



# **University of New York Tirana**

## **Research Paper**

### **Internal displacement protection by the doctrine**

Student: Doriana Qoli

Course: Refugee Law

Instructor: Dr. Denard Veshi

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## Abstract

The enormous number of individuals moving from one place to another, is a phenomena which gives legal and social effects to the society. These mixed movements might include either migration, refugees, or internal displaced individuals, who for one reason or another could choose spontaneously or not to move abroad or to find the safest residing place within their country. The paper will focus in the analysis regarding the protection of individuals in the case of the internal displacement. The structure of the paper will be the following: after an overview of the similarities and differences between economic migrants and refugees, the paper will focus on the mutual common characteristics between internal displacement and refugees. The research will study the “Guiding Principles on Internal Displaced Individuals”. Although this is a *soft-law* document, it gives important rules which might be considered a legal requirement for states to comply since it is published under the umbrella of UNHCR. The paper will apply a legal analysis of the “Convention Relating to the Status of Refugees” of the 1951, and of the “Guiding Principles on Internal Displaced Individuals”, in addition to the case-law study. In the conclusion, the paper will suggest some of the main reasons of the protection of internal displacement.

*Keywords: internal displaced individual, refugees, economic migrants, protection, human rights*

## Introduction

The number of displaced individuals is growing every day according to statistics provided by different organizations such as the United Nations High Commissioner for Refugees (UNCHR), or United Nation Office for the Coordination of Humanitarian Affair (OCHA) and many other studies. According to the statistics provided by the UNCHR, in 2018 there were over 68.5 displaced individuals in total all over the world. From that, only 40 million were internal displaced individuals, 25.4 million were refugees and 3.1 million were asylum seekers. As it can be seen internal displaced individuals composes nowadays the highest number of displaced persons. The research question of this paper is to give a potential legal answer to the concern regarding why the doctrine applies a protection for internal displaced individuals (IDPs), since it is widely known that refugees movement are a well discussed issue and the interest for their protection began since in the early 1920s . Meanwhile the concept of internal displacement was a new entry between the 1990s. So during this short period of time, the paper aims to better understand the main reasons why has the UNCHR given a big importance to their protection. In order to give an answer to the main question and its derivatives as well, it is needed to analyze three concepts of displacement such as economic migrant, refugees, and internal displaced individuals. Their differences and mutual characteristics will be revealed by studying some legal documents such as the “1951 Convention Relating to the Status of Refugees”, and the “Guiding Principles on Internal Displaced Individuals”. This analysis will show that even though the first document regarding the 1951 Convention on protection of refugees has a strong legal power, the Framework on the principles for the protection of internal displaced individuals has also become a very important instrument for the member states as well, due to the main fact as a publication of the UNCHR. The study will be followed by some case-laws by taking in consideration both

civil law and common law system. During the analysis it will be observed that even though these two systems differ from each other because the first one gives a major importance to codified legislation and the second to case laws which are later used as precedents, when it comes to protection of human rights they all have one single goal.<sup>1</sup> In the conclusions, the paper will reveal the answer of the main issue of this study.

### Differences between a refugee and an economic migrant.

The flow of refugees from all over the world has been present as a phenomena for centuries but the first international legally- binding modern, still in application protecting the right to asylum is the 1951 Convention “Relating to the Status of Refugees”. The Office of United Nations High Commissioner for Refugees has given a broad authoritative interpretation of it and this international organization puts in practice all the articles of the Convention with its main aim to give international protection to all asylum seekers.<sup>2</sup> In order to better understand the differences between a refugee and an economic migrant, it is important to analyze the legal definition for each of them. The 1951 Convention in Article 1 A(2) defines refugees as following : “...the term “refugee” shall apply to any 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.”<sup>3</sup>

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<sup>1</sup> O'Donnell, G. (2004). *The Quality of Democracy: Why the Rule of Matters*, pg. 32-46.

<sup>2</sup> Cherubini, F. (2015). *Asylum Law in European Union*. Routledge Research in Asylum, Migration, and Refugee Law: New York, pg.8.

<sup>3</sup> Art.1 (a), section 1: *1951 Convention Relating to Status of Refugees*.

“In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”.<sup>4</sup>

The term well-founded fear is the key phrase which aims to reveal that even though ‘fear’ it is usually found as a subjective form of expression, in this case it is a must to be well founded so to have an objective basis.<sup>5</sup> This objectiveness is of a major importance in order to prove the threat for your life by your own state, by showing all the necessary and required facts. Article 1A (2) of the 1951 Convention, shows also the grounds for persecution which leads the individuals to move outside of their origin country. The accepted reasons for a well-founded fear of life are that of race, religion, nationality, membership of a particular social group or political opinion.<sup>6</sup>

Race is one of the five grounds foreseen by the Convention and one of the most wide spread violations which it includes all kinds of ethnic groups. It often happens that much more discriminated in this situations are ethnic minorities, who being in a non-dominant position compared to the rest, less powerful and always asking for their rights, it is much easier for the government not to ensure those rights and making their life impossible. Religion as well it amounts ground for a well-founded fear of persecution. One of the most well-known cases in certain states, is that where religion plays a major role in people’s life. Since the latter refuses to accept the religion such as including the refusal to hold particular beliefs, to practice that

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<sup>4</sup> *ibid.*

<sup>5</sup> Division of internal protection. (1979). *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNCHR, Geneva, pg. 3.

<sup>6</sup> *ibid*, pg. 7.

particular religion or to conform in accordance with the teachings of that particular religion<sup>7</sup>, this can amount grounds for persecution.

Nationality is another valid reason foreseen by the Convention. By nationality is understood the citizenship of an individual. This article gives the opportunity to ask for asylum also to stateless persons or to individuals who have two citizenships. In this case if one of the countries is persecuting him than is the obligation of the other country to give him the international protection. Continuing with Membership of a Particular Social Group, it needs a further interpretation because it may include many issues. In the case *Cheung v. Canada* the Federal Court of Appeal of Canada held that: “A Particular social group is a group of persons who share similar backgrounds, habits, social status, political outlook, education, values, economic interest, often in contrary to those of the prevailing government by sharing solidarity with each other and with the purpose for their association not to be required to change it”.<sup>8</sup> So this shows the variety of the cases which may fall under the concept of a particular social group are many. What is important is that this social group has a different interest compared to the state. When these group of individuals makes them differences open, then the state by knowing it does anything to make it impossible for them to live. The last of the reasons is the political opinion. Under this ground, the individual must prove that he or she has a well-founded fear of being persecuted due to the fact that it holds a different political opinion from those of the Government.<sup>9</sup> Any claim on the basis of political opinion, presupposes that the person holds or might hold opinions which cannot be tolerated by the authorities or society because they are in contradiction with their policies or traditions. This kind of fear is founded most in communist countries where people are

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<sup>7</sup> *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention relating to the Status of Refugees*. (1992, January), para 71.

<sup>8</sup> *Cheung v Canada*, [1993] 2 F.C. 314, pg.4.

<sup>9</sup> *Handbook on procedures and criteria's determining refugee status under the 1951 Convention relating to the Status of refugees*. (1992, January), para. 80.

forced to believe in a particular ideology and any movement in contrary to it, amounts a danger for people's life. In all of the previous cases the test of well-founded fear would be based on a calculation of the consequences. This means which are the consequences if the hosting state does not give the refugee status if they deem that they do not fulfill the requirements of a refugee and turns them back to their origin country.

In order to give an answer to this hypothesis, it should be studied article 33(1) of the "1951 Convention Relating to the Status of Refugees" which provides for the "Prohibition of expulsion or return ("refoulement"). This article states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".<sup>10</sup> Based on this article, it is an obligation of the contracting states of the 1951 Convention not to return a person who fulfills the criteria's of a refugee back to his origin country. Since the reason of his movement from their origin country was due to a well-founded fear of persecution, this means that if they would be exposed to an immediate threat of their life in case that state does not respect this provision. The UNCHR in 2007, revealed an "Advisory Opinion" regarding the principle of *non refoulment* where among other things held that this principle is not referred only to refugees but also to asylum seekers.<sup>11</sup> For as long as there is no final decision determining their status this means that there is a possibility that their lives might be in risks as well. This leads to the following question. Based on this article, a state cannot return back neither a refugee nor an asylum seeker because by doing this it will put in danger their life. In case that a person does not gain the status of a

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<sup>10</sup> Art.33 (1), section 5: *1951 Convention Relating to Status of Refugees*.

<sup>11</sup> UNHCR. (2007, January). *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, pg.3.



refugee it means that he has no well-founded fear of life , so the state does not accepts them due to the fact that there is no reason to believe that his life would be in danger.

On the other hand, when it comes to economic migrants, there is not a proper legal definition because it does not exist any international agreement which would force their legal position.

Economic migrants are individuals who choose to move from their origin country, not because of a direct and well-founded fear of persecution, but for economic reasons in order to seek material improvement for their lives.<sup>12</sup> Since they do not decide to go somewhere else from the fear of persecution it means that in case that they return they would face no threat for their lives by the government. Connected to this, a state has no legal obligation to accept an economic migrant due to the fact that there is no international agreement that could protect them and in many states the policy makers tend to say that if an individual enters in their country illegally so without any legal document, then that individual must be an economic migrant who is seeking a better life and must be turned back.

Ian Goldin (2018), stated in his report on “Migration and Economy” that : migration has been present for many years but only lately countries started to ask for passports by also increasing boarders control.<sup>13</sup> This shows that for an economic migrant nowadays to go abroad and to live in the country that they have chosen illegally, is very difficult because no state would allow a migrant that would profit from that state’s economy by not paying any taxes as all individuals do. So everything in violation with their laws is an incentive for the states not to accept this category.

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<sup>12</sup> UNHCR. (2016, July). *UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?*

<sup>13</sup>Goldin, I (2018). *Migration and Economy*, Economic Realities, Social Impact & Political Choices, pg. 17.

As it can be seen these two concepts are very different from each other in many aspects. Now the paper will make a study regarding the concept of refugees and of the main focus that of internal displaced individuals. This leads to the main research question of this paper.

### Mutual characteristics and differences between refugees and internal displaced individuals.

This section will discuss two other categories, including as the new and main concept that of internal displaced person. In order to provide for the mutual characteristics and differences between the refugees and internal displaced individuals, a focus shall be given to their definitions. The paper has already discussed what a refugee is therefore it will continue with the definition of IDPs. Actually, there is no legal definition regarding internal displacement individuals, but the most accepted term is provided by the Framework on the “Guiding Principles on Internal Displacement” by the UNCHR. Based on this framework it is stated that “Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border”.<sup>14</sup> This concept is considered as a *soft-law* definition rather than a legal one because it is not a legally-binding document therefore it has not the same strength as a treaty.<sup>15</sup> Nevertheless the spirit of this Framework, is a composition of human rights law which will be analyzed further in the next chapter.

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<sup>14</sup> UNHCR, (2004), *Guiding principles on Internal Displaced Individuals*, pg.1.

<sup>15</sup>The Brookings Institution’s Project on Internal Displacement, (1999), *Handbook for Applying the Guiding Principles on Internal Displacement*, pg. 6.

The definitions of the two categories, leads to their respective mutual and different characteristics. The first aspect in common is that both the refugees and displaced people, are forced to move from the place where they live and conduct their everyday activity. The reasons for their movement are external factors which in the case of refugees have been mentioned previously. Meanwhile, regarding the pushing factors that oblige people to move in case of internal displacement are usually reasons of arm conflict within the region, or continuous violation of human rights by the government and of course it cannot be exclude any natural catastrophe.<sup>16</sup> People by having it impossible to live where they used to, are now obliged to move away.

By having no other choice but to move, this part becomes the crucial point which makes the difference between a refugee and a displaced person. The paper showed that based on the 1951 Convention on protection of refugees, people by having a well-founded fear of life due to race, religion, nationality, being part of a particular social group or political opinion, move outside of their origin country and have the right to ask for international protection in the host country. The latter due to the 1951 Convention, if the person complies with all the requirements, grants to them the international protection. On the other hand, internal displaced people do not cross the boarders of their country but they move within the country hoping to find a safe place where to live, so this means that they still continue to be under the protection of their state.<sup>17</sup>

It was mentioned above that due to the well-founded fear of life and based on article 33 of *non refoulment*, which provides the hosting state obligation to not return back the refugee in his origin country because his or her life would be in danger.<sup>18</sup> In the same manner it could also

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<sup>16</sup> UNHCR, (2004), *Guiding principles on Internal Displaced Individuals*, pg.1.

<sup>17</sup> The Brookings Institution's Project on Internal Displacement, (1999), *Handbook for Applying the Guiding Principles on Internal Displacement*, pg.5.

<sup>18</sup> Art.33 (1), section 5: *1951 Convention Relating to Status of Refugees*.

happen to an IDP. In case that they return back, it might exist the probability that the state authorities might threaten them or are unable to protect them for example in case of a natural phenomenon if their home is destroyed and therefore their life conditions would be miserable.

Similarly to article (33) of the 1951 Convention, in the case of IDPs, section 5, principle 28 until 30 of the: “Guiding Principles on Internal Displacement”, presents the principle of return, resettlement and reintegration which shows that in this case the state must provide the means and conditions for the individual to return back in a safe way to the residence where it used to live or in a new residing place within the country. The return must be under his free will and by creating programs to integrate the individuals in the society. Regarding the right to return and resettle, if a person does not wish to go back home but wants to move in another place within the country it has his full right to ask for its accomplishment<sup>19</sup> and shall not face any kind of discrimination. This means that the individual is entitled to live with dignity and equally like the rest of the people. Another fundamental right is the regaining of their property possession and if that is not possible than the state must compensate the person.

Another similarity between Refugees and Internal Displaced Individuals is that both in many cases have been protected by the European Court on Human Rights. Many cases regarding refugees have been sent in front of the European Court of Human Rights by including as the main issues falling under articles of the ECHR right against torture, right to life, right to family.<sup>20</sup> On the other hand, the Framework on the “Guiding Principles on Internal Displacement” in its

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<sup>19</sup> The Brookings Institution’s Project on Internal Displacement, (1999), *Handbook for Applying the Guiding Principles on Internal Displacement*, pg.55.

<sup>20</sup> Cherubini, F. (2015). *Asylum Law in European Union*. Routledge Research in Asylum, Migration, and Refugee Law: New York, pg.102-125.

third section has in many of its principles, articles deriving from the European Convention on Human Rights which will be analyzed in the next chapter.<sup>21</sup>

One of the most famous cases which left a precedent in many fields of law but especially gave life to the protection of IDPs from the European Court of Human Rights (ECHR), is the case of *Cyprus v. Turkey*.<sup>22</sup> In this case when the Turkish army invaded the northern part of Cyprus, they also proclaimed the “Turkish Republic of Northern Cyprus” and enacted a new Constitution. The Cypriots claimed in front of the ECHR, that during this period the Turkish army killed a lot of persons, others disappeared and there was a considerable number of displaced individuals which were forced to move to the Southern part of Cyprus without any possibility to return back where they used to live. Cyprus was pretending for several violations of the European Convention of Human Rights and after a long judicial process, proving of facts and circumstances the Court found several violations from the Turkish government.

One of the violations which was found, was in Article 8 on the “Right to respect for private and family life”<sup>23</sup> in conjunction with Protocol 1-1 on the “Protection of Property”<sup>24</sup> and with Article 13 of the Convention on “Effective Remedies”.<sup>25</sup> The European Court of Human Rights argued that the refusal of allowing internal displaced individuals to turn back in their territories where they could continue with their life near their family, prevention of the latter to have access in their rights as owners of those properties and adding also the fact that the Turkish Government failed to provide effective remedies to Cyprus citizens in order for them to fight for their rights

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<sup>21</sup> UNHCR, (2004), *Guiding principles on Internal Displaced Individuals, Section 3.*

<sup>22</sup> *Cyprus v. Turkey*, Ap. no. 25781/94, 10 May 2001.

<sup>23</sup> Art. 8, section 1: *European Convention on Human Rights.*

<sup>24</sup> Art.1, Protocol 1: *European Convention on Human Rights.*

<sup>25</sup> Art. 13, section 1: *European Convention on Human Rights.*

(such as that of turning back and the right of property), was a direct violation of the Turkish Government.

The question raised in this point is that in what extend do the international authorities and the international law monitors the states by making sure if the protection of human rights is actually applicable. This is exactly what the third chapter of this paper will analyze after examining the role of the state itself and its duty as the main authority regarding the internal displaced individuals.

### Internal Displacement Protection.

As previously mentioned, the first entitled authority which has the jurisdiction to secure full enjoyment of the human rights for the IDPs, is the state itself.<sup>26</sup> Due to the fact that the movement of these individuals remain within the limits of the state's boarder it shows that their protection must be primarily guaranteed by the government because IDPs are still under the sovereignty of their state.<sup>27</sup> By duty of the state it is understood the duty that all the legitimized authorities have, such as the public authority, military force or police agents. Protection of human rights in this case falls under three categories such as: duty to respect the right of movement, to protect the human rights and duty to take all the necessary means to fulfill these rights.<sup>28</sup>

The first category of duties means that in case of an emergency the state shall not impede the individuals to move in a safe area if they chose to do this within the country, so must not interfere to the individuals in exercising this right.<sup>29</sup> The second duty has as its main aim to avoid

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<sup>26</sup> Global Protection Cluster Working Group (2010, March), *Handbook for protection of internally displaced individuals*, pg. 9.

<sup>27</sup> Ruddick. E. (1997). *The Continuing Constraint of Sovereignty: International Law, International Protection, and Internally Displaced*.

<sup>28</sup> *ibid*, pg.24.

<sup>29</sup> *Ibid*, pg.24.

any violation of human rights by third parties toward IDPs. This prevention is done by the state investigating and making sure that people which have moved in a safe area are actually being protected by state authorities and the latter is not allowing any third party to violate their rights , for example rape, prevention from food aliment, shelter etc. In order for the previous duty to be fulfilled, the state has to take measures which leads us to the third category of duty. The measures can vary from the basic needs for example water, food supply, shelter, or medical services to a more advanced measure such as asking for international support.<sup>30</sup>

In the previous section, the paper introduced the Framework on the “General Principles on Internal Displacement”. This framework gives a general overview of all the rights of IDPs, general principles on protection, resettlement and reintegration and right to humanitarian assistance. Even though this document is non-binding, the fact that it includes and elaborates principles of international law and international human rights law, it has now gained its authority within the states.<sup>31</sup> The content of this framework consist on thirty principles which sets the rights of IDPs and guarantees their protection. Its sections are composed as following: “General principles”, “ Principles Relating to protection from displacement”, “ Principles relating to protection during displacement”, “ Principles relating to humanitarian assistance” and “ Principles relating to Return, Resettlement and Reintegration”.

The first section of the framework has as its main focus the equality and non-discrimination of internal displaced people despite race, religion, color, sex, political opinion etc. This means that beside the fact that they are obliged to move from their home and not to live normally as they used to, this does not take away their right of being equally treated in front of the law as the rest of the population. On the other hand, the nondiscrimination includes also the fact that they have

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<sup>30</sup> Ibid, pg.24.

<sup>31</sup>The Brookings Institution’s Project on Internal Displacement, (1999), *Handbook for Applying the Guiding Principles on Internal Displacement*, pg.2.

responsibilities as well because equal treatment means both rights and duties.<sup>32</sup> For example IDPs can be subject to criminal offences if they commit a crime. The guideline expresses the non-discriminatory treatment toward IDPs, because they are considered as a potential group of people whose human rights might be violated much more easily than the rest. As mentioned previously in the paper, the national authorities have the responsibility that under the domestic law of the state to ensure the protection of their rights. This is another principle of the first section which emphasizes that due to the fact that all individuals including IDPs are equal, the state as well has to perform its duty and protect these group of individuals.

The next section from principles five to nine, offer some principles regarding protection from involuntary displacement forced by any arbitrary action of the state.<sup>33</sup> This principle demonstrates that arbitrary action of the state constitutes a violation of human rights because it prevents people from freely choosing where to reside. As a result the only moment on which a state can interfere in people's decision regarding the movement it is acceptable only if the state manages to justify their actions.<sup>34</sup> One of the cases it could be in times of war where only if the state authorities manages to prove that their safety is not guaranteed in their residence than this would not constitute an arbitrary action. It is of course, as previously mentioned in the paper, the duty of the state to find proper places where the basic standards of life are met, such as food, water, shelter, nutrition, health care etc.

The third chapter of this Framework focuses on the protection during the displacement because this category is a potential group whose basic human rights due to their non-favorable position can be easily violated. This section is strictly connected with the rights provided by the European Convention on Human Rights (ECHR) so they can be parallelized with each other. The first

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<sup>32</sup> *ibid*, pg.9.

<sup>33</sup> *ibid*, pg.15.

<sup>34</sup> *ibid*, pg. 16.



provision of this chapter it is the same article provided by the ECHR, which is article 2 “Right to life”.<sup>35</sup> It highlights the fact that no IDP can be deprived from the right of life and it shall be protected especially from specific situations which randomly happen in this cases, such as Genocide, Murder, Arbitrary Execution or enforced disappearances. Based on the jurisprudence of the European Convention on Human Rights, in the case *L.C.B v. UK*, the right to life is a right born with the person and therefore it is the state’s positive obligation to undertake every possible measure to protect it.<sup>36</sup> The same procedure is meant also by the IDPs protection framework.

Again in the same section, the Framework continues with several principles regarding the right to dignity and integrity of the person. This principle is a derivation of Article 3 of the ECHR on “Prohibition of Torture”.<sup>37</sup> The prohibition against torture or any inhuman treatment is a fundamental right.<sup>38</sup> Torture or inhuman treatment may include anything such as rape, assault mutilation or any kind of violence toward IDPs.<sup>39</sup> Another principle is the right to preserve the family unit, meaning that in case of displacement during the movement and also when arriving in the destination, the family has to stay together. This principle gives focus in particular to the relation between the children and the mother. The European Convention on Human Rights also provides for the right to family and private life which is article 8 of the ECHR.<sup>40</sup>

Internal Displaced Individuals shall be all equal to the law. In order to further develop the concept of equality, the framework provides for the rights of freedom of thought, consciousness, religion, opinion, right of voting even though not living in their residence. This strengthens once more that no matter the fact that a person is in the position of an IDP, the state must provide for

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<sup>35</sup> Art. 2, section1: *European Convention on Human Rights*.

<sup>36</sup> *L.C.B v. UK*, Ap. no. 16094/90, 9 June 1998, para.36.

<sup>37</sup> Art.3, section 1: *European Convention on Human Rights*.

<sup>38</sup> The Brookings Institution’s Project on Internal Displacement, (1999), *Handbook for Applying the Guiding Principles on Internal Displacement*, P. 27.

<sup>39</sup> *Ibid*, pg. 27.

<sup>40</sup> Art.8, section1: *European Convention on Human Rights*.

all the possible means to ensure to the individuals to exercise all of the individual rights enacted by domestic and international law.<sup>41</sup>

The Framework sets out in its fourth section the role of not only the national authorities but that of international bodies as well in order to provide assistance for IDPs. Since the duty of the national authority is analyzed above, the analysis will continue regarding the role of the international authorities. In June 2017 the United Nation High Commissioner implemented the framework on “UNCHR’S role in support of an enhanced Humanitarian Response to situations of internal displacement policy framework and implementation strategy”<sup>42</sup>. With this framework the UNCHR has implemented its role and policy regarding IDPs protection. The articles reveal that UNCHR has undertaken the duty in taking measures to protect IDPs, because even though they are not considered as refugees, the fact that massive violence of human rights occurs during displacement it falls under their jurisdiction to ensure individuals basic human rights . Section 4, paragraph 27 sets some of the strategies that UNCHR will undertake such as special focus on closely working with the states in which the phenomena happened, cooperation with other international actors by finding solution in ensuring their basic needs, promoting solutions for their return in their residence or to find another suitable place<sup>43</sup>. In the next paragraph (no 28) of the same section it is revealed that the focus it will also be given to the process of legal, social and economic integration of IDPs.<sup>44</sup>

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<sup>41</sup> Deng. F (1995). *Frontiers of sovereignty: A Framework of Protection, Assistance, and Development of the Internally Displaced*, pg. 249-286.

<sup>42</sup> UNHCR, (2007, June): *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*.

<sup>43</sup> UNHCR, (2007, June): *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, para. 27

<sup>44</sup> UNHCR, (2007, June): *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, para 28.

Paragraph 29 on the UNCHR framework shows that the strategy that will be followed it will be based on age and gender diversity<sup>45</sup>. This means that since females are a much more delicate group of people and have less power than males, the organization will try to ensure the rights starting from this category. The last section of UNCHR framework focuses on the implementation of their policies. In paragraph 35 it is mentioned that a staff will be appointed in order to coordinate the full implementation of the strategy set out from this framework<sup>46</sup>. The support team and the coordinator will have to meet several time in order to be informed for the situation and in what stage has the implementation been done. This group of individuals it will be composed of experts with full knowledge of the framework and the IDPs delicate situation, in order to better implement the UNCHR framework goals.

The last section of the Framework on the “General Principles on Internal Displacement, are principles analyzed in the previous chapter regarding the “Principle relating to Return, Resettlement and Reintegration”. The comparison between this article and article 33(1) of the 1951 Convention gave a clear distinction and similarity between the two.

## Conclusion

This paper focused on the issue of internal displaced persons. Its main aim was to show through various analysis that even though not having a legally binding document regarding protection of IDPs, their status is still protected by the states and the international authorities. The analysis of the differences between the economic migrants, refugees, and internal displaced individuals was prepared by using the “1951 Convention Relating to the Status of Refugees”, and the Framework on the “Guiding Principles on Internal Displaced Individuals”. The 1951 Convention was used to

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<sup>45</sup> UNHCR (2007, June): *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, para 29.

<sup>46</sup> UNHCR (2007, June): *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, para 35.

show the strong legal position that refugees have in the international law. Meanwhile the framework showed that even though it is not a legally binding document it has actually become one. This is due to the fact that it is a publication of the United Nation High Commissioner for Refugees which is one of the main international institution assisting on the protection of different vulnerable group of individuals facing human rights violations. After that case laws from both civil and common law system revealed that even two different systems can lead to the same results. This means and proves that human rights are primary in the sphere of both domestic and international law and is an obligation for the states to protect them. All these conclusions lead to the main question. The reason why the doctrine approaches protection of IDPs is that as human being when their life is at risk, their basic rights are violated and not even the state itself undertakes any measure to protect them, than a higher interference is needed. The international authorities cooperate with each other in order to give assistance to these individuals because human rights are rights born with the person, without any possibility of derogating them and they can cede to exist only with the death of the person. This means that independently from the circumstances that an individual is found, his human rights must always be respected by the authorities and shall be promoted in both national and international level.

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# **Refugee Impact in the Host Countries**

By Laert Gjata

**Supervisor:** Dr. Denard Veshi

Paper in 'Refugee Law'

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## Abstract

Starting from the late 1970s the world has been very much aware of the serious effect that extensive scale of refugees has on the social, monetary and political existence of host countries. This paper focuses on the impact that refugees have on the host countries. While the first section focuses on what the effect of refugees is in the labor market of host countries, the second sections investigates on the relation between refugees and crime in the host countries. After a short overview of the legal analysis of the “1951 Convention and Protocol Relating to the Status of Refugees”, the paper applies a law and economics approach by considering the data mainly in Germany and USA since these are some of the two western countries most affected by refugee flow. In the conclusion, the paper suggests some eventual policy implications.

Key words: migrant, economic migrant, illegal migrant, refugee, impact, labour market, crime rate, USA, Germany

## Introduction

In 2017 there was a record of approximately 68.5 million persons who were forced to flee their homes because of persecution, violence or human rights violations. Between them 25.4 million are registered as refugees, the remaining is split on 40 million internally displaced and 3.1 million left are registered as asylum-seekers. This massive flow of refugees might have affected the economy of the host countries. This paper focuses on certain reports from states such as Germany and USA which are the most highly chosen states by refugees and economic

migrants therefore they also are the most affected.<sup>1</sup> This might happen because of the higher opportunities that the labour market offers and also the general “laziness” of the natives to work. This paper has two main sections. The first section focuses on the effects of refugees in the labour market of the host country, by dividing them between legal migrants and illegal migrants. Legal migrants are the ones that are accepted and granted the refugee status, while on the other hand those that are not accepted therefore are not granted the refugee status are considered as illegal migrants, if after the denying of the refugee status they are not extradited. The second section describes the relation between migrants and crimes in the host countries. It focuses on the refugee’s probability to commit crimes and the effect it has to the national security of the country. There is a connection between migration and national security. In conclusion the paper makes some suggestions regarding new policies regulating the management of the refugee impact.

#### Refugee impact on the labor market in host countries

This section analyses the impact of refugees in the host countries by examining the different empirical studies. Before the investigation a short overview of the difference between “economic migrants” and “refugees” should be developed. Although the terms “economic migrants” and “refugee” might have similar characteristics, they are completely different in what they represent. The official binding definition of a refugee is provided by the “Convention and Protocol Relating to the Refugee Status (from now on, the 1951 Convention)”.<sup>2</sup> As indicated by the 1951 Convention a refugee is someone who is forced to leave its country of origin because of having a well-founded of persecution because of its race, religious background, nationality or belonging to an ethnic

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<sup>1</sup> The New York Times; 2015; Countries Under the Most Strain in the European Migration Crisis; <https://www.nytimes.com/interactive/2015/08/28/world/europe/countries-under-strain-from-european-migration-crisis.html>; (access on: 20.01.2019)

<sup>2</sup> UNHCR; Convention and Protocol Relating to the Refugee Status; 1951; <https://www.unhcr.org/3b66c2aa10> ; (access on: 02.02.2019)

group or even for having a certain opinion. The main difference between an economic migrant and a refugee is that first type of migrant is the person who has left its nation to improve its financial prospects while as a refugee has fled its nation so as to ensure its life.<sup>3</sup> In general economic migrants work in the host countries and invest their earnings in their country of origin while refugees work and invest in the host country.<sup>4</sup>

Another element that needs to be taken in consideration is that refugees also respond to economic factors when it comes to fleeing their home country. Factors such as opportunity cost, psycho-social cost, migration cost of the moving process and adaption cost play a huge role in a refugee's decision to leave its home country. Opportunity cost consists of everything that a refugee leaves behind in every decision made such as the initial asset holding in its country. Psycho-social cost is related to the psychological cost such as stress, social and family relationship. Adaption cost consists on the level of education, skills, age and expected lifetime utility. Adaption policies in the labour market are also important because they include language training and active labour market programs.<sup>5</sup>

After entering in a country, refugees might become part of the community and they might also start to challenge the citizens for the basic daily needs such as water, food and a place to live. After some time, their needs grow and they start to search for employment and education in order to increase their living standards. At some point these changes might start to affect the economic level of the local communities. Nevertheless the changes differ from one country to another.

Refugee impact in the USA labour market

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<sup>3</sup> UNHCR; <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> ; (access on: 02.02.2019)

<sup>4</sup> Ibid

<sup>5</sup> Peter Schaeffer; Refugees: On the Economics of Political Migration; 2010; [http://www.petervschaefter.com/uploads/7/4/3/3/74334295/http\\_authorservices.wiley.com\\_bauthor\\_wisproxy.asp\\_doi\\_10.1111\\_j.1468-2435.2009.00539.pdf](http://www.petervschaefter.com/uploads/7/4/3/3/74334295/http_authorservices.wiley.com_bauthor_wisproxy.asp_doi_10.1111_j.1468-2435.2009.00539.pdf) ; (access on: 09.02.2019)

The USA is one of the most affected countries by the refugee flow.<sup>6</sup> The refugee flow has turned out to be a success for the USA for several years. Since when the worldwide flow of refugees begun in the 1970s, the USA has been one of the first countries to accept massive numbers of refugees each year.<sup>7</sup> Studies show that refugees are also an important factor and contributor to the American job market and economy by having a greater employment frequency than the local community.<sup>8</sup> Refugee females are similarly as likely as American born females to be employed. The moderately high rate of work among displaced people is a representation of the work participation for the entire refugee population, who likewise work at a higher rate than does the local community. Refugees are additionally more likely than the American citizens and economic migrants to be of working age between 25 to 64 years.<sup>9</sup>

Big countries like USA and Germany have shown that the migrant workforce is essential to the economy. This happens because migrants are approached in many low paid jobs that do not require a specific level of skills. This creates a big profit for employers since they pay the migrants less than they would pay a US born citizen. Migrants also have their profit too because it is easy for them to find a low paid jobs since the local citizens are not attracted to these kind of jobs. This process contributes a lot to the economy of the host country because it lowers the unemployment rate. As mentioned earlier above economic migrants work in the host countries and invest their earnings in their country of origin while refugees work and invest in the host country.<sup>10</sup> Therefore economic migrants' impact on the economy of a host country is lower than the impact of refugees. Since refugees cannot go back and have no connection with their country of origin anymore, they

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<sup>6</sup> USA for UNHCR; <https://www.unrefugees.org/refugee-facts/usa/>; (access on 02.02.2019)

<sup>7</sup> ibid

<sup>8</sup> New American Economy; 2017; From Struggle to Resilience; [www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE\\_Refugees\\_V5.pdf](http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE_Refugees_V5.pdf); (access on: 22.01.2019)

<sup>9</sup> New American Economy; 2017; From Struggle to Resilience; [www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE\\_Refugees\\_V5.pdf](http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE_Refugees_V5.pdf); (access on: 22.01.2019)

<sup>10</sup> UNHCR; <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>; (access on: 02.02.2019)

invest their economic capital in the host country.<sup>11</sup> In order to work and stay in the host country refugees need to adapt to the society, learn the official language and go to schools. As a result after several years of staying in the host country and working there, refugees start to earn more than economic migrants. As a result their impact is positive in the long run. Studies have shown that the refugee workforce is essential to the economy of host countries, in particular in USA. Based on a report done by New American Economy<sup>12</sup> in 2015 the number of refugee business owners in America was close to 200.000 and the entrepreneurship rate of refugees was 13% while the US natives 9% and other groups of immigrants 11%. Only in 2015 the total profit of refugee owned businesses was an astonishing 4.6 billion dollars.<sup>13</sup> In order to show the real impact of refugees in USA it is important to mention some of the states with the highest number of refugee population. States such as California, Washington, Michigan, Texas and Minnesota have the highest numbers of refugees, in particular more than 80.000 refugees per state.<sup>14</sup> California and Texas are the biggest host states in the USA by accepting, only in 2017, almost 8000 refugees.<sup>15</sup> Refugees in California have the best measure of spending, approximately at 17.2 billion dollars, which is 2.2% of the state's yearly spending in total. To conclude, the help and support given to refugees turns out to be a smart movement by the host countries in the long term, though sometimes the only negative effect is that illegal migrants reduce the wage levels of the local citizens in low paid jobs.

## Relation between refugees and crime in host countries

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<sup>11</sup> ibid

<sup>12</sup> New American Economy; 2017; <https://www.newamericaneconomy.org/>

<sup>13</sup> New American Economy; 2017; From Struggle to Resilience; page 10; [http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE\\_Refugees\\_V5.pdf](http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE_Refugees_V5.pdf); (access on: 27.01.2019)

<sup>14</sup> New American Economy; 2017; From Struggle to Resilience; page 14 ; [http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE\\_Refugees\\_V5.pdf](http://www.newamericaneconomy.org/wp-content/uploads/2017/06/NAE_Refugees_V5.pdf); (access on 27.01.2019)

<sup>15</sup> State of California; 2017; Department of Social Services ; <http://www.cdss.ca.gov/inforesources/Refugees/Reports-and-Data/Arrivals-Data> ; (access on: 27.01.2019)

This section investigates the relation between refugees and criminality in the host countries. This section provides facts and statistics only regarding refugees. Governments of host countries are always worried and aware of the impact that migration has on the national security of the state. The commitment of a crime is affected by the job opportunities that the market offers in most cases. In simple words there is a higher possibility for illegal migrant to commit crimes than legal migrants and refugees, so the correlation between migrants and crimes is based on the utility of the illegal activity and the opportunity of legal acts. Local citizens of a host country are always skeptical about migration and the more migrants enter the country the more afraid the locals are. But their attitude is not the same towards each group. The local community of a host country tends to be welcoming and not afraid of legal migrants and refugees, but their attitude is different towards illegal migrants. This happens because as mentioned above illegal migrants tend to commit more crime. There are several factors that lead an illegal migrant into committing crimes. First, since they are illegal it means that they cannot work on legal jobs, so job opportunities are limited and the payment is below average. This factor leads to poverty which is one of the main reasons why crimes are committed. In most cases male migrants that are less educated, young and single tend to commit more crime than female migrants or more educated ones. Out of the three categories of crime migrants tend to respond to property crime which includes burglary, theft, vandalism and shoplifting.

#### Relation between refugees and crime in the USA

Since 1965 when the US congress passed the law regarding refugee acceptance approximately 60 million refugees have entered into the country. Today, the refugees in the USA make up nearly 15% of the whole population, most of them coming from Latin America and Asian continent.



American parties have different opinions regarding the effect of migration toward crimes. According to a research 71% of Republican Party supporters believe that migration raises the crime rates, while the same opinion is shared by 34% Democrats.<sup>16</sup> Nevertheless it seems that refugees have no correlation and impact to the crime rates on host countries such as USA and Germany. According to study concluded by “New York Times” the data shows that the since the year 1980 US natives have committed more crime than migrants.<sup>17</sup> Refugees on the contrary have lower crime rates. A study done by “New American Economy” showed that during a period of eleven years from 2006 to 2015 there was rather strange change in the crime rates of several states that accepted a big number of refugees in those years. Rather than criminality expanding, nine of these states turned out to be impressively increasingly protected. Two of those turned out to have an astonishing statistic. Michigan registered the most drastic decrease by 77% in violent crime rate and by 46% in property crime. Second to it was Georgia that registered a decrease by 62% in violent crimes and third was California that registered a decrease by 44% in property crimes.<sup>18</sup> This study shows that despite the massive acceptance of refugees, none of these states has experienced a certain impact and no registered crime has been attributed to the refugee community. This might happen because refugees appreciate the opportunities that the USA offers and focus only in working and investing for their future.

### Relation between refugees and crime in Germany

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<sup>16</sup> Pew Research Centre; 2015; <https://www.globalcitizen.org/en/content/these-are-the-facts-on-refugees-and-crime/> ; (access on: 29.01.2019)

<sup>17</sup> New York Times; 2017; [https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?\\_r=0](https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?_r=0) ; (access on: 29.01.2019)

<sup>18</sup> New American Economy; Is there a link between Refugees and U.S. crime rates? ; 2017; <https://research.newamericaneconomy.org/report/is-there-a-link-between-refugees-and-u-s-crime-rates/> ; (access on 29.01.2019)

While the refugee correlation to crime in America is nonexistent, the contrary happens in Germany. Being one of the biggest countries in Europe and also the most accepting when it comes to refugees, Germany is currently struggling to manage the rise of crime rates since 2014 when the crime rates started to increase fast. In particular, Lower Saxony, one of Germany's most populated areas registered an increase of 10.4% in crime rate during 2016.<sup>19</sup> Out of all crime cases registered between 2015 and 2016, 90% of them were committed by male refugees.<sup>20</sup> In most cases the victims of crimes such as robberies, theft, rape the victims were local citizens. This can be explained by the fact that asylum seekers find it hard to succeed in Germany. They are not allowed to work until they get a work permit and the language is extremely difficult to learn. Due to the lack of earning money by a legitimate job they choose to commit crimes. Another factor that leads refugees to commit crimes is the fact that they are mostly coming from torn apart from war countries such as Morocco, Tunisia and Algeria. According to a research done by "Prof. Dr. Frank Bovenkerk" of "Willem Pompe Institute University Utrecht" the asylum seekers coming from poor North-African countries have shown a tendency to committing crimes as being part of their home "tradition".<sup>21</sup>

However in 2017 there was a big change in Germany's crime rates. According to a report done by "Deutsche Welle" in 2017 Germany registered a decrease by 10% in the annual crime rates.<sup>22</sup> This happened because of the more tightened up refugee policies that Germany started to apply. By not accepting large numbers of refugees the less crimes are committed, but even though the crime rates have decreased a lot German born citizens still are afraid because of the large number

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<sup>19</sup> Bloomberg; 2018; <https://www.bloomberg.com/opinion/articles/2018-01-03/germany-must-come-to-terms-with-refugee-crime>; (access on 30.01.2019)

<sup>20</sup> ibid

<sup>21</sup> Prof. Dr. Frank Bovenkerk; Crime among young Moroccan men in the Netherlands: Does their regional origin matter? ; [https://pure.knaw.nl/ws/files/1729086/2015\\_Bovenkerk\\_en\\_Fokkema\\_EJC\\_post\\_print\\_0087.pdf](https://pure.knaw.nl/ws/files/1729086/2015_Bovenkerk_en_Fokkema_EJC_post_print_0087.pdf); (access on: 02.02.2019)

<sup>22</sup> Deutsche Welle; 2018; Crime in Germany drops 10 percent in 2017, report shows ; <https://www.dw.com/en/crime-in-germany-drops-10-percent-in-2017-report-shows/a-43485926>; (access on: 30.01.2019)

of migrants that arrived all at once and that now live in Germany. The feeling of not being safe is largely spread in big cities where migrants are represented a significant number of the population.

## Conclusion

This paper investigated the impact that refugees have on host countries. The first section focused on the impact that refugees have on the economy of the host countries. As the analysis showed, refugees compose a valuable force that contributes heavily in a host country's economy. Their impact on the labour market offers a positive effect in the long term by lowering the unemployment rate and composing a significant number to the states "gross domestic product" (GDP). This proves that the short term support given by host countries is crucial to the long term effect that refugees cause. Host countries that lack native workforce should invest more in the refugee policy as it proves to be a smart investment.

The second section focused on the impact that refugees have on the crime rate in host countries.. Refugees tend to respond to different factors in different countries. While several states in the USA experienced a massive decrease in violent crimes and property crimes between the years 2005 and 2016, Germany experienced the contrary between the years 2014 - 2016. In the USA reports showed that the US born citizens committed more crimes than refugees, while in Germany refugees were responsible for the majority of the registered crimes in 2016. This investigation showed that it is important for a host country to rather accept less refugees in a long term period than to accept a massive number of refugees all at once, like Germany did in 2014.

To conclude, this paper showed that if provided initial short term support and more effective managing policies, refugees might become an important part of the economy and wellbeing of the host countries.

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## **Funding**

This course has been funded by Jean Monnet Module in Refugee Law 2017-2020 with the leader Dr. Denard Veshi.









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Co-funded by the  
Erasmus+ Programme  
of the European Union

# **An Illustrative Analysis of Migration Regulation and Control in the Federal Republic of Austria (1990-2007)**

*By Artenis Peka*

**Supervisor:** Dr. Denard Veshi

Paper in 'Refugee Law'

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## Abstract

*The Study* will discuss and focuses on the relation between Migration Regulation and Control mechanisms in an illustrative analysis involving the Federal Republic of Austria in the years 1990-2007. We will look closer into Austria's managerial system of the influx of refugees by analyzing concretely the effects of migration regulation in its own domestic systems by focusing on the issue of the externalized border control mechanism, control in the workplace, the migration patterns followed up by a summary conclusion. Based on empirical data the research has tried to analyze the patterns of the policy and legal buildup that shaped the attitude of this country towards migration regulation and its control mechanism.

**Key words:** Migration Regulation, Migration Control, Austria

## Introduction

The Western economies have long been impacted by migration waves which have shaped the continent and have allowed space for the development and nourishing of a complex system of inclusive values that shape the European landscape and as well as help forge the unique patterns of the European economy. In many ways the issue of migration has been at the epicenter of socio-political as well as legal developments for quite some time now and time has come to make a retrospect of the policies used to handle the migration waves but also realize the intrinsic nature of European economy which is inherently linked with the migration waves and the fact that reliance on migrant workforce has become a de-facto component of Austria's employment policies.

For Austria, migration until the early 1970s-80s was an issue that involved solely the labor market system. Later on, the debate gradually expanded to include even broader issues of control in areas such as territory access, integration, asylum, family reunification etc. As the Eastern Bloc collapsed, the liberalization of the labor market regime that followed the economic boom of the late 1990s boosted foreign employment in Austria. The new workers came from Austria's traditional recruiting countries of labor, i.e Turkey and the former Yugoslavia. In an unprecedented show, Austria in the 1990s instituted its only "legislation" campaign, in which it permitted foreign workers within a short period of time to regulate their status following only a short period of residence. Furthermore, with the advent of the Yugoslav conflict, Austria accepted another large number of war refugees from Bosnia-Herzegovina, almost doubling the number from 34.400 in 1988 to 690.000 in 1993.<sup>1</sup>

As the number of refugees and migrants increased, so did the internal public pressure and the government decided to take measures. Quickly thereafter the federal government introduced numerous measures related to residence, employment, asylum, and immigration.<sup>2</sup> The Asylum law was also modified followed by a new Residence Act in 1993 which for the first time reestablished quotas for migrant categories therefore significantly limiting the number of residence permits issued in a year. As of that time, further revisions have been adopted in key legislative documents including the Asylum national domestic law, as well as the Aliens Act.

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<sup>1</sup> Biffi, G. (ed.) (2001). Arbeitsmarktrelevante Effekte der Ausländerintegration in Österreich. Vienna: Austrian Institute of Economic Research (WIFO).

<sup>2</sup> Fassmann, H. & I. Stacher, (2003), Österreichischer Migrations- und Integrationsbericht. Klagenfurt: Drava Verlag.

## **An Overview of the Border Control Mechanism**

Austrian state is renowned for maintaining very efficient border control policies through the help of the police, special intelligence units as well as the Austrian Federal Army. These programs issued in the border with Hungary which mobilized around 2000 forces in patrol duty is still active and more important than ever considering also the influx of Syrian and other Middle Eastern refugees who knocked on Europe's door. In addition, Austria's border was reinforced by some 3200 gendarmes and 200 police officers. Overall over 295.000 army recruits had served in the border patrol area at least once during their active military service between 1990 and 2005. As the enlargement process of EU meets four of Austria's neighbors, the 800 customs officials simply assumed other border control duties along the external Schengen boundary bordering Austria. As part of an attempt to structurally reorganize the border control forces, the gendarmerie and police were merged into a single force which served to strengthen the capacities for control of illegal migration.

Currently, Austria applies three externalized border control mechanisms. The first consists of search groups and surveillance groups. Known as the *Überwachungstruppen* and the *Fahndungstruppe*, they were first introduced in 1989 and serve in the border control within the Schengen Area, in daily patrol duty in the border's vicinity. The second is focused at border-crossing points known as the blue and green borders, referring to river and land crossings. The third mechanism imposed by Austria takes the form of support units, serving under the central command of the border service. The unit is deployed whenever needed in the country and since 1999 they operate and are active in the internal infrastructural network of the country including international trains and main roads.

Austria in the past decade has worked intensively to prevent the phenomena of illegal migration and human smuggling around its borders. In the early 1990s new legislative undertakings which established new penal offenses aimed at preventing the illegal activity of human smuggling were introduced. This followed by a modification of the 1997 Aliens Act and the Criminal Code itself. Under the new provisions persons who engaged "in alien smuggling as a member of a criminal group" was punishable up to five years imprisonment. The illegal entry

of an alien on an irregular basis for money (even in a non-commercial context) was made more severe. These substantiated changes were in line with the efforts of the Council of EU and the European Commission to establish minimal legislative instruments to combat efficiently at national and international level, the issue of human smuggling<sup>3</sup>.

Austria's effectiveness in combating illegal migrant activity in the border can be traced to two main causes: a) the effective sharpening of legal instruments followed up by b) structural changes in the police forces who were created and deployed to deal with particular problems concerning illegal migration and the task of coordinating international cooperation to fight against human smugglers. A typical example would be the merging of the Criminal Intelligence Service (*Bundeskriminalamt*) with the state police (*Staatpolizei*) and together now they help coordinate Austria with its neighboring countries as well as other EU bodies (such as Eurojust, Europol).

These organizational restructurings were issued by Austria in compliance with her strategic external as well as internal reasons. On the one hand, the efforts to strengthen the law enforcement agencies in preventing human smuggling and illegal migration seems to have yielded considerable results. This was followed by acceleration and improvement of the Austrian legislative structures which had to be kept in resonance with Schengen standards. The implementation of the Dublin regime has had consequently a large impact in the illegal migration strategies and the smuggling of migrants. Within the first few months of the accession of Austria's neighbors in the EU and the implementation of the EURODAC system, a noticeable drop in asylum applications followed and have continued to decrease ever since. The refugee wave had its impact in Austria as well, but thanks to a careful coordinating of legal policies, they were spared the negative externalities which come with a refugee wave.

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<sup>3</sup> National Contact Point Austria within the European Migration Network (2005), 'Illegal Immigration in Austria'.

## External and Internal Control Mechanism

A preliminary analysis of Austria's instruments of controlling incoming migration is as a result of careful policies that begins before these migrants even reach the country's borders. A combination of carrier sanctions combined with strict visa requirements and regulation have prevented unauthorized migrants from boarding in ships, busses or plains without having the necessary documentation. Austria introduced it's own visa requirements but it was highly dependent on the other countries. This is known as the "spill-over" effect in which a country's visa policy is dependent on the other country. A typical example was that of the Bosnian refugees fleeing the devastating conflict in the early 1990s. The initial aim of these refugees was Germany, and Austria was simply intended as a transit point, but as soon as Germany introduced heavier restrictive requirements, Austria was faced with a prospect of an unprecedented influx of war refugees. This forced Austria to immediately tighten its grip and thus the entry requirements were harshened on the persons coming from the territories of former-Yugoslavia.

Austria has kept a consistent visa policy in accordance with its Schengen requirements. This inadvertently includes adherence to a common list of countries exempted from such requirement.<sup>4</sup> This procedure indeed provides a rare example of entry liberalization from third country nationals. As the European countries started introducing their own carrier sanctions and liabilities, including Austria, the European Council issued the Directive 2001/51/EC<sup>5</sup>. This directive specified a fine which amounted to a maximum of 5.000 euros in fines for each person illegally carried<sup>6</sup>.

In conformity with the Schengen II agreement, the Austrian Federal Ministry of Interior carried out consultative and coordinative missions with many countries of the world including Albania, Egypt, Syria, Serbia etc. This established network helped facilitate the exchange of communication between countries of origin and transit countries, helping identify in the process

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<sup>4</sup> Republik Österreich, Bundesministerium für Inneres (2004/2005), 'Bericht Organisierte Schlepperkriminalität', Jahresbericht 2003/2004. Vienna.

<sup>5</sup> Kraler, A. & V. Bilger (2006), 'Report on Austria', in M. Poulain, N. Perrin & A. Singleton, (eds.), THESIM – Towards Harmonised European Statistics on International Migration, 565-575. Louvain-La-Neuve: UCL Presses.

<sup>6</sup> Austrian legislation has specified an exact fine of 3.000 euro for each individual being transported within Austria's borders without necessary travel documents.

the fraudulent use of documents for illegal migration purposes. Schengen II also provides an elaborate plan for joint expulsion flights, cross-border police cooperation, facilitation of repatriation etc.

A key reason for the success of the Austrian control mechanism on refugees is her ability to quickly react to impending challenges and take measures that are both efficient and effective. A typical example was the surge of illegal entries into Austria via Vienna-bound flights in 2003 from Kharkiv, Ukraine. In a quick reaction, the Austrian border police assigned trained officers on board of the planes to Kharkiv. As a result of the tight control measures in place, a year later in 2004, the rates dropped by 77 percent (Republik Österreich 2005: 59).

Austria follows a strict regime of internal control measures for aliens with legal residence in the country, for as long as they are non-naturalized citizens whether short term or long term migrants, asylum seekers or seasonal workers. Laws and ordinances regulate their entry, social security, welfare benefits, residence status etc. According to Austrian aliens legislation, asylum seekers are subject to tight control mechanisms and other restrictions on first-time asylum procedures. The interesting questions that follow up are how do authorities maintain such a strong grip on present residents who are unknown to authorities?

There are a number of control instruments which the Austrian authorities use for detecting illegal residents. I will mention them briefly below: Firstly, the use of various databases that helps filter out those citizens who stay without permission in Austria. During contact with authorities this strategy becomes especially effective since when illegal immigrants get in touch with public services, they are required to provide documentation of their legal residence. The automatic identification of illegal residents through the synchronization of databases has made possible for the first time the automatic detention of illegal residents. Secondly, the use of a very simple mechanism can also yield satisfactory results. The random police controls on the streets is a practice that continues to occur despite the fact that the bearing of an identity card is not an obligatory act upon the individual. Also, we have to bear in mind that random identity checks are most relevant when there are valid suspicions with respect to criminal activities. Thirdly, the traditional "rundown" on immigration sweeps is used by authorities in locations where illegal resident aliens are suspected of living. However, this practice is very rarely used by authorities with the only exceptions being of cases that involve potential criminal activity.



Fourthly Austria operates on a centralized computer system registrar where all the demographic information of Austria's citizens is kept and preserved. However, it is not used to detect illegal residents since there is very little coordination between data sets of various ministries and the municipalities. This may be an intentional doing of the authorities so as to guarantee universal access to all citizens in basic commodities. A typical example would be the registration of children in kindergarten or school, where the parent's legal residence is deliberately left unchecked to ensure the children's free universal access to education. There is, therefore, a consensus to keep this system of open admissions.

By contrast, having access to public welfare benefits, it's almost impossible without a valid legal residence status. Access to the public healthcare system is almost entirely open only to citizens with legal residence. However, there are certain NGOs and freedom in decision making where doctors based on medical needs are not obliged to turn over illegal migrants to public authorities.

### **Workplace Controls and the Legal Migration Pattern**

The internal state instruments in combating and systematically controlling illegal immigration increasing are looking towards the workplace as the medium where the state exercises a tight control once the Austrian borders have been crossed. The authorities, however, are led by different motives to undertake the search at the workplace. Rather than detect illegal residence or employment activity, this search by authorities is undertaken to prevent the irregular forms of employment, including social security regulations, labor, and tax employment regulations etc.

It became apparent the need to establish a coordinated effort by the authorities to combat the growing illegal employment of foreigners. To such aim various sectorial units of the Ministry of Economy (MEL) together with the Ministry of Finance(MoF) coordinated together and established the Control Unit for Illegal Employment(KIAB) which has gradually expanded operations and currently holds a vast bureaucratic apparatus, a clear indication of the growing importance this institution has in combating illegal employment of foreigners.

This increase in operation capacities is met in turn by a large increase in workplace inspections detecting steady and growing irregularities and foreigners detected in illegal

employment. By far the sectors of agriculture, construction or catering are the most vulnerable sectors as the inspectors have a larger difficulty and weaker access to mount efficient control schemes. Interestingly enough the patterns suggest some level of consensus on the need to have less tight control in those areas as this would in turn contrast and interfere with other social policy goals.

The annual migration quotas were a mechanism enforced by the Austrian state in an attempt to regulate the total volume of migration coming in the country. The Residence Act of 1992 which entered into force only after a decade in 2003, established a quota regime, thereby limiting the number of residence permit allocations to be issued each year. This fixed quota is regulated by the federal government every year after a number of consultations with the social partners and parliamentary committees. According to the data provided by the Ministry of Economy and Labour, there is a general discrepancy between the actual number of migrants and the official quotas which the government provides.

This, of course, has not gone unnoticed by the federal authorities, but there is little they can do since the gap in immigrants comes as a result of applications falling outside the quota restrictions imposed, or somehow they have managed to evade the restrictions altogether. The government undertook several legislative acts such as the 2005 Settlement and Residence Act, or a series of provisions incorporated in the aliens' law package, specifically aimed at having an efficient effect at migration volume. Further still another amendment took place in 2006, this time aimed at the Austrian Naturalization Act which restricted the granting of early naturalization of spouses of Austrian nationals as well as recognized refugees<sup>7</sup>. This was followed up by an increase from 100 to 300 hours of German language course under the “integration agreement”. Failure to do so within 5 years would result in an extension of the residence permit or subsequent non-granting of the naturalization.

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<sup>7</sup> Jandl, M. (1998) 'Asylum- and Refugee Policy in Selected European Countries', Ph.D. dissertation, University of Vienna. Vienna.

## Summary Conclusions

As in many other developed countries, Austria's main migration control policies focus on external rather than internal control measures. This due to the intrinsic geopolitical position of Austria as a key access point with western and southern Europe as well as the historical development of these policies regarding migration which have shaped the country's attitude towards the issue at hand. Cooperation with neighboring countries has been a hallmark of these external control measures both in combating smuggling and trafficking as well as illegal migration who used Austria as a transit or destination country. This was followed by an intense increase in visa regulatory procedures in an attempt to curb and control the steady influx of migrants in Austria. According to various empirical data<sup>8</sup> the internal control mechanism was not per se focused at illegal migrants, but the illegal work and the unjustifiable use of state funds. However, these methods have yielded margins of success in the struggle to prevent irregular migration.

Interesting, however, is that during this period (1991-2007) legal migration was seen to have lost most of its importance as a result of the fact that the migration process seems to be defined by the family ties, and network rather than the government. The legislation was tightened in this regard by imposing stricter naturalization laws, minimum income requirements and language proficiency tests.

In conclusion, the focus of the research paper was to analyze the development patterns in the field of migration by concretely analyzing the dynamic evolution of legal policies in Austria in the period 1990-2007. The rudimentary effect of migration has without a doubt been a sensitive issue and left his mark in the Austrian legal system. It is by analyzing this continuum of policy buildup towards migration that has shaped the current modern Austrian approach towards migration.

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## **Funding**

This course has been funded by Jean Monnet Module in Refugee Law 2017-2020 with the leader Dr. Denard Veshi.



XV  
years



Co-funded by the  
Erasmus+ Programme  
of the European Union

# Refugee Rights and the European Court of Human Rights

By

**Supervisor:** Dr. Denard Veshi

Paper in 'Refugee Law'

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## Abstract

Although *prima facie*, the European Convention of Human Rights does not talk about refugee law or asylum-seekers' rights, it is a powerful tool to guarantee the safeguard of aliens in the territory of its Contracting States. This paper analyses the scope of the human rights of refugees under the ECHR looking at the latest trends in the jurisprudence developed by the Court and which are relevant to the protection of refugees. In doing so, it concentrates on the determination of those rights by the Court, leaving aside issues of access to those rights by refugees. Up until now, the Court has acknowledged the theoretical basis of Articles 2,3,5,6 and 8. Since its jurisprudence is very wide, this paper will only deal with an analysis of case law regarding Article 2, 3 and 5 as one of the most important Articles refugees can invoke when their rights are not respected. The paper is divided in two chapters, rights of refugees against expulsion and rights of refugees in the territory of a Contracting State.

**Key words:** : Refugees, asylum-seekers, European Convention on Human Rights, Safeguard from expulsion, Article 2, 3,5,6 of ECHR

## Introduction

During the recent years, Europe has faced an ongoing refugee crisis. The presence of refugees and asylum seekers, especially in southern countries, has created several issues for their governments to resolve. According to various domestic and international laws, each State has to provide efficient procedures as to the admission or expulsion of asylum- seekers, as well as their accommodation while waiting on a decision for their status.

Incidentally, the question arises whether these governments would issue decisions unfavorable to the asylum seekers and refugees, in order to protect their national interest. Therefore, international and domestic legislation was introduced in order to prescribe several rights to refugees and asylum seekers, all while limiting States from infringing those rights. New legislation came in form of international conventions, be them binding or non-binding.

One of the most important pieces of international legislation is the Geneva Convention relating to the Status of Refugees, which provided its contracting parties with a legal definition of the term “refugee”. Furthermore, this Convention imposed a number of obligations to the contracting parties, which in turn derived from other international conventions. Such obligations include prohibition of torture, sending a child to a country where he might be subjects to actions causing an irreparable harm, prohibition of expulsion of aliens etc. The concept of asylum comes from Article 14 of the Universal Declaration of Human Rights, which protects the right to “seek and enjoy asylum from persecution”[\[1\]](#). Nevertheless, this right is not expressly found in other general instruments of international human rights such as the International Convention on Civil and



[\[1\]](#) Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14

Political Rights or European Convention of Human Rights. In contrast, the Geneva Convention was drafted to constitute a *lex specialis*, to fully cover the issue of refugees.[\[1\]](#)

Usually, international protection in Europe may take the form of refugee status or subsidiary protection.[\[2\]](#) As mentioned above, the Geneva Convention is the one that regulates refugee status, meanwhile subsidiary protection is granted when a foreign State deems necessary for a migrant to be protected, but for reasons not included in the Geneva Convention. It is important to mention that the Geneva Convention has no international supervision procedure. The case-law that has been developed in connection to refugees and asylum seekers has been based only on interpretation and application by national courts; therefore there has been no uniformity of approach. Since there is also no express provision relating to asylum contained in the articles of the ECHR, it seems as it is only of marginal relevance to those seeking asylum in Europe.[\[3\]](#) On the contrary, extensive case law of the Court on this subject has proved that the Convention has been an important instrument on setting high standards for the rights of asylum seekers across Europe. The Member States of the Council of Europe are under the obligation to secure to everyone within their jurisdiction, including migrants, the respect of the rights guaranteed by the ECHR. And it is to this end that the Court's case-law imposes certain limitations on the right of

[1] Nuala Mole, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, London, England, 2000, pg. 5

[2] Council of Europe, *Asylum*, Human Rights Education for Legal Professionals 2016

[3] A number of other international instruments also affect the rights of asylum-seekers: the Universal Declaration of Human Rights, Articles 13 and 14; the International Covenant on Civil and Political Rights, Articles 12 and 13; the International Convention for the Elimination of All Forms of Racial Discrimination, Articles 5.d.i and ii; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; the Convention on the Status of Stateless Persons, Articles 27 and 28; the Organization of African Unity's Refugee Convention (1969); the Organization of American States' Declaration; the United Nations Declaration on Territorial Asylum; and the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country where they Live.

States to turn someone away from their borders.[1] Once an asylum-seeker enters into the territory of one of the Contracting Parties, he finds himself immediately under the protection of the Convention. This also means that the contracting states have to pay extra attention to the possibility of expulsion, refoulement or extradition, as they will bear responsibility for what happens to the asylum- seeker in third countries if not granted refugee status.

The Court through its analysis and judgments has established a number rules and a certain level of protection for refugees and asylum-seekers.<sup>[2]</sup> Therefore, the Court's jurisprudence has continuously granted basic rights to refugees, which can be divided into two categories. The first category grants the rights necessary for the safeguard of refugees against expulsion, which is now firmly established.<sup>[3]</sup> The second category includes the basic rights of refugees present in the territory of a Contracting State.

<sup>[1]</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 9214/80, 28 May 1985, para. 67, Series A no. 94, and *Saadi v. Italy* [GC], 37201/06, para. 124-125, ECHR 2008

<sup>[2]</sup> Tomasz Szewczyk, *The Rights of Refugees and Asylum Seekers under the European Convention on Human Rights*, University of Iceland, Human Rights Institute, April 2016, pg.6

<sup>[3]</sup> Mole, *cited above*, pg. 9

## 1. Safeguarding refugees from expulsion

The European Court of Human Rights has expressed itself on numerous occasions that it is in the hands of each State to control entry, residence and expulsion of aliens. This opinion has its basis on the fact that the right to political asylum is not explicitly protected by the Convention. Nevertheless, the expulsion of refugees might constitute to a breach of the Convention if it is in violation of Article 2- the right to life, or Article 3- prohibition from torture. This means that States are prohibited to expel an alien when they know or ought to have known that if deported, he faces

a real risk of a treatment contrary to the Articles mentioned above.<sup>[1]</sup> A breach of Article 2 is rarely found, since it can only be established in extreme cases, while there are many cases in which the Court has found a violation of Article 3. The above mentioned Articles can also be invoked when refugees are refused entry at a land border of a certain State<sup>[2]</sup> or when being intercepted at sea. In the case of *Hirsi Jamaa and Others v. Italy* <sup>[3]</sup>, the Court decided that returning Libyan migrants back to their country of origin when intercepted at sea by Italian authorities was a violation of Article 3 as they faced a real risk of ill-treatment if going back. Instead they should have been given an opportunity to apply for asylum in Italy.

## 1. Article 3 of the European Convention on Human Rights

Article 3 is one of the most relevant provisions to be invoked by a refugee in the context of expulsion.<sup>[4]</sup> Article 3 prohibits torture, inhuman or degrading treatment or punishment. To invoke a breach of Article 3, one must prove on reasonable grounds that if expelled, they will face treatment severe enough to constitute treatment contrary to Article 3. The threshold of application in these cases, is not proving beyond reasonable doubt that the ill-treatment has occurred, but only that there exists a real risk that if returned, the refugee will face a prospective treatment that would include torture, inhuman or degrading treatment or punishment. In general, to constitute a breach of Article 3 of the Convention, treatment must reach a minimum level of severity.<sup>[5]</sup> When assessing the threshold, the Court takes under consideration all the individual circumstances of the case, such as the applicant's age, sex and state of health.<sup>[6]</sup>

The Court's jurisprudence on Article 3 in connection to asylum-seekers was established in 1991 with two separate Judgments, which concluded that the expulsion of an asylum seeker can give rise to an issue under Article 3.<sup>[7]</sup> In the case of *Chahal v. United Kingdom*, the Court reaffirmed that Article 3 implies an obligation not to expel an asylum-seeker, if substantial grounds have been shown that if expelled, that person would be in a real risk of being subjected to treatment contrary to Article 3.<sup>[8]</sup> In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.

The Court has also argued that Article 3 of ECHR provides protection against not only direct but also indirect return to the place of origin. The indirect removal of an application to an intermediate country, also a Contracting State, does not affect the responsibility of the first Contracting State to ensure that due to this decision to be expelled will face treatment contrary to Article 3.<sup>[9]</sup> This means that receiving state is responsible to examine whether the intermediary country will transfer the alien to the country where he will face ill-treatment.<sup>[10]</sup> In the case of *Abdolkhani and Karimnia v. Turkey*, the Court pointed out that if removed from Turkey to Iraq, the Iranian applicants would very possibly be sent back to Iran.<sup>[11]</sup> The fact that the Turkish government had not assessed this risk was interpreted by the Court as a violation of Article 3 of the Convention.<sup>[12]</sup>

## 2. Article 2 of the European Convention of Human Rights

Article 2 of the ECHR safeguards the right to life and is one of the few provisions that allows no derogations in times of war or other public emergency.<sup>[13]</sup> As generally established, Article 2 imposes a positive obligation on the Contracting States to protect the life of every citizen, as well

a negative obligation on States to prevent the deprivation of life by the State and its agents.<sup>[14]</sup> Initially, Article 2 does not abolish the death penalty, as it allows it in special cases, one of them to carry out a punishment given by law. This was abolished from the Criminal Codes of the Contracting States with Protocol no.6 to the Convention and was abolished from the Military Codes as well with the drafting of Protocol no.13 to the Convention. Nevertheless, the fact that some countries have still not ratified the Protocol makes it necessary for the Court to analyze whether the death penalty is in accordance with the Convention. In the case of *Öcalan v. Turkey*, the Court concluded that capital punishment in peacetime is no longer permissible under Article 2.<sup>[15]</sup>

Taking Article 2 in the context of refugee rights, it is only invoked in the most extreme cases. The Court has admitted that a Contracting State's responsibility can also be engaged under Article 2 of the Convention, highlighting the fact that for this to happen, the deported alien should face a serious risk of execution.<sup>[16]</sup> The Court has also stated that the imposition of a capital punishment following an unfair trial as an arbitrary deprivation of life always has to be concerned as contrary to Article 2 of the Convention.<sup>[17]</sup> In the case of *Bader and Kanbor v. Sweden*, the Court concluded that deporting the asylum-seeker, Mr. Bader, to Syria where he would face capital punishment following an unfair trial, would constitute a breach of Article 2 of the Convention.<sup>[18]</sup>

Still, most of the Court's jurisprudence on applicant's cases with the fear of death element is considered within the context of the examination of the related complaints under Article 3.<sup>[19]</sup> In *H.L.R. v. France* <sup>[20]</sup>, *the applicant claimed his life would be in danger if expelled in Colombia, however the Court considered the matter under Article 3. Furthermore, declared D. v. the United Kingdom* <sup>[21]</sup> *admissible under Article 2 but the Court preferred to examine it under Article 3 as did the Commission in Bahaddar* <sup>[22]</sup>. In most of the cases where death of the applicant can

occur but it is not certain (or almost certain) the complaint under Article 2 must be seen as indissociable from the complaint under Article 3.[\[23\]](#)

### 3. The Role of the European Court of Human Rights in Protecting the Rights of Refugees present in the territory of a Contracting State

#### 1. Conditions of reception of asylum seekers

The Court has established that Article 3 can also be invoked in cases when the receiving States do not provide accommodation and decent material conditions to the asylum-seekers who await response on the asylum procedure and depend solely on State support.[\[24\]](#) This was argued in the landmark decision of the Court *M.S.S v. Belgium and Greece*[\[25\]](#). ***Among the conditions considered as in violation with Article 3 was the severe overcrowding of the detention center, the inadequate sanitation conditions etc. The Court also considered as ill-treatment the fact that the applicant lived in a state of extreme poverty after being released as well as in a constant state of fear, with the situation not seeming to get any better.***

According to the Court, even when the conditions are much better than in the above mentioned case, the authorities of the removing State still have the obligation to ensure that the conditions of the facilities in the receiving State will be adapted to the needs of the asylum-seekers. This is especially needed in cases of families with minor children, because keeping the family together is of uttermost importance for the best interest of the child.[\[26\]](#)

## 2. Detention of asylum- seekers and its limits

In the context of refugee or asylum-seekers rights, the control of the liberty of foreign nationals is often categorized under Article 5 of the ECHR- the right to liberty and security. Nevertheless, in some cases refugees might be detained until the receiving State authorizes them to enter or remain in the country.

Under Article 5/1 of the Convention<sup>[27]</sup>, an alien may only be deprived from liberty in accordance with a procedure prescribed by law. Justification for this measure may only be in grounds or preventing unauthorized entry or for the purpose of expulsion. In order to be in compliance with the requirements of the Convention, such detention must be carried out in good faith.<sup>[28]</sup> This requires the respect of the proportionality principle, in the aspect that the detention should justify the purpose of preventing unauthorized entry or expulsion as well as the time limit<sup>[29]</sup>. It also means that the place and conditions must be appropriate and that the proceedings must be carried out without due diligence<sup>[30]</sup> or if there is no longer a realistic prospect of removal.<sup>[31]</sup>

Article 5/2 of the Convention<sup>[32]</sup> prescribes the right of the detained asylum seeker to be promptly informed for the reasons of their detention<sup>[33]</sup> and in a language they understand.

Article 5/4<sup>[34]</sup> requires access to a judge, who in turn must decide speedily<sup>[35]</sup> on the legality of the detention after the examination of all the facts<sup>[36]</sup>. In the case of minors, the deprivation of liberty in turn is rarely justified<sup>[37]</sup>. What's most important, the question of whether the



deprivation of liberty is in compliance with the Convention must always be assessed in the light of individual circumstances of each case.

[1] *A v. UK* , *Osman v. UK* 23452/94 ECHR 1998-VIII. This obligation also involves an implicit duty to provide an effective investigation (under Article 3 and/or Article 13) and more generally to provide a right to an effective remedy.

[2] *Gebremedhin [Gaberamadhien] v. France*, 25389/05, ECHR 2007-II

[3] *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, ECHR 2012

[4] Article 2 of the ECHR and Article 1 of Protocol 6 have had little use in comparison.

[5] *Ireland v. United Kingdom*, Judgement of 18 January 1978, Series A, No. 25, para. 162

[6] *Ibid.*

[7] *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, Appl. No. 15576/89, Series A, No. 201, paras. 69–70; *Vilvarajah and Others v. United Kingdom*, Judgement of 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Series A, No. 215, reaffirming the *Cruz Varas* Judgement and setting out criteria for assessing the risk of ill-treatment in paras. 107–8. In both these cases, the Court nevertheless found no breach of Article 3 in the particular circumstances.

[8] *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93, Reports of Judgments and Decisions 1996-V.

[9] *T.I. v. United Kingdom*, Admissibility Decision of 7 March 2000, Appl. No. 43844/98.

[10] Szewczyk, cited abovepg.22

[11] *Abdolkhani and Karminia v. Turkey*, app. no. 30471/08, 22 September 2009, para. 87

[12] *Ibid*, para. 92

[13] D. J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinbrugh 1995, p. 37

[14] L. Garlicki and o., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1 -18*, Warsaw 2010, p. 133

[15] *Öcalan v. Turkey*, app. no. 46221/99, 12 May 2005, para. 163

[16] *Bader and Kanbor v. Sweden*, app. no. 13284/04, 08 November 2005, para. 42

[17] *Ibid*, para. 166

[18] *Ibid*

[19] *Said v. the Netherlands*, app. no. 2345/02 para. 37, 05 July 2005; *NA. v. the United Kingdom*, op. cit., para 95; *Abdolkhani and Karminia v. Turkey*, para. 62

[20] Appl. No. 24573/94, Report of 7 December 1995.

[21] Judgment of 2 May 1997.

[22] Report of 13 September 1996.

[23] *NA. v. the United Kingdom*, app. no. 25904/07, 17 July 2008

[24] Council of Europe, *Asylum*, cited above, page 5.

[25] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011

[26] *Tarakhel v. Switzerland* [GC], 29217/12, ECHR 2014 (extracts)

[27] 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[28] Council of Europe, *Asylum*, cited above, page 5.

[29] *Saadi v. Italy* [GC], 37201/06, ECHR 2008

[30] *Chahal v. the United Kingdom*, cited above

[31] *Mikolenko v. Estonia*, 10664/05, 8 October 2009

[32] “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

[33] *Louled Massoud v. Malta*, 24340/08, 27 July 2010

[34] “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

[35] *Stawomir Musiał v. Poland*, 28300/06, 20 January 2009

[36] *Nikolova v. Bulgaria* [GC], 31195/96, ECHR 1999-II

[37] *Rahimi v. Greece*, 8687/08, 5 April 2011, *Muskhadzhiyeva and Others v. Belgium*, 41442/07, 19 January 2010 and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, ECHR 2006-XI

## Conclusion

The refugee crisis has recently affected Europe and all of its State's policies. Therefore the right of refugees and asylum- seekers are in need of protection from abuse because of State's protecting their own interests. Several multilateral international treaties have helped in determining what rights refugees are entitled to, but can sometimes prove ineffective as to effective protection of those rights. Even though the European Court on Human Rights has no definition of right to asylum of refugee rights, it does help indirectly to improve the protection of alien's rights. The jurisprudence of the Court is essential in guaranteeing the prohibition of ill-treatment against refugees as Article 3 prescribes, or the right of liberty and security of every refugee inside the territory of a Contracting State. In exercising control of their borders, States must act in conformity with the ECHR standards and with the principles derived from the vast body of the Court's case-law in order to guarantee the respect of asylum seekers' human rights. How the Court will continue to respond in the new millennium to the needs of those at risk not only in their countries of origin but exposed to racism and xenophobia in the host countries remains to be seen

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## **Acknowledgment**

(only eventual)

## **Funding**

This course has been funded by Jean Monnet Module in Refugee Law 2017-2020 with the leader Dr. Denard Veshi.

## The Process of Refugee status application in Germany

# Abstract

Mrs. Lydia Morris said: “In May 1999 Germany took a step away from its reliance on blood-based belonging, revising its nationality law to introduce an element of territory in the designation of citizenship. It is argued that alongside the enhanced recognition of the original guest worker population a set of contradictory pressures now dominate the politics of migration, the recognition of human rights, the management of the labor market and the protection of welfare resources.”

So, this essay will be focused on the definition of a refugee person and the definition of an asylum person according to National Law of Germany and EU Law, and the process of the asylum in Germany. I will also mention some statistics on the application for the refugee status from people around the world.

Key words: Refugee person; Asylum seeker



# Introduction

Applying for asylum is a constitutional right in Germany and it is granted to everyone who get rid of political persecution. It is codified in article 16(a) of the German Basic Law. According to a statistic from the UNCHR. The application for the refugee status is from people all around the world, but two-thirds of all refugees worldwide come from five countries such as: Syria, Afghanistan, South Sudan, Myanmar and Somalia. (see [www.loc.gov](http://www.loc.gov))

# Section 1

Who is called a Refugee person?

<sup>1</sup>According to Article 1 of the 1951 UN Convention, as modified by the 1967 Protocol, “a refugee is defined as a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is 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.” ([www.unrefugees.org](http://www.unrefugees.org))

Who is going to be called an Asylum Seeker?

<sup>2</sup>“An asylum seeker is called a person who has left their hometown and has applied for asylum in another country, but whose application has not yet been completed. Asylum seeker can be two types: (1) refused asylum seekers and (2) economic migrant”. ([www.refugeecouncil.org](http://www.refugeecouncil.org))

Refugee person can be called an asylum seeker until he or she grants the refugee status by contracting state or if they formally make a claim for asylum in UNHCR.

An asylum seeker can stay in Germany if he or she is granted on political asylum, refugee status, or subsidiary protection, or if the agency declares a deportation prohibition. The Asylum

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<sup>1</sup> Definition of a Refugee person under 1951 UN Convention

<sup>2</sup> General definition of an asylum seeker.

Act and the Residence Act are the two most important immigration laws in Germany that provide rules for the admission and handling of refugee claims. There have been several amendments to these and other laws due to the current refugee crisis.

Focusing the place such as Germany, because it is the only place that had had many applications over the years and since World War II, and it has become one of the major immigration countries in the world<sup>3</sup>. To the foreigner people, this seemed more surprising since about one-quarter of the German population has a biographical background of immigration in the sense that individuals, or one of their ancestors, were born outside the country.

According to the monthly statistics of the Federal Office for Migration and Refugees, Germany has received 425,035 asylum applications from January to November 2015, and only 57,816 were in November. The number of asylum applications has been increasing since 2014 with an increase of 134.2%. Most of the applicants in November came from Syria (30,398 first-time applicants), Afghanistan (4,929), and Iraq (4,391). In 2015, most applicants came from Syria, Albania, and Kosovo. The applications of Syrians were approved in 94.8% of the cases, whereas the success rates for Albanians and people from Kosovo were 0.2% and 0.4%, respectively. In general, 45.8% of the applications were approved in 2015.<sup>4</sup>

## Section 2

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<sup>3</sup> Author: Michael Bommes on “Migration and Migration Research in Germany”

<sup>4</sup> Statistics in Germany on refugee applications

## What is Duldung?

<sup>5</sup>“Duldung is a certificate which is issued for refugees who are forced to leave Germany.

Duldung means that (1) the allocation to a community continues; (2) the limitation of freedom of continuation movement and can even come to increase; (3) permits a residence for family members, and (4) does not allow people to work”. An obligation to leave Germany arises if the reasons for escape in the asylum request were rejected and the rejection is legally binding.  
*(fluechtlingsrat-leverkusen.de)*

## Section 3

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<sup>5</sup> What is Duldung?

## The procedure of Refugee status application

A refugee can either be register as an asylum seeker at the border or inside the country. The authorities then direct him or her to the closest reception facility. Staff at this reception facility issues a certificate of registration as an asylum seeker, which includes personal details and a photo. In order to determine whether a person is entitled to refugee status, an interview is conducted, and country-specific resources consulted.

<sup>6</sup>Every applicant over the age of fourteen must submit to measures establishing his or her identity and provide fingerprints, which are cross-checked with national and European databases and the Visa Information System. Refugees are generally housed in reception facilities, which provide them with essential items like food, housing, heat, clothing, health care, and household items in kind or in the form of vouchers, whereas persons who are housed outside of reception facilities primarily receive cash allowances to purchase essential items.

<sup>7</sup>While an asylum application is pending, applicants are not allowed to leave the area of the reception facility without permission, but you cannot start working immediately. If you want to work during the period you are waiting for your application to be processed, you will need to be granted permission to work. At minimum this can be granted after three months from your application. Technically you will also need to obtain permission to work from your local employment agency. If a refugee has no independent means of subsistence, a residence permit may also be restricted territorially. A refugee can obtain citizenship after six years of legal

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<sup>6</sup> The application procedure for a Refugee status

<sup>7</sup> Application for Refugee status is on hold

residence, rather than eight, and naturalization of refugees has also been deemed presumptively in the public interest for purposes of discretionary naturalization.

<sup>8</sup>If you receive a notification on the legally binding rejection of your asylum application, you should **immediately** inform the Ausländerbehörde (Alien's Office) in typing form that you are going to return willingly. But, if there was no approval given in the asylum request, there can still be legal and *de facto* reasons for a necessary further stay in Germany. If a departure is legally and *de facto* possible and is only not possible because the refugee is not willing to depart, Aufenthaltserlaubnis (Alien's Department) will forced return the refugee. The deportation will not be announced beforehand. Whether Aufenthaltserlaubnis (Alien's office) can be granted and under which circumstances this may be done, can only be decided in individual cases. However, it is important that the refugee is not responsible for the impeded leave. (*www.loc.gov*)

<sup>9</sup>Applicants who are awarded political asylum or refugee status receive a three year residence permit. After those initial three years, a settlement permit with no time limit is issued if the Federal Office for Migration and Refugees does not object. (*www.loc.gov*)

The permission of the application depends on the capacity available, the home country of the asylum seeker, and a quota system. Not all branch offices handle all countries. In addition, each German state only needs to accept a certain number of applicants based on a quota system. The quota is calculated each year according to the tax receipts and population numbers of the German states. If the reception center in which the asylum seeker registered is not the one that is responsible for handling his or her case, he or she must travel to the responsible center.

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<sup>8</sup> Rejection of the Refugee application in Germany

<sup>9</sup> Acceptance of the Refugee application in Germany

The branch offices of the Federal Office for Migration and Refugees in which the asylum seeker must submit his or her application are usually close to the reception centers.

Asylum seekers who enter Germany from safe third countries have no right to asylum and are removed to the country they came from. Safe third countries are the European Union (EU) countries like: Norway, and Switzerland.

<sup>10</sup>The rejection for asylum application in International Law can be in different reasons. It can be (1) the application is unfounded for a specific reason; (2) when there is no prohibition against deportation, (3) when the asylum application is inadmissible because another Member State of the European Union (EU) is responsible for processing the application (Dublin procedure), or if the application is withdrawn, a deportation order is issued, and the applicant must leave Germany. The period for departure is either thirty days if the application was rejected as without merit or one week if it was rejected as manifestly without merit.

If the asylum seeker entered without or with false or expired papers or via a safe country of origin, the asylum procedure is carried out directly in the airport transit area. Safe countries of origin are all EU countries which some of them are Albania, Bosnia and Herzegovina, Ghana, Kosovo, Macedonia, Montenegro, Senegal, and Serbia. The Federal Office for Migration and Refugees must decide within two days whether the asylum application is justified. If the application is denied, the applicant will be denied entry into Germany and threatened with deportation if he enters Germany illegally. The applicant has the right to an attorney and can appeal the decision within three days. A judge will issue a ruling in an emergency proceeding

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<sup>10</sup> Application denied in EU

within fourteen days. While the application is pending, the asylum seeker must stay in the airport transit area and cannot enter Germany.

## Section 4

### Subsidiarity protection

In Germany, the federal government recognizes several categories:

- Category 1 – Protection from Political Persecution
- Category 2 – Protection as a Refugee
- Category 3 – Subsidiary Protection
- Category 4 – Prohibition of Deportation
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#### ***Category 3 – Subsidiary Protection***

“Subsidiary protection is codified in section 4, paragraph 1 of the Asylum Act and is awarded to applicants who can prove that they are threatened with serious harm in their country of origin.

Applicants subject to subsidiary protection are initially granted a residence permit for one year, which can be extended for two additional years. ([www.europarl.europa.eu](http://www.europarl.europa.eu))



<sup>11</sup>“The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.”  
(*www.europarl.europa.eu*)

When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union’s non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.

The principle of subsidiarity and the principle of proportionality govern the exercise of the EU’s competences. In areas in which the European Union does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorizes intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, ‘by reason of the scale and effects of the proposed action’. The purpose of including a reference to the principle in the EU Treaties is also to ensure that powers are exercised as close to the citizen as possible, in accordance with the proximity principle referred to in Article 10(3) of the TEU.

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<sup>11</sup> The aim of the principle of subsidiarity

<sup>12</sup>The principle of subsidiarity applies to all the EU institutions and has practical significance for legislative procedures. The Lisbon Treaty has strengthened the role of both the national parliaments and the Court of Justice in monitoring compliance with the principle of subsidiarity. It not only introduced an explicit reference to the subnational dimension of the subsidiarity principle, but also strengthened the role of the Committee of the Regions and made it possible, at the discretion of national parliaments, for regional parliaments with legislative powers to be involved in the ex-ante 'early warning' mechanism.

## **Conclusion**

In my opinion, this should stop, because most asylum seekers are living in poverty and experience poor health and hunger. Many families are not able to pay for the basics such as clothing, food, a place to stay or live, or pay the medicines for any sickness issues.

Some other families have found places to stay, and have earned some benefits from them and have stayed there for like three or more additional years

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<sup>12</sup> Where is it applied?

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