the new policies, it is better to take a look at the general legislature background of the EU's asylum and immigration policy.¹⁰

⁹ *Ibid.*

¹⁰ UNHCR (2002) "Towards A Common European Asylum System", *European Summer School, Academic Network for Legal Studies on Immigration and Asylum in Europe, European Union Law and Policy on Immigration and Asylum*, Lectures on Asylum, Université Libre de Bruxelles, 3-14 July 2006, Brussels: ULB, p76.

4. "Communaularisation" of asylum policy in the EU

When the European integration process started, it was a matter of economic cooperation on a single terrain –coal and steel. Then it became a common market for all kinds of commodities and services. With the free movement of commodities and services, the free movement of persons has been added to that process by the 1986 Single European Act. Shortly, the objective of the Single European Act was the abolition of controls at intra-member state borders. The Act envisaged a transitional period, ending at the end of 1992.¹¹

The Act was arranging the free movement of people to the EU and inside the EU borders. Meanwhile, some working groups were created to search for the free movement of particular groups and many of them dealt with the labour force. However, the Act did not include any provision related to the refugee issue.

On the other hand the Act was the starting point for free movement, which has been finally achieved by the Schengen Agreement. The application agreement of Schengen was signed in 1990 but it came into force in 1995. With the Schengen Agreement, the internal borders have shifted to external borders of the Union. Despite the fact that most articles were related to border controls and visa policies, it had direct effect on asylum issues.¹² However, from the refugee and asylum perspective, there are some non-humanitarian measures in Shengen. The fear of mass "unwanted" migrants led states to adopt more restrictionist or protectionist policies. In order to limit inflows, these countries adopted new visa requirements, carrier sanctions and applications like Schengen Information System. However these new measures led to a rise in illegal entries. Also burden-sharing became one of the main principles of the Union with the Agreement since the member states at the external borders had to deal with much more flows and problems of entrance.

¹¹ Elspeth Guild (2006) "The Europeanisation of Europe's Asylum Policy", *International Journal of Refugee Law*, vol. 18(3-4), Oxford University Press, <http://ijrl.oxfordjournals.org/cgi/content/full/18/3-4/630>, p.635.

¹² Mehmet Özcan (2005) *Avrupa Birliği Sığınma Hukuku-Ortak Bir Sığınma Hukukunun Ortaya Çıkışı*, Ankara: Uluslararası Stratejik Araştırmalar Kurumu, pp.36-38.

In Schengen the most important point concerning refugees, is the mechanism that determines which country is responsible for processing the application of an asylum-seeker. But that mechanism was properly implemented under the Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities), that was signed in 1990 and came into force in 1997.¹³

With the Dublin Convention, it is expressed that an asylum-seeker's first entrance country to the European Union is responsible for concluding the application. The main purpose of that application is hindering refugees from "asylum shopping" (applying to more than one member state) and "refugee in orbit" (not to find any state to evaluate the application) positions. With that, the parties who signed the Convention identified each other as safe countries. After one or two years from the signature of the Convention the safe third country concept expanded to some periphery states of the Union. Besides, some countries were announced like "safe country of origin". So, that means, if an asylee is coming from such a country, he/she will not be listed and returned to his/her "safe" country.¹⁴

The safe third country concept has also been emphasized in the London Resolution of 1992. In 1992, the justice and interior ministers of the member states adopted three measures which would set the agenda for the next 15 years. The first is defining the principle of a manifestly unfounded application for asylum:

"That means if an asylum seeker passes through a safe third country, the state which asylum-seeker wants to apply is not the authorized country for determination. The second resolution makes a common definition of a safe third country, that is to say a country which is not the country of origin of the asylum seeker but through which the asylum seeker has passes on his/her way to the member state."

¹³ Mehmet Özcan (2005) *op.cit.*, p.56.

¹⁴ Philip Marfleet (2006) *Refugees in a Global Era*, New York: Palgrave Macmillan, p.250

The third resolution is a conclusion defining the concept "safe countries of origin."¹⁵

After the Resolution, the Maastricht Treaty came into force in 1st November 1993. With this Treaty, the European Community has transformed itself into the European Union. And most importantly the "three pillar approach" was introduced as a new legal structure. The Third Pillar was important for formalizing the efforts of member states to form a common policy on asylum and immigration. Like the other issues under the Justice and Home Affairs title, asylum and immigration issues were highly sensitive. Thus, the Maastricht Treaty did not make the expected impact. It was mostly because of the inter-governmental character of the third pillar in which the issues are highly sensitive for member states.

Regarding borders, movement of third country nationals, immigration and asylum issues at EU level, all insufficiencies of measures and of third pillar arrangements led member states to re-think the system and measures at an intergovernmental conference. At the end of the conference, the Amsterdam Treaty was signed and came into force on 1st May 1999. The Amsterdam treaty has moved key issues related to asylum and immigration from the third pillar to the first pillar where the decisions are made with the community method.

In Amsterdam, a 5 year transition period was set for adopting the directives on minimum standards on asylum issues. Also in this period new mechanisms have developed for solving the problems between member states about burden-sharing issues. Just after Amsterdam, the Tampere Summit has come into the agenda which stressed the desire for a common policy again.

When the whole process was observed it was realized that the EU on the one hand was getting tighter with common asylum and immigration policies, while on the other hand becoming an isolated area for refugees or potential asylum-seekers. Safe third country concept, readmission agreements, first country of asylum policies, visa requirements, carrier sanctions are all the parts of that isolation process. Furthermore, the EU is cooperating with non-EU or candidate states. And to ensure a harmonization policy, the EU is

¹⁵ Elspeth Guild (2006) *op.cit.*, p.639.

exporting its policies to those states where the human rights standards are questionable. So, the application of asylum seekers from those "safe" third countries, is being defined as unfounded and nobody in Europe knows if the applicant is aggrieved or not.¹⁶

The "extra-territorial processing" of the EU is under serious criticism by the UNHCR, NGO's and international organizations. This is also formalized with an action programme entitled the Hague Programme of 2004. The programme called for the adoption of a directive on asylum procedures. According to the UNHCR that proposal may lead to breaches of international law, which may lead to the adoption of accelerated decision-making processes that prevent an individual from having a consideration of his/her application on the EU territory. These concerns are rising from the question that the protection obligations of EU member states can be shifted away from the EU.¹⁷

Finally, the EU is in a process of conserving the external borders, controlling and monitoring the procedures from outside. And the other countries have to struggle with their own burdens by relying on their own resources. Turkey as a neighbour and candidate state to the EU is in the midst of all these policies. And under the candidature conditions, she is passing through a harmonization process, which brings about legal and institutional policy transformation.

5. Asylum and immigration practises of Turkey

Turkey has a multi-dimensional geopolitical function at international level as a receiving, sending and transit country. Until the 1980's, Turkey was mostly considered to be a "sending" country in terms of international migratory flows. In these terms, Turkey mostly experienced labour migration to European countries by the 1960's. The most important character of these movements was that they were encouraged by the state. After the Second World War the labour shortages canalized developed countries to import labour from developing ones. Thus, various agreements were signed between European countries and Turkey.

¹⁶ Elspeth Guild (2006) *op.cit.*, p.645.

¹⁷ Elspeth Guild (2006) *op.cit.*, p.646.

With the oil crisis of 1973, the economic crisis in Western Europe ended the recruitment of labour from Turkey. However, Europe's recession coincided with an economic boom in the Middle East that led Turkish workers to emigrate to countries such as Libya, Saudi Arabia, and Iraq. By the years of the Gulf War, the Turkish presence was reduced in these countries and shifted particularly to the Russian Federation.

Meanwhile, when the recruitment of "guest workers" stopped, the workers began to bring their families under the codes of "family reunification" especially in Germany. With the new generations born abroad, the integration problems about education, ghetto lives and associationization activities became common in the life of European cities. But in the 1990's the attitudes have become stricter towards migrants under the notion of xenophobia.¹⁸

Although recruitment of "guest workers" stopped, the recruitment of highly qualified professionals and university graduates has increased during the last decade. It is estimated that there are approximately 3.6–4 million Turkish nationals living abroad, of whom about 3.2 million are in European countries, a substantial increase from 600,000 in 1972.¹⁹

As mentioned above Turkey as a sending country usually experienced the migration issue as a labour exporting country. However, since the mid-1980's asylum seekers from Turkey have been seeking protection from the consequences of the Turkish military's intervention in civilian politics in 1980. According to UNHCR statistics, during the course of the 1990s nearly 340,000 Turkish citizens applied for asylum in various European countries.²⁰

¹⁸ Nermin Abadan-Unat (2002) *Bitmeyen Göç: Konuk İşçilikten Ulus-Ötesi Yurttaşlığa*, İstanbul: İstanbul Bilgi Üniversitesi Yayınları, p.38.

¹⁹ Kemal Kirişçi (2004) "Reconciling Refugee Protection With Combating Irregular Migration: The Experience of Turkey", *Regional Conference on Migration "Migrants in the Transit Countries: Sharing Responsibilities in Management and Protection"*, 30th September-1st October 2004, İstanbul, http://www.coe.int/t/f/coh%20E9sion_sociale/migrations/Source/MG-RCONF_2004_9e_Istanbul_conference_Proceedings_en.pdf

²⁰ Kemal Kirişçi (November 2003) "Turkey: A Transformation from Emigration to Immigration", Migration Information Source, <http://www.migrationinformation.org/Feature/display.cfm?ID=176>,

On the other hand, as a receiving country, Turkey had seen many asylum influxes particularly by the 1980's and 1990's. Actually, Turkey did not have any specific asylum policies until the end of the WW-II. The migrants from the Balkans (particularly ethnic Turks) arrived in Turkey as asylum seekers or they arrived as a result of population exchange policies. However, Turkey considered them as "guests" rather than asylum seekers.

After the end of the WW-II, the emergence of a bipolar world and the establishment of the United Nations affected refugee policies all over the world. Thus, Turkey signed the first international refugee document – the 1951 Geneva Convention - and its additional protocol in 1967 with the geographical limitation. In parallel with the anti-communist attitude followed by Turkey during the Cold War, the geographical limitation meant that Turkey would accept refugees just from European countries and the Soviet Union.²¹

So, with the geographical limitation, the refugees were divided into three types: convention refugees, non-convention refugees and ethnic Turks or national refugees. Convention refugees were the ones coming from Soviet or European countries, particularly from the Balkans. The non-convention refugees were usually from the Middle East particularly from Iran or Iraq, Asia and Africa. And finally national refugees usually means ethnic Turks who are not seen as refugees and usually entitled "guests".²²

The most concerned groups were seen as non-convention refugees since there was not any legislation regulating their status in Turkey. The first group of these people is Iranian asylum-seekers. They first flew into Turkey after the Islamic Revolution in Iran in 1979 and entered Turkey without any documents. According to Turkish legislation their situation was undefined and they were called "tourists". Though it is not an exact number, it was estimated that there were approximately a million people under this situation and they made their ways to Western countries by their own connections.²³

²¹ Kemal Kirişçi (1991) "The Legal Status of Asylum Seekers in Turkey: Problems and Prospects", *International Journal of Refugee Law*, vol.3, no.3, p.512.

²² Kemal Kirişçi (1991) *op.cit.*, pp.512-515.

²³ Ahmet İçduygu (2000) "The Politics of International Migratory Regimes: Transit Migration Flows in Turkey", *International Social Science Journal*, vol.52, no.165, September 2000, p.360.

The second huge migration wave was seen between 1988-1991 from Iraq. *The first flow* in 1988, came towards the end of the Iran-Iraq war. The usage of chemical weapons by the Iraqi government against the Kurds caused flows of Kurdish families towards Turkey and Iran. On the other hand, as Turkey did not have any legal regulation of such situations, those fleeing people were called "temporary guests". These asylum-seekers were settled in camps at the border of Turkey-Iraq. The Western countries did not show any attempt to take those people in. At the same time, Turkey was blamed for not providing enough assistance.²⁴

The second flow of Iraqi asylum seekers to other places came after the Gulf War. Approximately 460,000 Kurds escaped to the Turkish borders under difficult conditions.²⁵ However it was the necessity of international consuetudinary law to provide temporary protection to these "refugees at first sight", with the memory of 1988 experiences, Turkey insisted on not taking these people in. Providing the reason of sensitive and unstable relations in the South-East, Turkey closed her border to Iraqi asylum-seekers and left them in life-threatening conditions on the mountainous region. Then, these people were sheltered in Iran.²⁶

The situation of Iraqi Kurdish refugees remained on the international agenda for a long time. By the decision of United Nations Security Council, a safe area was established in North Iraq and fleeing Kurds began to return back.²⁷

Apart from the Middle Eastern asylum-seekers, Turkey also experienced asylum influxes of around 369,000 Bulgarians in 1989; 20,000 Bosnians after the Yugoslavian civil war between 1992-1999; 17,746 Kosovan Albanian in 1999 and 10,500 Macedonians in 2001. Most of them left Turkey after the conflicts ended in their

²⁴ Muhteşem Kaynak, Refet Yinanç, Cemalettin Şahin, Mehmet Tomanbay, Mustafa Safran, Nurcan Süzal, Mehmet Aldan, Alaettin Özkipser, Fethi Aytaç (1992) *The Iraqi Asylum Seekers and Türkiye (1988-1991)*, Ankara: Tanmak Publications, pp.24-25.

²⁵ Taner Kılıç (2006) "Asylum as a Human Right," International Migration Symposium Communique, 8-11 December 2005, Zeytinburnu Municipality, İstanbul, p.522

²⁶ *Ibid.*

²⁷ *Ibid.*

respective countries.²⁸ Also after the Russian-Chechen war crowded groups of Chechens sought asylum in Turkey.

On the other hand it must be emphasized that Turkey with her geographical position is a transit country at the crossroads of the continents. Transit migrants have been crossing Turkey with the intention of arriving at another destination. So their character is "temporary" and usually "illegal". As a consequence of various developments taking place at the regional and global level, Turkey, due to its geographical situation, faced an ever growing illegal migratory pressure. As estimated, 500,000 illegal migrants reach the European countries annually. Each year approximately 70,000 illegal migrants head for Europe who are apprehended in Turkey (www.egm.gov.tr).

Apart from the *de facto* asylum-seekers, growing numbers of economic migrants from the various parts of Africa and Asia have been trying to use Turkey as a transit area to enter the West. Also thousands of migrants, with the intention of temporary stay, come to Turkey often to find their way to the developed world. Since the late 1980s, thousands of transit migrants have arrived from African and Asian countries such as Ghana, Nigeria, Tanzania, Ethiopia, Sudan, Tunisia, Afghanistan, the Philippines and Sri Lanka.²⁹

However, the asylum seekers could also be perceived as illegal migrants, who had entered the country with the intention of either staying or of leaving again illegally. In Turkey usually the flows of asylum seekers and of irregular migrants have been inextricably interwoven and, for all practical purposes, the policies and practice related to both should be considered together.

As one of the nearest neighbours of Europe, especially Turkey's all these transit position have been under consideration of Europe since the migrants from various underdeveloped countries have been using Turkey as a connection point to arrive in European territories.

²⁸ Mehmet Terzioğlu (2006) "Turkey as a Country of Migrants: Juridical Structure and Practices," International Migration Symposium Communiqué, 8-11 December 2005, Zeytinburnu Municipality, İstanbul, p.517.

²⁹ BFBA (Bureau for Foreigners, Borders, and Asylum) at the Directorate of General Security of the Ministry of Interior (2001) *Documents and Views on Foreigners, Borders, and Asylum: 2000*, Ankara, Ministry of Interior (in Turkish).

Thus, the adoption of Turkish immigration and asylum policy to norms and standards of the EU would help increasing security measures of the Union. So under pre-accession conditions, related regulations and agreements were made between the EU and Turkey particularly concerning transit-irregular migration and asylum regulations. Also in Accession Partnership documents, Turkey has been warned about the issues of combating illegal migration. The details of the adoption process are given below.

6. The Turkish legal framework and the way to EU candidature

In spite of being located on migrant routes, Turkey did not have a specific migration and asylum policy. Although in some countries the right to seek asylum has been defined at constitutional level, Turkey did not have any national regulation related to asylees. The first related regulation was made in 1994. The mass influxes from the Middle East after the Iranian Revolution and the Gulf War, led Turkey to take measures concerning the situation of asylum-seekers.

Historical experiences have shown that countries have made regulations on asylum issues when they have been confronted with mass influxes. So, until the 1990's, Turkey did not need any regulation on asylum. Furthermore, the 1980's were problematic years in terms of democracy in Turkey. The Turkish democracy was interrupted by a military coup in September 1980. In spite of an election in 1983, we can say that the process of reinstallation of a real democracy continued until the end of the 80's. The opponents of the military regime started to escape from Turkey. This political atmosphere limited inflows to Turkey. Also it should be noted that as a developing country, Turkey was not an attractive final destination for asylum-seekers. The asylees have just used Turkey as a transit zone.

Until the 1994 Asylum Regulation, Turkey had just used the 1934 Settlement Law (partly for refugees from Turkish descent and culture) and the 1951 Geneva Convention as legal tools. On the other hand, Middle Eastern asylum-seekers caused tensions between Turkey and the UNHCR. Before the 1994 Regulation the UNHCR was operating the necessary asylum procedures in Turkey particularly for Balkan refugees. When Turkey closed her borders

to Iraqi asylum-seekers, the UNHCR as well as Western countries, blamed Turkey for not caring about humanitarian issues. The UNHCR accepted those asylum-seekers as refugees but Turkey did not. So these tensions ended with the adoption of:

“the 1994 Regulation on the Procedures and the Principles Related to Mass Influx and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum from a Third Country”.

In the 1994 Regulation, a distinction was made between asylum-seekers coming from European or non-European countries. European asylum seekers were given the right to stay in Turkey as refugees and non-Europeans have just been given the right to enjoy temporary protection while waiting for resettlement to a third country by the UNHCR. It is also important to note the UNHCR's role in Turkey.

However, currently Turkey's asylum policy is being shaped by the harmonization process of the EU. With the declaration of official candidacy of Turkey's full membership to the EU in the European Council Meeting held at Helsinki on 10-11 December 1999, the transnational period for policy and legislation harmonization has started. In this process Turkey accepted to adapt her national law to EU norms and standards. The EU has given special importance to “Justice and Home Affairs” issues in particular to asylum, visa and border control. So, Turkey had to focus specifically upon these areas since they are vitally important for the EU.

The EU's conservative concerns on its external borders led the Union to influence surrounding non-EU or candidate states on migration and asylum issues. The EU has used the “europeanization” idea to carry out that process. Europeanization has been used as a tool for exporting the EU's policies, practices, etc. to peripheral zones surrounding Europe. The purpose of that process can be stated as covering the weak points of surrounding states to prevent any “leakage” from the walls of the “fortress”. From that point of view Turkey can be seen as a case study of the effects of EU's “burden-shifting” policies.

Also, it is important to note that if Turkey becomes a member of the EU, its eastern borders would effectively become the external borders of the Union. Consequently the EU would in effect have a common border with large asylum seeker and migrant populations

producing countries such as Iraq, Iran and Syria.³⁰ So, due importance to these issues has been reflected in the Accession Partnership documents that the EU Commission has prepared identifying short and medium term priorities, intermediate objectives and conditions on which accession preparations must concentrate.

The harmonisation issues of Turkey related to asylum and immigration cover national legislation changes, legislative harmonization, institution building and policy formation and implementation of these policies in line with the EU requirements. The legal tools for integrating that process have been the:

Accession Partnership, the National Programme for the Adoption of the Acquis, the Revised Accession Partnership, the Revised National Programme for the Adoption of the Acquis and finally the National Action Plan for Asylum and Immigration.³¹

After the Helsinki Summit, the first Accession Partnership (AP) was adopted on 8th March 2001 by the Council. In the AP, Turkey suggested to determine a national programme. With the offer of reform packages for Turkey, some issues that have not been dealt with before were brought into the agenda. "Lifting geographical limitation" was on the top of the list. Even though tensions existed as to the AP criteria, Turkey has adopted them on 19th March 2001.

Afterwards, Turkey prepared a National Programme as a result of the AP. In the programme Turkey implied her concerns about lifting the geographical limitation and stated that she would only lift the condition if it would not encourage large-scale refugee inflows from East and thus invited the EU to take the necessary measures about the burden-sharing principle. Though the answer of Turkey was specific and offering a conditional response, it could

³⁰ Celia Mannaert (May 2003) "Irregular Migration and Asylum in Turkey", New Issues in Refugee Research, Working Paper No: 89.

³¹ Başak Kale (December 2005) *The Impact of Europeanization on Domestic Policy Structures: Asylum and Refugee Policies in Turkey's Accession Process to the European Union*, unpublished thesis, Middle East Technical University, The Graduate School of Social Sciences, Department of International Relations, Ankara, p.234.

also be perceived as the signal for lifting the geographical limitation.

That process has continued with the reforms and progress report in 2002. After the reform packages the second Revised Accession Partnership document was adopted for determining the EU's new priorities in the accession process of Turkey. But lifting the geographical limitation was among the most emphasized issues in the document. From the first Accession Partnership (2001) up to 2003, there has not been any major progress on the asylum issue. So in the second paper it emphasized the lifting of the geographical limitation and the development of accommodation facilities and social support for asylum-seekers and refugees.

The 2003 Revised National Programme for the Adoption of the Acquis has taken on board the Accession Partnership. That National Programme has been shaped in the light of the Asylum Strategy Paper and the main issues of the paper were specialization and institutionalization in asylum. Also "safe third country", negative attitudes of officials to asylum seekers, the right of seeking asylum for asylees who arrived in illegal ways and temporary protection were stated in the Document. After the revised national programme was concluded, meetings were held about readmission agreements. On the legal side, the decision was taken to adopt an asylum law and a calendar was prepared on institutional structuring, personnel training, establishment of asylum reception and sheltering centres, strengthening databases in the country of origin and improving social service capacities.

Considering the question "what has been done in Turkey on the way to candidature on asylum and immigration subjects", briefly the subjects can be listed below:

- Legislation has been strengthened and heavier penalties have been prescribed against criminal networks involved in migrant smuggling and human trafficking. Under the UN Convention against Transnational Organized Crime and its supplementary Protocol against Migrant Smuggling and Human Trafficking, related amendments have been incorporated in the Turkish penal code, defining migrant smuggling and human trafficking.
- The Turkish Parliament has ratified the said UN Convention and its two Protocols: the first one Against Migrant Smuggling and the other for the Prevention of Trafficking in Persons on 18 March 2003.

- Preventive measures taken by the Turkish Coast Guard have seriously hindered the illegal departure of boats and vessels from Turkish ports to the Aegean and Mediterranean Seas.
- Turkey signed readmission agreements with Greece on 8 October 2001, Syria on 10 September 2001, Kyrgyzstan on 6 May 2003 and Romania on 16 October 2004. With Bulgaria, Uzbekistan, Libya, Sri Lanka and Ukraine negotiations are underway.³²
- The "Law on Work Permits for Foreigners" has been approved by the Parliament and entered into force on 6 September 2003.
- The Turkish Citizenship Law number 403 has been amended on 4 June 2003.³³
- Turkey has harmonized its legislation with the EU Visa Negative List by 75%. Turkey is also in the process of adopting the EU Schengen visa system, which requires member countries to apply a common visa policy to third-country nationals.

Then, an Asylum-Immigration Twinning Project came into force in cooperation with a Danish and English Consortium on 8th March 2004. And in the same year a Task Force for drawing up an Asylum-Immigration Action Plan was formed to adopt an Action Plan on the basis of advice received from the Twinning Project. Finally that Task Force completed its studies and prepared the "National Action Plan on Asylum and Immigration" at the end of 2004.³⁴

The Action Plan's main components and expectations can be summarized as training personnel, institutionalization, paying much more attention to illegal migration, establishing a refugee

³² EGM (Emniyet Genel Müdürlüğü, Yabancılar Hudut Dairesi Başkanlığı) (2004) "Yasadışı Göç ve Göçmen Kaçakçılığı", Yolsuzluk, Dolandırıcılık, Organize Suçlar, Karaparanın Aklanması, Yasadışı Göç ve Schengen Uygulamaları Semineri, 30-31.03.2004.

³³ With this amendment a probation period of 3 years is required for acquiring Turkish citizenship through marriage. Accordingly, those who have a job incompatible with the marriage and do not share the same house with his/her spouse will not be able to acquire Turkish citizenship.

³⁴ UNHCR, Turkish Ministry of Interior (2005) *Legislation on Asylum and Immigration*, Ankara, p7.

integration system, proposing a functional refugee status determination system, appeal procedures against negative asylum decisions, temporary protection in mass influx, and involvement of NGO's in all the process.

In spite of bringing positive developments in the immigration and asylum system, some articles of Action Plan were criticized by NGO's, particularly Amnesty International. Here are some critical points on the Action Plan:³⁵

- The action plan is foreseeing an Asylum Code that includes an "accelerated procedure" which is used in European countries. Turkey does not know and did not use such a system before. So its usage would cause serious human rights violations.
- In the Action Plan it is stated that Turkey does not have enough institutional and personnel capacity. With the twinning projects, it is expected to train personnel.
- Turkey has started to build asylum-seeker acceptance centres, refugee hosting centres and accommodation facilities in 7 different provinces of Turkey. Human rights organizations are worried whether these centres would be used as internment or detention centres.
- Opening a training academy is within the medium-term targets. It would be useful that training studies would be centralised.
- The operation of "Returning Centres" which will be used for re-accommodation until the transactions of the people to be returned is undefined in the Action Plan.
- A certain degree of flexibility was brought to asylum application procedures. For instance, according to the previous rule, an applicant had to have an ID. This is no longer a requirement.
- The Action Plan also brought several changes related to the role and status of translators for asylum seekers. For instance they must have a certain degree of education and experience. However, it remains to be seen to what extent these new regulations will be implemented.

³⁵ Taner Kılıç (2005) *op.cit.*, p.535.

- It is stated that the “sensitivity shown for the execution of non-refoulement principle will become spread”. But up to now the non-refoulement principle has not been cared for. So it is important to develop a different mechanism concerning the principle.
- It will be the first time in Turkey that “subsidiary protection” will be implemented. Although that protection is commonly used in Europe, Turkey will be implementing the process for the first time.

As seen from the main parts of the Plan, it is anticipating the implementation of some new practices in Turkey. In this process there seem to be many debates and opposition will be experienced amongst the public institutions and human rights advocates because of the undefined parts of the plan. So we will have to see how it will be implemented.

7. Conclusion

Within a historical context, when compared with the 1950's, the refugee issue has become more complex and diversified in all corners of the globe. With the increase in their numbers, the asylum seekers portray a negative image particularly in European countries. As a result, extreme right attitudes and xenophobia have expanded and increased in Europe. These attitudes have deepened after the 11th September attacks. Especially after the last enlargement, the EU has declared that the need for security has increased and the efforts to build a common procedure need to be intensified.

So, with the fear of the refugees, European countries have embraced the harmonization process and tried to find more effective and restrictive policies against “unwanted”. Migration control measures like visa requirements, carrier sanctions, pre-embarkation immigration controls, physical interception or interdiction on territorial waters or high seas, making the situation impossible to travel legally to Europe and access to international protection for refugees and asylum-seekers, have been introduced. These kind of measures usually led to a procedure called “extra-territorial processing” which have been the fundamental part of the EU's immigration and asylum policies using such tools as readmission agreements, the safe third country concept, the establishment of transit camps, etc.

All this process has been closely observed by third countries, particularly those surrounding the EU. Turkey has been in the middle of these policies because of the geographical closeness to the EU. Due to its geostrategic position, many Western countries considered Turkey as a "safety and buffer zone" vis-à-vis the Communist bloc during the Cold War period. As a result, the US-led Western bloc developed close relations with Turkey. In fact, the Republic had decided to join the Western bloc since 1924. As a result, the Turkish Republic cooperated with Western countries throughout the Cold War. This cooperation led to the coordination of several policies among these countries. Therefore, policy coordination in asylum and immigration issues between Turkey and European countries is partly a result of this legacy.

On the other hand the adoption of the EU *acquis* will inevitably mean the modification of existing domestic policies for harmonization. That will be especially important in the process of preparation for full membership. Within this framework, the issues of migration, asylum and border control are vitally important to the EU. Especially after the last EU enlargement, a great concern has been paid to illegal migration and asylum measures.

As we observe from the experiences of Turkey, asylum and illegal migration are issues which are integrated with each other. It is important to emphasize that Turkey has not been a final destination for any asylum seekers from all over the world. The temporary nature of asylees or other types of immigrants, and insufficiencies about combating irregular migration in Turkey have been under consideration in Europe. Especially for many transit migrants from Africa and Asia, entry into Turkey is a relatively easy process, but departure for a third country is quite difficult. The same situation is valid for asylum seekers. The safe third country concept has been exacerbating the process for both migrants and Turkey. Also with regards to institutional and legal insufficiencies, it seems that the bulk of the burden would stay on the shoulders of Turkey.

Readmission agreements are the other criticized tool aiming to "shift" the burden from the EU to other third countries rather than "sharing". Turkey has been signing these agreements with the European countries reluctantly since 2004. But the other third countries, particularly migrant sending countries to Turkey, are also reluctant to sign readmission agreements with Turkey. So, Turkey

is becoming a "buffer zone" where unwanted asylum seekers are gathering.

Briefly, Turkey has entered into a very important period of improving her migration system. While Turkey has been historically a country uninterested in migration policies, the EU process and her transit location have forced Turkey to take measures about the issue. However, these measures are on the way to make Turkey a part of the negative migration policies that the EU has produced. Because of her geo-political location, any asylum and migration reforms which would be introduced by Turkey, would effect the Near and Middle East and Europe as well as determining the lives of thousands of migrants.

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SECURITIZATION OF MIGRATION: THE CASE OF TURKEY

ZEYNEP SELEN ARTAN

Among many other things, globalization has paved the way for the promotion and acceleration of migratory movements all around the world. European states, where migrants were welcomed especially after 1960s, started to implement restricted migration policies from 1980s onwards. The Europeanization of migration policies was accompanied by the development of a securitized perception of migration where migrants were stigmatized as threats to political, internal, cultural and economic unity of their host country. The European Union not only adopts and implements policies that would produce and strengthen securitized perceptions of migration but also exports them to candidate states in the form of *acquis communautaire*.

1. Introduction

In May 2007, 27 African migrants had a life and death struggle in the Mediterranean, in front of the eyes of the Western Europe, which is regarded as the *cradle* of human rights. These migrants, whose boat sank in the middle of the sea, were not accepted on board a Maltese boat, but were allowed to cling to the tuna net of the boat. After spending 72 hours on sea without having anything to eat or drink, an Italian boat passing nearby rescued them. The daily *Independent* wrote 'Europe's Shame' in the headlines.¹ It was an appropriate headline. The crime committed had its long established roots, and blaming only Malta for what happened would only help to conceal the responsible. This tragedy that we are forced to witness is very much related to the change in the concept of security which perceives and constructs migrants as a potential threat of security.

¹ "Europe's Shame," *The Independent*, May 28, 2007.

Among many other things, globalization has paved the way for the promotion and acceleration of migratory movements all around the world. The pace of technological development facilitated the transnational mobility of people and reduced the perceived distance between states. European states, where migrants were welcomed especially after the 1960s, started to implement restrictive migration policies from the 1980s onwards. The completion of the single market, the adoption of the Schengen Convention as part of the EU *acquis*, the eradication of internal borders of the European Union were paralleled by the development of a *securitized* perception of migration, which resulted in the creation of a notion of *Fortress Europe*. More and more, the emphasis was put on controlling trans-border movements, stopping migrants before they put foot on EU territory and sending them back to their country of origin. These developments were often resulted in human rights violations as many asylum-seekers who managed to reach EU countries through illegal means were forced to return to their countries of origin or other third countries. The European Union not only adopted rules that would produce and strengthen securitized perceptions of migration but also exported them to candidate states and other third countries in the form of the *acquis communautaire*.

This paper is composed of three sections. The first part offers a brief analysis of the theoretical debate over the discourse of securitization of migration. The second part examines the path through which migration policies, which mostly focus on the control of migratory movements rather than their regulation, are Europeanized. In the third and final part, the transposition of the restrictive migration policies and the securitization discourse from the EU to candidate states as part of the *acquis communautaire* is analyzed through the case study of Turkey, which is both a Mediterranean country and an EU candidate and exposed to huge annual population flows.

2. The Debate Over the Securitization of Migration

As the post-Cold War period announced the demise of the bipolar structure of international political system where security had been perceived and defined by military issues such as the possibility of a nuclear war, the arms race and the balance of power; non-

military issues including ethnic tensions, environmental deterioration, population growth, increasing unemployment, and international mass migration began to emerge as new forms of security preoccupations of the new era.² During the Cold War period, the focus was on state security whereas it shifted on to individual security in the post-Cold War era which paved the way for the widening of the concept of security.³ According to Buzan, a new security agenda emerged in this period that has its principal focus on society rather than the state.⁴ In this new agenda, military threat is not as prominent as it used to be. However, the emphasis is placed on protecting society from the threats posed by cosmopolitanism, standardizing mass culture and migration on national identity.⁵ Kicinger states that this transformation of the concept of security away from a militaristic understanding paved the way for the consolidation of the notion of "non-traditional security threats" where international migration has become one component of it.⁶ Having been perceived as a destabilizing factor in West European societies, international migration came to be defined as a threat to external, internal, cultural and social unity of the host country.

Migratory movements are perceived as security threats under various circumstances. Migrants (political migrants especially) are claimed to constitute potential threats that would deteriorate relations between the sending and the receiving countries.⁷ To begin

² Huysman, J. (2000) "The European Union and the Securitization of Migration," *Journal of Common Market Studies*, vol. 38, no. 5, pp. 5.

³ Ibrahim, M. (2005) "The Securitization of Migration: A Racial Discourse," *International Migration*, vol. 43, no. 5, pp. 168.

⁴ Buzan, B. (1993) "Introduction: the changing security agenda in Europe," in Waever, O., B. Buzan, M. Kelstrup and P. Lemaître, eds *Identity, Migration and New Security Agenda in Europe*, London: Printer Publishers Ltd., pp. 2.

⁵ Hassner (1991) cited in Buzan (1993), pp. 3.

⁶ Kicinger, A. (2004), "International Migration as a Non-Traditional Security Threat and the EU Responses to this Phenomenon," *Central European Forum for Migration Research Working Paper*, Warsaw, pp. 1.

⁷ Weiner, M. (1992/93) "Security, Stability and International Migration," *International Security*, vol. 17, no. 3, pp. 105; Lohrmann, R. (2000) "Migrants, Refugees and Insecurity: Current Threats to Peace?," *International Migration*, vol. 38, issue 4, pp. 4.

with, the mere act of granting refugee status is argued to carry the danger of being perceived as a potential source of tension between the host country – the shelter for people running away from persecution; and the home country – the source of persecution.⁸ According to this argument, stigmatization of home country as the source of persecution may worsen bilateral relations between the two countries. Moreover, it is indicated that a home country may hold a host country responsible for the activities its citizens are engaged in.⁹ The issue of ROJ TV, a Kurdish television channel which is claimed by Turkish officials to broadcast in favor of PKK (*Partiya Karkerên Kurdistan* - Kurdistan Worker's Party) from Denmark, strained and continues to strain the relations between Turkey and Denmark. By looking at the Middle Eastern history, Pollack and Byman argue that large number of refugee re-settlements can introduce instability and import war to host countries.¹⁰ They point out Arab-Israeli conflicts in 1956 and 1967 as examples where the conflicts were provoked by cross-border attacks of the Palestinian refugees to Israel.¹¹ Refugees are asserted to be political threats when they get dissatisfied with the host country's policies pertaining to their country of origin, and/or when they feel they were not supported enough.¹² They are claimed to establish alliances with people from the local community that they have ethnic and/or religious affinity with and engage in actions against the host country.¹³

Migration may also be perceived as a threat to the internal security of a country. Immigrants are said to create uneasiness in their host societies by getting involved in criminal activities such as drug trafficking, human smuggling, robbery and even terrorist attacks. In the new security agenda that is focused on societal insecurity, influxes of migrants are perceived and depicted as threats to national identity.¹⁴ However, Lohrmann indicates that

⁸ Weiner (1992/93), pp. 107.

⁹ *Ibid.*, pp. 108.

¹⁰ Pollack M, Byman, D. (2006) "Iraqi Refugees: Carriers of Conflict," *The Atlantic Monthly*, November.

¹¹ *Ibid.*

¹² Weiner (1992/93), pp. 109.

¹³ Pollack & Byman (2006).

¹⁴ Buzan (1993), pp. 3.

there is an overestimation and misrepresentation of the impact of international migration on the internal security of the host country.¹⁵ The securitization of culture stems from the homogeneity discourse of West European societies where migrants are depicted as the intruders of the genuine societal unity.¹⁶ Cultural identity, defining "who belongs to or who can be admitted into" a country, is a mechanism through which inclusion/exclusion practices operate.¹⁷ Homogeneity discourse perceives people with different racial, ethnic, religious, linguistic or cultural characteristics as potential threats to cultural unity of a society. Kicinger gives the headscarves affair in France as an example where the homogeneous cultural identity of the French people was challenged by immigrants.¹⁸

The securitization of social welfare, on the other hand, renders immigrants into a situation in which they are recognized as "illegitimate recipients or claimants of socio-economic rights".¹⁹ It is argued that the economic burden caused by migrants leaves states in a reluctant situation pertaining to immigration.²⁰ According to Fauser, in times of economic bottlenecks, it is the immigrants that lose their jobs easier than the natives, and as a result, become dependant on social security payments.²¹ Goodhart indicates that in order to sustain the welfare state at a time when group solidarity has been weakened by increasing diversity in society, native people have to be reassured that immigrants feel the same responsibility towards payments of taxes and they will not abuse the welfare system by free-riding.²²

According to Michel Foucault, societies are playgrounds for multiple forms of power relations whose construction,

¹⁵ Lohrmann (2000), pp. 8.

¹⁶ Huysmans (2000), pp. 762.

¹⁷ Weiner (1992/93), pp. 110.

¹⁸ Kicinger (2004), pp. 2.

¹⁹ Huysmans (2000), pp. 767.

²⁰ Weiner (1992/93), pp. 114.

²¹ Fauser, M. (2006), "Transnational Migration: A National Security Risk? Securitization of Migration Policies in Germany, Spain and the United Kingdom," in *Reports & Analyses 2/06*, Center for International Relations, Warsaw, pp. 4.

²² Goodhart, D. (2004), 'Too Diverse?', *Prospect*, pp. 3.

intensification and implementation occur through the establishment, functioning and perpetuation of a discourse.²³ Therefore, in order to comprehend the processes that paved the way for the redefinition of migration as a security threat, one has to concentrate on the power relations through which the securitization discourse was produced, and in turn, began to be treated as a factually established truth. As Weiner rightly argues, security is a social construct.²⁴ The threat perceptions are all products of a process of construction. Therefore, security is not an essential characteristic of migratory movements and the link between the two concepts is not a given fact. Rather, securitization of migration is "the mixed result of discourses and practices by given social groups and institutions in a particular cultural, socio-economic and political context".²⁵

In order to follow the traces of the ways in which securitization discourse influenced and continues to influence immigration and asylum policies of the European Union, an analysis of the communautarization processes of these policies beginning from the 1980s is essential and imperative. Therefore, the following section focuses on Europeanization of immigration policies in the EU context.

3. Communautarization/Europeanization of Migration Policies

Migration is one of the primary policy areas where states do not want to give up their sovereignty. However, the completion of the internal market and the eradication of internal borders paved the way for the EU to delineate policies and practices that would enhance the control over population flows in and out of the Union. In this respect, the Maastricht Treaty (1992) established a three pillar system where the first pillar was composed of *common* policies such as customs union, single market, agricultural policy, fisheries policy, etc. The second pillar included security and defense issues

²³ Foucault 1980, cited in Ibrahim (2005), pp. 164.

²⁴ Weiner (1992/1993), pp. 103.

²⁵ Lohrmann (2000), pp. 5-6.

titled as the 'Common Foreign and Security Policy,' and the third pillar was composed of policies pertaining to migration, asylum and judicial cooperation, under the title 'Justice and Home Affairs.' Contrary to the first pillar, the policies of the last two pillars were not Europeanized. The Amsterdam Treaty (1997) moved some policy areas of migration, asylum and judicial cooperation in civil matters from the third pillar to the first one; and hence communautarized them. In addition to that, the Amsterdam Treaty incorporated the Schengen Convention, signed in 1990 and came into force in 1995, into the communautarized first pillar of the Union structure.

The European Council Presidency Conclusions of the Tampere Summit (1999) delineated four areas of action for the implementation of a common migration and asylum policy: partnership with countries of origin, a common European Asylum system, fair treatment of third country nationals, and management of migration flows.²⁶ Of these four areas, only the third one concentrates on the mechanisms for the inclusion of immigrants in EU member states, whereas the remaining three areas concentrate on ways of controlling population inflows into the Union. The Laeken Summit Presidency Conclusions asserted the European Council's desire to adopt a common policy on asylum and immigration and called for an action plan on illegal immigration and smuggling of human beings while emphasized the need for a better management of external border controls in order to prevent illegal migration.²⁷ Two years later at the Thessaloniki European Council, the emphasis was again on the development of a common policy on illegal immigration and external border controls, and additionally, on the return of illegal migrants and the establishment of cooperation between the EU and third countries where readmission agreements form an important part of the policy.²⁸

The Hague Programme, adopted in 2004 provides a further step in the formation of a common migration and asylum policy. The

²⁶ Council of the European Union (1999) Tampere European Council, October 15-16, Presidency Conclusions.

²⁷ Council of the European Union (2001) Laeken European Council, December 14-15, Presidency Conclusions.

²⁸ Council of the European Union (2003) Thessaloniki European Council, June 20, Presidency Conclusions.

Hague Programme Action Plan for the area of Freedom, Security and Justice, designed for the period between 2005 and 2010, is composed of ten policy areas for which measures are deemed necessary to be taken²⁹. Some of these policy areas are the following: migration management; internal borders, external borders and visas; common asylum policy; and integration of immigrants. The Presidency Conclusions of the EU Brussels Summit in December 2006 also underlined the urgent need for a Europeanized migration policy by stating that concentration on both the challenges and benefits of migration is a priority concern for members of the EU in the 21st century.³⁰ In addition to the policy areas stated in The Hague Action Plan; the presidency conclusions included a section for policies necessary for the management of legal migration.

The analysis of EU policy proposals and action plans displays six main areas of concern pertaining to the issue of migration. These include the scrutinization of the Union's external borders; the fight against illegal migration; cooperation and signing of readmission agreements with third countries; asylum; management of labor migration and integration of immigrants into their host societies. Among these six areas, only the last two are focused on inclusionary policies, whereas the remaining four are concentrated on the mechanisms that would keep potential *unwanted* migrants outside of the European Union.

Europeanization of migration policies paved the way for the adoption of a restrictive perspective rather than a liberal one with regards to migration, focusing on strengthening the external border control in order to stop migratory flows before they enter EU territory. Policies adopted as part of this communautarized policy realm not only binds member states, but also obligate candidate states to transform their migration policies and align them to that of the European Union. Through the transfer of EU policies in this domain, candidate states enhance their abilities to control external

²⁹ The Hague Programme Action Plan, see <http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm>.

³⁰ Council of the European Union (2006) Brussels European Council, December 14-15, Presidency Conclusions.

borders, develop the necessary infrastructure and technological know-how in order to detect fraudulent documents, and sign readmission agreements with migrant sending third countries, before becoming members of the Union.

4. Securitization of Migration in Turkey

Although Turkey is well known as a country of emigration due to its past history, it started to transform into a country of immigration and transit beginning from the 1980s. It attracts not only legal migrants but also asylum seekers and irregular migrants. Having been granted candidacy status in 1999, Turkey started to align its migration policy with that of the European Union. However, currently, there is not only a process of harmonization of migration policies but also a tendency to adopt and internalize the mentality which perceives migrants as a security threat to the unity of the country.

4.1 *Migration History of Turkey*

Contrary to the generally held belief that emigration from Turkey started back in 1960s in the form of labor migration to west European countries, Turkish records of emigration date back to the late 18th century.³¹ The dissolution of the Ottoman Empire and the establishment of the Republic of Turkey accelerated migratory movements from Turkey. Before the signing of the Lausanne Peace Treaty, which officially established the Republic, Turkey signed the Convention concerning the Exchange of Turkish and Greek Populations on January 30, 1923 in Lausanne, Switzerland with Greece which foresaw the exchange of Greek-Orthodox residing in Anatolia and Turkish-Muslims living in Greece.³² As a result, 149,851 Greek-Orthodox and 456,720 Turkish-Muslims were repatriated in two years time.³³ The departure of non-Muslim

³¹ Akgunduz, A. (1998) "Migration to and from Turkey, 1783-1960," *Journal of Ethnic and Migration Studies*, vol. 24.

³² For further details see, < <http://www.hri.org/docs/straits/exchange.html> >.

³³ Geray cited in Akgunduz (1998).

minorities from Turkey continued even after the population exchange. In addition to the Armenians and Greeks that have continuously fled the country; between 1948 and 1950, 33,159 Jews emigrated and settled in Israel.³⁴

Beginning from the 1960s, population movements from Turkey changed in terms of content and destination. Contrary to the population flows that took place in the early Republican era, migrants that left the country during 1960s-70s were predominantly Turkish-Muslims seeking employment and the destination was west European countries. They were recruited as *guest workers* following the economic boom and the consequent labor shortages that took place after the Second World War.³⁵ The bilateral contracts signed between Turkey and Germany, Austria, France, the Netherlands, Belgium, Sweden and Switzerland, in principle, intended to provide temporary workers who will eventually return to their home country. Although European countries terminated worker recruitment programs due to the economic recession that occurred following the oil crises of 1973, emigration from Turkey continued in the form of family reunification/formation throughout the 1980s and 1990s.³⁶

From the 1980s onwards, an acceleration in the asylum applications from Turkey to the EU countries was observed. The 1980 military coup which was followed by the armed conflict between PKK and the Turkish armed forces in the southeast of Turkey and the subsequent institution of a state of emergency in the region paved the way for many Kurds holding a Turkish citizenship to seek asylum in European countries.³⁷

The 1980s also marked a turning point in the history of migratory movements as Turkey gradually evolved from a country of emigration to one of immigration and transit migration. The

³⁴ Weiker cited in Akgunduz (1998).

³⁵ Abadan-Unat, N. (2002) *Bitmeyen Göç: Konuk İşçilikten Ulusötesi Yurttaşlığa*, Istanbul: Istanbul Bilgi Üniversitesi Yayınları, pp. 37-69.

³⁶ *Ibid.*

³⁷ Kirişçi, K. (2003) 'Turkey: A Transformation from Emigration to Immigration', *Migration Information Source*, see <<http://www.migrationinformation.org>>; Mannaert, C. (2003) "Irregular Migration and Asylum in Turkey," *Working Paper No. 89*, UNHCR Evaluation and Policy Analysis Unit, pp. 6.

Iranian Revolution in 1979 and the following Iran-Iraq war poured 1.5 million people from Iran to Turkey between 1980 and 1991.³⁸ In 1988 and 1991, Iraqi Kurds fled Iraq and came to Turkey in search of a shelter. UNHCR indicates the number of Kurdish asylum seekers in 1991 as 460,000.³⁹ A year later, in 1992, around 25,000 Muslim Bosnian asylum seekers flowed into Turkey escaping from war.⁴⁰ Furthermore, the Kosovo crisis in 1999 forced approximately 10,000 Kosovo Albanians to leave their lands and come to Turkey.⁴¹ Beginning from the early 1980s, asylum seekers from places as distant as Nigeria, Ghana, Tanzania, Ethiopia, Sudan, Algeria, Tunisia, Indonesia, Sri Lanka, the Philippines, Bangladesh and Pakistan began to enter Turkey.⁴² Another group of immigrants coming to Turkey are the citizens of Russian Federation and former Soviet republics like Moldova, Armenia, Georgia, Romania and Ukraine. These people usually enter legally, on tourist visas, but engage in commercial activities, while some of them overstay their visas and become illegal immigrants.⁴³

Turkey has also become a waiting room for irregular migrants on their journey to Europe. Icduygu studies irregular migrants coming to Turkey under two groups.⁴⁴ The first group is composed of transit migrants that are coming from the Middle East (Iraq and Iran) and various Asian (Pakistan, Bangladesh, Sri Lanka, etc.) and African (Nigeria, Somalia, Republic of Congo) countries and try to reach EU countries. The second group consists of migrants from Romania, Moldova, Ukraine and Russian Federation who enter legally but overstay their visas. They are usually employed in the insecure informal market where most of them work as nannies or housekeepers.

³⁸ Mannaert 2003, pp. 2.

³⁹ UNHCR, Turkey, see <<http://www.unhcr.org.tr>>

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Mannaert (2003), pp. 3; Kirisci, K. (2004) "Old and New Patterns Immigration into Turkey: EU as a Vehicle of 'Post-National Transformation' in Turkey" draft paper presented at on *Turkey – Towards Post Nationalism*, Basel, 14-16 October, pp. 7.

⁴³ Kirisci (2004), pp. 7.

⁴⁴ Icduygu, A. (2005) "Transit Migration in Turkey: Trends, Patterns and Issues," European University Institute, CARIM-RR 2005/04, pp. 8-9.

Another recent trend of migratory movements directed to Turkey includes professionals and students.⁴⁵ According to the data provided by UNHCR Turkey and the Department of Foreigners, Borders and Asylum, 168,100 people received resident permits in 2000. Among this number, 24,200 resident permits were given due to work permits, 24,600 due to education, and 119,300 for other (according to Icduygu, this number includes families of those who received resident permits for education and employment) reasons.⁴⁶ In 2005, the number of residence permits issued reached 131,594 including 22,130 for employment, 25,240 for education and 84,224 for other reasons.⁴⁷

As the data clearly indicates, Turkey was a country of emigration from the 1920s, the establishment of the Republic, until the 1980s. However, the 1980s mark a turning point in the history of migration where Turkey was transformed from a country of emigration into a country of immigration and transit. Today, not only asylum-seekers or irregular migrants who perceive Turkey as a waiting room on their journey to western countries but also irregular labor migrants and professionals who choose Turkey as their destination point are coming to the country.

4.2 *Policy Implications of the Europeanization of Migration*

4.2.1 *Visa Policy*

Fortification of the European Union against the *invasion* of unwanted immigrants underlines the significance of two components of the Europeanized migration policy that directly deal with the prevention of irregular migrants upon entry; visa policy and border management. In 2001, the EU adopted the Council Regulation (EC) No 539/2001, which includes a list of third countries whose nationals must possess visas when crossing the external borders of the Union (negative list) and those for whose

⁴⁵ Icduygu, A. (2006) *Türkiye-Avrupa Birliği İlişkileri Bağlamında Uluslararası Göç Tartışmaları*, İstanbul: TUSIAD, pp.76.

⁴⁶ *Ibid*, pp. 73.

⁴⁷ *Ibid*.

nationals there is no such requirement (positive list).⁴⁸ Following the annual revision of the list, the regulation was amended by the Council Regulation (EC) No 453/2003 of 6 March 2003 which has transferred Ecuador from the positive list to the negative list.⁴⁹

Although there was a wide gap between the negative and positive lists of Turkey and the European Union, in September 2002 Turkey took important steps in aligning to the Schengen acquis and introduced visa requirements for the nationals of Bahrain, Qatar, United Arab Emirates, Kuwait, Oman and Saudi Arabia. The Commission's 2002 Regular Report indicated the discrepancy between the two negative lists as twenty one and called Turkey to align its visa list further with that of the European Union.⁵⁰ The alignment process continued and in April 2003 Turkish government introduced visa requirements for the nationals of Indonesia, South Africa, Kenya, Maldives, Seychelles, Grenada, Saint Lucia, Bahamas, Barbados, Belize, Jamaica, Fiji Islands and Mauritius and hence reduced the discrepancy deriving from the differences between the negative lists to seven.⁵¹ In November 2003 a visa requirement was established for the nationals of Azerbaijan and the difference between the negative lists shrank to six countries which include Bosnia Herzegovina, Iran, Kyrgyzstan, Macedonia, Morocco and Tunisia.⁵² In 2006, Turkey lifted visa requirements for Guatemala and Czech Republic and introduced visas for the Marshall Islands and Micronesia. Visa exemption agreements with

⁴⁸ Council of the European Union, 2001, Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those nationals are exempt from that requirement, *OJ L 81 21.03.2001*.

⁴⁹ Council of the European Union, 2003, Council Regulation (EC) No 453/2003 of 6 March 2003 amending Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those nationals are exempt from that requirement, *OJ L 69 13.03.2003*.

⁵⁰ Commission of the European Communities, 2002 Regular Report on Turkey's Progress towards Accession, 09.10.2002, SEC (2002) 1412.

⁵¹ Commission of the European Communities, 2003 Regular Report on Turkey's Progress towards Accession.

⁵² Commission of the European Communities, 2004 Regular Report on Turkey's Progress towards Accession, 06.10.2004, SEC (2004) 1201.

Venezuela and Paraguay came into force and another one was signed with Columbia. Moreover, visa requirement for Andorra was lifted. However, the six-country-gap between the negative lists of Turkey and the EU continues to exist.⁵³

In addition to aligning to the negative and positive lists of the European Union; ensuring the security of the travel documents constitutes a significant aspect of the visa policy. As a result, the EU adopted the Council Regulation (EC) No. 1683/95 of 29 May 1995 which delineates a uniform format for visas. In 2002, the Council adopted a regulation that amends Regulation No. 1683/95 by incorporating a photograph into the uniform format of the visas. In 2004, Turkey started to implement a twinning project with a budget of EUR 1,918,667, pertaining to the amelioration and alignment of its visa policy. Under the project, which was completed in 2005, around 300,000 consular staff received trainings on new visa instructions, on how to detect forged and falsified travel documents and how to use the technical equipment in order to ensure document safety.⁵⁴ The project also provided diplomatic missions abroad with anti-forgery equipment and relevant hardware and software. Moreover, a new visa sticker with higher security characteristics was developed as one of the components of the twinning project.

Turkey has a flexible and yet at the same time a complex visa system, composed of three components, and each including different regulations applied to different groups of nationals.⁵⁵ The first component encompasses countries whose nationals are not required to obtain visas in order to enter and stay for a defined period of time in Turkey while the second group consisted of countries whose nationals are obliged to acquire visas. The third component, on the other hand, includes sticker visas (*bandrol*) issued at the borders. However, the application of sticker visa regime is contrary to Schengen standards and Turkey was obligated to terminate the

⁵³ European Commission, Turkey 2005 Progress Report, 09.11.2005, SEC (2005) 1426, pp. 111; Commission of the European Communities, Commission Staff Working Document, Turkey 2006 Regular Report, 08.11.2006, SEC (2006) 1390, pp. 60.

⁵⁴ 'Visa Policy and Practice', Twinning Project No: TR-03-JH-05, pp. 5.

⁵⁵ Kirisci, K. (2007) "Border Management and EU-Turkish Relations: Convergence or Deadlock," CARIM-RR-2007/03, pp. 32.

issuance of visas at the border during the harmonization process. In the National Program of 2003, the Turkish state promised to bring this application to an end by 2005. However, the cost of abolishing the sticker visa regime or initiating new visas to neighboring countries as well as other third countries that Turkey has close social, economic and cultural relations, accompanied by uncertainty regarding full membership, created reluctance on the Turkish side in aligning to the EU visa policy.⁵⁶ As a result, following a *tacit* agreement made between Turkey and the EU, full adoption of the negative list was decided to be achieved towards the accession, not before it.⁵⁷

4.2.2 External Border Management

Following the eradication of internal borders with the Schengen Agreement, the management and control of the external border of the European Union gained utmost importance. European Council of October 2003 made a novel decision by supporting the Commission's proposal for the establishment of a Border Management Agency.⁵⁸ In that respect the Commission initiated a proposal for a Council Regulation on the establishment of a European Agency for the management of external borders of the Union which was adopted in October 2004.⁵⁹ This legislation is a significant development with regards to the promotion of cooperation between the member states for the external border control.

Turkey has a 2,949 km long land border with Greece, Bulgaria, Georgia, Armenia, Azerbaijan, Iraq, Iran and Syria. Among its neighbors, only Greece and Bulgaria are members of the European Union. Therefore, upon Turkish accession Greek and Bulgarian borders will become internal borders and the Turkish border with

⁵⁶ *Ibid*, pp. 42.

⁵⁷ *Ibid*, pp. 42.

⁵⁸ Council of the European Union (2003) Brussels European Council, March 20-21, Presidency Conclusions, pp. 10.

⁵⁹ Council of the European Union, 2004, Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L 349 25.11.2004*.

the remaining six countries will constitute the external border of the EU. As a result, Turkey is responsible for the protection and control of a 2,477 km land border (excluding Greek and Bulgarian border) and a 6,530 km sea border. Beginning from the 1980s, Turkey became a country of transit migration where the majority of the migrants enter illegally from the eastern border. Consequently, the European Union has increased its calls for Turkey to strengthen its border control and surveillance.

One of the most important criticisms directed to Turkey in the progress reports focused on the scattered structure of the border guard units. The control and surveillance of the Turkish border is divided between the responsibilities of the army (land forces), gendarmerie, police, navy and the coast guard. The navy and the coast guard is responsible for the protection of the sea border, the army and the gendarmerie is responsible for the surveillance of the green border and the police is responsible for the control of border crossings at crossing points and airports.⁶⁰ Turkey introduced a time table in the National Plan for the Adoption of the Acquis (NPAA) where the creation of a unified, non-military Border Guard Unit is foreseen at the end of 2005.

In 2003, the Task Force on Asylum, Immigration and External Borders produced a strategy paper on the protection of Turkish external borders.⁶¹ Encouraged by the strategy paper, Turkey started to implement a twinning project entitled 'Support for the development of an Action Plan to implement Turkey's integrated border management strategy' in 2003 which was completed in 2006. The twinning project produced an Action Plan defining the necessary legal and institutional measures as well as the infrastructure and equipments for the effective implementation of the border management strategy in March 2006.⁶² Moreover, in line with the directives of the strategy, Directorate for Integrated Border

⁶⁰ Commission of the European Communities, 2000 Regular Report from the Commission on Turkey's Progress towards Accession, 08.11.2000.

⁶¹ Kirisci (2007), pp. 20.

⁶² "Support for the development of Action Plan to implement Turkey's integrated border management strategy," Twinning Project No: TR-02-JH-02, pp. 3; Progress Report 2006, pp. 60

Management, which would supervise the implementation of projects pertaining to the creation of a border guard unit, was established in June 2004 under the Ministry of Interior.⁶³ In 2005, Turkey started to implement another twinning project with the objective of developing a training strategy, program and curriculum in EU standards for the new border police that will be established during the harmonization process.⁶⁴ The project is aimed to be completed in 2007.

Turkey still has a long way to go before providing full alignment with the *acquis* on external border management. To begin with, the establishment of a unified, non-military Border Guard Unit has not been achieved yet. In addition to that, cooperation between the agencies responsible for the protection of different parts of the border is newly developing.⁶⁵ The strengthening of the training of the border guards and the deployment of conscripts are highly recommended by the European Union.⁶⁶ Upgrading of infrastructure at some checking points and adaptation of surveillance equipment at crossing points and along the green border is requested.⁶⁷

4.2.3 Re-admission Agreements

Re-admission agreements are an essential component of the Europeanized migration policy which is mainly focused on keeping the unwanted outside of the EU borders. Readmission agreements are one of the oldest mechanisms used by the European Union in order to control the flow of people and prevent the border-crossing of irregular migrants.⁶⁸ The development of the mechanism of readmission agreements dates back to 1994, when a Council Recommendation of 30 November 1994 regarding specimen bilateral

⁶³ Regular Report 2004, pp. 139.

⁶⁴ 'Development of a Training System for Border Police', Twinning Project No: TR-2004/IB/JH/05

⁶⁵ Progress Report 2006, pp. 60.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Apap, J., Carrera, S., Kirisci, K. (2004) "Turkey in the European Area of Freedom, Security and Justice," *EU-Turkey Working Papers No. 3*, Centre for European Policy Studies (CEPS), pp. 9.

readmission agreements between a Member State and a third country was adopted. The aim of the recommendation was to facilitate the repatriation of the third country nationals to their country of origin. The recommendation was followed by the adoption of guiding principles regulating the drafting of protocols for the implementation of the agreements in 1995.

The Seville European Council concluded that any agreement or cooperation that would be established between the European Union and any third country should include joint management of migratory movements and obligatory readmission in case the movement is deemed illegal.⁶⁹ Article 13 of the Cotonou Agreement, signed between the EU and the African Caribbean and Pacific (ACP) states in 2000 and which came into effect in 2003, indicates that "each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member States' request and without further formalities."⁷⁰

The Amsterdam Treaty delegated powers to the Council in order to take necessary measures, by acting unanimously upon the proposal of the Commission or a Member State, pertaining to readmission of third country nationals. Article 63(b) of the Treaty indicates that the Council shall take measures in the area of "illegal immigration and illegal residence, including repatriation of illegal residents".⁷¹ The Council has authorized, so far, the Commission to conduct readmission agreements in the name of the European Union with 11 countries including Morocco, Sri Lanka, Russia, Pakistan (September 2000), Hong Kong, Macao (May 2001), Ukraine (June 2002) and Albania, Algeria, China, Turkey (November 2002)⁷². Only five of the negotiations were completed successfully:

⁶⁹ Council of the European Union (2002) Seville European Council, June 21-22, Presidency Conclusions.

⁷⁰ Cotonou Agreement 2000. See <<http://www.acpsec.org/en/conventions/cotonou/accord1.htm>>.

⁷¹ European Union, Consolidated Version of the Treaty on European Union and Treaty Establishing the European Community, *OJ C 321E*, 29.12.2006, Article 63.

⁷² See <http://ec.europa.eu/justice_home/fsj/immigration/relation/fsj_immigration_relations_en.htm>.

Hong Kong (November 2001), Macao (October 2002), Sri Lanka (May 2002), Albania (November 2003) and Russia (October 2005).⁷³

The EU has demanded that Turkey sign a readmission agreement with the European Union as part of the membership requirements. The 2003 Accession Partnership document stated the conclusion of a readmission agreement with the Union as a short term objective. Although Turkey objected to signing a readmission agreement with the whole Union at the beginning, in March 2004 rather reluctantly agreed to start negotiations.⁷⁴

Since it is very difficult to open readmission agreements with third countries, the Turkish state was reluctant to negotiate a readmission agreement with the European Union fearing from the idea of being stuck with unwanted migrants. So far, Turkey has concluded readmission agreements with Greece (November 2001), Syria (September 2001), Kyrgyzstan (May 2003), Romania (January 2004) and Ukraine (June 2005).⁷⁵ In addition to that, negotiations are ongoing with Russian Federation, Uzbekistan, Belarus, Hungary, Macedonia, Ukraine, Lebanon, Libya, Egypt, and Iran. These agreements are proposed to Bangladesh, India, China, Mongolia, Israel, Georgia, Ethiopia, Algeria, Morocco, Nigeria, Pakistan, Kazakhstan, Sudan and Tunisia.⁷⁶

4.3 *Securitization of Migration: Signs of a Mentality Change*

The completion of the internal market, paved the way for the beginning of a gradual process of communautarization of migration policies. This process not only obligated member states to adopt and implement common policies and practices, but also requested prospective member states to accept them as part of the harmonization process and the *acquis communautaire*. However, the adoption of community rules and regulations in this policy domain can not be viewed as a simple activity of alignment to the European Union since the process of harmonization of migration policies by

⁷³ *Ibid.*

⁷⁴ Apap, Carrera, Kirisci (2004), pp. 22.

⁷⁵ Kirisci (2007), pp. 26.

⁷⁶ Icduygu (2005), pp. 28.

the candidate countries goes hand in hand with the adoption and internalization of a securitized perception pertaining to (im)migrants. Although Turkey is at the very beginning of its journey to the European Union, early signs of a transformation of perceptions along the lines of securitization discourse are becoming visible, especially at the level of security bureaucrats.

In December 2005, an international symposium on migration was organized by the Municipality of Zeytinburnu in Istanbul. On the first day of this three-day conference, the then Minister of Internal Affairs, Abdülkadir Aksu, delivered a speech where he indicated that migratory movements had brought forth crimes including terrorism; drug, arms and human smuggling; human trafficking and organized crime.⁷⁷ Moreover, he stated that migratory movements had negative impact on the stability and development of regions and countries. Perception of migration as a destabilizing factor is one of the essential components of the securitization discourse. In addition to that, discerning migration as a source for crimes such as trafficking, smuggling and terrorism renders migrants as potential criminals. This paves the way for their stigmatization in their host society.

In December 2006, the Turkish weekly magazine *Tempo* published an interview conducted with the Chief Officer of Narcotics at the Security Directorate of Istanbul.⁷⁸ In that interview the Chief discusses various issues including drug use among youngsters; drug dealers and the police operations conducted against them. He also states that some of the dealers captured in the operations were Africans. However, he continues by telling the reporter how uncomfortable he feels whenever he comes across with an African on the street. This is a very dangerous statement that can be made by a high-level security official as the discourse of securitization is not only reproduced and strengthened but also normalized in the eyes of the public. As Huysmans rightly argues, security bureaucrats are the producers of information and

⁷⁷ "Göç, güvenlik konseptini değiştirdi (Migration changed the concept of security)," *Zaman*, December 9, 2005.

⁷⁸ "Uyuşturucu sorununu çözmek bir ütopyadır (Solving the problem of drugs is a utopia)," *Tempo*, no. 50, December 14, 2006.

knowledge on security.⁷⁹ Therefore, when a security official indicates his uneasiness about a certain group of people living in that society, he, intentionally or unintentionally, may lead to the development of negative feelings and attitudes towards that group.

A recent public utterance of the securitization discourse regarding migrants took place following the death of a Nigerian asylum-seeker Festus Okey, who was killed in a police station on August 20, 2007 in Istanbul. According to the official statement by the Security Directorate of Istanbul, which was made 17 days after the killing, the police stopped Okey and his Burundian friend due to their suspicious behaviors; searched and found drugs on them.⁸⁰ They were taken to a police station and placed in different rooms. While under interrogation, Okey tried to grab the gun of a police officer and he was shot as the gun was fired during the struggle. Okey died at the hospital that day. On the other hand, Okey's Burundian friend who was taken under custody with him claims that he first heard screams which were followed by a gun-shot.⁸¹ The public prosecutor initiated an investigation however he is having great difficulty in collecting evidence.⁸² There is no camera recording and the shirt worn by Okey, from which the distance of the shooting will be determined, is missing. While the mystery over what happened is still unsolved, the Governor of Istanbul, Muammer Güler, made a tragic statement.⁸³ After repeating the official statement of the Security Directorate regarding how the incident took place, he continued by claiming that African migrants in Istanbul are involving in various crimes, including selling of drugs. Governor's statement not only portrays African migrants as potential criminals, but also stigmatizes them as an internal threat to the security of the society they are living in.

⁷⁹ Huysmans (2000), pp. 757.

⁸⁰ "Emniyetten Festus Okey açıklaması (Explanation from the Security Directorate on Festus Okey case)," *Radikal*, September 9, 2007.

⁸¹ "Ölüm Yeri: Beyoğlu Emniyeti (Place of death: Beyoğlu police station)," *Radikal*, August 30, 2007.

⁸² "Emniyet de Delil Kaybederse (If the Security Directorate loses evidence)," *Radikal*, September 20, 2007.

⁸³ "Ölen Nijeryalı için Müfettiş Devrede (Public Prosecutor is in charge of the case over the death of the Nigerian)," *CNN Türk*, September 7, 2007. See, <http://www.cnnturk.com/TURKIYE/haber_detay.asp?PID=318&haberID=389614>.

These three recent incidents clearly indicate that there is a strong tendency in Turkey for the adoption of a securitized perception with regards to migrants. The adoption of the EU migration policies which strongly urge and oblige Turkey to prevent the inflow of migrants is going hand in hand with the internalization of the security discourse accompanied by the policies. Although migrants are mostly depicted as threats to internal security of the society rather than to cultural unity or economic welfare in Turkey, current situation presents the initial steps of the adoption of the discourse and signals that more will come in the upcoming years.

5. Conclusion

The age of globalization has facilitated the promotion and acceleration of the migratory movements all around the world. The European Union is one of the most desired territories of destination for many migrants coming from various areas, ranging from Africa to the Middle East, Asia to Caucasus. In 1960s, many west European countries which were experiencing an economic boom and labor shortage after the Second World War were welcoming migrants as guest workers, whereas beginning from the 1980s these countries gradually came to perceive migration as a destabilizing factor and a source of potential threat to their internal, cultural, and economic unity.

The establishment of the internal market and the eradication of the internal borders within the European Union resulted in the placing of an increased focus and attention on the control of border movements. In a process started by the Tampere Summit in 1999 and continued until today, the policy proposals and action plans adopted by the European Union were focusing on how to prevent the movement of migrants to the Union. Rules adopted as part of this communautarized policy domain not only binds member states, but also obligates candidate states to transform their migration policies and align to that of the Union. Through the transfer of EU policies, candidate states enhance their abilities to control external borders, develop necessary infrastructure and technological know-how in order to detect fraudulent documents, and sign readmission agreements with migrant sending third countries, before becoming members of the Union. Since these policies are accompanied by a

securitized perception toward migrants, candidate countries also adopt and internalize this perception which portrays immigrants as potential threats to their host society.

In the 1999 Helsinki Summit, Turkey was finally declared as a candidate country on the way to full membership. As a result, an intense process of harmonization with the rules and regulations of the European Union started. Since the beginning of its candidate status, Turkey has been advised, among many other things, to strengthen its border control, enhance its visa policy, abolish its sticker visa implementation, and sign readmission agreements with migrant sending third countries. Moreover, there are recent signs of a mentality change in state bureaucrats and security officials indicating their adoption of a securitized perception toward immigrants. This is a serious development since it paves the way for the portrayal of migrants as potential threats not only in the eyes of the state officials but also those of the wider republic. Public stigmatization of migrants as a source of danger to their host country places them in grave situations in which their human rights are violated, as the case of Turkey clearly illustrates.

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CLANDESTINE IMMIGRATION ACROSS THE STRAIT OF GIBRALTAR. EFFECTS OF CONTROL MECHANISMS ON IMMIGRATION FROM NORTH AFRICA*

JOSÉ RODRÍGUEZ MESA

The restrictive criteria imposed by European regulations and visa constraints since May 1991 on Moroccan subjects, have led to an increase in illegal or clandestine immigration from Morocco, both by Moroccan and sub-Saharan citizens who transit through Morocco with the intention of reaching Europe. Across the Strait of Gibraltar, only 14 kilometers separate Europe from the African continent. It is understandable why, despite the increasing importance of other routes in recent years, the Strait of Gibraltar remains the inevitable crossing for thousands of North African and sub-Saharan citizens trying to come to Europe and establish themselves there.

KEY WORDS: Immigration Morocco-Spain. Clandestine immigration. Control of migratory fluxes.

1. Introduction

The increasing inequalities between Europe and Africa together with the restrictive criteria imposed by European regulation and visa constraints since May 1991 on Moroccan subjects have led to illegal or clandestine routes becoming the most popular immigration route from Morocco, not only for Moroccan citizens but also for sub-Saharan ones aiming to cross the Straits of Gibraltar from Morocco. Official figures on the number of people that cross into Spain clandestinely each year via the Strait do not exist. However, the

* Translation by Anass Mahmoud el Mouden. PhD Program Doctoral Studies "Juridical Regulation of Immigration Morocco – Spain". University of Cadiz.

number of small boats intercepted in waters of the Strait of Gibraltar in the last three years was 24,105. The scale of the problem of clandestine immigration to Europe from Morocco – Spain route is further indicated by the fact that over 60,000 detentions were carried out by Moroccan authorities since 1999 and 8,000 to 10,000 deaths were recorded between 1989 and 2002.

The enormous influx of migrants into Spanish territory together with continued pressure from the European Community, has led to a significant revision of Spanish regulations on the status of foreigners and immigration. The revision is based on the idea of contingents and controls to the migratory flow and seems to prove that the ultimate motivation behind these limits on access by foreigners to Spanish territory is to uphold the interests of the Spanish State and of those of the European Community in general.

2. The Importance Of The Strait Of Gibraltar As A Route For Clandestine Immigration From Northern Morocco

A comparative analysis of the number of immigrants detained whilst attempting to cross the Strait of Gibraltar, compared to the general number of clandestine immigrants coming to the Spanish territory by sea between the years 1999 and 2006 shows an irregular fluctuation in the number of intercepted immigrants, both in the Strait as in the rest of the Spanish coasts, throughout the last seven years. The increase in the percentage of immigrants intercepted in 2000 with regards to the previous year, was essentially due to the increase in detentions in the Strait along with an increase in intercepted migrants reaching the coasts of the Canary Islands. In general terms, during the year 2001, the number of immigrants intercepted in waters of the Strait was almost four times that of those intercepted on the coasts of the Canary Islands. Nevertheless, percentage-wise, immigration via the Strait grew little when compared to the immigration route towards the Canary Islands, 12.6 % as opposed to 70.6 %. This fact reveals the existence of a new "Gate to Europe" that, in 2002, reached a crucial point where, for the first time, the total number of immigrants intercepted on the coasts of the Canary Islands surpassed that of the intercepted ones in the Gibraltar Strait route by 3,320 persons.

This change in numbers in 2002 results from a shift in the migratory flows from North Africa due to the attempted

"hermetization" of the Strait, on one hand, and of the implementation from the Moroccan side, of a policy of cooperation in fighting illegal immigration on the other. To this avail, in 2002 Morocco assured that it deported forty thousand African immigrants from its country. These figures were presented to the European Union in order to account for the money received for border control enhancement.

Nevertheless, in 2003 there was an evident upturn in immigration across the Strait, which increased by 47% with regards to the previous year, whereas immigration towards the Canary Islands remained more or less stable. It was thus possible to deduce from this fact that after the establishment of the route towards the Canary Islands as a doorway to Spanish territory, the use of this route would tend to remain constant and rather independent from the use of the Gibraltar Strait route. It is no surprise that from then on the Canary Islands ceased being a mere alternative to the Strait route, to actually become the primary route chosen by Senegalese and Mauriticians.

In 2004 and 2005 there was however a significant reduction in clandestine immigration via the sea routes. In 2004, the fall was more pronounced in the Strait, where it decreased by 27.4 % with regard to the previous year, attaining similar figures to those of 2002. The increase of security alertness in Morocco, the inception of the S.I.V.E. (*Sistema Integral de Vigilancia Exterior*) in Cadiz and Granada at the end of 2004 and the cooperation agreements between Spain and Morocco aimed at fighting illegal immigration, were certainly key factors. The figures for 2005 confirm the accentuated downward trend in maritime clandestine immigration towards Spain. Whereas in the area of the Strait the decrease was slight; along the route of the Canaries it diminished by 44 %, reaching, for the first time in four years, levels inferior to those of the Strait.

However, this marked downwards trend changed radically in the year 2006. By the 8th of November a total of 35,481 immigrants attempting to reach the Spanish coasts had been intercepted. It was, undoubtedly one of the worst figures found in our country, 201 % higher than the figures of the previous year.

An analysis of the figures from January to August 2006 gives two conclusions: a) the marked increase in the number of immigrants intercepted during this period is mainly due to the

intensification in the arrival of Algerian and sub-Saharan citizens, which increased by 128 % and 346 % respectively with regard to 2005. b) An actual 450% increase in just eight months highlights more than a simple shift in routes; it is a massive attempt to reach Spain by people who had never thought of doing so before or who never had the opportunity to do so (due to the lack of finance, contacts, etc.)

On the other hand, the increase in clandestine immigration in the Strait of Gibraltar during the first eight months of 2006 shows that the migratory fluxes coming from North Africa to Spain across the Strait have a distinct nature and identity from the route towards the Canaries. It is therefore not a question of alternative routes but rather of complementary ones.

3. Control Mechanisms For Clandestine Immigration From North Africa

The fight against clandestine immigration from Northern Morocco is based, according to Spanish legislation, on three important pillars: security of the borders via the S.I.V.E.; the repatriation of illegal immigrants through different legal mechanisms and the sanctioning of those caught residing illegally in Spanish territory. To these three basic measures, it is necessary to add the ordinary and extraordinary means of registering foreigners who enter illegally, but whose situation subsequently becomes legal.

3.1 Border surveillance. Impact of the S.I.V.E. on the control of clandestine immigration via sea routes

The S.I.V.E. can be defined technically as being an "operative device that, via technical means, facilitates the surveillance of Spanish territorial waters and its surroundings, providing the Control and Command Center with real time data with which to issue precise orders for the interception of any element capable of illegally entering the territory of the EU".

It is essentially a preventive system, which allows the type of craft and crew members to be identified in order to ascertain if illegal operations are occurring. If they are, S.I.V.E coordinates the pursuit of the craft using the maritime, aerial and terrestrial

methods available to the *Guardia Civil* to intercept the suspected criminals or to rescue illegal immigrants in distress¹.

Ever since the establishment of S.I.V.E. in Algeciras in 2002, it has been possible to reduce the number of small boats intercepted in the zone of the Strait to such a degree that in 2005, only 348 small boats were detected. That was 98 less than the year before, and 50 % less than in 2000.

The data from 2005 reflects a change in preferred routes. The decrease in the number of intercepted crafts in the Strait was balanced by a 71.7 % increase in small boats intercepted along the coast of Almeria. Similarly, the decrease of 71 % in small boats intercepted in Fuerteventura -where the S.I.V.E. has operated since December 2003- was accompanied by a 37 % increase in small boat interception to Gran Canaria and 11.7 % to Tenerife. Despite this, the establishment of S.I.V.E. has not diminished the number of people dying whilst attempting to reach the Spanish coasts. The need to look for alternative and therefore more risky routes, has led to a heavier toll of 368 confirmed deaths in 2005, of which 98 took place in the Strait and 226 en route to the Canaries.

All these data, when combined with the events of 2005 at the borders of Ceuta and Melilla with Morocco, demonstrate that a campaign against clandestine immigration based on the physical (fences) or immaterial (S.I.V.E.) blockage of borders is doomed to failure.

3.2 *The deportation and refusal of entry of clandestine immigrants.*

The purpose of repatriating foreigners, who try to enter Spanish territory illegally, is not only to keep a tight control on immigration, but also to dissuade others who wish to enter illegally from doing so. When deemed necessary, offenders must be punished.

Besides expulsion, which will be discussed later, the Spanish legal code presents two legal mechanisms with which to carry out the repatriation of clandestine immigrants or those in an irregular situation: deportation and refusal of entry.

¹ J. Nuñez Calvo, "La Guardia Civil frente a la inmigración irregular. Cádiz, una experiencia a pie de playa", www.uned.es/investigacion/publicaciones/Cuadernillo%20INMIGRACION%203.pdf > www.uned.es/investigacion/publicaciones/Cuadernillo%20INMIGRACION%203.pdf, p. 5.

a) The refusal of entry at the borders between Morocco and Spain.

In line with article 156.1 of the RD (Royal Decree) 2393/2004², refusal of entry occurs when a foreigner is in a situation that allows entry and the border authorities do not consider they fulfill the necessary entry requirements. This legal approach presupposes that entry is not clandestine, but that it is known by the Spanish authorities, who then refuse it either for non-fulfillment of the legal requirements necessary for clearance³ or because the person belongs to a category for whom entry is blocked⁴.

The majority of people who try to cross the border between Morocco and Spain do so at the frontier positions of Ceuta and Melilla, or at the Port of Algeciras. During 2003 and 2004 respectively 13,657,287 and 10,722,022 entries into Spanish territory occurred across the Moroccan border at Ceuta and Melilla. These figures make up 32.9 % and 27.7 % of all Spanish entries registered in this period.

With respect to the Port of Algeciras, in 2003 it received the maximum number of entries that occurred at ports, with 896,885 entries and 998.288 exits. Regarding entry refusals at the border in maritime location, the majority occur at the Ports of Almeria and Algeciras.

It is important to note the significant increase in refusals of entry that took place in the Port of Algeciras during the year 2003; totaling 23.1 % of all refusals at Spanish border locations and over 76% of all rejections in maritime positions. It is also important to emphasize also that during this year 97 % of these rejections were of Moroccan citizens, with 63 % of these rejections due to the presentation of false documents.

This increase might be due, in part, to the establishment of the trial centre for S.I.V.E in Algeciras in August 2002. The

² RD 2393/2004 of the 30th December by which is approved the Regulation of OL 4/2000, on Rights and Freedoms of foreigners in Spain.

³ Art. 4 of RD 2393/2004.

⁴ Art. 10 of RD 2393/2004.

increase in rejections at the Port of Algeciras during 2003 coincides, with a fall in the number of small boats intercepted in the Strait area in that year. This information illustrates the changing strategy of clandestine immigration from Morocco – replacing the trip by boat by the acquisition and presentation of false documents.

In 2005, the refusal of entry at the port of Algeciras was 145 % more than in the previous year, 112 percentage point higher than the expected national increase. This increase may be due to the increase in police controls at the port of Algeciras. What it reveals is the inverse relationship between the number of small boats intercepted in the strait and the number of rejections at the port of Algeciras. The decrease in the number of small boats in the last years has been met by the increase of Moroccan citizens rejected in the Port of Algeciras attempting to enter Spain with false documentation.

Regarding terrestrial borders, the majority of the refusals of entry currently take place at the border of Morocco with Ceuta – which represented 100 % of refusals at the terrestrial borders in 2003. As with refusals in maritime positions, at the terrestrial borders, represented principally by the border of Ceuta, 98 % of those rejected during 2003 were of Moroccan nationality and 81 % of these rejections were due to the presentation of false documentation.

This reveals that, besides the route taken by clandestine boats across the Strait, the majority of Moroccan citizens who try to enter Spanish territory do so at the terrestrial borders of Ceuta and Melilla, or at the Port of Algeciras, in most cases, using false documentation.

b) The deportation of immigrants intercepted in the Strait of Gibraltar to Morocco.

Unlike the previous procedure, deportation presupposes that the foreigner has already entered Spanish territory, though it can also be applied to “those who try to enter the country illegally” – for example, to those intercepted in small boats in Spanish waters in the Strait-. According to article 58.2 of LO 4/2000, it is no longer necessary for a record of expulsion to be made

when returning foreigners who have been expelled previously, who contravene the entry regulations for Spain or who try to enter the country illegally. It is thus an automatic administrative mechanism, which can only be halted if a formal request for asylum is made or if the person is a pregnant women for whom "the measure could suppose a risk for the pregnancy or health of the mother".

In accordance with the sentence of the Supreme Court of March 20, 2003, deportation is only possible in the case of foreigners who have illegally entered Spanish territory or have been caught with the intent to enter, even if entry was not achieved. For other cases, expulsion is the standard procedure.

From 1998 to 2004, between 85 % and 97 % of the people who were returned to their countries as consequence of either attempted illegal entry or violation of a prohibition of entry have been Moroccan subjects. One can conclude that the Spanish State is both adept at sending back Moroccan citizens and inept at implementing the return of other African citizens, as is the case of Nigerians, Mauritians or Senegalese. These foreigners are not admitted by Morocco, even when it is proved their departure was from Moroccan soil and neither were they sent back to their native lands for lack of specific agreements between the Spanish State and their state of origin.

In the case in which foreigners are returned to Morocco, it is necessary to consider article 50 of Moroccan Law no. 02-03⁵ which foresees the imposition of a fine between 3,000 and 10,000 dirhams and/or imprisonment for one to six months for any person who clandestinely leaves Morocco via terrestrial, maritime or aerial borders, and this without prejudice against of the penal dispositions applicable.

⁵ Relative to the entrance and exit of foreigners of Morocco, to the emigration and the irregular immigration of 11th November of 2003.

3.3 *The expulsion of immigrants with irregular administrative situations to Morocco.*

The article. 53 a) of LO 4/2000 classifies as a serious infraction "to be on Spanish territory in a state of irregularity, due to not having obtained an extension of stay, lacking authorization for residence, or for failing to renew the aforementioned authorization after three months of expiry."

The infraction presupposes a situation of irregularity caused by one of the above reasons. Irregularity here includes not only people who, after legal entry and stay become illegal after failure to obtain an extension or renewal after three months of the authorization of their residence, but also includes foreigners who entered illegally or clandestinely to Spain and who, in consequence, lack authorization to stay or reside.

Thus, once illegal or clandestine entry to Spanish territory occurs, repatriation of the foreigner is only possible after the enactment of a administrative sanctioning procedure in which expulsion is agreed.

Expulsion orders against Moroccan immigrants have reached a rate of between 20% and 29% of the total number of expulsion orders submitted i.e. about one-quarter. This is largely due to the fact that until two years ago, Moroccan citizens represented the largest group, by nationality, of those in Spain illegally. It is also due to the ease with which they are identified and expelled to the neighboring country.

One of the most important questions raised by expulsion is its non-execution in many cases where it has been decreed. The reasons for not executing the order of expulsion are twofold: the inability to know the nationality of the foreigner and the absence of agreements of readmission with the native lands. However, according to figures provided by the Spanish Federation of Policemen, 80% of the unexecuted expulsions concern citizens from countries where there is an agreement of repatriation, as is the case with Moroccans; for whom, at the beginning of 2005, 31,122 orders of expulsion were still outstanding.

The non execution of orders of expulsion leaves these thousands of foreigners in a situation of administrative invisibility doomed to marginality and the social exclusion. Hence, the necessary legal channels should be developed in order to allow undocumented

foreigners under non-executed orders of expulsion to end the situation of illegality they find themselves in.

3.4 The regularization of the administrative irregular condition of the foreigner

Regularization defines the administrative procedure included in the legislation whereby a foreigner must reaffirm their intentions in order to obtain a renewed residence authorization from the Spanish territory and so bypassing the previous filters involved in the request of visa. If this definition of regularization is accepted, then it must be accepted that it is an anomalous means by which to obtain a residence permit which exists in the legislation due to the pressure exerted by clandestine immigration.

Regularization as a legal order is required only when migratory flows cannot be canalized through the traditional orders that regulate the status of foreigners; that is, when traditional methods foreseen by legislation prove to be insufficient to control the entry and presence in Spanish territory of clandestine immigrants or those in irregular situations.

It is a group that, given their legal situation, are doomed to extreme marginality and overexploitation, with all the negative consequences that stem from it; so much for the group of immigrants in this situation (non recognition of rights, risk of detention and expulsion, xenophobia, abuse of workforce, etc.) as for society in general (civil insecurity, unfair competition on the part of companies that abuse foreign workers' rights, etc.). By means of the legal figure of regularization the aim is ultimately to regularize the legal situation of foreigners who live in and / or are employed in Spain regardless the absence of the necessary authorizations in this respect.

The increase in immigration into Spain, as a recipient country since the 80s, and the failure of the quota policy to regulate and control migratory flows, has turned regularization into a necessary legal requirement in the Spanish regulatory framework for foreigners. The change is such that it has ceased to be a process of extraordinary character to become an integral part of the ordinary procedures in the current regulation.

a) *The routes of standard regularization: the rooting.*

For a non European foreigner to settle in Spain, it is necessary that he have previously obtained a residence and / or work permit. But, it can happen that the foreigner does not fulfill the requirements legally established for the grant of such permit – for example, because he is irregularly in Spanish territory- and chooses to remain in Spain under an irregular situation. The only way of providing legal coverage to this reality is through regularization based on the idea of the rooting.

Rooting is understood as the

“situation resulting from the permanency in Spanish territory for an amount of time, as well as from the offer of viable employment that demonstrates the real and effective incorporation to the labor market, or from the ability to prove family links with resident foreigners in Spain or with natives”,

which is an innovation introduced by OL 4/2000, which distinguishes between labor⁶, social⁷ and family rooting⁸. The means of labor rooting, which has been in effect since August 8, 2006⁹, means that foreigners will be able to obtain a temporary residence and work permit if they prove permanency in Spain –

⁶ Art. 45.2. a) RD 2393/2004: “For labor rooting, will obtain authorization those who can prove their permanency in Spain for a minimal period of two years, provided that they have no criminal records in Spain or in their native land, and must demonstrate the existence of labor relations whose duration is not less than one year”.

⁷ Art. 45.2. b) RD 2393/2004: “To the foreigners who prove a permanency in Spain of a minimal period of three years, provided that they have no criminal records in Spain or in their native land, that they possess a work contract signed by the worker and the businessman in the moment of request, a request whose duration should not be less than one year and must prove family ties with other resident foreigners, or present a report that credits their social insertion and must be given by the town hall where he is domiciled. To these effects, family links will refer exclusively to spouses, ascendants and descendants in direct line”.

⁸ Art. 45.2 c) RD 2393/2004: Referring to children of father or mother of Spanish origins.

⁹ See the Fourth Final Disposition (Regulation) of the RD 2393/2004.

regardless of what their legal situation might have been¹⁰ – have no penal antecedents, and demonstrate the existence of labor relations whose duration is not less than one year.¹¹ The purpose of this measure is to guarantee the rights of workers, and to be more effective in the fight against clandestine immigration and the persecution of underground economy.

For foreigners to gain such regularization, they must report the businessman for whom they work to the Industrial Relations Commission. The record of infraction/bill of accusation against the businessman is sent to the governmental authority, which decides whether or not to grant authorization to inspect and register the irregular immigrant for Social Security, with retroactive effect, and liquidate the unpaid quotas. It is notable, that the hiring of foreign workers without previous authorization constitutes a very serious infraction in the subject of the status of foreigners¹² and in the case of abuse it might constitute a crime against the rights of workers.¹³

b) Extraordinary Regularizations

These are the emergency juridical-administrative solutions to the cyclical overflows of immigrants in an irregular situation in Spanish territory. Since the first extraordinary operation of immigrants' regularization carried out by the Spanish government in 1985-1986, there have been four other processes of regularization (1991, 2000, 2001 and 2005). From the number

¹⁰ Concerning the accreditation of this requirement, the presentation of original documents or properly certified copies will be needed that contain identification information of the interested party. Preference will be granted to the accreditation of this permanence by means of documents that have been expressed and/or registered by a Spanish public administration. Leaving Spanish territory during this permanency period of two years is no impediment as long as the period does not extend beyond three months. Provisional instructions on labor rooting. Department of Labor and Social Affairs.

¹¹ Labor relation, to these effects, is one which has taken place continuously or discontinuously with same or different employer(s), as long as some form of accreditation exists for a period that is all together one year.

¹² Art. 54 d) OL 4/2000.

¹³ Art. 312.2 of Penal Code.

of regularized immigrants – 572,000 of 700,000 presented requests –, the most important operation was the one carried out in 2005, which unlike the previous ones, was based exclusively on *labor rooting*. In this process of regularization, a large portion of the 16,850 Moroccan subjects have obtained authorization of residence during the first quarter of the year 2006.

With this process, thousands of foreigners escaped a situation of absolute social and legal exclusion and a large part of the underground economy based on the abuse of the foreign workforce has been removed. As a consequence, workers rights have been reestablished allowing free competition in the market and a growth in numbers of people with social security. Despite these events that can only be seen as positive, the focus exclusively on the fight against the black economy has lumped together the issues of undocumented immigrants and the underground workforce. This overlooks the fact that undocumented immigration involves a wider spectrum of human issues beyond those of underground labor markets that cannot be tackled from just this perspective¹⁴. Hence there is a need, once the process of extraordinary regularization is complete, that attention be give to the ordinary processes of regularization and other exceptional circumstances foreseen starting from article 45 of RD 2393/2004 onwards.

4. Mechanisms In The Fight Against Illegal Human Trafficking. Administrative And Penal Sanctions.

The dictionary definition of illegal human trafficking is the “movement or trafficking of people by any means of transport regardless what the law stipulates”. Concerning illegal people smuggling occurring between Morocco and Spain, it is particularly interesting to study the concept of “*undocumented people smuggling*”, by which people with inadequate formal travels documents or prior approval try to enter a country, remain

¹⁴ F. Torres (2005) “La regularización extraordinaria. Luces y Sombras”, *Página Abierta*, nº 160, in <http://www.pensamientocritico.org/frantor0605.htm>.

permanently in it or leave it, in flagrant violation of the internal legislation and of the international procedure. Besides the hazardous and inhuman conditions that the undocumented are exposed to by the dealers, the prevention of these activities concerns States especially as they involve activities by organized crime groups that have established a new criminal market which covers the recruitment, movement and introduction of one or more people into a foreign territory or state, usually for profit.

The fight by the Spanish State against illegal human trafficking is marked to a great extent by the regulation of the European Community in the matter¹⁵, and focuses principally on the administrative and penal pursuit of these types of practices.

Along with the Spanish legal regulation set against human smuggling, it is necessary to bear in mind that the Kingdom of Morocco also legally persecutes this type of conduct, punishing the organizers who transport people attempting clandestine entry or exit from Morocco with a sentence of imprisonment from fifteen to twenty years¹⁶, that might reach life imprisonment if the immigrants die in the process¹⁷.

4.1 *The sanctioning administrative framework*

Article 54 b) of the OL 4/2000 sanctions as very serious infraction, with a fine from 1,000,001 up to 10,000,000 pesetas, for "inducing, promoting, favoring or facilitating for profit, as an individual or as part of an organization, the illegal trafficking of humans through or to Spanish territory, provided that the act does not constitute a crime".

This precept provides the frame of reference in the fight against the smuggling and exploitation of human beings, and directed – originally – against the organized crime networks dedicated to

¹⁵ See widely on this matter C. Villacampa Estiarte (2006) "Normativa europea y regulación del tráfico de personas en el Código Penal Español," in Rodríguez Mesa et Ruiz Rodríguez, Coords. *Immigration and Penal System*, Valencia, Tirant Lo Blanch.

¹⁶ Moroccan Law n° 02-03 art. 52.5.

¹⁷ Moroccan law n° 02-03 art. 52.6.

human smuggling, and extends from the reform carried out by the OL 14/2003 to "all persons" with the intention of making profit by carrying out any of the conducts prohibited by law.

But in spite of the extension of its area of application, the reform still does not solve one of the most controversial aspects of this concept: that of its compatibility with crimes against the human rights of foreign nationals exemplified in article 318 bis of the Spanish Penal Code. The principle of minimal intervention and *ultima ratio* in criminal law means that penal protection is only available when fundamental rights are violated in a serious way, thus denying universal and uniform protection. Consequently, administrative infractions are prosecuted only in cases where aspects of the basic legal rights of the victim or other protected interests have been damaged.

4.2 *The Penal Context*

Until the reform, introduced in the Penal Code by OL 4/2000, the majority of trafficking activities into Spain that focused on sexual exploitation or the violation of workers rights (Tít. XV, article 313.1 PC), and which legally constituted the crime of illegal human trafficking, was considered within the domain of sexual abuse and crimes against personal freedom (Tít. VIII, Chap. V, article 188.2 PC).

Considering the criminality revolving around clandestine immigration, a penal framework was needed to protect foreign nationals from situations where their legal rights, other than their freedom and their rights as workers, were seriously jeopardized. Related to this, the United Nations Security Council warned (Resolution 1995/10) that the trafficking of illegal immigrants continues to be a widespread activity in which often highly organized international crime syndicates are coordinating human shipment, in flagrant violation of internal legislations and international regulation, taking no account of the hazardous and inhuman conditions that the undocumented were exposed to. With the intention of ending these crimes, states that still had not done so were urged to enact national penal laws to fight against all aspects of human smuggling.

Article 318 bis- introduced in the Spanish Penal Code by OL 4/2000 and reformed by OL 14/2003-came in response to this

international pressure. Nevertheless, from both the drafting of the law and its systematic placement, it is evident that its fundamental aim is not protecting the legal rights of the individual foreigner who is a victim of smuggling, but rather that of protecting a vital legal domain from third party abuse – that might result under conditions of illegality and which guarantees that foreigners can live with secure and quality liberties when exercising their rights. Given this, the code might focus on the protection of the dignity of this especially vulnerable group. Given the connotations associated with the specific importance ascribed to dignity and traditional practices, the end result is the growth in collective dignity of foreigners who attempt to enter and stay illegally or clandestinely in Spain as legal right protected by the legal body.

Additionally, it is clear that exclusive reference to art. 318 bis on foreigners is interpretable only in the light of the European policy to regulate migration based principally on the fight against clandestine immigration and the traffic of clandestine immigrants to Europe. If the Spanish legislator had really wanted to protect the rights of persons against the conduct of illegal human trafficking, he should have extended it to all the persons, regardless of whether they were national or foreign, and in the latter case, regardless of their legal situation.¹⁸

The basic framework punishes with a prison sentence of four to eight years he who “directly or indirectly promotes, favors or facilitates the illegal traffic of humans or clandestine immigration from, through or destined to Spain.” It is an open framework that punishes under the pretext of authorship practically any conduct related to the illegal trafficking of human beings or clandestine immigration.

In order to be considered, the traffic of humans has to be “illegal” or “clandestine”. If based on the protected legal rights and the irregular condition of the subject this determines the inability to accede to the right recognized to foreigners by the Spanish legislation, illegal trafficking must be understood as the

¹⁸ M. Cugat (2006) “Sujetos protegidos por el delito del tráfico de personas del artículo 318 bis del CP”, in Rodríguez Mesa et Ruiz Rodríguez, Coords. *Immigration and Penal System*, Valencia, Tirant Lo Blanch, pp. 204, 221-222.

displacement of individuals undertaking without regard for the current entry regulations, permanency and exit of foreigners in and out of Spanish territory.

The second part of this precept punishes with sentences ranging from five to ten years in prison for cases where illegal human trafficking occurs with the intention of sexual exploitation. With regard to children, "sexual exploitation" is considered as all conduct that aims to persuade or compel a child to participate in any illicit sexual act; the exploitation of children by means of prostitution or other illegal sexual practices; and children's exploitation for pornographic material and performances be it through production, sale, and distribution or other forms of traffic of such material, and the possession of the above mentioned material. With respect to adults, sexual exploitation is through prostitution¹⁹ even if it happened with their consent.

Number three of article 318 bis foresees, in its first half, the imposition of sentences previously mentioned in numbers 1 and 2, if the conducts carried out were done with a profit motive, or with violence, intimidation or deception, or abusing a situation of need or special vulnerability of the victim, or victimizing a minor or an incapable person, or putting in danger the life, the health or the integrity of other persons.

When the code refers to "those who carry out the conducts described in the previous number" it only applies to those who have collaborated in the illegal trafficking of humans in a format described in the legal framework. The crime of illegal trafficking occurs from the moment displacement begins, and is independent of whether the passive subject successfully entered or left Spain, since it is a crime with effects that are permanent in time, the circumstances persist even once the crime has occurred. In other words, it is highly unlikely to result in violence or intimidation, since generally those who leave their country to emigrate do so voluntarily.

However, in cases where circumstances coincide with the crime, and the perpetrator has participated in the trafficking, other legal

¹⁹ European Union Joint Action of 24 February 1997 (97/154/JAI) on combating trafficking in persons and the sexual exploitation of children.

frameworks are applicable such as threats, theft, coercions or injuries, but these do not address the underlying crime.

The fundamental argument for increasing the penalty is the existence of a *profit motive* which is specific to human smuggling and which results from using human beings as merchandise, as mere object for sale. From this perspective, the profit motive has to be at level with the benefit or material utility the author has earned or expects to earn through such conduct.

Undoubtedly, the qualification will be applicable if the material benefit expected comes directly from the act of displacement. The same applies to cases in which the perpetrator, driven by a profit motive and with a preordained plan, aims to facilitate the illegal stay of the foreigner in the receiving or transit country, since this type of conduct fits perfectly in what is known as facilitating the traffic of people.

The use of the terms of *violence, intimidation, or deception* reflect to a great extent the ambiguity with which the typical conducts have been described in the legal framework. This refers to objective and material circumstances and to the means used to commit such an act.

Crimes of theft require violence and intimidation to control an object; similarly, they are used in rape or sexual aggressions to overcome the resistance of the victim and thus depriving them of their sexual freedom. From this perspective one must understand that the violence or intimidation in relation to the effects of Article 318 bis 3 Penal Code is that which leads to the end of resistance by the victim with regard to illegal displacement. Thus, one considers that, on one hand, the impacts of human smuggling continue after the crime occurs, whilst the victim finds himself/herself in a situation of illegality, and on the other, that violence or intimidation related to these conducts is usually used once the displacement has taken place. Sufficient arguments exist, practical as well as political and criminal, to support that violence or intimidation does not have to be related in any way to the displacement since it is sufficient if it is related to it. To understand this requirement in its ultimate sense would greatly reduce its practical sphere of application.

The abuse, on the part of the perpetrator, of a situation of superiority or special vulnerability of the victim presupposes that an inequality exists in the status of trafficker and immigrant, being

necessary to appreciate the aggravation that the former knows such a situation and abuses of it. In any case, abuse, understood as the use of an existing situation, must be proven; it is not sufficient that a situation of inferiority or special vulnerability on the part of the victim is observed.

The basis of aggravation in cases in which the victim is underage or incapacitated rests in the special vulnerability of these groups. Therefore, specific reference to this group without heeding their special vulnerabilities can only be understood as an *iuris tantum* presumption according to which, it is unnecessary to prove the relation of inequality between trafficker and victim exists, as alluded to previously.

Finally, with consideration to the conditions in which illegal trafficking of persons is undertaken, the legislator foresees that imposing a more severe penal framework in which, along with the denigration resulting from the conduct of the trafficker towards the foreign citizens rights, the devaluation of which jeopardizes other fundamental rights and puts them in danger. The awareness of the circumstance necessitates the presence of an outcome which jeopardizes a fundamental individual legal right. It is necessary to specifically prove that the undermining basic rights occurred in that specific case, since it will not be presumed as being an *ex ante* threatening conduct.

In addition to the problems outlined in the first three paragraphs, the 4th part of article 318 bis further considers the negative sanction of suspension from work from six to twelve years for those who use authority or their status of public servant to commit the aforementioned crimes. It is necessary in such a case that the culprit may have used his/her authority effectively so as to facilitate the success of the operation. It is also essential that the manner in which he used his authority be illicit.

When the culprit belongs to an organization or affiliation, even of transitory character, that is dedicated to the illegal traffic of persons, nº 5 of article 318 bis foresees the top imposition of sentences for higher degree crimes to those foreseen in the previous numbers together with the special disqualification for office, industry or commerce at the time of the condemnation. When chiefs, administrators or managers are involved in the above mentioned organizations or affiliations, the sentence will be applied in its highest half with the possibility of raising it to the degree

immediately above it. Also, the judicial authority will be able to decree some of the measurements foreseen in article 129 of the Penal Code.

The reference to the transient nature of the affiliation reveals that what is being persecuted is the use of structured networks that act in this particular case, regardless their duration in time. In any case, being transient is not incompatible with the demand of temporary stability, which is a distinctive will operate as regarding emblem of the putting together of the subjects.

Unlike the previous regulation, which in terms of sentence ignored the nature of the personal contribution of the subject, the reform carried out by OL 11/2003, in concordance with the stipulations of the article 515 of the Penal Code, imposes a heavier sentence for chiefs, organizers or managers of the organization or affiliation.

Finally, OL 11/2003 incorporates in its 6th paragraph an attenuating statement regarding courts considering the gravity of the act and its circumstances, the conditions of the culprit and the purpose motivating this one. According to this paragraph, courts would be able to impose a sentence one degree lower than the one stipulated. The introduction of this extenuation is meant to readjust, to a certain extent, the gravity of the sentence foreseen by the legislator, who by the game of aggravations in cascade can make the sentence reach 22 years and six months of prison, when the article 36.1 of the Penal Code establishes, as a rule, a maximum duration of twenty years for a prison sentence.

5. Conclusion

Limiting migratory movement and preventing illegal people smuggling, are challenges with economic, political and legal aspects which, far, exceed the classical autonomy-based framework that States put together for themselves.

Although Spanish legislation in this domain reflects the benchmarks set by the European Community, it is clear that much work is needed in order to fill the loopholes resulting from such framework.

Given the precarious situation unexpelled, undocumented immigrants find themselves in, it would be better if Spanish law would comprise of a set of alternative measures aimed at limiting

their illegal presence in Spain. The impossibility for these people to access legal employment marginalizes them to the point where the sole alternatives are to work in the black market, or to engage in illicit activities.

On the other hand, the efforts put in protecting individuals from human smuggling activities haven't been sufficient. It is true that the Spanish criminal code seems to have recently focused its interest towards such illegal activities. Undoubtedly it has been a positive and necessary step forward but it is far from deserving to be deemed as satisfactory.

Illegal people smuggling, in as much as it exemplifies the usage of human beings for the sake of personal benefit, represents, first and foremost, the violation of the fundamental legal rights accorded to individuals, strongly linked to the notions of freedom and dignity. Therefore, such crimes would rightly deserve to be categorized amongst those affecting essential individual rights – such as torture and crimes against moral integrity, rather than amongst those affecting collective rights.

As a consequence of this categorization, human smuggling can only be deemed as illegal when the means used to accomplish it, the situation of the victim or the pursued objective come as a result of a violation of the dignity and rights of the individual, regardless of whether entry into Spanish territory was done in accordance with the applicable legislation or not.

Therefore, we may consider that if the rights and dignity of the individual are violated when: the smuggling takes place without the victim's full and well-informed consent; by means of reward, payment or promise or for the purpose of sexual or economic exploitation. If none of these circumstances apply to the smuggling act, it would be, due to the principle of minimal intervention, an administrative route who would need to deal with the issue.

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THE REGULARISATION OF UNDOCUMENTED MIGRANTS: A PATH TO RIGHTS IN THE EUROPEAN UNION

RUTH FERRERO AND GEMMA PINYOL

Regularisation programmes and instruments that have been applied in Europe in an attempt to manage the problem of irregular immigration have generated highly disputed discussions, mainly because they serve to solve dysfunctions of the legal immigration management policies. Regularisation programmes are applied to grant – in a retrospective way – legal status, meaning rights and duties, to people who are already in the country. The main objective of this paper is to analyse to what extent regularisation instruments in Europe are an unexpected path for managing (irregular) immigration and for promoting immigrants' rights.

Summary

1. Introduction. 2. Regularisation instruments: an overview. 2.1. Regularisation for reasons of work or residence. 2.2. Permanent regularisations or those with a specific duration. 2.3. Individual and group regularisations. 2.4. 'Fait accompli' or protection regularisations. 3. Regularisation mechanisms in the European Union countries, 1986-2006. 3.1. The Western Europe Scenario. 3.2. The Southern Europe Scenario. 3.3. Other Scenarios (Scandinavia and Eastern Europe). 4. The 2005 Spanish regularisation and recent EU initiatives. 5. A path to rights? An outlook for the future. 6. Bibliography.

1. Introduction

According to the Organization for Economic Cooperation and Development (OECD), in its member countries there are around 20 million immigrants in an irregular situation (50% of them in the United States). To deal with these irregular stocks, which have especially risen in the last two decades, many of the OECD countries have introduced regularisation programmes. Although

these regularisation programmes have been elaborated to respond to different specific goals, their implementation has invariably produced controversy.

Regularisation programmes and instruments applied in Europe to handle the problem of irregular immigration have raised large debates. First, because of their reactive nature. Regularisation mechanisms try to solve dysfunctions in the current legal immigration management policies, as these mechanisms are applied to retrospectively grant legal status to people who are already in the country. The fight against irregular migration is at the core of a better management of migration flows. Secondly, due to the establishment of a borderless zone in the Schengen area, regularisation programmes implemented in one country, could have consequences in the other Schengen ones.

The first section of this paper presents the main regularisation instruments and their implementation in different European countries and scenarios from 1986 to 2006. The second part reviews the Spanish 2005 regularisation process, examining its objectives and outcomes, and comparing it with other regularisation instruments developed in the European Union countries. Since the last Spanish process has given rise to heated debate, special attention will be paid to the common efforts and initiatives that have been discussed in the EU arena. The European Union is moving towards the construction of a common legislative framework to deal with migration issues, and some of the more recent steps increasingly demonstrate that managing irregular migration should also be done within the European framework. Finally, the last section also analyses to what extent regularisation instruments have – paradoxically – become structural mechanisms for managing immigration and for granting rights to immigrants.

2. Regularisation instruments: an overview

Regularisation instruments enable immigrants residing irregularly in a country to legalise their situation by obtaining a residence and/or work permit on a permanent or temporary basis. Regularisation programmes have become an important instrument to incorporate new residents into the host societies, and in many destination countries, they also become a source of legal labour. In this sense, these programmes facilitate the incorporation of foreign

workers into the formal labour market, granting them labour rights and collecting their fiscal contributions. Furthermore, regularisations play a significant role not only in the labour, but also in the social, integration of these workers.

There is an evident link between immigration flows and labour demands, and the existence of an illegal labour market explains, to a great extent, the persistence of irregular migration flows. The relation between irregular migration and black labour market is not so evident in the U.S., where there are a large number (over 12 million) of immigrants in an irregular situation and where there doesn't exist an important illegal labour market. Because the flexibility of the country's labour market, it has made it possible for a long time to hire irregular immigrants to work in the formal economy (they pay taxes), but without giving them access to social services. There are provisions, however, in the law which sanction employers who hired persons unauthorized to work in the United States. On the contrary, in Europe there is a direct relation between irregular immigration and the irregular economy. Since hiring irregular foreign workers is punishable by law, irregular immigrants living in a European country can only work as cheap labour on the black economy.

In any case, regularisation programmes try to solve a distortion of migration control and labour market policies, which, in addition, hugely affects social cohesion. There are four basic criteria used in regularisation programmes, which grant residence/work permits on a permanent/temporary basis through permanent/ad hoc mechanisms enacted to solve individual/collective situations. The main criteria are, first, the reason on which the regularisation is based (work or residence); second, the permanent or temporary nature of regularisation mechanisms as instruments of immigration policies; third, the character of the regularisation and fourth, the individual or collective character of the regularisation programmes.

Other types of regularisations¹ include those based on *formal*

¹ Generally speaking, the criteria of regularisation programmes tend to be based on a range of factors: geographic, economic, humanitarian (family, state of health, etc.), as well as the degree of integration or the educational level of the immigrants.

and informal mechanisms, or those deriving from *obligations* created by bilateral agreements or international conventions (Apap et al. (2000): 263-308)².

2.1 Regularisation for reasons of work or residence

Regularisations for reasons of residence are based on the notion that after a certain length of stay in a country, immigrants have built up links with the host society. Usually, under these regularisation programmes, immigrants are required to demonstrate (the instruments used to prove continued residence are several and different in each country) that they have been living continuously in the country since before the date set.

Regularisations for reasons of work plan to legalise the situation of foreign workers who, despite their irregular situation, are active in the host country labour market. The capacity to demonstrate that one is working (and again, these criteria differ from one programme to another, from one country to another) is the criterion on which the regularisation application is based.

2.2 Permanent regularisations or those with a specific duration

Permanent regularisations, which are not so usual in European countries, do not take into account the date on which the irregular immigrant entered the country, though the duration of the person's length of stay can be used as a factor for consideration. Meanwhile, regularisations with a specific duration, also known as "one-off" regularisations, set a specific date that is established as a discriminating element to determine whether the person is allowed access to the regularisation programme. This type of regularisation is usually used to deal with a large group of immigrants in an irregular situation, while the first one is a permanent mechanism for regularisation.

² For complementary information about typologies of regularisation processes, could be useful to see Apap, J., Bruycker, P. De, Schmitter, C. (2000) and de Bruycker, P. (ed.) (2000).

2.3 *Individual and group regularisations*

Individual regularisation is carried out by studying, on an individual basis, immigrants who fulfil specific criteria. In this process, elements of a discretionary nature can be taken into consideration (skills, geographical origin, etc.). On the other hand, collective regularisations use criteria that are applied to all applicants, without exception.

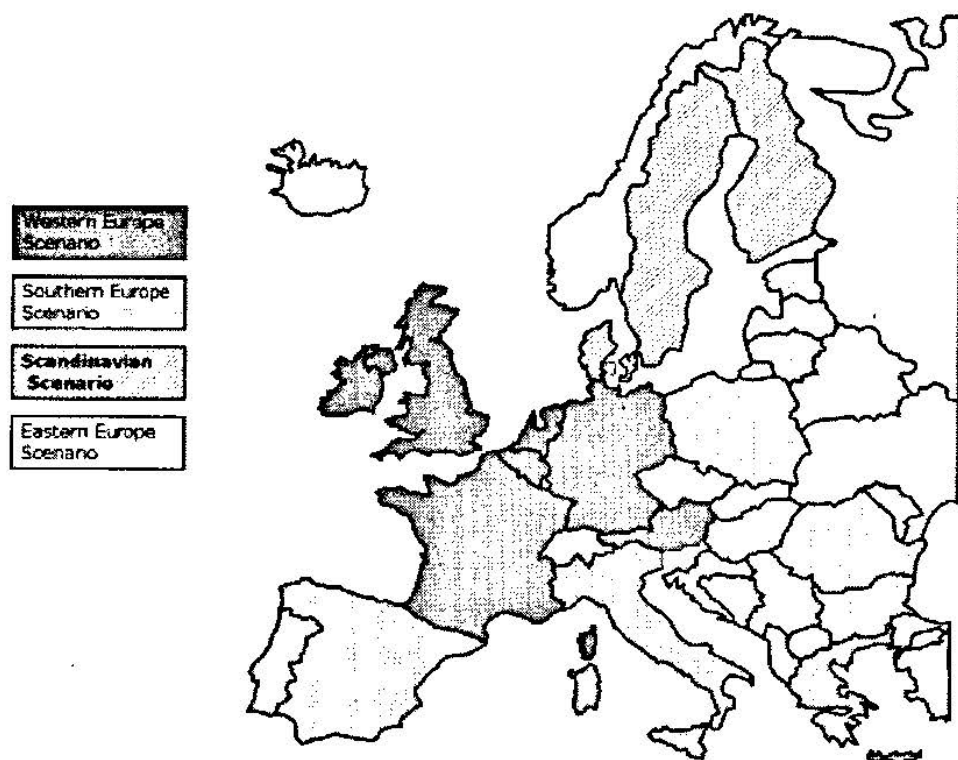
2.4 *"Fait accompli" or protection regularisations*

Fait accompli regularisations (which include most of the regularisations carried out in Europe) are established to regularise immigrants already residing in the country, and concession criteria could differ in any case. Protection regularisations (which are the only type that have been implemented in Scandinavian countries) are used to grant residence based on specific humanitarian criteria such as the existence of family ties and other factors.

3. **Regularisation processes in the European Union countries, 1986-2006**

Regularisation instruments could represent a failure of policies on border control and on managing migration flows. For these reasons, many states are reluctant to apply regularisation mechanisms or, if they do apply them, to publicise them.

However, over the past decades, many EU countries have opted to use regularisation mechanisms. Upon examining the regularisation processes carried out in the European Union in recent years, three different scenarios could be defined. The first scenario can be where regularisation processes have been used on an occasional basis since the early 1970s have occurred primarily in Western European countries. A second scenario is that of Southern Europe countries, where mass regularisations have been carried out with a certain frequency but only since the early 1990s. The third scenario can be seen in the Scandinavian countries, where governments have proved reluctant to apply regularisation programmes, and the fourth one, in Eastern Europe, is emerging right now, so it is too soon to draw up some features related to regularisation processes there.

Regularization Scenarios in the European Union

There are dissimilarities between the types of regularisation implemented in the different scenarios, but there are also temporary differences between them. In the first group – Western Europe –, which is made up of Germany, Belgium, France, Netherlands and the United Kingdom, occasional regularisation processes of different types and volumes have been carried out during the last years, being more massive in the past than currently. The second group – Southern Europe – leads with the highest number of regularisation programmes in last years. In Spain and Italy, followed by Greece and Portugal, regularisation mechanisms have become a recurring feature in their immigration management policies. On the other side, Scandinavian countries consider these instruments – especially mass regularisation processes – as an absolute failure of migration policies. So any regularisation process which has been implemented there, with the exception of some processes for humanitarian criteria, have benefited a limited number of persons. More time is necessary to see how the new European Member States who joined in 2004 will deal with irregular immigration. So far, these countries are in process of becoming destination countries, and irregular migration is just rising to the top of their agendas.

A chronology of regularisation processes in the EU countries 1973-2005

1970s	1973	1974	1975	1977	1978	1979	
	France 20,000	Belgium 7,448	Netherlands 15,000	UK 462	Netherlands 1,800	France n.d.a.	
		UK 1,809					
1980s	1981	1986					
	France 121,000	Spain 43,800					
	Italy n.d.a.	Italy 118,700					
		UK n.d.a.					
1990s	1990	1991	1993	1995	1996	1998	1999
	Italy 235,000	France 15,000	Portugal 39,200	Belgium 6,137	Netherlands 2,000	France 77,800	Germany 23,000
		Spain 110,100		Spain 21,300	Germany 7,556	Greece 371,000	
				Italy 238,000	Portugal 21,800	Italy 193,200	
						UK 600	
2000s	2000	2001	2002	2003	2004	2005	
	Belgium 42,000	Greece 351,000	Italy 634,700	Portugal 3,000	Hungary n.d.a.	Spain 573,270	
	Spain 398,500	Luxembourg 2,850					
		Portugal 179,200					

 Western Europe Scenario
 Southern Europe Scenario
 Eastern Europe Scenario
 n.d.a.: no data available

3.1 The Western European Scenario

In most of the countries that make up this group (mainly Germany, Belgium, France, the Netherlands and the United Kingdom), regularisations were carried out during the eighties, following the *fait accompli* criteria. Germany and, to a lesser extent, the United Kingdom, prefer regularisations for protection. Usually, in these countries the requirements that determine the length of stay are really restrictive, and are linked with considerations of a humanitarian nature (Belgium), integration (France) or employment (the Netherlands).

These countries have been destinations for migration flows (mainly labour migration) since the 1950s, which explains why the first regularisation programmes took place there. France, for example, implemented its first regularisation programme in 1973

and carried out another in 1981, while Belgium and the United Kingdom implemented their first such programmes in 1974, though Britain carried out another in 1977. The Netherlands executed a regularisation programme in 1975, a second one in 1978, and in 2007 started a new one which will regularize around 30.000 immigrants who arrived as asylum seekers in the last decade. In France, it is calculated that the two processes prior to 1986 benefited 170,000 people, while in the same period in the Netherlands, just over 15,000 people were regularised (most of them in the 1975 programme). The two British programmes served to regularise fewer than 2,000 people, while the Belgian process regularised 7,000 applicants.

After the 1970s, Belgium had opted not to introduce any further regularisation processes for foreigners in a situation of administrative irregularity. However, in early 2000, the gradual rise in the number of irregular immigrants generated a solidarity movement, which led the government to implement a mass regularisation campaign based on the criteria of residence and humanitarian reasons. The programme was aimed at all asylum seekers who had been waiting for at least four years without having obtained a legal resolution, as well as those who could not return to their countries of origin for humanitarian reasons, or those who had lived in Belgium for at least six years, and who were not the object of an expulsion order. The process lasted for three weeks, during which time almost 60,000 applications were submitted, of which 50,000 were approved. This figure was augmented further by regularisations granted to people for reasons of family resettlement.

Apart from this process, the Belgian government has stated that it does not plan to implement any further mass regularisation processes for immigrants, and that the only current regularisations are processed on an individual basis and are aimed at people who have been living in Belgium for over five years, and who did not receive a reply to their regularisation application in the general process carried out in 1999. Also to solve the situation of asylum seekers living in the Netherlands before 2001, the new Dutch government started a regularisation process early in 2007. It is interesting to note that, due to the traditional generosity of asylum policies in the Netherlands, the asylum seeker figure has been used also by economic migrants.

In the same line, Germany, which has been extremely reluctant to carry out regularisation processes (extraordinary regularisation are forbidden by law), have only implemented two regularisation processes (1996 and 1999) for asylum seekers and their family members. But in 2007, German government decided to respond to the status of 200,000 of irregular "tolerated" immigrants (foreigners whose expulsion has been postponed, for legal or ethical reasons). At present, the German government is attempting to draft a strategy for this specific group of immigrants, with the aim of granting them permanent rights of residence.

On the other hand, since 1986, France has carried out two regularisation processes (1991 and 1997) that benefited nearly 100.000 people, mainly for family reunification criteria. In July 2006, France introduced a new law on Immigration and Integration, drafted with the aim of promoting *immigration choisie* as the only source of entry for migration flows, and to combat illegal immigration. To coincide with this law, the government opened a two-month period of regularisation for humanitarian reasons; the main beneficiaries of this group were families in an irregular situation that included children studying in the French school system. Apart from this programme, it is estimated that some 70,000 people are regularised in France every year through regularisation mechanisms of a permanent nature.

United Kingdom has not carried out any mass regularisations in recent years; instead, the country has opted for specific, occasional regularisations that affect a limited number of people. Finally, Ireland and Austria are the exceptions, as they never carried out regularisation processes.

3. 2 *The Southern European Scenario*

Mainly because immigration is a new phenomenon for them, Southern European countries have carried out several regularisation processes in recent years. Geographical factors (such as their proximity to countries in which migration flows originate) and structural ones (i.e. the existence of a strong informal labour market) appear to explain the significant presence of irregular immigrants in these countries and why these countries carry out regularisation processes more frequently.

Spain and Italy are the two countries in this group that have

implemented the most regularisation programmes, which they have carried out with an approximate frequency of four to five years. In Spain, different types of regularisations took place in 1985, 1991, 1996, 2000 and 2005, while in Italy such programmes were implemented in 1986, 1990, 1995, 1998, 2002 and 2006. Meanwhile, Greece has implemented two large-scale regularisations (in 1998 and 2001), and Portugal has carried out five (1992-1993, 1996, 2001, 2003 and 2004), though these were aimed mainly at Portuguese-speaking immigrants.

Irregular immigration has become a hot topic in these countries, which focus their migration policies in fighting against it. In the past 15 years, the number of immigrants – both regular and irregular – who live and (most of whom) work in Greece has quadrupled, resulting in one of the highest growth rates for an immigrant-receiving population in the European Union. To solve this situation, Greece has carried out two large-scale regularisation processes (1998 and 2001) to grant residence and/or work permits.

Similarly, massive disembarkations on the Italian (mainly Sicilian) shores have placed irregular immigration at the core of the Italian public debates. Between 1986 and 2002, Italy carried out four regularisation processes (1986, 1995-1996, 1998 and 2002) that legalised more than 1.5 million immigrants, mainly workers. Though it cannot strictly be called a regularisation process, in 2006 an “additional programme” was approved for the 2006 quota, which led to the normalisation of irregular workers.

Until the mid-1990s, Portugal still was an emigration country, so regularisation programmes held in 1992, 1993 and 1996 were centred on Lusophone communities. For the first time, in 2001, a regularisation process based on work permits benefited 179,000 people, while in 2003 another process that was aimed at Brazilian workers was introduced.

Between 1986 and 2005, six regularisation processes have been carried out in Spain. Since the one which took place in 1986, the ‘taking roots’ condition had been included as a criterion to be considered. Long term residence in irregular conditions, working and social links in the host societies have become the most used criteria in the Spanish regularisation programmes; although in 2001, for example, specific regularisation mechanisms, such as the one for Ecuadorian nationals, were also established. In the period

2000-2001, the government carried out four regularisation processes for work and residence permits; as a result of these processes, 334,882 people saw their situation legalised. The 2005 process, which will be analysed with more detail below, was implemented on the basis of labour roots. It meant that, with some restrictions, any foreigners who could prove that they were living and working in Spain could normalise their legal situation. Along with this regularisation process, more inspections to fight against the irregular labour market were introduced.

Southern European countries have often resorted to such one-off regularisation programmes that have affected a considerable number of people, which have given rise to serious debate in the heart of the European Union.

3. 3. Other Scenarios (Scandinavia and Eastern Europe)

With comparatively low irregular immigration figures, both Sweden and Denmark have very specific programmes for regularising immigrants using humanitarian (need of protection; vulnerability, etc.) criteria. No other type of regularisation processes have been implemented in these countries.

On the other hand, only Hungary and Poland (without success) have tried to implement measures to reduce irregular immigration in their countries. The Eastern European countries are in a process of transformation from emigration to immigration ones, and after their 2004 accession to the European Union, they have restricted their migration law. Nevertheless, it is premature to evaluate how these countries are dealing with irregular immigration, and which are their main concerns about it.

4. The 2005 Spanish regularisation and recent EU initiatives

Among all Member States in the European Union, Spain is the one which has implemented more regularization programmes. As we mentioned before, six programmes have regularised the status of about 1.25 million immigrants since 1985.

However the process carried out in 2005 was different than the ones before. A new concept of immigration policies had emerged in Europe. Effectively, the new Spanish government immigration policies took a global approach and were not limited to just one field

of the issue. Briefly, this new approach joined both employment issues and migration management issues.

All this view was reflected on the new immigration normative which was built up at the end of 2004 and that included the regularization process as an annex. The four pillars under which the whole regulation was built were control of irregular migratory flows, managing labour migration, cooperation with countries of origin and transit of flows and integration policies. This ambitious plan should only be possible with the consensus among all actors involved on it meaning the Government, the trade unions, the employers, political parties, regions and immigrants associations. Unfortunately, not all of them were in agreement with it, and even before the negotiations started, they refused the proposal. So at the end of the day, the pact was signed by the Government, the main trade unions and the employers, with the support of the majority of the political parties, except the conservative party in the opposition.

The philosophy under this regulation is based on the concept of labour rootedness. This concept meant that any foreigner who could prove that they were living and working in Spain for some amount of time could normalise their legal situation. The target was to fight against underground economy, bringing workers from the informal into the formal working sector. The result should be a more fair competition among workers and employers, more contributions to the Social Security system and, of course, a better integration of immigrants through employment. All of it meaning, more rights for more people, or simply give rights to workers.

The new normative also included other measures more related with preventive and security issues. On one hand, at the same time that immigrant workers and employers have the ways to do the whole process legally, the Administration increased labour inspections as well as an increment of fines for employers who had workers in an irregular situation in order to accomplish the law. All above was accompanied by measures focusing on increasing border control as well as a stronger cooperation than before with the rest of Member States of the EU as a result the active assistance of the European Union Agency FRONTEX which had started to monitor the coasts of Canary Islands, Mauritania and Senegal.

While the whole system was starting the Spanish government started the so-called process for the normalization of foreign workers (it became known as the "normalisation programme") that

lasted for four months. During this period, 690,679 applications were submitted, of which 604,357 were accepted, and 577,923 were approved. The goals of this process were the end of shadow economy, give to the foreign workers a "normality" status which allows them to exercise labour and citizen rights and to start an immigration policy of "zero tolerance" with irregular work which is the origin of irregular immigration.

External observers said that the whole process was a success. They assured that the combined measures of attacking irregular immigration, given appropriate channels for legal migration and combating illegal employment mitigated any pull effect. However, the political opposition claimed that it provoked a pull effect towards Spain completely out of control.

And while all that was happening in Spain, what was going on in the European Union? Until 2004, the debate over regularisation of immigrant population did not start. Everything started to be discussed with the EU Communication 412 of June 2004, which deals with the links between legal and illegal migration. As the document points out:

"Most Member States recognize that for pragmatic reasons the need may arise to regularize certain individuals who do not fulfill the normal criteria for a residence permit. (...) Certain countries refuse to carry out regularizations at all, except on a case by case basis in exceptional circumstances"⁸.

This means that some of the Member States acknowledged the need to implement regularisation programmes, and it was pointed out that most of the immigrant population living in these countries were also working highlighting the existence of a shadow economy. According to the aforementioned Communication, regularisation programmes produced both positive results (mainly related with combating irregular labour) and negative ones (they could have a "pull effect"). The communication also stated that these programmes:

"Allow better population management, enabling governments to have a clearer picture of those who are present on their

territory. They also serve to tackle illegal working and increase government revenue through taxation and social security payments (...). However, it must be noted that the effectiveness of regularizations on reducing the extent of the unregulated labor market has been questioned. On the other hand, it is believed that to a certain extent regularizations offer a form of encouragement to illegal migration"⁴.

The Commission, as usual, after evaluating both the benefits and drawbacks of regularisation programmes avoided making any definitive pronouncement on the instruments. And so, this ambiguous approach was the Commission's response to the various opinions of Member States concerning regularisations. As the Council of Europe stated the same year, all Member States would have to open a debate on the issue, given that the free circulation of people, the absence of border controls in the Schengen area and the common visa policy means that regularisations carried out in one country will have knock-on effects for the rest of their European partners. In this sense, Scandinavian countries have, on more than one occasion, expressed a fear that regularisations carried out in countries in the south of Europe will end up affecting their own borders and territories in the north. "Regularisations can – in the longer-term – have effects on migratory movements between Member States, because of the mobility provisions contained in Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents".

To this end, the Netherlands (which at that time held the presidency of the European Union) opened a debate on the need to establish a common framework through which to organise regularisation processes. The Netherlands then asked the Member States if they considered it necessary to establish joint information mechanisms on these processes, and if they deemed it necessary to adopt common norms for implementing regularisations. While most Member States responded in the affirmative to the proposal of an information system, most of them also gave a negative answer

⁴ Ibidem.

to the suggestion that common mechanisms for regularisations should be devised and introduced.

Shortly before this took place, the European Union was informed that in February 2005, Spain was planning to embark on a mass regularisation process based on criteria of labour rootedness. The news displeased many member countries – including Germany, France and the Netherlands – who considered that Spain should have consulted them before embarking on this new process. To calm the situation, and with the aim of avoiding future discrepancies, the Luxembourg presidency proposed that a mutual information mechanism be established:

“Thus, in conformity with the Hague programme, according to the competences conferred by the Treaties and on the basis of the Commission’s communications, the Luxembourg Presidency and the Commission propose to continue reflections started under Dutch Presidency on the setting-up of a system of mutual information and early warning on important decisions to be taken in the Member States between those responsible for migration and asylum policies”⁵.

Paradoxically, Germany and the Netherlands have been the ones that later on have started regularization processes in their respective countries. This situation reflects very clearly how the position of the member states can change drastically with a governmental change, as was the case in the Netherlands.

In parallel the debate was also aimed at the main politicians in charge in the Commission, as Franco Frattini, European Commissioner, for Justice, Freedom and Security, proposed that a Mutual Information Mechanism should be established relating to any measure that might affect legislation on immigration and asylum, including regularisation processes, especially if it could affect other Member States. The Council included this idea in its conclusions in April 2005, and the Commission incorporated it into Communication 480 of October of that year. The Council formally adopted the communication in October 2006, and among the considerations for its decision, noted that a better coordination between member states is required.

⁵ Communication from the Presidency. Régularisation des sans-papiers, 11-02-2005.

"The development of common asylum and immigration policies since the entry into force of the Treaty of Amsterdam has resulted in closer interdependency between Member States' policies in these areas, making the need for a more coordinated approach of national policies essential for strengthening the area of freedom, security and justice"⁶.

The information mechanism requests, as suggested in the Council Decision, EU Member States to communicate to other Member States and to the Commission information concerning national measures in the areas of immigration and asylum likely to have a significant impact on Member States or on the European Union as a whole. This information should be communicated through a web-based network which has its central point at the Commission. The goal of this system is to enhance the trust among Member States giving another step towards common approaches to sort out questions of common interest. In order to reinforce the above mentioned the Commission had planned to launch this year a study on actual practice, effects and impacts of regularisation processes in the Member States which will be the basis of future discussions towards a common legal framework in Europe, though apparently, until date, the main emphasis will not be on human rights approaches.

5. A path to rights? An outlook for the future

As it has been reflected in this paper, the European Union is building up its legislative framework of action on the field of immigration very slowly. Though there are some directives already in action concerning irregular immigration, it is also clear that issues of irregular migration management, especially those concerning regularisation tools, should also be developed within the European Union framework. The issue, again, at the European Union level is how many competences Member States will give to the communitarian institutions in order to be able to create a common legislative framework for regularisations.

⁶ 2006/688/CE Council Decision of 5 October 2006.

To this end, the obligatory mutual information proposal could be approved. This would involve implementing (as has been done in other areas) the open method of coordination for issues of immigration policy. One step further in this sense (but which seems rather unlikely in the short term) would be the introduction of the obligation to achieve authorisation from the Council, by qualified majority, before implementing a regularisation process.

At European Union level it is quite hard to put on the discussion table the possibility of a common regularisation model when such contrasting opinions exist toward these mechanisms. Even though they are not considered a desirable instrument by any of the EU countries, regularisation programmes are certainly common in some of them, especially in southern countries. For these countries, the various regularisation programmes serve the function of "safety valves" in the event of the presence of unsustainable volumes of irregular immigrant populations. Other countries use these programmes as a response to very specific situations, while in a third group (consisting mainly – though not exclusively – of Scandinavian countries), these mechanisms represent a failure of migration policy.

Apparently it is not very much a probability that the EU institution will take the option to ban all regularisations, especially because there are some countries which will oppose to it. We cannot forget that the failure of the Constitutional Treaty also had effects on immigration policies due to the EU normative lack existing nowadays. So, in fact, the best option will be the information mechanism, that will pacify the countries, and the Governments, against mass regularisations, and, at the same time, it would represent an acknowledgement of the fact that even though they are not desirable, regularisation programmes are an instrument for the management of immigration. And also, if we follow the last documents presented at the Council of Europe, its recommendations mention the use of regularisation processes as one among other many tools for managing immigration and not as a stand-alone policy. This last means that immigration policies should be designed taking into account flows, labour market, demographic needs of the country and control and security measures, and all of it should be developed in a way that immigrants and workers and their families human rights will be respected above all.

So, as of this date, the Frattini proposal and the need to

exchange information is the only jointly-agreed step that the European Union has taken in relation to policies of irregular immigration management. It seems obvious that it will be difficult to reach agreement on the management of irregular immigration in the European arena. But of course, it does not have to be made a priority, either. Though the different options on this point that currently exist in Europe have been clearly stated, attention should be paid to the need to organise a European immigration policy of a comprehensive nature.

Without a common policy to organise common objectives, define common instruments and establish common game rules, it seems pointless to talk about the need to act all together in response to the challenge of irregular migration. The drafting of a common immigration policy would be the answer, but at the moment, it seems that the European Union has opted to begin by finding common ground on very specific, partial aspects before giving greater priority to the construction of a real European immigration policy.

An experience as the "normalization process" in Spain in 2005 is therefore a good practice in order to accomplish the hard work of managing immigration as global phenomena due to the holistic and integral approach used in this process. The way in which the whole process was making and the documents asked for were just the right ones: labour contract, previous residence and penal certificate. Linking regularisation with participation in the labour market, the most important think about this normalization process was that immigrants got straight into the Spanish labour market with the same rights and duties than the native s population: an important step towards immigrants' integration. We should think that the bigger shadow economy is, more irregular immigration the European States will have, meaning more informal and unregulated jobs and less rights for those workers. Finally, we should state that the first step towards a good social integration is to have rights, so any prosecution of "bad" employers or the reinforcement of labour inspection are other weapons able to fight irregularity.

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FROM SECURITY TO DEVELOPMENT: MIGRATION CONTRIBUTION TO EURO- MEDITERRANEAN COOPERATION

ANDREA GALLINA

In the current European Union (EU) debate on migration despite the positive linkage between Migration and Development gaining momentum, emphasis is still greater on how to guarantee borders security and curb irregular migration. This is possibly due also to the lack of concrete indications on how to operationalise the linkage between Migration and Development on the one hand, and to the existing discrepancies between some individual Member States' political agendas and the attempts of the European Commission (EC) to set a framework promoting development-friendly migration, on the other. Concrete recommendations on how to enhance Migration and Development linkages have been put forward in recent key EC/EU communications, yet they are vaguely presented because of the lack of a comprehensive analytical framework linking the various elements. The present article attempts to fill the existing gap between theories and practice by proposing the path towards a more comprehensive analytical framework that takes into account the intertwining of the internal resources (i.e. migrants' financial, human, social and symbolic capital) and external - the social, political, economic and cultural environment in which these resources can be created and mobilised. The paper is organised in four sections: an introduction presenting the evolution in the Migration and Development policy and recommendations at EC/EU level, a second section presenting a resource-based approach to Migration and Development, a third section on the migration trends in the Euro-Mediterranean region and the concrete utilisation of migrants' resources and a final section concluding and highlighting the potential for regional co-operation in creating, enhancing and mobilising migrants' resources.

1. Integrating migration into development: key policy steps

Over the last decade, the link between Migration and Development has received increased attention from the European Commission and EU Member States while also featuring high on the global international policy agenda¹. The debate registered the gradual dismissal of the “root causes approach”, meaning attempts to remove the causes of migration, and its substitution by the more sophisticated “migration hump” approach².

This approach was fully adopted by the European Commission in December 2002 with the adoption of a Communication³ ‘*Integrating migration issues in the European Union’s relations with Third countries*’, constituting a first attempt at clarifying the links between Migration and Development, suggesting a number of key initiatives and promoting coherence between the two policy areas. The root causes still remained to be tackled as a long-term policy objective as stated in the European Council in Seville on 21-22 June 2002 whereas now, instead of substituting migration with development, the focus lies on finding ways to make migration contribute to development. This has been reiterated by several Communications and Council Conclusions.

Further inputs on the Migration and Development debate came by the Conclusions of the Council on 19 May 2003 on *Migration*

¹ This first section draws widely from a study for the European Commission I co-authored together with Laurence Hunzinger and Marco Zupi, see EC (2007).

² “The migration hump shows that there is little migration at low levels of development, but that as development takes place and income levels rise, so too does migration [...] Migration continues to rise with income levels until an income threshold is reached. Once this threshold is reached, and the domestic economy begins to offer people opportunities at home, migration starts to taper off [...] The migration hump raises very important issues for policy. As the poorest do not migrate, or do not migrate far, it cannot be assumed that policies which help migrants will also help the poor [...] Developed countries cannot expect to solve their immigration problems by reducing poverty in developing countries. Indeed the migration hump suggests that if we are successful in reducing poverty, we should expect increased out-migration from developing countries”, UK House of Commons, 2004.

³ COM (2002) 703 final.

and Development,⁴ and by The Hague Programme endorsed by the European Council of November 2004. The Hague Programme had stressed that policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin⁵.

The new challenge for the EU is how to develop aid tools to strengthen the positive aspects of the Migration and Development linkage, taking into account that, on the one hand, countries sending migrants to the EU are mainly middle-income countries and therefore it would be unreasonable to divert overseas development assistance to improve migration flows⁶, and, on the other, that encouraging migrants to remit and perhaps to return, making migration more development-friendly and more informed remains in large part a responsibility of sending countries⁷. Yet, the room for manoeuvre of the EC/EU remains large in assisting both migrants' sending and receiving countries to improve migration flows.

1.1 Towards the operationalisation of the Migration and Development Approach

A milestone in this process was the Commission' Communication, *Migration and Development: Some concrete orientations*, of 1

⁴ The Council Conclusions underlined the key principles on which Migration and Development are based, and encouraged complementarity between development and migration related policies.

⁵ The terms migrants' "sending and receiving" and "origin and destination" countries are used in the paper to indicate the place from where migrants' start and end the migration project. "Transit countries" is used to indicate the place migrants cross to reach the final destination, although often transit countries become destination countries. Although these dichotomous concepts are misleading, in fact countries can be both receiving, transit and sending, they are used in the paper as synonymous of Southern Mediterranean countries (sending) and EU countries (receiving).

⁶ According to the OECD, 2007, "Only 3 per cent of low-skilled foreign born in the OECD come from sub-Saharan Africa, and only 4 per cent from South Asia; these are the poorest regions of the world. The numbers of low-skilled migrants from the middle-income economies of Latin America, Eastern Europe and Central Asia are much higher.

⁷ UK House of Commons, *op. cit.*

September 2005⁸, in which a comprehensive approach to Migration and Development is set out, with a series of practical actions to be taken forward in partnership with source and transit countries in the field of remittances; diasporas as actors of home country development; circular labour migration; and professional migrant circulation versus brain drain.

This Communication recognises that development through migration occurs through the interplay of an articulated set of factors that are embedded in the complex relationship between the migrants' countries of origin socio-cultural and economic context and the migrants' destination countries socio-cultural and economic context. The rise of the "trans-nationalism approach"⁹ helped to explain that the practical link between Migration and Development passes through the mobilisation of migrants' financial (remittances), human (expertise and skills) and social (networks and relations) accumulated during various *stages* and *places* of the "migratory project". To these three forms of resources I add the symbolic capital, i.e. attitudes, norms and values with which migrants and their communities represent the migration project.

In analysing this phase of the debate at EC/EU level, it was pointed out that the Commission's 2005 Communication on

⁸ COM (2005) 390 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions, Migration and Development: Some concrete orientations.

⁹ Conventional migration theories treated migrants as individuals who either departed (emigrants) or arrived (immigrants). To overcome this false dichotomy, and to capture migrants' multiple attachments more realistically, researchers proposed that migrants be understood as forming part of two or more dynamically intertwined worlds and transnational migration as "the processes by which immigrants forge and sustain multi-stranded social relations that link together their societies of origin and settlement. Thus, sending and receiving societies became understood as constituting one single field of analysis. Transnational migration scholars begin with the understanding that migrants must be studied within the transnational social fields, i.e. a set of multiple interlocking networks of social relationships through which ideas, practices, and resources are unequally exchanged, organized, and transformed. The boundaries of social fields do not necessarily overlap with those of nations. National social fields are those that stay within national boundaries while transnational social fields connect actors, through direct and indirect relations, across borders, in Levitt P. and N. Nyberg-Sørensen (2004).

“Migration and Development” while underlining the importance of developing initiatives offering *win-win-win* opportunities to countries of origin, destination and to labour migrants, failed to recognise that the reality of migration is much more complex. For example non-convergent interests may exist between countries of origin and destination. In addition, there are legitimate and different interests of commercial banks versus money transfer companies. Furthermore, different and sometimes opposite expectations and interests exist between migrants who send money home (who want to influence the decisions on how to spend remittances), the families who receive remittances in their countries of origin (who consider remittances as money that belongs to them), the receiving governments’ central banks (who use remittances for addressing macroeconomic issues) and international stakeholders (who wish to use remittances to influence development aid)¹⁰.

The Commission’s Communication of 1 September 2005 was welcomed by the General Affairs and External Relations Council in its Conclusions on *Migration and External Relations* of 21 November 2005 which acknowledged that migration can be an essential part of the development agenda and development policy. The Council invited the Commission to play an active role in promoting an integrated and coherent approach to Migration and Development, including encouraging the involvement of migrants themselves. It also invited the Commission to make Migration and Development issues an integral part of the dialogue, partnership and cooperation with interested countries or their regional organizations, on the terms proposed in The Hague Programme. Multi-annual cooperation Programmes with partners (i.e. country and regional strategies and actions plans) at a bilateral and regional level should incorporate specific cooperation provisions on migration issues when appropriate.

1.2 *Focusing on North and Sub-Saharan Africa countries*

Following the events in Ceuta and Melilla in September 2005, Heads of State and Government met at Hampton Court, discussed

¹⁰ Marco Zupi’s contribution to the EC Study on Migration and Development Linkage, 2007, *op. cit.*

the challenges of migration and concluded that there was an urgent need for more action, both among Member States and in partnership between the EU and countries of origin and transit, in particular North and Sub-Saharan Africa. In response the Commission issued a Communication, *Priority actions for responding to the challenges of migration*, on 30 November 2005¹¹. This document set out a comprehensive approach to migration with a series of immediate, practical actions to be taken forward in partnership with source and transit countries.

Building upon the Communication's conclusions, the European Council adopted the *Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean* in its Conclusions of 16 December 2005, and called upon the Commission to report on progress made in this area in one year's time. The Council's Conclusions indicated a list of actions to be implemented in 2006. Priority actions were envisaged in three areas:

- (i) strengthening cooperation and action between Member States;
- (ii) working with key countries of origin and transit in Africa; and
- (iii) working with neighbouring countries in the Mediterranean region. An EU-Africa Ministerial Conference on Migration and Development (covering the entire continent) was one of these priority actions. The place chosen for the conference was the Moroccan city Rabat.

The Rabat conference was organized in July 2006. It brought together EU Member States with a number of African countries of origin and transit in West, North and Central Africa with the aim of identifying joint actions on migration along specific migratory routes. It also took a comprehensive approach by focusing on a range of issues including Migration and Development, legal migration, and combating illegal migration and trafficking in human beings. The *Rabat Action Plan* contains a series of measures to be considered by all partners in the context of their dialogue, with a deliberate aim to act on the major causes of irregular

¹¹COM (2005) 621.

migration flows¹². The Rabat Process, with the first Follow-up Meeting which was held on 21 June 2007 in Madrid and the second Ministerial Conference which will be held in 2008, is particularly important for the regional approach at its inception.

A parallel EU-Africa Ministerial Conference on *Migration and Development* was also held in Tripoli, Libya, from 22 to 23 November 2006 to formulate a joint approach to migration between the EU and the whole of Africa for the first time. The ministerial conference adopted a *Joint Africa-EU Declaration on Migration and Development* and the *Ouagadougou Plan of Action on Trafficking in Human Beings*. The Tripoli Declaration introduced into its chapter on Migration and Development a statement on the financial transfers towards the countries of origin, tackling the question of reducing the costs of the transfers. While recognising that these funds are private money, the Tripoli Declaration deals with the question of their re-orientation towards development. Point 4 of the Declaration refers to human resources and the brain drain, while the general framework also refers to the Millennium Development Goals. The Declaration will provide the basis for cooperation between the EU and Africa in years to come, and support the EU's effort to strengthen political dialogue on Migration and Development issues with Africa.

In its wake, in November 2006 the Commission issued another important Communication, *The Global Approach to Migration one year on: Towards a comprehensive European migration policy*¹³. The Communication had two aims. First, it responded to the European Council's invitation to the Commission to report back on progress made in implementing the first phase of the Global Approach and the priority actions focusing on Africa and the Mediterranean by

In the field of Migration and Development the following measures are recommended: a) Promoting development (through improving cooperation; promoting migration as a positive factor for development; promoting regional integration; supporting the creation of Euro-African economic and business forum, etc.); b) Considering the establishment of financial instruments favourable to co-development; c) Supporting the development of knowledge and know-how; d) Developing partnerships between technical and scientific institutions; e) Strengthening cooperation in terms of professional training.
COM (2006) 735 final.

the end of 2006. Second, it proposed ways to make the European Union's approach more comprehensive by extending it geographically as well as by including further areas more substantially such as legal migration and integration.

The Communication foresees an *EU Programme on Migration and Development in Africa* to provide a short-term developmental response to the migration challenge for African, Caribbean and Pacific (ACP) countries. The first objective of this joint Programming initiative would be to address the lack of decent jobs in Africa. Promoting investments in labour-intensive sectors in regions with high outward migration will be an important priority, in a wider context of facilitating intra-Africa migration labour and mobility. Other proposals include offering more assistance to African countries in better managing migration, also by establishing Migration Support Teams that would bring in technical expertise to improve operational and administrative capacity. The Communication furthermore proposes the establishment of European Job Mobility Portals that will provide African countries with information about the job opportunities in Europe. Other actions should facilitate matching the demand and supply of labour. Specific Migration Centres could be established in partner countries, supported by EC funding. Such centres could also play a role in facilitating the management of seasonal workers, the exchanges of students and researchers and other forms of legal movement of people. Finally, the Communication suggests how similar measures could be extended, where relevant, to other regions such as Eastern Europe, Latin America and Asia.

1.3 Policies towards Migrants' Resources Enhancement

In May 2007, the Commission issued two other important Communications broadening the geographical scope and enhancing the content of the Global Approach:

- (i) *Applying the Global Approach to migration to the Eastern and South-Eastern regions neighbouring the European Union*¹⁴; and

¹⁴ COM (2007) 247 final.

(ii) *Circular migration and mobility partnerships between the European Union and Third countries*¹⁵.

The second Communication deals with two issues: mobility partnerships and circular migration.

Mobility partnerships can be negotiated between the EU and third countries in order to engage actively in more effective management of migration flows. The underlying thinking is that specific 'packages' could be established between the EU and interested third countries that contain something for both sides – incentives such as visa facilitation, quotas from certain Member States, circular migration schemes, in return for cooperation on fighting illegal migration and issues related to return and readmission. The Communication proposes to start the negotiation of a limited number of pilot partnerships to test the feasibility of the concept already in the near future.

In its conclusions on *Extending and Enhancing the Global Approach to Migration* of 16-17 June 2007, the Council invited the Commission to report back on the outcome of the mobility consultations in order to enable the Council to decide, by the end of 2007, whether to invite the Commission to launch pilot partnerships. Partnerships could include: the enhancement of the links between Migration and Development to facilitate productive use of the resources of migrant communities and to promote co-development projects; the promotion of the reintegration of returnees; visa facilitation in accordance with the common approach; or enhancing the protection of human rights in the fight against illegal immigration in readmission and return policies and in the reception of migrants and asylum seekers. The Communication also looks at fostering circular migration through legislative and non-legislative measures that could facilitate such migration. The mobilisation of financial, human, symbolic and social capital of the migrants' communities becomes strategic in the promotion of "co-development", if accompanied by measures ensuring the protection of migrants, refugees and returnees.

The Council indications to focus on *migrants' resources* for

enhancing co-development and further protection of migrants regardless of their skills and origin is of outmost importance for a move towards a genuinely global approach to migration. However, the EC right after proposed a "blue card" scheme -similar to the United States green card- that would offer fast track procedure to obtain work permits for highly skilled candidates. This is not only creating selective mechanisms, but is dramatically increasing the risk of brain drain for developing countries¹⁶. Although the proposal promotes ethical recruitment standards to limit active recruitment by Member States in developing countries suffering from serious brain drain, it has been received by experts and African countries' governments with great concern and disbelief¹⁷.

Therefore, despite integrating migration into development cooperation features high on the EC agenda, within development partner countries governments' agencies, EU development non-governmental organisations (Ngos), academia and diasporas' organisations there are doubts about the real dividends. On the one hand, in many partner countries, local stakeholders perceive EU Member States governments' engagement in Migration and Development projects as a tool to encourage people's return to their country of origin. For this reason many migrants' organisations perceive "co-development" as a new form of migration control or as a way to discourage migration. On the other, European Ngos are afraid of having funds cut because of new development aid priorities supporting migrants' sending countries which are not the poorest in the world. Finally, academia is not able to provide robust evidence due to lack of data in this area and finds it difficult to make recommendations when even the anecdotal evidence is not univocal.

The operationalisation of the link between Migration and Development is a very multifaceted issue and within the current policy framework is even more difficult to realise in full. Addressing the linkage between Migration and Development requires a deeper

¹⁶ Interestingly, in the Issue Paper "Consultation on the future of EU development policy, by the DG Development of the 7th January 2005, it was clearly stated that EU Member States should be encouraged to refrain from 'harmful recruitment' of highly trained and skilled staff from under-serviced regions in developing countries, p.7.

¹⁷ P. Apps, 26 October 2007.

understanding of the process, and probably a “fresher” approach outside *wishful thinking* or political ideology.

In the following paragraphs a theoretical framework encompassing these difficulties and combining contributions from different branches of social sciences is presented. This in turn may shed lights on new development aid tools that can be created for this purpose.

2. A resource-based approach to Migration and Development

Scholarly research has demonstrated that migration is a multidimensional phenomenon behind which there are cultural and social aspects [i.e. altruism, social ties and social stratifications] combined with economic rationales [return from investments, insurance, etc.]¹⁸. In this web of articulated relations, family, ties, informed decisions, and economic rationales, the basis and result of migration processes are thus the creation, mobilisation and enhancement of migrants' resources or migrants' capitals. These resources can take the form of *financial capital*, i.e. the monetary remittances of savings accumulated during the migratory project, *social capital*, i.e. the ties, networks, associations, and trust between and among the community at home and the individuals and groups abroad that increase the access of migrants to information, facilities and resources, empowering their role in the society, *human capital*, i.e. technical and entrepreneurial skills gained at home and possibly improved abroad and *symbolic capital*, i.e. migrants' attitudes and aspirations towards migration and the needs and demands that their community of origin expresses towards the migrants and towards migration. Symbolic capital is essential to understand the aspirations of each community towards their process of emancipation and development¹⁹. These resources can be combined in individual and collective actions and can include one or more type of capital at the same time (Figure 1).

¹⁸ See A. Gallina 2006b for a review of the literature.

¹⁹ Anthropological studies have widely demonstrated that migrants financial or social capital are not necessarily used directly for productive purposes or human capital enhancement, but to improve the social and political status of the family left behind, with often determining effects on the development trajectory of the individual community, see the study on the Comoros Island by V. Da Cruz *et al.*

Figure 1 – Migrants’ four forms of capitals and their utilisation

	Individual	Collective
Financial Capital (remittances and in-kind transfers)	Investment in housing, education, health, capital equipment, vehicle, land, etc., cash transfer to family members left behind, debt repayment	Fund-raising for small infrastructures (hospitals, schools, churches, roads, electricity generators), cooperatives, clothes and food during humanitarian crises
Human Capital (Skills and competences, <i>Le. brain gain</i>)	Transfer of technical and scientific knowledge, social engagement in training in the local schools and universities, transfer of management skills, etc.	Institutions’ participation to scientific research networks, consultancy for technical assistance to local governments, etc.
Social Capital (networks and contacts)	Business contacts, import-export, establishing contacts for local associations and projects, promotion of philanthropic initiatives	Participation to political life in the country of origin and destination, contribution to establishing associations, creating cooperatives for trade and production, etc.
Symbolic Capital (behaviours, cultural attitudes)	Introduction of norms and values, cultural attitudes learned throughout the migratory project for the promotion of more gender balanced and sustainable development and for a more articulated view on migration risks and opportunities	Diasporic engagement in institutional and cultural changes, advocacy for the promotion of migrants’ human rights

Source: author’s elaboration for EC, 2007.

Yet the linkage between Migration and Development cannot only be limited to and depend on the exploitation of one or more of these forms of capital. Research has showed that migration impact on development is influenced by factors such as for example policies in origin and host countries and factors such as the number of households’ members, disposable income, land ownership, educational levels, etc. The interplay between these factors determines the individual success or failure in the migration process and in its potential impact on the development of the country of origin²⁰. Therefore, the analysis should be multidimensional and embed the resource-based approach within a framework that takes into account both structural factors (origin,

²⁰ R. Chami *et al.* (2005). V. Da Cruz *et al.* (2004). B. De la Briere *et al.* (2002). D. Giubilaro (1997), A. Gallina (2005); M. Gamburd (2000), Jean-Pierre Garson and Georges Tapinos (1981).

transit and destination countries contexts) and contingent needs (labour needs, poverty).

2.1 Linking migration with development from a resource-based perspective

Once conditions in origin, transit and destination countries are assessed, the creation, enhancement and mobilisation of the financial, human, symbolic and social capital are therefore key measures for enhancing the developmental dimension of migration. Without substituting established development actors, but being a potentially important complement to development processes, migrants can become "development agents" of their country of origin.

Migrants' financial capital, or remittances, by going directly into a household's pockets might have a direct impact on individual poverty levels. Even if remittances are not directly used for investments in manufacturing or craft industries, the impact on national and local human development in migrant-sending countries is undisputed²¹. Considering that even the best equipped investors often avoid projects in developing countries is remarkable if a little share of remittances is invested by migrants and their households for productive purposes²². But remittances tend also to decline if migrants reunite with their families and integrate in the host countries and only if measures exist to stimulate investments in the home country the flows of remittances can begin again.

The same reasoning applies for the transfer of migrants' human capital. Investments in vocational and professional training for low-skilled migrants or international collaborative research projects for highly skilled migrants can lead to an increased human capital accumulation of the migrants' population but this not necessarily implies an increased participation in the development of the home country, hence transforming a *brain drain* into a *brain gain*. Thus, the presence of human capital is not sufficient if agreements on circular migration are not associated with policies of reintegration

²¹ S. M. Maimbo and D. Ratha, 2005; P. Fajnzylber and J.H. López, 2007.

²² P. De Vasconcelos, 2005, p. 12.

of workers, or with the creation of investments, opportunities for migrant workers in the home country while remaining abroad. The EC blue card scheme will stimulate positive linkages for the development of the EU economies while draining developing countries from their important human resources. The EC could have started by recognising the university or technical degrees of migrants living or overstaying in the EU eliminating the diffuse phenomenon of *brain waste*, i.e. doctors and carpenters working in Southern Italy picking up tomatoes.

Similar issues exist with symbolic capital creation and mobilisation. Symbolic capital is the resource available to an individual on the basis of honor, prestige or recognition. It functions as an authoritative embodiment of cultural value. Therefore, although limited in numbers, the group of migrants that can mobilise symbolic capital might have a dramatic effect on a large part of the migrants' community²³. They can be supported in informing their own communities on migration related risks and opportunities. Similarly, governments should stop considering migrants either as national heroes or traitors. However, if migrants and their communities consider migration only as a way to improve their economic situation then symbolic capital would do little. Instead, if migration represented a way to start an emancipatory process and the liberation from oppressive social ties and mechanisms, or just the liberation from a situation of stagnation, then symbolic capital would become a central asset. The risk associated with symbolic capital is that it supports the creation of a strong identity which can lead to political tensions. Yet, a strong identity is the basis for maintaining strong ties with the country of origin, a crucial factor for stimulating positive linkages between Migration and Development.

Social capital is another central resource for migrants and their home country. Business links, trade relationship and investments in home country depend largely on the presence/absence of social capital. Social capital has also positive impact on development by

²³ These aspects have been discussed with Mattia Vitiello, migration researcher at the Italian National Research Council. Personal communication 25th June 2007.

limiting moral hazard and free-riding behaviours. But a political change in the home country, both at national and local level, leading to diminished accountability or transparency in the use of development aid or increasing bureaucratic procedures for opening a business will not contribute to the mobilisation of social capital. Often migrants claim that despite their willingness to use old and new contacts to establish a business in the home country they are forced to stop because of the bureaucracy and lack of confidence towards the home country authorities²⁴. The presence of large communities in the host countries can contribute to increase the participation to diasporas' activities in support of the home country. Yet, again, if the host societies do not recognise or favour the creation of such diasporas organisations collective social capital can be hardly mobilised²⁵.

Evidently the positive relationship between Migration and Development depends upon various internal and external factors and cannot be reduced to the creation and mobilisation of one form of migrants' capital. An approach starting from the analysis of the resources available (internal factors) and the limits and potentialities in their use can provide a solid ground for operationalisation of the linkage between Migration and Development, but without taking into account the external factors any project or Programme is doomed to fail.

There are important responsibilities within the individual governments and the EU towards the creation of the framework enabling the creation of the linkage between Migration and Development. Poverty reduction strategies should start taking this potential link into account, as well as regional cooperation frameworks should deal with this issue but taking into account the differences characterising each country's migration patterns and history. It is within the interplay of all the endogenous and exogenous factors that the relationship between Migration and Development should be analysed.

²⁴ M. Collyer, 2004; A. Gallina, 2006b.

²⁵ A typical example is the Sri Lanka ethnic Tamil diasporas, which social capital utilisation is hindered by the ongoing conflict, A. Gallina, 2007.

3. Integrating Migration and Development in Practice: the case of the Euro-Mediterranean region

3.1 Euro-Mediterranean Relationships

The relationships between the EU and the Mediterranean Partner Countries (MPCs) are framed within the Euro-Mediterranean Partnership (EMP or Barcelona Process), a wide framework of political, economic and cultural cooperation, built on the previous "Renewed Mediterranean Policy" (1992-1995). The main political goal of the EMP was to reduce the economic gap existing between the EU countries and the Southern and Eastern Mediterranean countries, also in the hope to lessen push and pull migration factors and guarantee political and social stability. The neoliberal positions that more or less explicitly underscored the association agreements have privileged trade liberalisation and economic modernisation against development cooperation and horizontal economic integration, assuming that the Mediterranean societies and production systems would adapt automatically to the EU continental development model and catch-up accordingly. The negative impact of free trade on the fragile production system of micro and family enterprises displacing labour in the low technology sectors has been widely documented²⁶. The development scheme devised by the EC was too limited to cope with the magnitude of the process and since the mid-1990s migration flows from MPCs towards the EU have increased considerably.

Ten years later, while celebrating lukewarmly in Barcelona the anniversary of the EMP, the Euro-Mediterranean Heads of State Summit (2005) set out the objectives for the next five years for the Partnership, and especially prioritized three of them:

- (a) *Justice, security and migration cooperation,*
- (b) *Sustainable economic development,*
- (c) *Social development and cultural exchanges*²⁷.

²⁶ Femise, 2005; D. Hunt *et al.* 2007; B. Amoroso and A. Gallina (2005).

²⁷ ENPI (European Neighbourhood and Partnership Instrument) Regional Strategy Paper (2007-2013) and Regional Indicative Programme (2007-2010) For The Euro-Mediterranean Partnership, Brussels, p. 14-16.

In the EC's Regional Indicative Programme (2007-2010) for the Euro-Mediterranean Partnership is emphasised that actions will be promoted for supporting justice and police through technical assistance and capacity building on migration management for both countries of origin and transit. Re-admission agreements with these countries will be negotiated by the EU aiming to facilitate the return of illegal migrants. In the meanwhile, MPCs have also become transit and destination countries²⁸.

In 2003, a new framework for Euro-Mediterranean cooperation was established under the new European Neighbourhood Policy (ENP)²⁹ which declared aim was to draw both old and new neighbours closer into the EU's political, economic and cultural realm and to promote a ring of well-governed countries to the east and south of the EU with whom the EU can enjoy close and cooperative relations. In return for the implementation of political, economic and institutional reforms, including improved migration management practices, the ENP countries obtain significant free trade agreements, improved migration and movements of persons, intensified cooperation in combating common security threats. The Barcelona Process, the bilateral Associations Agreements that followed and the new ENP are now managed within one single instrument (European Neighbourhood Partnership Instrument –

²⁸ In a recent working paper by Hein de Haas some sources and estimates are reported: according to Alioua (2005) estimates the number of sub-Saharan migrants and refugees living in Morocco at several tens of thousands. According to Libyan authorities, each year between 75,000 and 100,000 foreign nationals enter the country. Libyan local authorities estimate the number of legal foreign workers at 600,000, while illegal immigrants are estimated to number between 750,000 and 1.2 million (Bredeloup and Pliez 2005:6; EC 2004). Another source claims that Libya houses 2 to 2.5 million immigrants (including 200,000 Moroccans, 60,000 Tunisians and 20,000 to 30,000 Algerians and 1 to 1.5 million sub-Saharan Africans), representing 25 to 30 percent of its total population (Boubakri 2004:2). Cairo hosts one of the largest urban refugee populations in the world, mainly Sudanese but also Palestinians, Somalis, Ethiopians and Eritreans. In addition, since the 1970s many Sudanese workers have migrated to Egypt; refugee and migrant population in Egypt (mainly Cairo) is estimated at levels of anywhere between 0.5 and 3 million (Zohry and Harrell-Bond 2003:49), in H. de Haas, 2007, p. 27-28.

²⁹ EC COM(2003) 104, March 2003.

ENPI). This has marked the end of a multilateral approach in the region and the adoption of a multi-bilateral scheme. In the field of migration this approach may weaken migration management, especially irregular migration which often involves complex migratory routes and transits linking more than one country.

3.2 Migration flows in the Euro-Mediterranean Region

The MPCs represent an area of major emigration. A little under half of all such first generation emigrants are directed towards the European Union³⁰. However, the exact figure is difficult to define, both because the differences in statistics in sending and destination countries and also due to the presence of an uncertain number of undocumented migrant workers. According to the origin countries' statistics, 7 out of 10 MPCs (Israel, Jordan, Syria do not provide statistics of their nationals abroad by country of residence) record little more than 8 million residents in the EU, while the EU member states statistics report the presence of about 5.8 million migrants of MPCs origin³¹.

To the 5.8 million first generation MPCs migrants (born-abroad), if the EU statistics are taken, it should be added the number of children born in host countries (so-called second generation). Using an average estimate of the ratio born abroad/foreigner in the EU countries in which this statistic is available, the total number of persons with origins in the MPCs would total about 10.6 million³². EU statistics show that Germany and France are the two major destination countries, with about 2 million MPCs migrants each, followed by the Netherlands, Italy and Spain each hosting between 350 to 400 thousands migrants originating from MPCs. Spain and Italy are new countries of destination.

Within the broad Euro-Mediterranean migration corridor, few countries show a high concentration of migrants coming from a specific Mediterranean country. Taking into account official EU

³⁰ P. Fargues, 2005, p. 11.

³¹ *Ibid*, p. 11.

³² *Ibid*, p. 13.

statistics, Germany hosts 72% of Turkish immigrants in the EU; France is home for 90% of Algerians, 72% of Tunisians and 45% of Moroccans; Spain and Italy hosts respectively 20 and 13% of Moroccans, and Italy receives 16% of the Tunisians migrants living in the EU. It is not the same for the Mashreq countries, which have stronger migration corridors with Arab Gulf countries and consequently migration and remittances are largely dependent on the fluctuations of oil prices.

Table 1 – Migrants and Remittances in the EU and in the Arab Countries (range constructed on data 1998-2003)

Countries	Total remittances as % of GDP	% EU of total remittances	Migrants as % of total population	% of migrants in the EU	% of migrants in the Arab countries
Turkey	1-2%	85%	5%	86%	3%
Morocco	6-9%	90%	10%	96%	9%
Algeria	2-3%	90%	4%	92%	6%
Tunisia	4-5%	85%	9%	83%	14%
Jordan	20-22%	5%	1%	27%	-
Egypt	3-4%	5%	4%	16%	70%
Lebanon	9-15%	-	15%	26%	20%
Syria	≈2%	-	1%	35%	-

Source: A. Gallina, 2006.

One of the striking features of this situation is that migration to Spain and Italy has occurred within the last decade at an accelerated pace and the uncertain but high number of undocumented workers would raise the current figures dramatically³³. Another important element is the changing type of labour migration in the region. New professional profiles with higher levels of education are migrating as a result of lack of job opportunities in the home country. They find occupation mainly in countries with a more flexible labour market and migration policy (UK, USA and Canada and less in Spain and Italy).

Yet today, more than half of the migrant workers from Maghreb

³³ Especially given the dramatic situation of the labour market in the MPCs, migration flows are only expected to grow.

countries and Turkey is composed of semi-skilled or unskilled workers finding occupation in construction, industry, agriculture and the service sector, namely the occupations that no longer attract the European labour force³⁴, and are still among the more vulnerable groups to unemployment³⁵.

4. Migrants capitals utilizations in Mediterranean Partner Countries

Real deficit of hard information and case-studies in this macro-region affects policy making dramatically. In the following sections, there are few examples of how migrants' capitals are providing the needed resources to unlock the development potential of sending areas. These can only be considered as an example of how the operationalisation of the linkage between Migration and Development can take place from a resource-based perspective, and as good practices that can be replicated.

4.1 Migrants financial capital (remittances)

In the Euro-Mediterranean region the aggregated data confirm the economic importance of remittances for the migrant sending countries. Workers' migration from Southern Mediterranean countries, and especially the Maghrib, has important economic implications, as demonstrated by the flow of remittances sent back to the households in the country of origin. In the region workers' remittances are two to three times higher than FDI flows and peaking at \$15 billions; they were about four times larger than total overseas development aid³⁶.

Both remittances and FDI peaked in 2001. The peak in remittances can be explained by the appreciation of the euro against the USD in 2001, which has pushed many people to send money home, or by the need to repatriate money that otherwise should have been declared to banks upon the conversion. However, when

³⁴ P. Fargues, 2005, *op. cit.*, p. 19.

³⁵ J.P. Garson, 2005.

³⁶ Data from 2004 in A. Gallina, 2006.

corrected for the exchange rate the peak disappears and a stable, slightly increasing flow of remittances remains. After exchange rate correction the FDI flow is still fluctuating and the peak in 2001 is still present. An explanation for this trend can be the privatization process in telecom and other utilities in Morocco and Turkey. Nonetheless, countries such as Egypt, Jordan and Turkey have experienced a "boom and bust" cycle, deriving from volatility in the revenue coming from oil prices and the changing migration opportunity in the Persian Gulf. In the case of Turkey, the economic and financial instability have contributed to the volatility of remittances³⁷. In Lebanon and Jordan remittances as share of GDP are larger compared to the other MPCs, but only a small portion is coming from Europe (5% or less) (table 1). For Morocco and Tunisia remittances are an important part of their GDP and most of the remittances come from Europe (85–90%). It must be stressed that formal flows of remittances are only the tip of the iceberg. It is estimated that informal remittances, in the Mediterranean region can double the official figures³⁸.

The importance of remittances in the Mediterranean Basin countries can also be viewed by comparing them with other financial flows. During the first five years of implementation of the Euro-Mediterranean Partnership the EU has allocated 3.4 billion euros in development assistance (ca. 680 million euros per year) and the European Investment Bank (EIB) another 4.8 billion for loans (about 900 million euros per year). In the second period, 2000-2006, the Mediterranean development funds (MEDA Programme) increased to 5.3 billion and the EIB 6.4 billions in loans and 1 billion for transnational projects. European FDIs were generally scarce compared with other regions in the world and mainly linked to the acquisition of existing companies (privatizations). During the last five years, on average EU aid transfers were equivalent to about €8 per capita, while FDIs were about €22 per capita and remittances €57 per capita. In the new seven-year budgetary period 2007-2013 the EU has allocated through the European Neighbourhood Policy Instrument an amount of 14.9 billion euros, i.e. 2.1 billion a year

³⁷ S. Sayan, 2004.

³⁸ EIB, 2006.

to be shared among the ten MPCs and the seven new neighbour countries, i.e. \$5.3 per capita.

In 2006, I co-authored a comprehensive study on the utilisation of remittances in the main migration-remittances corridors between the Southern and Eastern Mediterranean countries and the EU for the European Investment Bank.³⁹ The study was based mainly on secondary sources, statistical data available from MPCs balance of payments and Eurostat, and small surveys in eight MPCs were conducted on costs and frequency of remittances. An important finding was the different direction and source of migration and remittances. Mashreq countries are more dependent on the fluctuations of Arab Gulf countries' labour market, whereas Maghrib countries are more dependent on EU and increasingly US migration policies. Another finding of this study was that migrants originating from Algeria, Morocco and Tunisia invest particularly in real estates [for both leisure and for improving the habitat conditions of the family left behind] and very little is invested in manufacturing activities. It is estimated that only about 5 per cent of the money sent home are used for purposes such as a family enterprise, usually in the service sectors with very low value added, and that only some of those with a medium-high level of education, which are still a small group, are risking their savings in higher value added sectors such as IT or finance.⁴⁰

4.2 *Social Capital Investments*

Information on diasporas' engagement practices in Southern and Eastern Mediterranean countries does not abound. An often cited example of collective social and financial capital is the work of the French-Moroccan Ngo "Migration & Development". After many years of exchange and engagement by the French and Moroccan communities living in France originating from the Southern region of Morocco, the local community has started to organize a local Ngo (*Migration & Développement*) and a dense network of village associations. The initial impetus from the French-Moroccan

³⁹ EIB, 2006.

⁴⁰ A. Gallina, 2005.

association has created the conditions for improving the infrastructures (roads and electricity). Then, the partnership with the villages of origins has spurred the creation of production cooperatives in sectors such as olive oil, oil of argan and saffron flowers⁴¹. These projects involve about 400 families and have mobilized public and private funds for several million euros since their inception. Even though not all the families in the village of origin have a member abroad able to send money, the strong participatory system created by the local Ngo together with the village associations enabled each member of the community to contribute to the works to be done. This process has spurred the creation of local village associations that decide upon the allocation of the money in the various areas of intervention. Especially women benefit from the cooperatives in the production of traditional goods in which women play a pivotal role such as saffron and argan oil⁴². The association and the cooperatives of women created a "space for women", while the village associations are mainly dominated by men. Migration has worked as an equilibrating factor and reduced the negative aspects of the patriarchal model that characterizes this area.

4.3 *Human Capital*

An example of how human and social capital can be enhanced is the project supported by the Emilia Romagna regional government in Morocco through the Italian Ngo Cospe. This project promotes the upgrading of skills in the traditional crafts for Moroccans both residents in Bologna and in Tangier. The craft production becomes a tool for establishing co-development links and is a practical way to operationalise the link between Migration and Development. In this way the Emilia Romagna region has started to look at migrants associations as potential partners for establishing solidarity and business links with the country of origin. Another example of this kind aiming to upgrade foreign residents' skills with the aim of establishing business links is the project promoting agro-food cooperatives in Khenifra, Morocco, and in

⁴¹ A. Gallina, 2005, 2006a, 2006b, 2006c.

⁴² A. Gallina 2007, EC 2007.

Emilia Romagna, Italy. Through this, seasonal Moroccan workers in Italy are trained to become agricultural technicians to be employed in the Italian cooperative branches in Morocco. In some cases the project helped some migrants to set up their own cooperative upon return in Morocco⁴³.

4.4 *Symbolic Capital*

Projects in this still un-explored field are not many. However, there is a component linked to the promotion of a positive perception of migration in almost any Migration and Development project. Migration management policies need to address symbolic capital as also the other forms of capital. For many migrants, the migration project represented a mechanism for emancipation and more equal opportunity between genders. The words of a migrant woman from Morocco living in the Netherlands are enlightening:

“We believe in equality between men and women. The emancipation of women and men is an integral part in striving for a better future. It is not easy for women in Southern Morocco to participate in public life and be economically engaged and independent. We assist our local partners in their efforts to make those changes come about”⁴⁴.

The promotion of symbolic capital should not however be understood as the promotion and export *tout court* of European values in migrants' sending countries. Symbolic capital's mobilization should aim at promoting a fair and balanced perception of migration in countries of origin and destination highlighting risks and opportunities, benefits and losses. “Engaged” migrants, as the woman quoted before, can play a pivotal role in this. Yet, in migration management practices, this form of capital is not fully taken into account because the intrinsic difficulties in addressing it and the reluctance in proposing a too positive view on migration which could encourage in turn more migration.

⁴³ F. Piperno and A. Stocchiero, 2006.

⁴⁴ Charito Basa *et al.*, 2006, p. 50.

5. Conclusions

Migration management policies and Migration and Development projects promoting a better, more orderly and safe migration are often based on few assumptions and limited hard information. As co-author of reports and papers for policy makers and as participant to several development projects, I have realised the objective difficulties in solving the issue on how to operationalise the Migration and Development linkage. For the Euro-Mediterranean cooperation frameworks, the presence of different stages of the migration process and the diverse geography of migration make the task even more complex.

It is clear that a positive relationship between Migration and Development exists but is not automatic. It is clear that any interventions aiming to create and support productive and social infrastructures in rural and urban areas from where migrants come from needs to be based on a careful assessment of the interactions between the external factors and the migrants' internal resources.

Regarding financial capital, in the current Euro-Mediterranean scenario the true challenge is how to maintain the remittances flow while creating conditions for a sustainable and balanced improvement of the country's socio-economic conditions. And to ensure long-term economic stability, Southern Mediterranean governments must do more than guarantee that remittances will be used for development purposes, and actually develop investment opportunities for the said remittances⁴⁵. This may lead to a reconsideration of development through migration strategies, while it remains central in the current debate on the relationship between remittances and co-development policies aiming to increase their multiplier and accelerator effects.

More complex is the issue of social capital development. New migrants tend to stay as long as possible due to their "permanency" of temporary status, even if this implies illegally over-staying on EU territory. Ties and networks are weakened by family reunifications. Low standard working conditions and incomes of

⁴⁵ A. Gallina, 2006b.

migrants make them more worried about their own livelihood than to engage with the home country development. Limited access to financial resources, difficulties in travelling back and forth for the promoters of the project, the difficulty in finding reliable institutional interlocutors in the home country are major setbacks to be addressed by policy makers.

Human capital development is at the core strategy for both sending and receiving countries. Enhancing skills of potential migrants in the country of origin and in the arrival country has been reiterated in the First Euro-Mediterranean Ministerial Meeting on Migration in Portugal in November 2007⁴⁶. Considering that brain drain from MPCs is not yet a big issue, it can be timely addressed by increasing the possibility for more exchange of scholars, students and professionals.

Promoting symbolic capital means instead to promote a fairer view of migration and provide thus assistance to communities and migrant sending countries' governments in making the population more aware on risks and opportunities. For migrants' receiving communities and governments, symbolic capital creation can contribute to a better understanding of migrants' cultural backgrounds and behaviors, reducing xenophobic tendencies and reducing cultural distances. Being closely related to identity, this form of capital can contribute to a better understanding of the differences that characterizes each community and ethnic group's migration projects but can also increase the chances for social tensions. And for this it cannot be any longer ignored. Furthermore, even within the same country, migration patterns and expectations can be different and therefore migration management policies and Migration and Development projects need to take this form of capital into account⁴⁷. Considering that symbolic capital is manifested through each of the other forms of capital (social, financial and human), it becomes a key element in the operationalisation of the Migration and Development linkage.

⁴⁶ [http://www.eu2007.pt/NR/rdonlyres/8D86D66E-B37A-457E-9E4A-7AFF2643D9/0/20071119 AGREEDCONCLUSIONSEuromed.pdf](http://www.eu2007.pt/NR/rdonlyres/8D86D66E-B37A-457E-9E4A-7AFF2643D9/0/20071119%20AGREEDCONCLUSIONSEuromed.pdf)

⁴⁷ H. Van Dalen *et al.*, 2005.

In the Euro-Mediterranean region, migration studies suffer from lack of data and too few case studies. The operationalisation of the linkage between Migration and Development is therefore not fully functional, yet the policy review presented in this paper demonstrate how the EC/EU institutions are moving towards a resources based approach putting at the centre the migrants' rights to migrate, stay, return and use their own resources.

The scope for assistance from the EU to MPCs is large and resources allocated within the ENPI can surely contribute to a better migration process if the concerns underlined are taken into account. What remains open is the issue of whether and how the policies on linking Migration and Development will be integrated in a coherent way into other EC and individual Member States policy areas such as trade, development, agriculture, affecting third countries socio-economic development and employment opportunities, and most of all, whether the integration and inclusion of third country nationals in the EU will start to be considered an equally important element of the linkage between Migration and Development. Strengthening migrants' social, financial, human and symbolic capitals might not directly aim to strengthen the positive linkages between Migration and Development but it can surely contribute to improving migration flows.

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BOOK REVIEWS

Stepping Out of the Brain Drain: Applying Catholic Social Teaching in a New Era of Migration. Lexington Books, Lanham Maryland. Pp. 235

Michele R. Pistone and John J. Hoeffner,

This compact and clearly argued book represents the collaborative effort of two lawyers who dedicate the same kind of attention to Catholic social teaching that they would to preparing a brief before an Appellate Court. Their central argument is that Catholic social teaching on migration should be revised because it adopts an unduly negative stance towards the so-called "brain drain" phenomenon; which they prefer to term: "STEP OUT" migration. Here the acronym "STEP OUT" refers to migration of Scientific, Technical and Educated Professionals Out of Underdeveloped Territories. As this shift also indicates, Pistone and Hoeffner wish to avoid talking about this kind of migration as if it were an ineluctable process

governed by the physical laws of gravity. Instead they prefer to describe it as the result of individual choices, which must be understood in the context of individual life plans and which can later be changed or retracted.

The book is structured around eighteen short chapters, each of which tackles a particular part of the "case" being made by the authors and does so in a way which is persuasive, enlightening and very well documented. A wealth of empirical evidence is assembled to show how STEP OUT migrants, particularly in modern conditions of globalization and using modern technologies of communication, usually maintain close ties with and participate in their communities of origin even while they are working in another state. Often the decision to emigrate to look for work can no longer be considered as a permanent one but is best viewed as a stage in one's career, in which an eventual return to the country of origin is clearly envisaged. Moreover, they show how these migrants often succeed in boosting the economic development of their regions of origin, whether through the remittances they send, through transnational projects they

initiate or through the knowledge transfers they facilitate.

This argument serves to throw a new light on the Church's social doctrine in this field, which the authors also contextualize. They do so by showing how it was based on partial and faulty economic studies and also reflected the conception of the brain drain as a zero-sum game that was the dominant common sense in international relations and economics at the time when it was formulated. In line with their understanding that STEP OUT migration can be a win-win scenario, the authors recommend that the Church not only revise its social doctrine in this regard, but also *inter alia* that it find ways of encouraging these migrants to see it as their duty to maintain productive ties with their homelands and to put pressure on sending and host states to facilitate the development of such ties.

While the central argument being made in this book may at first appear to concern only Catholics, in reality the theme is much broader. The central question is whether an assessment of the benefits and disadvantages of migration is best undertaken from the vantage point of the state or

from that of the individual migrant. By opting for the latter, the authors are well placed to show how relying on the resourcefulness and agility of the individual migrant is not only a stance which respects her dignity and human rights, but also makes possible a less prejudiced view of what STEP OUT migrants are really trying to achieve. Once the decision to emigrate is not automatically labeled as a betrayal of one's homeland, the possibility that these emigrants may construct multiple affiliations and may seek to use their migration project as a means to contribute to their communities of origin must be given its due weight.

At the same time, referring to the multiple affiliations of migrants points to one aspect of the argument made in this book which this reviewer feels is somewhat under-explored and that is the attitude which is required of the hosting state in order to enable the kinds of ties with their homelands which the authors are advocating. The modern nation-state, with its tendency to insist that migrants should integrate within a national culture, may not always be as tolerant as one would wish towards immigrants who maintain strong ties to their countries (and cultures) of

origin. This is particularly the case if that nation-state feels somehow threatened by the inevitable cultural "baggage" which strong links with the homeland bring with them. In the United States, for example, despite, its strong and vibrant tradition of welcoming and incorporating immigrants, expression of hostility towards the use of Spanish by Latino immigrants are not uncommon.

There are, of course, ways of resolving these conflicts and they are not specific to STEP-OUT migrants. Indeed, by whetting our appetite for further discussion on these matters, the authors confirm the importance and usefulness of their book that extends beyond the apparent scope of the title. Due to the breadth of the issues it raises, the revolutionary perspective it advocates and the clear and persuasive manner in which it is written, it is hard to think of any aspect of migration studies that would not be enriched by engaging with the arguments made in this volume. I highly recommend it.

David E. Zammit
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**Human Rights and the WTO:
The Case of Patents and
Access to Medicines.**

Including annexes, bibliography, and index.

ISBN: 978-0-19-921520-1

Holger Hestermeyer
Oxford University Press
(2007)

When people get serious about social justice, the "moderates" step in to show how to use existing rules to advance the social aims. This book is one of those efforts and it succeeds admirably. It will repay a good read by lawyers, diplomats, human rights advocates, and students of international affairs by illuminating the ways one might solve conflicts between legal regimes. In closely reasoned argument, Hestermeyer shows how access to medicine is a human right as is the individual right to the fruits of one's ideas and inventions. He then shows how current rules under the GATT, WTO dispute settlement rules, and even TRIPs can be used directly or with the assistance of customary and general principles of international law to advance the right to medicine. He thinks that one does not need to make overly broad claims for human rights to

achieve important advances in human rights. "Overly broad claims can do more bad than good, particularly in regime conflict, as the repetition of overly broad claims might have contributed to the critical view of human rights that has long been prevalent within the WTO (p. 204)."

Through the book one learns a great deal about the arguments for and against a right to medicine, the evolution of intellectual properties law, and some of the content in modern trade and trade-related intellectual properties as they apply to medicine. He takes great care to evaluate claims and counterclaims from those who would protect intellectual properties to a high degree and those who would do the same for human rights. As a consequence, his suggestions for further enhancing the capacity of trade law to advance human rights - without denying some protection to pharmaceutical firms - are models of legal reasoning. They reflect both the theory and practice of the law, but the book as a whole also sets law in the larger picture of the aims of international public policy. If pursued, he may well be right that the co evolution of trade and social justice will happen through jurisprudence on the matters.

The book has five chapters, with each succeeding chapter being more technical and narrowly focused. It begins with review of the debate about whether there is a human right to medicine. He concludes there is one, and that at times it could trump the protections afforded to pharmaceuticals. The second chapter discusses the history and purposes of patent law. The third considers in more detail the international law of human rights and whether medicine is among them. The fourth chapter directly addresses problems of conflict of legal regimes. The last chapter takes up access to medicine within the context of the WTO. There is a summary of his main arguments in appendix 1. Appendix 2 provides a useful list of national accessions to various treaties and international organizations. Appendix three lists WTO dispute settlement cases related to TRIPS. There is both an extensive bibliography and a useful index.

Hestermeyer establishes in Chapter 3 that there is a human right to medicine by locating the right in Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). That, of course, would exclude the US, which is one the nonsignatories

to this Covenant. But the author also argues that the right to life, through the provision of life-saving medicine, is also a right under Article 6 of the International Covenant on Civil and Political Rights, to which the US is a signatory. He also argues that the ICESCR provides a subsidiary right to medicine in that the Covenant says people have the right to benefits from the results of scientific progress. Moreover, he shows that access to medicine in a national emergency is part of both customary international law and a general principle of international law. Here, state practice is quite clear by a range of states, from those facing national disaster with AIDS to the United States behavior when it wanted to stockpile CIPRO in light of the anthrax attacks following 9/11.

The author is quite careful not to claim more than the agreements and law can bear. For example he notes that no reading of either the ICESCR or the ICCPR imposes human rights law directly on corporations. This is a duty for states to ensure that private parties not violate the rules (p.96). Some may object that the Covenants, coupled with the Universal Declaration on Human Rights do impose such a

duty on private entities, but he notes only the preamble suggest such a thing, a 'weak' basis for the claim. At the same time, he buttresses the argument that there is a right by noting the justiciability of the right in national courts. Thus the "softness" of human rights law is not as soft as some would claim.

The most interesting chapter, in some respects, is devoted to an extended discussion on the conflict between intellectual properties and access to medicine. The conflict is not inherent in trade law, but rather in the fragmentation of law caused by growing law beyond bilateral rules of coexistence into multilateral rules of community interest. This careful discussion explores how regular international law might inform the application of more specialized law. He argues that hierarchy in law is necessary to resolve the gaps between different legal regimes. The fragmentation of international law is producing less clarity than it might, but a consideration of both normative and factual hierarchy might be useful. Normatively, human rights trumps trade and, especially, intellectual properties protections for firms (as opposed to individual inventors). But

factually, it is the world of trade that has the growing capacity to adjudicate a range of issues (p. 200, 206). Trade will touch on environmental and human rights concerns, so the emphasis in bringing the broader world of customary international law and general principles must operate here.

GATT, Art XX, offers considerable leeway to cope with regime conflicts due to the factual hierarchy between trade and human rights. But, TRIPS has no similar mechanism. Rather interpretation of flexibilities in TRIPS will need to be employed to achieve a better balance between human rights and trade. Again use of the broader system of international law could help as the WTO dispute settlement processes operate to interpret the flexibilities. In fact, says Hestermeyer, the WTO has shown an "astonishing willingness to disregard its own decision-making rules when deciding on the issue" of access to medication (p. 207). But he argues that either the appellate or the political bodies will need to clarify this to provide more certainty in the process. Hestermeyer does not think that the WTO regime is a law apart from international law. Non WTO law may be applied under

limited circumstances to clarify and resolve conflicts between duties. He notes ways this could happen and rulings where non-WTO law has been applied.

The Doha Declaration is a start on correcting the imperfections in TRIPS relative to human rights to medicine. At the time of the writing of the book, it was far too early to say whether the deal made pursuant to Doha would work. Hestermeyer said the uncertainty and doubts would remain in TRIPs and that the action will have to take place in WTO Panels. His assessment seems correct, give the difficulties associated with using the new flexibilities. In July 2007 "Rwanda notified the World Trade Organization's (WTO) Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) that it plans to import the HIV-drug TriAvir from the Canadian company Apotex and will not enforce any patents granted in that respect in Rwanda" (*ASIL Insight*, Dec 14, 2007). It took considerable twists and turns in Canada to get the law right and it is not clear if Rwanda really got a good deal in the end. Thus, Hestermeyer's view that more will need to be done seems sustained.

In sum, this is a meaty book.

While those unfamiliar with international law would struggle with the volume, particularly in the later chapters, it does offer a very effective base on which lawyers, activists, and scholars of international regimes could build a dialog. More generally, its thoughtful analysis of regime conflicts and the ways specialized legal settings like the WTO could use general international law should generate serious work by practitioners and scholars alike on ways forward. It is possible to square the public welfare that comes from freer trade with the public welfare based on human rights.

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**Poverty and Human Rights:
Sen's 'Capability Perspective'
Explored,
Polly Vizard
Oxford University Press
(2006)**

'Poverty itself is a violation of numerous basic human rights.'

Polly Vizard starts off her monograph by presenting this quote from Mary Robinson, Honorary President of Oxfam International and Former UN High Commissioner on Human Rights.

Poverty and Human Rights is a revised version of a Ph.D. thesis written by Vizard at London School of Economics and further developed by her while she was PostDoctoral Research Fellow and Research Associate at the Centre for Analysis of Social Exclusion (CASE).

Polly Vizard examines the thesis put forward by Mary Robinson by considering what freedom actually is, moving on to analyse poverty and eventually examining why global poverty is indeed a human rights issue, especially through the lens of Sen's contributions in the fields of ethics and economics and the consequences of such theories.

Amartya Sen is Lamont University Professor at Harvard University. He was previously

professor of economics at LSE and remains a senior research associate of STICERD. He was awarded the Nobel Prize for Economics in 1998 "for his contributions to welfare economics".

On an international level, there is an ever-increasing awareness that freedom from poverty is a basic human right that gives rise to moral and legal obligations on the part of governments and other actors. This is shown from the work of various organisations such as UNICEF and Amnesty International in relation to the matter.

In considering the meaning of freedom, Vizard examines theories put forth by Hayek, Nozick and others. She continues by exploring the thoughts of Pogge who postulates that human rights and justice involve fundamental principles of negative duties. In this way severe poverty is a violation of negative duties and freedom from such severe poverty is a basic human right.

Vizard shows how Sen's 'capability approach' also puts forth the idea that global poverty is a denial or violation of fundamental human rights. This approach provides the basis for the elucidation of a subclass of human rights that focuses directly on the valuable things

that people can do and be, including the capability to be adequately nourished, to have adequate medical care available, etc.

Drawing on the fields of ethics, economics and international law, Vizard provides a detailed analysis of Sen's work and how this has influenced modern thinking on the issue and to the establishment of poverty as a human rights issue.

The introductory chapter to the book provides a background to the debate being explored by analysing what freedom is, what poverty is and summarising in a concise fashion the various authoritative thoughts on the link between poverty and human rights.

In the second chapter, Vizard analyses some of the debates in ethics and liberal political theory raised by the proposition that global poverty is a denial or violation of fundamental freedoms and human rights.

Chapter Three deals with Sen's development of an ethical framework in which freedom from basic forms of deprivation and impoverishment can be meaningfully and coherently conceptualised as fundamental human rights that governments have obligations to respect, protect and promote.

The fourth chapter focuses on Sen's contributions in the field of economics. It considers the ways in which the research agenda has directed international attention towards the critical importance of fundamental freedoms and human rights for economic analysis.

Chapter Five examines the international legal framework dealing with poverty and human rights. It discusses the ways in which the development of the 'capability perspective' in ethics and economics can be reinforced and supported through the somewhat basic – but developing – body of international standards in the field of global poverty and human rights. This chapter touches upon the UN system for the protection and promotion of human rights as well as the responsibilities of non-state actors. Vizard identifies and discusses eight key correspondences between the 'capability approach' and evolving standards in international human rights law and jurisprudence.

Chapter Six approaches the thesis of freedom from poverty as a basic human right by using deontic logic. Vizard explores the ways in which formal analysis can better focus debates about poverty and human rights. She examines Kanger's work to

develop a logical system aimed at the formal representation of all 'rights-types' that are possible and to establish all of the human rights in the Universal Declaration as 'valid' rules of rights within the confines of this system. Vizard discusses various attempts to refine and expand the Kanger system and argues that the proposals for the formal representation of human rights in H. Kanger (1984) fail to capture and formalise widely accepted ethical and legal language expressions of the idea of human rights. Various proposals for moving forward are discussed. These improve on past approaches by building on Sen's concept of 'capability-rights' and 'meta-rights' and by capturing and formalising some of the internationally-recognised standards described in Chapter Five.

The last chapter concludes the book by examining how the link between Sen's 'capability approach' and the international human rights framework provides a basis for the development of cross-disciplinary 'working models' of international accountability and responsibility in the field of global poverty and human rights.

Vizard ends the book with a proposal to combine 'capability space' with a supplementary

theory of international human rights law. Vizard puts forth the theory that internationally-recognised human rights and corresponding obligations imposed on states and other actors have are associated with an implicit capability set.

Polly Vizard's *Poverty and Human Rights* is an in-depth analysis of the idea of freedom from poverty being a human right. This thesis is examined in the varying contexts of ethics, economics and the international legal framework. Sen's con-

tributions in the fields of ethics and economics are examined, as well as the underlying relationship between these two fields and the existing international legal framework. Vizard also examines ways how such international legal framework may be further developed so that may better address the modern debate which constantly challenges the fairness and efficacy of such framework.

Stephanie Zammit

لبعض الدول الأعضاء ومحاولات اللجنة الأوروبية لإنشاء إطار يشجّع الهجرة الهادفة إلى التنمية ويؤيد الجوانب الإيجابية للصلة بين الهجرة والتنمية في صالح الدول التي ينحدر منها المهاجرون. هذا وتحلّ التوصيات والبلاغات الهامة حول الهجرة الصادرة مؤخراً عن اللجنة الأوروبية والاتحاد الأوروبي الصلة بين الهجرة والتنمية، مع أن آثار هذه الصلة ميدانياً لم تُحدّد بعد وهناك صعوبات في ملء الفراغ بين مصالح اللجنة الأوروبية ومصالح الدول الأعضاء من جهة ومصالح الدول الأصلية ومؤسسات التشرّد من جهة أخرى. كما يشير البحث إلى أنه لا يمكن ترجمة الصلة بين الهجرة والتنمية إلى الأمر الواقع إلا إذا أخذت بعين الاعتبار العوامل الداخلية والخارجية المؤثرة في الهجرة، أي موارد المهاجرين (المالية منها والإنسانية والاجتماعية والرأسمال الرمزي) والبيئة الاجتماعية والسياسية والاقتصادية والثقافية التي يمكن فيها خلق هذه الموارد وتعبئتها. ويحاول البحث أن يملأ الفراغ الحالي بين النظرية وسياسة تطبيقها. وللبحث أربعة أقسام: مدخل إلى تطوّر سياسة الهجرة والتنمية في إطار اللجنة الأوروبية، وقسم ثان يعالج الهجرة والتنمية من منطلق الموارد، وقسم ثالث يتعلّق باتجاهات الهجرة في المنطقة الأوروبية المتوسطية، وقسم أخير يضيف الضوء على إمكانية التعاون الإقليمي بغية خلق وتشجيع وتعبئة موارد المهاجرين.

القارة الأوروبية عن القارة الإفريقية سوى مضيق جبل طارق الذي يبلغ طوله 14 كيلومتراً فقط. ورغم طرق الهجرة المختلفة التي أستخدمت في السنوات الأخيرة، غير أنه يمكن فهم السبب وراء أهمية مضيق جبل طارق بصفته العبور المحتوم لآلاف مواطني شمال إفريقيا ومناطق جنوب الصحراء الكبرى الذين يحاولون الوصول إلى أوروبا والاستقرار فيها.

إضفاء طابع الانتظام على المهاجرين غير الشرعيين: طريق نحو الحقوق في الاتحاد الأوروبي

روث فيريرو وجيما بنيول

إن ما طبقت في أوروبا من برامج وأدوات رامية إلى إضفاء طابع الانتظام على المهاجرين غير الشرعيين، في محاولة لمعالجة مشكلة الهجرة غير المنتظمة، ولدت نزاعاً حاداً، وذلك، عموماً، لأن مثل هذه البرامج والأدوات تعمل على حلّ اختلالات وظيفية لسياسات إدارة الهجرة القانونية. فالبرامج المعنية ترمي إلى منح مركز قانوني، ولو بطريقة استعادية، تشمل الحقوق والواجبات، لأناس متواجدين في البلد. والهدف الرئيسي لهذا البحث تحليل ما إذا كانت هذه الآليات في أوروبا سبيل غير متوقع لإدارة الهجرة غير المنتظمة ولتشجيع حقوق المهاجرين.

من الأمن إلى التنمية: مساهمة الهجرة في التعاون الأوروبي - المتوسطي.

اندريا غالينا

رغم ما تشهده المناقشة الجارية حالياً حول الهجرة من تأكيد على الصلة الإيجابية بين الهجرة والتنمية، غير أنه يتم التركيز بشكل أكبر على قضية أمن الحدود، وتبقى قضية كيفية ترجمة الصلة المشار إليها أعلاه ترجمة حقيقية قضية غامضة. ففي الاتحاد الأوروبي ثمة حالة تضارب واضحة بين جدول الأعمال السياسية

امستردام. وفي هذه العملية تأثرت تركيا مباشرة بسياسة أوروبا للهجرة واللجوء بسبب قربها من الإقليم. ونظراً لكونها بلد دخول وعبور وخروج اللاجئين تأثرت تركيا بهذه السياسات بطريقة متعددة البعد. ويأخذ هذا البحث بعين الاعتبار سياسة الاتحاد الأوروبي الرامية إلى تنسيق قضايا اللجوء والهجرة وانعكاساتها على تركيا.

تأمين الهجرة: قضية تركيا

زينب سيلين ارتان

لقد مهدت العولمة الطريق لتشجيع وتعجيل حركات الهجرة في كل أنحاء العالم. أما الدول الأوروبية فرحبت بالمهاجرين بعد الستينيات، ولكن أخذت تطبق سياسات تقييدية إزاء الهجرة ابتداء من الثمانينيات. وصاحب أوربة سياسات الهجرة تطور لإدراك أمني للهجرة حيث تم وصم المهاجرين بأنهم تهديد للوحدة السياسية والداخلية والثقافية والاقتصادية للبلد الذي يستضيفهم. فالاتحاد الأوروبي لا يتبنى ويطبق فقط سياسات تؤدي إلى مفاهيم أمنية للهجرة وتعزيزها، بل يقوم بتصديرها للدول المرشحة للانضمام إليه في صيغة قواعد الاتحاد الأوروبي.

الهجرة السرية عبر مضيق جبل طارق. آثار آليات مراقبة الهجرة من شمال إفريقيا

خوسي رودريغوز ميسا

أنت المعايير التقييدية التي فرضتها القواعد الأوروبية وقيود التأشيرة منذ شهر مايو 1991 في حق المواطنين المغاربة إلى زيادة في الهجرة غير المشروعة أو السرية من المغرب من طرف مواطنين مغاربة ومواطني مناطق جنوب الصحراء الكبرى الذين يعبرون المغرب بغية الوصول إلى أوروبا. ولا يفصل القارة الأوروبية عن القارة الإفريقية سوى مضيق جبل طارق الذي يبلغ طوله 14

المقال أن يركز على اللاجئين والمهاجرين في إفريقيا. وتخلص الدراسة إلى الاستنتاج أنه، في حين أنجزت إفريقيا الكثير نظرياً لحماية اللاجئين ضمن حدودها، وذلك بالنظر، على الأقل، إلى اتفاقيتها، غير أن الحقيقة تثبت عكس ذلك.

ما بعد "سور ادريان" للقرن العشرين: "تصدير" سياسة الاتحاد الأوروبي حول الهجرة ومراقبة الحدود

ماسيمو فريغو

يطبق الاتحاد الأوروبي سياسة ترمي إلى "تصدير"، إلى الدول المغاربية، سياسته المتعلقة بمراقبة الحدود وإدارة الهجرة، وذلك عبر تمويل تفعيل المرافق المضادة للهجرة في هذه الدول. ويتم ذلك في إطار برامج التنمية للاتحاد الأوروبي. ويدرس هذا البحث سنّ هذه السياسة نحو ليبيا حيث تجربة حقوق الإنسان ضعيفة جداً. ويتضح من البحث أن الاتحاد الأوروبي والدول الأعضاء، بسببها لهذه السياسة، تخاطر على خرق التزاماتها الدولية في مجال حقوق الإنسان، دون إدخال شروط قوية يمكن إنفاذها متعلقة بحقوق الإنسان.

سياسة الاتحاد الأوروبي الرامية إلى تنسيق اللجوء ومجهودات تركيا للتكامل

اتيلا جيوكتورك وجيولر ونلو

بعد حربين عالميتين والعديد من المواجهات العرقية، شهد القرن الماضي ملايين من حالات التشرد الإنساني في كل أنحاء المعمورة. واتخذت الدول مواقف مختلفة إزاء المجموعات المشردة وقررت معظم البلدان أن تغلق "أبوابها". واختار الاتحاد الأوروبي، كتجمع إقليمي، أن يقيد دخول اللاجئين من شينغين إلى امستردام. وفي هذه العملية تأثرت تركيا مباشرة بسياسة أوروبا للهجرة واللجوء

اللاجئون في مصر. كما يأخذ هذا البحث بعين الاعتبار موقف الشريعة من هذه القضية.

وربما تجدر الإشارة إلى أن هذا أول مقال يبحث حقّ أولاد اللاجئين في التعليم في مصر من المنظور القانوني وبقدر لا بأس به من التفاصيل. ويهدف المقال أساساً إلى تقديم للمحاميين والأكاديميين معالجة أولى للموضوع، أملاً أن تتبعه مزيد من المقالات، وربما بمزيد من التفاصيل حول هذه القضية. والعقبة الرئيسية التي واجهتها في إعدادي لهذا المقال فقد كمنت في قلة المعلومات المتوفرة وفي الفوضى التي أحاطت بحقّ أولاد اللاجئين في التعليم في مصر. ولقد بحثت معظم المقالات حول هذا الموضوع من الزاويتين الاجتماعية والانثروبولوجية. هذا والسوابق القضائية التي تعالج هذا الحقّ فيما يخصّ اللاجئين تكاد تكون غير موجودة، ولا شكّ أن هذا الأمر زاد عملية جمع المعلومات صعوبة. وإن تمكنتُ من العثور على موارد كافية لإعداد هذا المقال، فذلك يعود لصفتي مستشاراً قانونياً لملتزمي اللجوء ولللاجئين.

حماية اللاجئين من وجهة نظر إفريقية

ميكيو هانسونغولي

إن ظاهرة اللجوء الطبيعية لإفريقيا وذلك نظراً للتجربة السيئة عموماً فيما يخصّ الحكم في هذه القارة. ومن السخرية أن ظاهرة "الاستقلال" في الستينيات والسبعينيات زادت المشكلة حدة. ومع ذلك، أجريت انتخابات هامة في عدة دول إفريقية جاءت بالأمل للملايين. وبالرغم مما تتجم عنه العوامل الطبيعية، وخاصة العوامل من صنع الإنسان، من حالات مؤذية باستمرار إلى اللجوء في عدد من الدول، يميل الاتجاه بشكل عام نحو اجتماعات أكثر استقراراً. وفي أوج المشكلة في عام 1969، تقدّمت إفريقيا باتفاقية خاصة بها هدفت إلى أن تكون تتمة لاتفاقية الأمم المتحدة وإلى التأكيد على خطورة المشكلة في المنطقة. غير أن هذا الإجراء لم ينعكس بنفس القوة في معظم الأنظمة المحلية، واللاجئون الإفريقيون والمهاجرون في إفريقيا لا يزالون يعانون من قلة الحماية. ويضفي هذا المقال الضوء على قانون اللاجئين في إفريقيا. أما الدراسات السابقة حول الموضوع فركّزت معظمها على اللاجئين الإفريقيين في أوروبا وغيرها، بينما يحاول هذا

المقال بتمثيل الهويات الثقافية والعرقية، التي تُمثل لتتغير مع الوضع غير المشروع وغير شرعيين وتأثير هذا التصنيف القانوني على تصوّرهم للهوية. ويتطرق المقال إلى النتائج التي قد تؤثر في الخيارات المتعلقة بسياسة معالجة هذا الموضوع في حال الاستماع إلى أصوات المهاجرين والأهتام بأرائهم.

حدود غير واضحة. تحديد "اللاجئ" في السياسات والقانون والمعالجة الاجتماعية في إيطاليا

كيارا ماركيتي

يعالج البحث ظاهرة الهجرة القسرية في إيطاليا ضمن إطار الطبيعة المتغيرة للهجرة القسرية ككل. إننا نقترح أننا لا نواجه فقط تشكلاً لمختلف أنواع الحماية الدولية، بل نقف أمام عملية أكثر تعقيداً تجعل الحدود غير واضحة بين فئات معينة لما يسمّى "لاجئين قسريين". ولا يكفي البحث بتحليل الإطار القانوني فقط، ولكن يتطرق إلى المعالجة الاجتماعية من طرف أولئك الذين يقرّرون تحديد هذه "العلامات"، ومن قبل أولئك الذين يتفاعلون يومياً مع مختلف اللاجئين.

أبناء اللاجئين في مصر والحق في التعليم. بحث الفجوة بين النظرية وتطبيقها.

طارق بدوي

يركّز هذا البحث على حقّ متّسم بالكثير من الفوضى في شأنه، أي الحقّ في التعليم الابتدائي. إن تحقّظ مصر فيما يتعلق بالمادة 22 (1) لاتفاقية اللاجئين، وتصديقها على معاهدات أخرى لحقوق الإنسان مؤكّدة للطبيعة الإجبارية للحقّ في التعليم الابتدائي، قد ترك الكثير من الأسئلة بدون جواب، منها: هل يتمنّع اللاجئون في مصر بالحقّ في التعليم الابتدائي أم لا؟ يبحث هذا المقال الأسباب وراء هذه الفوضى ويحاول التّقدم ببعض الحلول لإحدى المشاكل التي يواجهونها

اللاجئون والمهاجرون غير القانونيين وملتمسو اللجوء: استخدام فئات استطرادية وشرعية سياسات اللجوء في إطار المعالجة السياسية اليونانية.

لينا كاراماتيدو

من الملاحظ أن جزءاً هاماً من السياسة والمعالجة الأوروبية للهجرة واللجوء اتسم بتصنيف المهاجرين في فئات متباينة، مع تصلب الحدود بين هذه الفئات (لويس ونيل، 2005). وفي حين يمكن اعتبار هذه الظاهرة نتيجة لعدم كفاية تحديد اتفاقية جينيف للاجئين في السياق الاجتماعي والسياسي الحالي، تخدم هذه الظاهرة أهداف سياسات الاتحاد الأوروبي والدول الرامية إلى مراقبة الهجرة ومنع الهجرة غير المنتظمة. ومما يؤكد هذا الاتجاه إعادة تصنيف ملتسمي اللجوء كمهاجرين غير قانونيين. وزعم ستوري (2005:17) أن ذلك عمل استطرادي ذو معنى وذو المضاعفات الهامة التي تؤثر كيفية اعتبار ملتسمي اللجوء والمهاجرين غير المرخص بهم والتفاعل معهم. ولقد تم تجريم المهاجرين غير المنتظمين وأعتبروا تهديداً لأمن الدولة، مما يشكل تحركاً استطرادياً يجيز السياسات التقييدية (دين بور 1996، هامفري 2003، ستوري 2005). ويهدف هذا البحث بالمرتبة الأولى إلى دراسة استخدام الفئات "ملتسم اللجوء" و"اللاجئ" و"المهاجر غير القانوني" في المعالجة السياسية اليونانية، مع الأخذ بعين الاعتبار العوامل المحلية والأوروبية. وثانياً، يأخذ البحث بعين الاعتبار التأثيرات الاجتماعية على المستوى الاستطرادي، وخاصة فيما يتعلق بشرعية السياسات التقييدية وحرمان الحماية للمهاجرين القسريين.

استراتيجيات الهوية للمهاجرين غير النظاميين في النمسا

كاتيرينا كراتسمن

من النادر أن يجد المهاجرون غير النظاميين آذاناً صاغية، ويبدو أنهم موضع معالجة تركز بالمرتبة الأولى على تأثيرات الهجرة غير الشرعية في الدول التي ترسل المهاجرين والدول التي تتلقاهم: خيارات الهجرة وأنظمة اللجوء والحكم ومراقبة الهجرة إلى آخر ذلك. إنني أعالج هذا البحث من المنظور الإثنولوجي، مركزة على الاستراتيجيات المتعلقة بالهوية للمهاجرين غير النظاميين. ويهتم

مجلة البحر المتوسط لحقوق الانسان

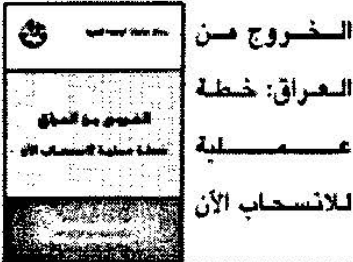
الملخصات باللغة العربية



صدر حديثاً عن

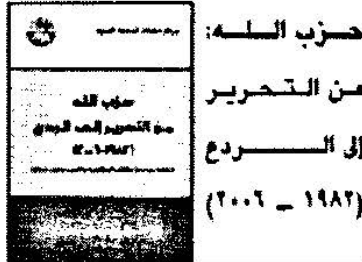
مركز دراسات الوحدة العربية

بنية مسارات تاوره - شارع ليون - ص.ب. ٦٠٠١ - ١١٣
الحمراء - بيروت ٢٠٩٠ - ١١٠٣ - لبنان
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إنترنت:



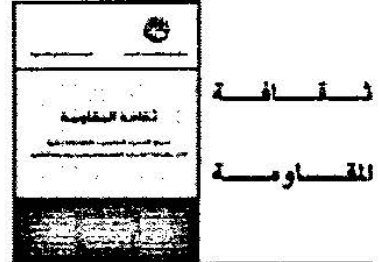
الخروج من
العراق: خطة
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د. جورج ماكغفرن ود. وليام بولك
(١٢٦ ص - ٥٤ \$)



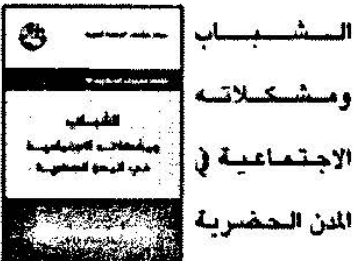
حزب الله:
من التحرير
إلى السردع
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د. عبد الإله بلقزيز
(١١١ ص - ٥٤ \$)



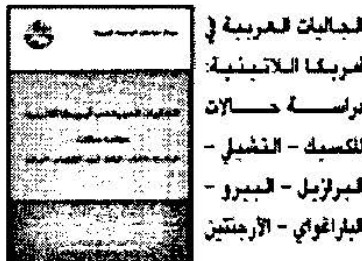
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ندوة فكرية
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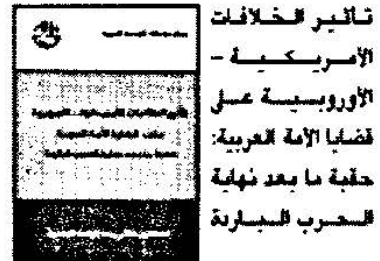
الشباب
ومشكلاته
الاجتماعية في
المدن الحضرية

د. علي بوخافة
(٢٩٦ ص - ٥٨ \$)



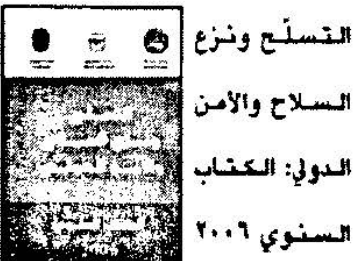
الجزائريون العرب في
أمريكا اللاتينية:
دراسة حالات
للبيسك - النخيلي -
قبرلايل - البيرو -
قبرلاغوي - الأرجنتين

مجموعة من الباحثين
(٢٥٨ ص - ٥١٠ \$)



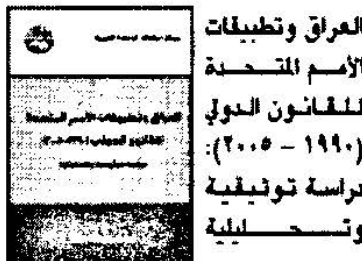
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د. ناظم عبد الواحد الجاسور
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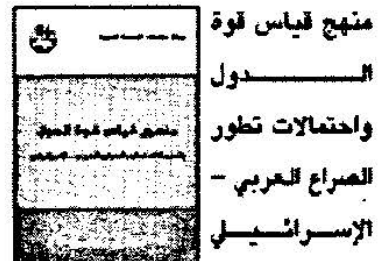
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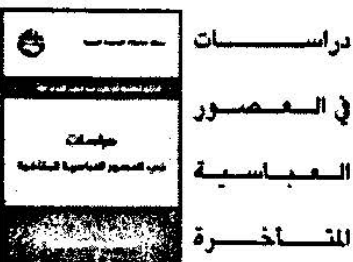
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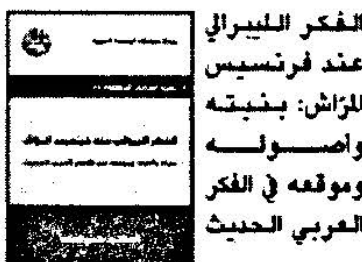
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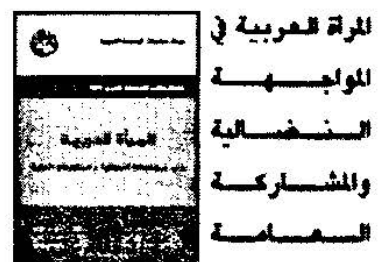
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الحمراء - بيروت ٢٠٩٠ - ١١٠٢ - لبنان
هاتف: ٨٦٩١٦٤ - ٨٠١٥٨٢ - ٨٠١٥٨٧ (٩٦٦.١)
فاكس: ٨٦٥٥٤٨ (٩٦٦.١) - برقية: مرعوي
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http://www.caus.org.lb
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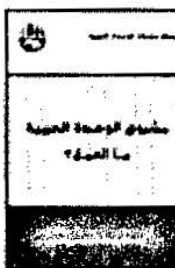
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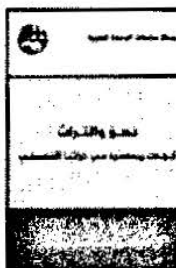
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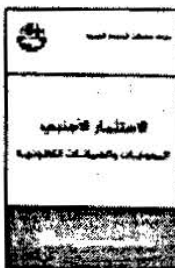
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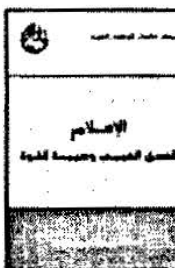
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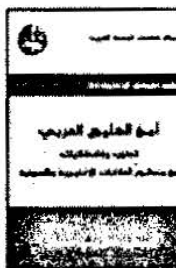
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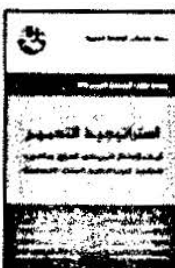
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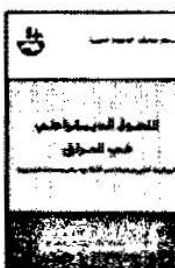
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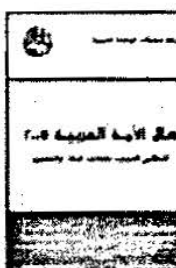
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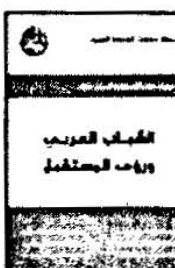
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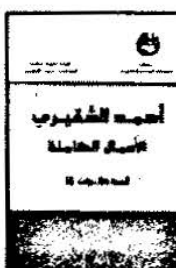
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Mediterranean Journal of Human Rights

VOL. 8, ISSUE 2, SPECIAL EDITION

Human Rights and the Forgotten Histories of the Israeli/Palestinian Conflict

Edited by: Dr. Ilan Pappé, Ms. Hadeel Al-Treiki, Dr. David Zammit



PHOTO: STEVE SABELLA

This special issue of the Mediterranean Journal of Human Rights aims to explore the presence of human rights discourse and issues within various histories of the Israeli/Palestinian question. We hope in this way to participate in what can never be an exclusively academic search for new perspectives on this deeply disturbing conflict.

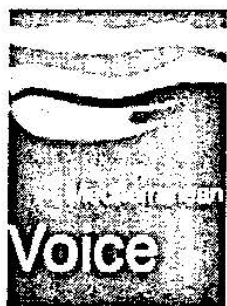
Israeli and Palestinian academics, human rights advocates, and journalists in this issue focus on the interface between history and human rights highlighting the moral and political implications of historiography, while also acknowledging that rights are never purely abstract principles but are created and invoked in specific historical contexts.

Contributors include: Salman H. Abu-Sitta, Eli Avraham & Anat First, Ahmed Badawi & Heike Kratt, Omar Barghouti, Randa Farah, Michael L Gross, Mahdi Abdul Hadi, Adam Hanieh, Josh Kaplan, Victor Kattan, Ilan Pappé, Bernard Sabella, Raji Sourani, Justus Reid Weiner.

Copies of this special edition (Vol.8 No. 2) of our journal can be ordered from: The Secretary, Mediterranean Journal of Human Rights, The Faculty of Laws, University of Malta, Msida MSD 06, MALTA [Tel: (+356) 23402785; Fax: (+356) 21324478; Email: mjhr@um.edu.mt]

A Mediterranean Voice (MedVoice) for a Cross-Cultural Dialogue

Some time ago, four graduates from the Mediterranean Master's Programme in Human Rights and Democratisation, University of Malta, decided to initiate a dynamic tool for inter-cultural dialogue, the Mediterranean Voice Website (www.medvoice.org), as the first step towards the fulfilment of their long-term project, which is the establishment of a Mediterranean Documentation Center for Human Rights.



The main concern of the Mediterranean Master's Programme graduates, was to ensure the continuation of the unique chance for a Mediterranean dialogue that they were offered during the course and furthermore attempt to contribute in the promotion of the human rights awareness within the Mediterranean basin, in accordance with the Programme's aims.

MedVoice – the new website

As an initial step they decided to concentrate their efforts on the creation of a website, which includes all relevant information regarding human rights in the Mediterranean (NGOs, IGOs, journals, law, media etc), until the suitable circumstances for the assignment's total application are shaped. The site, both in English and Arabic, includes a collection of selected articles, country information, as well as an exhaustive list of opportunity links (jobs, internships, programmes, etc.). In view of the promotion of human rights and the launch of a fruitful dialogue in the area, as first raised issue in their 'Opinion' forum, the floor is set for a 'Reform Debate concerning the Arab world', calling for ideas and comments.

MedVoice – the Documentation Center

Their ultimate ambition, however, still remains their long-term project, the creation of a Mediterranean Documentation Center for Human Rights. The aim is to establish a body empowered to mediate among relevant human rights institutions (e.g. EU, universities, NGOs, etc.) and young human rights experts from southern Mediterranean countries working at the local level through flexible mini-projects.

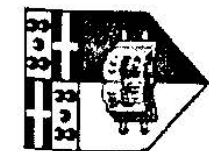
Despite the obvious necessity for settlement of justice and order in the concerned areas, young people especially, and in particular those who have both a personal and professional interest in human rights, face difficulties in having their voice heard in a "Mediterranean dialogue," due to lack of facilities and formal linkages. MedVoice seeks to give such people a voice. Commissioned by the University of Malta, the MedVoice team completed a large database of human rights experts from southern and eastern Mediterranean countries.

MedVoice – need for support

MedVoice is currently going through a strategic planning process in which the MedVoice team is trying to find organizations and academic institutions interested in hosting the website and project or through a concrete support.

For more information: www.medvoice.org

Contact: medvoice@medvoice.org



The Faculty of Laws at the University of Malta

was established over 250 years ago. The University of Malta traces its origins to the founding of the Collegium Melitense which was set up through direct papal intervention in 1592. The Faculty of Laws currently offers four taught masters programmes and one by research:

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- **Master of Arts in Laws**
- **Master of Arts in Human Rights & Democratisation**
- **Master of Arts in Financial Services**

Each of these programmes can be followed on a full-time (1 year), or a part-time (2 year) basis. We also welcome enquiries from students wishing to pursue research degrees for either a Ph.D. or M.Phil. Language of teaching is English. For further information on these programmes, and the research interests of the members of staff of the School, please visit our website at: <http://home.um.edu.mt/laws/>

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