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COMMENTARY

Which EU Institution still Cares about "European Values" in Practice?: A Continued Denial of Reality[1]

Holger Hoffmann[2]

Business as usual at the EU level – they confer, decide on something - and no sooner has the ink dried on the signatures to the agreements than no one cares any more or they argue about how something is meant and should be implemented in practice. Even in the second half of 2022, no further regulations were passed and the "package" on the CEAS, which has been on the table since September 2020, was not brought forward. Perhaps this standstill is even a good thing, because other than "defence against illegal immigration", repatriation, border procedures, border management and "dismantling smuggling networks" was and is not on the agenda anyway. Human rights? European values? Topics for Sunday speeches.

However, the fact that the EU institutions do not enforce EU law at the external borders, nor does the Commission oblige Frontex in particular to consistently comply with it, represents a crisis in the rule of law. The information summarised in the News & Notes section of this issue on the situation in Bulgaria, Hungary, Croatia or on the behaviour of Frontex with regard to cooperation with the so-called "Libyan coast guard" has been available in abundance for some time thanks to the committed work of various NGOs and speaks for itself. The Commission could initiate infringement proceedings in case of human rights violations. The Federal Ministry of the Interior could examine whether Frontex missions with the participation of the Federal Police must be terminated if they violate EU law. However, in response to a question from the left-wing Member of the Bundestag Clara Bünger, the Federal Government replied on 10 December 2022 that it saw "no reason to withdraw German officers from the Frontex operation in Greece".

What else but continued denial of reality is what the EU Council and Commission are demonstrating? In May, it is decided to "take" 8,000 refugees from Italy and distribute them among other EU states. Germany agrees to take in 3,500 people. 117 had actually arrived in Germany by mid-December.

Has the situation on the Polish-Belarusian border improved for the refugees concerned in 2022 thanks to EU intervention? One is inclined to conclude: Of course not. And on the Greek-Turkish border? The Bulgarian? The Hungarian? The Croatian? - See the News & Notes. Everywhere you look: It is a horror, unworthy of the "European values" that supposedly apply everywhere at the external borders. And what is the situation of refugees

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when, despite everything, they have reached Greece, Belgium, France or Hungary? The above-mentioned case law of the ECtHR, even if it unfortunately all too often reaches its decisions years after the actual events, shows how often "European values" and the applicable legal norms, e.g., the Directive on Reception Conditions, are disregarded in these states as well, and refugees are forced to live in homelessness without any provisions (see the Jurisdiction section of this issue).

The EU institutions praise themselves incessantly for activating the "Mass Influx" Directive in 2022 and accepting Ukrainian nationals – which, however, applies exclusively to them and not to third-country nationals with the right of residence in Ukraine – thus establishing two-tier refugee law at the European level. Human rights apply equally to all? So please: Where is that supposed to be?

"Tragically, far too many people still die at sea in search of protection", UNHCR said in an appeal to the EU. This has been the case for almost ten years, with the first major shipwreck off Lampedusa in October 2013. Since then, many more have followed – and the rescue ships that take in shipwrecked people continue to be discredited. European value: saving people? But who does it – apart from the committed NGOs? EU agencies and institutions tend not to do it.

Antonio Vitorino, Director of IOM, said migration must be regulated not by closing borders but by opening regular channels for immigration. To whom is he saying this? Apparently to deaf ears in the EU Commission and Council.

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The Diplomatic Protection of Refugees by Their State of Asylum: A Possible Scenario for the Day after the Russian-Ukrainian Conflict[1]

Alberta Fabbricotti[2]

Abstract

This article intends to verify the possibility of legitimizing the action in diplomatic protection of refugees vis-à-vis the State from which they have fled by the receiving State. This is a hypothesis that has no basis in traditional international law but which is advanced on the basis of new developments in international practice. The diplomatic protection of refugees by their State of Asylum is therefore the main thesis addressed by the present essay. The questions examined in this article involve various areas and institutes of international law. In particular, two codification projects elaborated by the International Law Commission are here considered: the Draft articles relating to the diplomatic protection of 2006 and the Draft articles on the international responsibility of States of 2001. Is it just a coincidence that both of these projects have not resulted in proper (binding) international conventions? As an appendix, it was deemed interesting to investigate the above thesis considering the huge mass of Ukrainians who fled from their country and who poured into most European countries. Regarding this exodus, the legal reasoning supporting the entitlement of the hosting States to exercise the diplomatic protection is particularly complex and has to unravel in two steps. The first step perlustrates the entitlement/capacity of the receiving State to exercise his right of diplomatic protection. The second step analyses the accountability, under the international law regime on State responsibility, of the State that invaded and occupied the territories from which the Ukrainians were forced to flee.

Key Words:

International Refugee Law; diplomatic protection; international responsibility of States; aggression; International Law Commission

1. Introduction

This essay is a revised version of my 2005 article (see Fabbricotti, 2005).[3] My main goal is to revisit Draft Article 8 of the text on diplomatic protection adopted by the International Law Commission (ILC) in 2006 (ILC 2006). This provision deals with the diplomatic protection of stateless persons and refugees by the State of residence/refuge. As an appendix, I will discuss about whether and how Draft Article 8 could apply in today's

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[3] A 2022 version of the present article was accepted as a chapter for publication in an edited volume on the law of refugees by Othon de Pontes Saraiva Filho O. & Homem de Siqueira J., to be published by Forum, Belo Horizonte, Brazil.

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emergency provoked by the massive flux of Ukrainians spreading to the territory of almost all European countries, especially the bordering States of Poland, Romania, Hungary and Slovakia. To date the number of refugees from Ukraine recorded across Europe is 8,087,952 (UNHCR, 2023). The legal response to the entrance and stay of Ukrainians in the European Union has been rapid, generous, and highly exceptional (on this sympathetic attitude, see Ramji-Nogales, 2022, 150-154). Yet, it seems appropriate to investigate on whether the receiving States have the right to exercise diplomatic protection in favour of the Ukrainian exiles.

2 Draft Article 8 on Diplomatic Protection

Draft Article 8 of the text on diplomatic protection provides that:

> "1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
>
> 2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
>
> 3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee."

Paragraphs 1 and 2 envisage that a State may exercise diplomatic protection in respect of a person who is stateless or has been recognized by that State as a refugee, if that person is lawfully and habitually resident in that State at the time of the injury and at the time the claim is officially made.

The following paragraph 3 clarifies that "[p]aragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee".

The drafting of these provisions proved to be extremely difficult, as the question of whether diplomatic protection can be exercised with respect to non-nationals of the claimant State is highly controversial. This is particularly true if one considers that the individuals concerned are stateless persons and refugees, i.e. two categories of persons that raise major political concerns in international relations. (In doctrine, on the question of the diplomatic protection of refugees by their host State, see also Reiterer, 1984; Ridi, 2013). Allowing this is particularly innovative, even revolutionary, when compared to the well-established rule of entitlement, which grants the right exercised through diplomatic protection only to the State of which the foreigner is a national. According to this traditional view, as expressed by the Permanent Court of International Justice in the Mavrommatis leading case, "[b]y taking up the case of one of its subjects and by resorting to diplomatic action [...] a State is in reality asserting its own right" (Permanent Court of International Justice, Judgement of 30/8/1924, Mavrommatis Palestine Concessions, Series A, No. 30, p. 12). The ILC itself admitted that Article 8 was an "exercise in progressive development of the law" (see ILC, 2004: 36), and thus did not reflect customary international law.

An exception to the general rule according to which a State might exercise diplomatic protection on behalf of its nationals was introduced in the 2006 Draft Articles for the benefit of stateless persons and refugees only, to take into account the concern of contemporary international law for the status of both categories of persons, which is evidenced by the 1961 Convention on the Reduction of Statelessness and the 1951

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Convention Relating to the Status of Refugees (ILC, 2004, at 45).

3 The Discussion about the Legal Character of Draft Article 8 on Diplomatic Protection

This progressive development approach is criticized by Alain Pellet (2004: 22; this concept is reiterated in Pellet, 2008):

> "[T]he new mania in the Commission of advocating 'diversity' in all and everything, and in particular, human rights and environment, can only be regretted. This way of thinking certainly attracts much sympathy and approval. But there are limits to this decentralised or "exploded" approach to international law […]. This does not rule out exceptions when exceptions are indispensable, but these exceptions must be included in the general codification; and when they are not, they must be provided for in the treaties themselves, not decreed by specialists without regard to the need for clear, general, uniform, well-established and well-respected rules. And this is not all that constraining: after all, codified rules are only applicable when the special treaties themselves do not provide otherwise!"

Draft Article 8 was considered de lege ferenda at the time of adoption by the ILC. E.g., in Court of Appeal, Judgement of 12/10/2006, Al Rawi et al. v. Secretary of State for Foreign and Commonwealth Affairs and another, [2006] EWCA 1279, at para. 118, the Court held that Art. 8 was "not yet part of international law". ILC Rapporteur John Dugard (2021, paras 47-48) clarified that:

> "Traditionally diplomatic protection was limited to the protection of nationals only. This meant that stateless persons and refugees might not be granted protection by their State of residence […]. The attitude of States to stateless persons and refugees has, however, undergone major changes and there is now considerable support for the extension of diplomatic protection to such persons. Consequently, in a clear exercise in progressive development, the ILC has proposed in Art. 8 Draft Articles."

Differently, Antonio Fortin argues that the meaning of the lack of national protection requirement of the refugee definition embodied in the Refugee Convention 1951 and in the Statute of UNHCR is often misunderstood in current discussions on international refugee law. According to one view, the protection to which the refugee definition alludes is 'internal protection', that is, the protection that the State must provide within its territory to victims or potential victims of persecution. In the view of Fortin, this view is not supported by the drafting history of the refugee definition, and is not consistent with the wording of the relevant texts. On the contrary, the term 'protection' in this context means 'diplomatic protection', that is, the protection accorded by States to their nationals abroad (Fortin, 2000).

Since 2006, there has been no evidence in international practice that this provision has been transformed into de lege lata.

4 The Main Limitation of Draft Article 8 on Diplomatic Protection

I will not dwell on a comparison between this article and the traditional theory of diplomatic protection, as this approach seems rather useless in the present context. Instead, I will focus on the main limitation on the exercise of diplomatic protection on behalf of a refugee by his or her host State, namely the subjective exclusion provided for in paragraph 3, which excludes the State of which the refugee is a national from the addressees of the claim. As we will see, this issue is relevant also for the debate regarding the diplomatic protection

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of the Ukrainians.

In order to describe the scope of the refugee rule enshrined in Article 8, one must first refer to the definition of diplomatic protection contained in the preceding Article 1 of the ILC project, which of course applies to all subsequent draft articles. "Diplomatic protection" is here defined as

> "diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State."

I will leave aside the somewhat curious fact that this general definition strictly adheres to the requirement of the nationality of the claimant and completely disregards the exception for stateless persons and refugees in Article 8. The text of Article 8 also does not bridge this "impasse", for example by a safeguard clause, but the gap is filled by Article 3:

> "1. The State entitled to exercise diplomatic protection is the State of nationality.
> 2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft Article 8"

Instead, let us focus on the most important requirement for the claim of diplomatic protection, namely the wrongfulness under international law of the act by which the national was injured.

5 The Relevance of ILC Draft Articles on State Responsibility

This leads us directly to the definition of "internationally wrongful act" contained in the Draft Article 2 on Responsibility of States adopted by the ILC in 2001. The topic of diplomatic protection is closely linked to the issue of State responsibility for injuries to individuals. Originally, the drafting of articles on diplomatic protection was even intended to be part of the study on State responsibility.

According to the State responsibility draft definition

> "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State."

It is well known among international law scholars that this definition contains two elements, often referred to as subjective and objective: the conduct in question must be attributable to the State under international law, and, for the State's air to be held responsible, the conduct must constitute a breach of an international legal obligation that was in force for that State at the time.

An internationally wrongful act always entails the responsibility of the author of that act. This principle of automatism, i.e. the determination of responsibility when an act contrary to international law is committed, is clearly set out in draft Article 1 on State responsibility and applies without prejudice to special circumstances, the occurrence of which precludes the wrongfulness of the act and thus the responsibility of the author of that act (see ILC, 2001: 168 ff., Chapter V. Circumstances precluding wrongfulness).

The question that arises at this point is whether or to what extent paragraph 3 of draft Article 8 on diplomatic protection fits into the general principles and rules of State

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responsibility discussed above. Paragraph 3 assumes that the conduct of the State of which the refugee is a national which has caused harm to the refugee may consist in a breach of an obligation under international law and, thus, in an act contrary to international law, but avoids referring to the consequences of responsibility. The latter point was probably considered completely irrelevant in order to deny the State of refuge the exercise of diplomatic protection vis-à-vis the State of which the refugee is a national. For Lina Panella (2008: 74), the exclusion of the State of citizenship of the refugee pursuant to paragraph 3 of draft article 8

> "is justified, for reasons of a political nature, since, in most cases, an individual who abandons his own country to take refuge in a foreign State can always advance reasons for resentment against its own State of origin, for which there could be a multiplication of international complaints and diplomatic protection could become an instrument of 'pressure' in international relations" (translation by the author).[4]

The ILC Commentary on paragraph 3 simply states that allowing the resort to diplomatic protection against the refugee's nation-State "would have contradicted the basic approach of the draft Articles, according to which nationality is the predominant basis for the exercise of diplomatic protection" (ILC, 2004: 37).

Indeed, this approach is consistent with draft Article 44 on State Responsibility, which states that: "[t]he responsibility of a State may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims". In this case, the nationality of claims provision is not only considered an admissibility requirement when raised before an international tribunal, but also as a general requirement for the assertion of responsibility in cases where it is applicable, namely in the field of diplomatic protection (ILC, 2001: 120).

6 The Human Rights Approach to Diplomatic Protection

For the combination of the above provisions, one could conclude that while the State of nationality of the refugee has committed an internationally wrongful act and is therefore responsible, even if only in principle, under international law, there is no room either for establishing this responsibility before an international court or for invoking it by another State through diplomatic protection. This sounds very much like non-justiciability or impunity!

This result is very much against the spirit and rationale of codification efforts in the field of diplomatic protection. In his first report, Special Rapporteur Dugard expressed the view that diplomatic protection was an essential tool for the protection of human rights (on this point, see Zieck, 2001; Gaja 2003; Condorelli 2003, at 19; Flauss, 2003; Dugard, 2005; Garibian, 2008; Leys, 2016; Heeps, 2017), i.e. a means to advance it. According to the Special Rapporteur, unlike human rights treaty remedies which are available only to a limited minority of individuals and, moreover, are often ineffective, diplomatic protection, as a customary rule of international law, applies universally and thus constitutes the best

[4] Original Italian text: "si giustifica, per ragioni di natura politica, in quanto, nella gran parte dei casi, un individuo che abbandona il proprio Paese per rifugiarsi in uno Stato straniero può sempre avanzare motivi di risentimento nei confronti del proprio Stato di appartenenza, per cui si potrebbe verificare un moltiplicarsi di reclami internazionali e la protezione diplomatica potrebbe diventare uno strumento di 'pressione' nelle relazioni internazionali".

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redress (Dugard, 2000: paras. 31, 32, 68). According to Dugard (2005: 77),

> "[w]hile the European Convention on Human Rights may offer real remedies to millions of Europeans, it is difficult to argue that the American Convention on Human Rights, or the African Charter on Human and Peoples' Rights, have achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, is not covered by a regional human rights convention. To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR), provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of states that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions."

Diplomatic protection as a means of promoting the protection of human rights therefore formed the premise of the first report and the draft articles therein, which already included a provision on refugees.

The Draft Articles are intended to complement, and not replace the rules and principles for the protection of the human rights of aliens. They are to be understood as different methods of achieving the common goal of human rights' protection. This is made very clear by Article 17, which states:

> "The present Draft Articles are without prejudice to the rights of States, natural persons or other entities to resort to actions or procedures under international law other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act" (Dugard, 2005: 91).

What remains rather undefined is whether refugees are entitled to an effective remedy under international human rights treaties against the State of their nationality. Is a State that has acceded to a human rights treaty, bound to comply with its associated standards in relation to a national if that national has fled abroad and has been granted refugee status by another State? To the extent that the treaty leaves room for individual petitions to a human rights body or court, this question should be rearranged: Is a petition filed by a refugee against his State of nationality admissible? This question can only be answered in the affirmative, since no valid legal argument can be advanced to exempt a party to a human rights treaty from continuing its obligations to a national after the latter has left its territory or from being liable retroactively for injuries suffered by the refugee at the time when he was still in his country of origin and thus subject to the territorial jurisdiction of that party. On the other hand, none of the procedural rules providing for the admission to courts or human rights institutions prevents the refugee from taking legal action against the State of his nationality.

If there is no legal impediment to the use of human rights treaties and monitoring mechanisms by refugees against the State of their nationality, then why do refugees not, but only exceptionally, use the available protection, namely the filing of individual complaints, to obtain some redress for injuries and pains suffered at the period before they fled? As far as I am aware, the overwhelming majority of cases involving refugees and decided by the UN Human Rights Committee, the UN Committee against Torture or the European Court on Human Rights have been about the right to non-refoulement, which is inferred by the prohibition of inhuman and degrading treatment, where the respondent State was the asylum seeker's host State. Only in a very few cases, have refugees brought a case against their State of nationality (Fabbricotti, 2005).

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Perhaps one explanation for this phenomenon is simply that the States responsible for the refugee flows avoid becoming parties to human rights treaties. Perhaps the standards of satisfaction or repayment established by human rights bodies in the event that the claim is successful are not 'just' enough to provide the refugee with an effective reparation for the violation suffered.

What is certain is that the protection of refugees against their State of nationality under human rights treaties is largely ineffective or inadequate. Of course, the implementation of human rights treaties prevents the phenomenon of refugees. However, once this goal of deterrence has failed, refugees appear to have no real means of redress vis-à-vis their home State. This is thus a domain where diplomatic protection could have worked better as a means of promoting human rights, according to the premises of the Dugard Report.

It is not at all surprising that this did not happen. This point is made very clear in the ILC's Commentary on paragraph 3 of Draft Article 8:

> "The paragraph is [...] justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees" (ILC, 2004, at 37).

According to James Crawford (2017: 154, note 75):

> "Like most floodgates arguments this is unconvincing. Under the Articles, diplomatic protection is an entitlement not an obligation. Why should a State be deterred from accepting a refugee merely because it might thereby acquire an entitlement to claim?"

Apart from these general political considerations, it should also be borne in mind that the human rights approach to diplomatic protection suggested by Special Rapporteur Dugard was not universally shared within the ILC as can be seen from the views of three former members of the ILC, namely Gaja (2003), Pellet (2008) and Crawford (2017). For example, some ILC members objected that while the content of a State's obligations under international law of aliens often overlaps with its obligations under international human rights law, the content of the State's corresponding rights may differ (Gaja, 2003: 373).

The right to diplomatic protection, through the exercise of which the State traditionally seeks to secure certain treatment abroad for nationals (aliens for the State against which the claim is addressed) or their property, belongs only to the State of nationality. In contrast, human rights obligations do not give rise to a bilateral relationship between the territorial State and the State of which the individual is a national, as they are erga omnes in character, i.e. their observance can be claimed - and the responsibility of the State author of a breach invoked - by any State towards which the obligation exists (on this issue, see, for instance, Vermeer-Künzli, 2007). An erga omnes obligation may be owed to the international community as a whole (if the rule giving rise to the obligation is part of customary international law) or to several States that do not comprise the entire international community (if the rule is conventional). According to this view, human rights of an individual may be defended either by his State of nationality, by way of diplomatic protection, or - irrespective of nationality, provided that the rights claimed for are the content of erga omnes obligations - by any State (including the State of nationality) to which the obligation exists, without resorting to diplomatic protection action. This view relies on the obiter dictum of the International Court of Justice in the Barcelona Traction

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judgment on the merits:

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. In view of the importance of the rights involved, all the States can be held to have a legal interest in their protection; they are obligations erga omnes" (see ICJ, Judgment of 5/2/1970, Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970, p. 32, para. 33).

In the case of a refugee, the first of these options is obviously not feasible, as the individual whose human rights are being violated is a national of the responsible State. As for the second option, one must again refer to the ILC's Draft Articles on Responsibility of States (the issue of State responsibility for having caused refugees' flows is tackled by Czaplinski & Sturma, 1994). According to its Draft Article 48, any State is entitled to invoke the responsibility of another State, i.e. to require the latter to cease the wrong and give assurances of non-repetition and reparation, if the obligation breached is owed either to a group of States to which that State belongs and was established to protect a collective interest of the group or of the international community as a whole (Draft Articles on Responsibility of States, cited above).

From this, one might conclude that if the refugee's human rights are protected by erga omnes obligations,[5] then any State, including the State of asylum, may invoke the responsibility of the State of which the refugee is a national and which has breached those obligations and infringed those rights. This is, of course, something compared to the situation outlined above, which comes close to impunity. However, it is far from satisfactory.

Indeed, it is doubtful whether this provision is applied often enough to meet the need of refugees' protection. It is hard to imagine a State or several States not directly involved in the specific event that triggered the flow of refugees, or in the consequences of such a flow, asserting the responsibility of the refugee's State of origin. Responses such as described in Draft Article 48 are certainly not, and never will be, the usual way to redress the harm done to refugees by their national State.

The implications of Draft Article 48 are likely to be greater when one considers that the States that can invoke the responsibility include the State of refuge.

In my view, the State that has given refugee status to the individual whose human rights have been infringed may be considered, in the first instance, as the State injured by the act in violation of international law. Draft Article 42 on State responsibility introduces the concept of the *injured* State, i.e. the State that is primarily entitled to claim the responsibility of another State. Under this definition, the injured State is not only the State to which the breached obligation is owed individually, but also the State *specially affected* by the breach, even if the obligation is also owed to other States or to the international community as a whole, as well as any State that is part of a group of States if the breach of the obligation by one of the members of that group is of such character as to radically change the position of all the others with respect to the further performance of the

[5] This will be the case, in the opinion expressed by the International Court of Justice in the Barcelona Traction judgment, for rights originating from the outlawing of acts of aggression, and of genocide, as for basic human rights, including protection from slavery and racial discrimination. See I.C.J. Reports 1970, p. 32, para. 34.

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obligation (ILC, 2001: 294).

The State that recognized the individual as a refugee might well be considered "specially affected" by the internationally wrongful act committed by the national State of the refugee, since it bears the burden, viz. the consequences, of the breach.

Therefore the State of refuge, being "specially affected", i.e. "injured", by the breach within the meaning of Draft Article 42, may therefore invoke the responsibility of the State of nationality of the refugee, even if the erga omnes character of the obligation breached is lacking.

This being said, it remains rather unclear what the implementation of the claims under Draft Articles 42 and 48 on State responsibility entails. The ILC Commentary on these provisions states that

> "invocation [of responsibility] should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal" (ILC, 2001: 294).

How then can the State of asylum, or any other State entitled to do so under Draft Article 48, exercise its right to invoke the responsibility of the national State of the refugee, if, as we have seen above, claims (whether for the purpose of diplomatic protection or the institution of proceedings) under Draft Article 44 are barred to them because they would not be brought in accordance with an applicable rule on nationality of claims?

7 Application to the Case of the Russian-Ukrainian Conflict

It is not possible in this paper to examine this issue in depth. I would like to limit myself to making some remarks at the end of this essay on the possible application of Draft Article 8 on the diplomatic protection to the future, hopefully imminent, end of the Russian-Ukrainian conflict.

It is not easy to predict the territorial situation in which Ukraine will find itself after a hypothetical peace agreement ending the war. To date (February 2023), there are still many unknowns; it is not clear how far Russian occupation forces will penetrate Ukraine, nor whether the occupied territory will become an integral part of the Russian Federation or a self-proclaimed independent body (a new subject of international law) or whether the Ukrainians will be successful in repelling the invader. Admittedly, it is not self-evident that any peace agreement will be reached and that there will not be a de facto territorial change.

From an international law perspective, a great majority of States did not recognize the annexation of Ukrainian territories by Russia. An example is the Statement by the Members of the European Council of 30 September 2022: "We firmly reject and unequivocally condemn the illegal annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions" (European Council, 2023). Non-recognition of legal situations comes from the customary obligation for all States not to recognize the effects of the use of force, a rule which is also codified in Article 41, para 2 of the Draft Articles on State responsibility. The UN General Assembly repeatedly condemned the aggression by the Russian Federation against Ukraine targeting this action as a violation of Article 2 (4) of the Charter.

Another example is the General Assembly Resolution adopted on 2 March 2022 (UNGA,

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2022), in which the General Assembly:

> "1. Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;
>
> 2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;
>
> 3. Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State;
>
> 4. Also demands that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders;
>
> 5. Deplores the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter;
>
> 6. Demands that the Russian Federation immediately and unconditionally reverse the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine."

Despite the great uncertainty of the situation, one would wonder how to manage and resolve the claims for recovery of status, restitution of property, reparation of damages etc. of hundreds of thousands, perhaps millions, of people who have been forced to flee Ukraine. Would States having received the fluxes of Ukrainian nationals be entitled to exercise an action in diplomatic protection against Russia? Would Draft Article 8 on diplomatic protection be applicable – at least in principle – to provide reparation for the immense material and moral losses of the Ukrainians?

One point needs to be clarified preliminarily, that of the legal status of expatriated Ukrainians. These people are not "refugees" within the international legal meaning (not under the 1951 Geneva Convention nor other international law regimes). The European Union qualifies them as displaced persons being entitled to temporary protection (EU Council Implementing Decision 2022/382 of 4 March 2022). However, the word "refugee" referred to in paragraph 2 of Draft Article 8

> "is not limited to refugees as defined in the 1951 Convention relating to the Status of Refugees and its 1976 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition" (ILC, 2006: 50).

In addition, paragraph 2 of Draft Article 8 sets down two criteria, namely the lawful-and-habitual-residence and the permanent residence, which are, at least the first of them, fulfilled by the Ukrainian exiles. Indeed, many of them reside lawfully in the host country since already one year or so, and it is likely that the stay will still last quite a long time.

Turning now to the very issue, the limit envisaged in paragraph 3 of Draft Article 8 seems hardly applicable *ratione personae* and/or *ratione temporis*. The act contrary to international law (in the case at hand, the illegal use of force with all its consequences) is referable to Russia, at a time when Russia is a State different from the State of nationality of the Ukrainian refugees. Furthermore, even if one of the possible outcomes of the war is the de facto annexation of Ukraine or part of it to the Russian Federation, the illegal act would have been committed at a time when the transfer of sovereignty or governmental power over the territory in question, with the consequent acquisition of a new nationality by the resident population, had not yet taken place. And this without going into an

important issue already mentioned, namely, the recognition (which is unlikely) by the international community of the sovereignty of an entity other than Ukraine on the territory conquered by Russia.

At least in principle, therefore, and assuming that Article 8 of the codification draft on diplomatic protection now has positive legal value (*de lege lata* and no more *de lege ferenda*), nothing would prevent States that have taken in and given protection to exiled Ukrainians from taking diplomatic protection measures against Russia or against the hypothetical new entity claiming sovereignty over Ukrainian territory captured as a result of the still ongoing conflict. Russia or that other entity are not the "State of nationality of the refugee". Thus, the discussed *restriction ratione* personae envisaged in paragraph 3 would not be enforceable.

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QRP

Addressing Climate-induced Migration through Adaptation Measures: An Emerging Human Rights-based Approach?[1]

Gianfranco Gabriele Nucera [2]

Abstract

The issue of adaptation has always been present in the international legal system to combat climate change, but the 2015 Paris Agreement represented a turning point in terms of its explicit recognition as a complementary measure to mitigation. Over the last few years, these measures are gaining importance also outside the context of climate conventions, due to the need to implement climate obligations in connection to human rights standards, as recognized by consistent judicial practice. This approach based on human rights appears to be functional to the judicial enforcement of international climate obligations, but it could have a more meaningful role, particularly in the context of climate-induced migration. Climate hazards in the country of origin, which lead to the perception of uninhabitability, could constitute the ground for the application of the non-refoulement principle. Existing literature on legal issues of climate migration mainly focuses on the use of pre-existing legal categories and the lack of suitable protection rules. However, focusing on States and other actors' practices and taking into consideration the emerging vulnerabilities of individuals affected by climate change would entail a more comprehensive approach. In the emerging jurisprudential practice, reference is made to the positive obligation of States to adopt all the necessary measures to ensure the exercise of fundamental rights, mainly with reference to the right to life. Such rulings underline how adaptation measures are relevant for defining States' standards of conduct based on due diligence. This standard varies according to the fundamental right concerned and reflects a balance between adaptation and mitigation measures, to be found on a case-by-case basis and considering the particular situation of each State, its vulnerability to the effects of climate change, its economic and technological capabilities.

Key Words:

Climate; migration; human rights; adaptation measures; non-refoulement

1. Introduction

In recent decades, there have been an increasing frequency of extreme climatic events and a progressive deterioration of certain natural resources linked to climate change. Such events have highlighted the risks arising from the worsening of the global warming situation and have produced a greater demand for adaptation actions to mitigate the

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negative effects of climate change.

With the term "adaptation", we refer to all actions aimed at and limiting the abovementioned effects on the population and the environment. There does not exist yet a unanimous legal definition of the term adaptation; however, there are several references to concrete measures that fall under the concept of adaptation. The 5th Assessment Report of Intergovernmental Panel on Climate Change (IPCC) has defined adaptation as

> "[t]he process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate harm or exploit beneficial opportunities. In natural systems, human intervention may facilitate adjustment to expected climate and its effects".

The same Report has identified different adaptation measures and has stressed the need for developing a universal consensus in outlining the contours of this concept (Noble, I. R. et al., 2014: 853). The subsequent 6th Assessment Report confirmed the mentioned broad definition of adaptation measures and focuses its attention mainly on the concept of maladaptation, as to say all

> "actions that may lead to increased risk of adverse climate-related outcomes, including via increased greenhouse gas emissions, increased or shifted vulnerability to climate change, more inequitable outcomes, or diminished welfare, now or in the future" (Ara Begum et al., 2022: 165).

The concept of adaptation surely includes all strategies and measures aimed at improving the resilience of society. Reference could be made, inter alia, to means of strengthening existing infrastructures, raising the banks of watercourses, changing the type of crops and agriculture, improving the efficiency of irrigation systems, introducing plant varieties resistant to rising temperatures, planning urban areas more efficiently, greening areas suitable for certain crops or livestock. Technically there could be different types of categorizations concerning adaptation options. The European Climate Adaptation Platform (Climate-ADAPT) identifies three categories: grey, green and soft measures. According to Climate-ADAPT,

> "[g]rey measures refer to technological and engineering solutions to improve adaptation of territory, infrastructures and people[; g]reen measures are based on the ecosystem-based (or nature-based) approach and make use of the multiple services provided by natural ecosystems to improve resilience and adaptation capacity[; s]oft options include policy, legal, social, management and financial measures that can alter human behaviour and styles of governance, contributing to improve adaptation capacity and to increase awareness on climate change issues" (European Commission & European Environment Agency, 2012).

A different classification of adaptation options is the one proposed by the 5th Assessment Report of the IPCC, which includes three main categories: structural and physical options, social options and institutional options. Such categories are further divided in sub-categories.

The issue of adaptation has always been present, albeit to a marginal extent, in the international legal system of combating climate change because it has been an element of primary importance for most developing countries but, at the same time, a politically sensitive issue because it is connected, on the one hand, to the predominant role played by the industrialised countries in the cause of alteration of the climate and, from the other side, the lower technical and economic capacity of some States to adapt to the negative effects of such alterations (see Mayer, B., 2021). It is worth noting, however, that the 2015

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Paris Agreement represented a turning point both in terms of institutionalization of adaptation actions and in their explicit recognition as a complementary measure to mitigation, to achieve the main objective of containing the rise in the Earth's temperature to within 2 °C, possibly within 1.5 °C (Lesnikowski et al., 2017; on the Paris Agreement see, inter alia, Klein et al., 2017; Montini., 2017; Bodansky, 2016; Rajamani, 2016; Van Asselt, 2016; Gervasi, 2016, Viñuales, 2016). Along this line, the Decision 1/CMA.3, Glasgow Climate Pact, adopted during the Third Conference of the Parties (COP) 26 in November 2021, has resolved to pursue efforts to limit the temperature increase to 1.5 °C, a target which requires rapid and sustained reductions in global greenhouse gas emissions,

> "including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around midcentury as well as deep reductions in other greenhouse gases".

Over the last few years, international action has been increasingly geared to adaptation, as a priority and demand for developing countries, while at the same time seeking to promote greater transparency between States (on the evolution of the international system see Cordini et al. 2017; Bodansky et al., 2017; Bueno Rubial & Siegele, 2020). In this sense, the rules on transparency, as defined in the framework of the Paris Agreement, also apply to adaptation actions, covering aspects relating to the monitoring of the progress made by the Parties for the purposes of the overall assessment referred to in Article 14 of the Agreement. In this sense, a substantial step ahead has been realized through the adoption of the Glasgow-Sharm el-Sheik Work Programme on the Global Goal on Adaptation, which aims at: enabling the full and sustained implementation of the Paris Agreement, towards achieving the global goal on adaptation, with a view to enhancing adaptation action and support; enhancing understanding of the global goal on adaptation; contributing to review progresses made in achieving the global goal on adaptation; enhance national planning and implementation of adaptation actions through the process to formulate and implement national adaptation plans and through nationally determined contributions and adaptation communications; enabling Parties to better communicate their adaptation priorities, implementation and support needs, plans and actions; facilitating the establishment of robust, nationally appropriate systems for monitoring and evaluating adaptation actions; strengthening implementation of adaptation actions in vulnerable developing countries; enhancing understanding of how communication and reporting instruments related to adaptation can complement each other in order to avoid duplication of efforts.

These measures are becoming important both within the framework of climate conventions and outside the United Nations Framework Convention on Climate Change (UNFCCC) system (on the origins of the UNFCCC see Marchisio, 1992; Bodansky, 1993; on the global environmental conventions see Marchisio, 2007), due to the need to interpret and implement obligations relating to tackling climate change in relation to human rights standards. It is well known, in fact, the judicial practice that has been developed, especially at the municipal level, since the case Urgenda Foundation v. the Netherlands, whose ruling of the District Court of The Hague dates back to 2015, and was followed by the decisions adopted by the Court of Appeal, in 2018, and by the Supreme Court, in 2019 (on these decisions see Nollkaemper & Burgers, 2020; De Schutter, 2020; Scovazzi, 2018). This case has been followed by several rulings which, on the one hand, have relied on human rights standards and, on the other hand, focused their attention on

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the obligation of reducing greenhouse gases emissions, neglecting, in some cases, the relevance of adaptation in the definition of the standard of conduct.

The objective of this research is, primarily, to introduce a different perspective on the current debate on the issue of climate migration. The current academic debate is characterized by some assumptions. First, international law does not adequately address the situation of persons who leave their country due to sudden-onset or slow-onset climate events. Second, in large part, the academic legal debate is not about the law as it is, giving necessary weight to national and international legal practice, but, in a de lege ferenda perspective, it is about what the international law should be.

According to main studies, persons displaced across international borders by climate factors do not benefit from international legal guarantees relating to refugees (see European Parliament, 2020, and the references therein). Treaties dealing with refugees, statelessness, human rights, climate change or the environment do not specifically address this particular situation (see, ex multis, Negozio & Rondine; Weerasinghe, 2020; Scott, 2020; Sciaccaluga, 2020; McAdam, 2020; Borges, 2019; Kälin, Schrepfer, 2012). This is of course an understandable situation, considering the historical period and date on which the Geneva Convention on the status of refugee has been negotiated and adopted, as well as some of the regional and national complementary forms of protection. From this issue, there derives a legal gap in relation to the "protection" of such persons (PDD, 2018: 145; Kälin, 2010: 85-89). Some scholars explicitly try to analyse the legal problem in terms of absence of international protection for forced movements caused by climate change, with voluntary migration left to the discretional regulation of States in their national legal order (Kälin & Schrepfer, 2012: 62). On the opposite, other authors criticize this approach, because it "underestimates the difficulty of distinguishing forced and voluntary movement" in the context of climate change and it is a

> "misrepresentation of the logic of international protection, which turns on prospective risk in the country of origin and a lack of national protection rather than the supposedly forced quality of movement" (Cantor, 2021: 280).

Main legal research focuses on possible solutions deriving from: an extensive interpretation of existing norms of international law (Scott, 2020; Weerasinghe, 2018: 109-110; Garlick et al., 2018: 121; Fraser, 2016: 110; Kozoll, 2004: 297); the applicability and use of some regional or national forms of temporary or other protection to persons moving for climate or environmental factors (Wood, 2015; McAdam, 2012: 256-266); possible future developments of soft law instruments or policy framework for cooperation (Schloss, 2018: 247-248; Ferris & Bergmann, 2017: 12; Mayer, 2011); proposal of a new binding conventional framework to fill the legal gap or amending the terms of existing treaties in the refugee or human rights field (Biermann & Boas, 2008; Felipe Pérez, 2018: 223-224).

In light of the above, a new perspective can be found in appreciating and analysing the set of adaptation norms and measures adopted by States. Within the framework of migration induced by negative effects of global warming, in fact, the adaptation measures have a twofold implication. On the one side, adaptation measures can help people that want to stay, to avoid movements, or at least postponing the decision to move, while on the other side, in specific situation of uninhabitability, migration can be an adaptation measure in itself. According to some authors, in fact,

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> "policymakers often view climate change adaptation measures and sustainable development in the larger sense as a means to reduce migration pressures, particularly for rural and hazard-exposed populations. […] There is growing consensus among scholars that migration itself serves as part of the positive adaptation strategies adopted in the context of environmental and climatic change. It can be a way to reduce population pressures in places prone to climate risks, while diasporas provide important resources to help communities adapt and respond to climate change, through economic and social remittances and more" (Gemenne & Blocher, 2017: 2).

The present paper will focus on the first issue, as to say on the adaptation measures, which need to be implemented in order to allow people to stay in their countries. The arguments will highlight the relevance that adaptation measures have acquired in the definition of international obligations in the field of combating climate change, to emphasize that the standard of conduct must take due account not only of international commitments on mitigation, but also of obligations related to the planning and implementation of adaptation measures. The adoption of such measures in the country of origin can indeed represent a legal criterion to be considered to trigger the non-refoulement principle for persons that decided to move for reasons linked to the negative effects of climate change and related situation of uninhabitability. In this sense, the work aims at identifying existing links among the mentioned areas and, from a methodological point of view, the analysis focuses on the adoption of a human rights-based approach and on the fundamental role of legal and judicial practice in this regard.

2 Adaptation within the Framework of International Climate Conventions

Despite the explicit acknowledgments of the negative effects of climate change and, consequently, of the necessary response measures, adaptation did not play a major role during the first two decades of the UNFCCC's life. From the outset, the attention of the Parties to the Convention, as well as the eyes of world public opinion, have been directed primarily to mitigation activities, relegating to a marginal position the question of adapting and financing such measures in support of the most vulnerable states. This is due, first, to the erroneous idea of temporal distance that has always accompanied the global warming, so that in all the appropriate forums there was a natural propensity for discussing something that would occur in the future or related to sudden-onset catastrophic events, with the consequence of neglecting, on the one hand, the negative effects already visible in the present and, on the other hand, the contribution that the adaptation measures themselves could make to reducing emissions.

Conceptually, however, the relevance of adaptation is extremely important since it tells us that the current effects of the climate catastrophe are avoidable, or at least reducible. Therefore, relocating the issue of adaptation to the centre of international climate policy makes it possible to rebalance the general approach of the system, updating part of the effects of international action to combat climate change.

Adaptation is also relevant because it calls into question the cliché that everyone is both responsible for and victim of climate change. This is generally true but, from a relativistic perspective, we observe that there are appreciable differences between States in relation to both causes and effects. All States, in different ways, are responsible for the production of global warming, and all States are victims, but not all in the same way. Adaptation, therefore, is also fundamental with a view to affirming a sort of "climate justice", as a

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theoretical legal concept that refers to the need to find a fair and equitable sharing and distribution of both burdens and benefits deriving from the effects connected to climate change as well as responsibilities to fight global warming (on the debate about the meaning and boundaries of this concept see Jafry, 2019).

Only thanks to the strong impetus of the Small Island Developing States (SIDS), which stressed the potential catastrophic impact that sea level rise would have on their very existence and, moreover, highlighting all the damages and losses already in place, and the need to adopt adaptation measures, it has been clarified that the effects of climate change have differentiated impacts due to the vulnerability of a State to this phenomenon.

However, it is precisely the difficulty in identifying, at least at this early stage, unambiguous criteria for assessing the negative impacts of climate change on each State that has certainly favoured poorly structured references within the framework of the UNFCCC. The Convention mentions the negative effects of climate change in the Preamble, recognising them as a common concern of humankind by "[a]cknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind", and introducing the concept of vulnerability of the State to climate change by

> "[r]ecognizing further that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change".

The Convention does not define the concept of vulnerability, but provides a non-exhaustive list of categories of States or areas considered vulnerable due to their specific circumstances and degree of development:

> "(a) Small island countries; (b) Countries with low-lying coastal areas; (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; (d) Countries with areas prone to natural disasters; (e) Countries with areas liable to drought and desertification; (f) Countries with areas of high urban atmospheric pollution; (g) Countries with areas with fragile ecosystems, including mountainous ecosystems; (h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and (i) Landlocked and transit countries".

The subsequent Kyoto Protocol, adopted in 1997 during the Third COP to the UNFCCC, is a binding legal instrument entirely dedicated to climate change mitigation, as it is specifically intended for setting emission reduction targets and obligations (see, ex multis, Nanda, 1999). Notwithstanding the purpose of the Protocol, the concept of adaptation is also mentioned in this legal instrument in the context of certain provisions reiterating the objectives of planning and preparation for adaptation. Art. 10 of the Protocol provides that:

> "[a]ll Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, [...] in order to achieve sustainable development [...] shall: (b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change".

Like the Convention, the Protocol does not specify what constitutes an adaptation action.

Between 2001 and 2010, the work of the COPs began to deal significantly with the subject

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of adaptation, mainly under the pressure of the Least Developed Countries (LDCs). In particular, the decision to create a five-year work programme (Bali Action Plan, BAP), adopted by Decision 1/CP.13, during the 2007 COP, enabled the parties to agree on the importance of promoting appropriate adaptation actions focusing in particular on international cooperation in support of the urgent implementation of adaptation measures, on risk reduction and management strategies, on the means of dealing with losses and damages resulting from climate change or on how to deal with economic differences to improve the resilience of populations and on the role of the UNFCCC as a tool to bring together in a structured way the needs and responses in this field.

In the process of implementing the BAP, the Cancun COP represented a watershed for global discussions on adaptation, as it recognized that "[a]daptation must be addressed with the same priority as mitigation and requires appropriate institutional arrangements to enhance adaptation action and support". Decision 1/CP.16 identified objectives and actions needed to address the problem through institutional mechanisms that can facilitate States in identifying needs and response measures. These decisions underpin the references contained today in the Paris Agreement, adopted during the 2015 COP.

The leading role played by adaptation in the international system for combating climate change is enshrined in the introduction in the latter treaty of two articles specifically devoted to the issue. In addition, there is an explicit recognition, on the one hand, of the link between mitigation objectives and adaptation needs and, on the other hand, of the need to allocate financial resources fairly to support both activities. The Agreement stresses the centrality of adaptation in terms of protecting populations, livelihoods, and ecosystems from the effects of climate change, taking into account the urgent and immediate needs of countries, which are particularly vulnerable to negative effects of global warming.

3. Adaptation Obligations in the Paris Agreement and the Human Rights-based Approach

The Paris Agreement provides for different types of obligations of the Parties. Firstly, each State must plan and implement adaptation measures, which are essential in the adoption, or improvement, of processes, policies and/or initiatives aimed at implementing adaptation actions, formulating and implementing national plans, assessing its vulnerability by paying also due attention to vulnerable populations, places and ecosystems, making socio-economic and ecological systems resilient, including through forms of economic diversification and sustainable management of natural resources.

Secondly, the State must submit and periodically update a communication on adaptation, identifying priorities and needs, as well as objectives and actions. This communication is to be considered as a component of, or accompanying, other documents such as the National Adaptation Plan (NAP) and the Declaration on Nationally Determined Contributions (NDCs). The communication on adaptation submitted by each State shall be published and contained in a register kept by the Secretariat. The link with the declarations on the national contribution requires States to foresee a progression over time of the objectives and adaptation measures, so these indications must periodically be revised upwards. Proving the universal value of such a system, as of March 2022, 194 states have adopted their first NDC, while 13 states have communicated the second NDC. It should be also noted that Eritrea has not yet ratified the Paris Agreement, which consists

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of 193 Parties, but has anyway decided to communicate the first NDC. The European Union, whose 27 Member States present a single NDC, in December 2020, following the adoption of the so-called "Green Deal", updated the first NDC, which had been announced in October 2016.

The obligations laid down in the Agreement shall maintain a differentiation between the parties, in accordance with the principle of common but differentiated responsibility (on the principle see Cullet, 2015). It should be noted that the principle within the Agreement meets two modes of implementation, horizontal and vertical (Maljean-Dubois, 2016; Voigt & Ferreira, 2016). Horizontal application refers to the link between the obligation and the specific circumstances of each State and is associated with the use of formulas such as "in the light of different national circumstances", which accompanies any reference to the principle, or "as appropriate", as specified in the obligation set out in Art. 7. The vertical application refers to a classical differentiation between particular categories of States, so that it is specified that the declarations must not entail additional standards for developing countries and that States, especially industrialized countries, must support, even financially, international cooperation on adaptation, with the aim of exchanging information and good practices, strengthening institutional mechanisms, improving scientific knowledge on climate and early warning systems, assisting developing countries in identify concrete and effective adaptation practices.

Within the framework of the total budget provided for in Article 14 of the Agreement, an overall assessment of the adaptation measures will be carried out to: recognise the efforts made by developing countries; strengthen the implementation of adaptation measures, considering national communications; and to review the adequacy and effectiveness of the measures and support offered; to examine the overall progress made in achieving the global adaptation objective. The global budget will allow us to understand how NAP and NDCs address progresses to be made in achieving the global objectives set out in art. 2.

Decision 1/CP.21, to which the text of the Agreement is annexed, mandates the Conference of the Parties to the Agreement (CMA) to define certain aspects of the actions to be taken to achieve the overall objective of adaptation. The CMA in Katowice, in 2018, adopted a package of twelve decisions to define criteria and procedures for implementing the obligations of the Agreement. Among these acts, Decisions Nos. 9, 10 and 11 are particularly relevant for the present work, as they are dedicated to the definition of criteria for coherence and transparency of commitments, as well as common indicators, providing the basis for the adoption of declarations on adaptation.

The measures above described should not be read in isolation, but systematically integrated with the obligations arising from other areas of international law, those relating to the protection and promotion of human rights. Systematic interpretation is at this point widely supported by doctrine and practice, also with reference to other areas of international law (see, ex multis, Pustorino, 2021; Knox, 2020; Boyle, 2018; Rajamani, 2018; Atapattu, 2018; Savaresi, 2018; on the impact of human rights theory and practice on other areas of international law, see Pisillo Mazzeschi, 2014; Marchisio, 2016). Human rights have gained a central role in the evolution of contemporary international law, producing innovations both on general and specific aspects of the law. In general terms, it would not be erroneous to affirm that a process of "humanization" of international law is ongoing (cf. Meron, T., 2006). It is quite true that, since the end of the Second World War, the creation of the United Nations and the development of principles and concrete

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rules on the protection and promotion of human rights, State-centred norms aimed at regulating relations between States have been complemented by human-centred norms aimed at protecting people, deriving

> "from universal conventions and, in some cases, they represent indispensable standards that safeguard the fundamental values of the international community. Such expansion of values, and the parallel strengthening of international standards, have led to a gradual weakening of the traditional reserved domain of States".

Furthermore,

> "[t]he evolution of the rules pertaining to specific areas of international law is an example of this change of perspective. Human rights standards and the new anthropocentric perspective have an influence on the rules concerning the protection of the environment"

and, as will result from the analysis of this research, on regulations relating to climate change.

> "In sum, even if contemporary international law remains a system State-centred, international obligations that States accepted during the last seventy years have shifted their action toward the protection of person" (Nucera, 2020: 297).

Moreover, even if an evolutionary and integrated interpretation of the provisions would not to be considered admissible, this systematicity could be identified in the essential link between human rights and climate change, widely explored and recognized or both in the context of international human rights bodies. According to the UN Secretary-General (2020),

> "human Rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes".

The Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment have recognized that

> "climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture" (UN General Assembly 2019:10).

In addition, the Preamble of the Paris Agreement explicitly recognises that

> "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

Moreover, also with regard to adaptation measures, the Agreement specifies that such measures must be sensitive to gender equality, defined through participatory and transparent processes, taking into account the needs of vulnerable groups, communities and ecosystems, inspired by the best available scientific knowledge and, where appropriate, traditional knowledge, indigenous peoples' cultures and local cultures, so as to integrate adaptation, where appropriate, into relevant socio-economic and

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environmental policies and measures.

Precisely this integrated approach based on human rights (so-called human rights-based approach) is what today appears to be functional to the enforcement by judicial means of international obligations in the field of combating climate change (Knox, 2016; Atapattu, 2015). The reference cases, both from the point of view of the decisions and of the reasons given by the applicants, and of the appeals still pending, are now numerous and involve courts, domestic and international, treaty-bodies. In addition to this internal practice, there are recent applications pending before the European Court of Human Rights. In other cases, the monitoring bodies of international human rights conventions dealt with the issue of human rights and climate change.

The consistent case-law established is constantly being updated. According to the United Nations Environment Programme (UNEP), as of 1 July 2020, the number of "climate" appeals has almost doubled compared to the previous year, with at least 1,550 appeals filed in 38 states. These complaints are, in a large number, legally based on the positive obligations of the States to take all necessary measures to ensure the exercise of the fundamental rights considered at stake in respect of persons under their jurisdiction. In the context of these individual complaints and communications, reference is made, in the majority of cases, to the right to life, prohibition of torture and inhuman and degrading treatment, to the prohibition of refoulement, to the right to respect for private and family life. However, there are also references to other important rights enshrined in human rights treaties, such as the right to health, the right to food, the right to water, the right of the child to have his or her best interests duly taken into account as a primary consideration.

Among these rights, the principle of non-refoulment seems to have a pivotal role in the case of climate migrants. In this sense, reference can be made primarily to the obligations enshrined in the International Covenant on Civil and Political Rights (ICCPR), that entails for the parties an

> "obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed" (UN Human Rights Committee, 2004: 12).

Arts. 6 and 7 of the Covenant refer, respectively, to the right to life and to the prohibition of torture, inhuman and degrading treatment, and impose positive obligations on the States to protect people under their jurisdiction and adopt a standard of diligence which, in the case of actions having an impact on climate change, cannot also disregard scientific considerations and the capabilities of the State.

It should be noted that, with particular regard to the rights to life and to private and family life, the jurisprudence of the regional courts on human rights and the treaty bodies has always used the parameter of the real and imminent threat of which the State has knowledge, or should have had knowledge, for the activation of the positive obligation of the State to take all necessary measures to prevent the violation of these rights. In many of the cases mentioned, the courts have recognized that the threat posed by climate change is real and based on scientific evidence and is imminent since it weighs not only on future generations, but already on present generations.

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In these respects, a fundamental role has been recognized, in the mentioned cases, to the studies conducted by the IPCC. The Panel's reports have an indisputable scientific value and are relevant for several reasons. Firstly, they raise awareness in the States on the risks associated with climatic alteration phenomena, precisely pointing out the quantitative and qualitative elements necessary to counteract these phenomena. In addition, these reports accurately identify the causal link between human actions and climate change and identify, based on predictive models, the greenhouse gas emission reduction thresholds, and those measures necessary to achieve the goal of limiting the increase in the Earth's temperature to within 2 °C.

Regarding the capacity of the State, each specific situation must be considered on a case-by-case basis when evaluating due diligence, first by assessing whether it is reasonably an industrialized country, a developing country, a least developed country, or a small island developing State. Depending on whether the State belongs to one of these categories, mitigation and financial obligations may be more or less relevant than adaptation obligations. However, it should be also noted that the category of developing countries has substantially evolved over the years and current aggregations consider new economies (for example that of the so-called BRICS, comprising Brazil, Russian Federation, India, China, and South Africa) or other factors not attributable to the previous logic (Marchisio, 2021: 51). In this regard, a correct interpretation of the obligation would give attention to the substantial elements of the State involved, rather than a formal affinity of the State to a specific group. In the case of an industrialized state, the former should assume greater weight in the evaluation of conduct. Conversely, in the case of a State belonging to one of the other categories, the adoption or need to adopt adaptation measures could take on a greater specific weight. This is because the countries that are the most vulnerable to the effects of climate change, and therefore in need of greater adaptation interventions, are those that have contributed least to climate change, that is, those that logically should have less burdensome mitigation obligations.

A further element of evaluation related to the specificities of the State concerns its technological capabilities. The assessment of the subject's conduct cannot be separated from the application of the principle of the best available technology (BAT) and from an analysis of the costs-benefits associated with the adoption of both mitigation and adaptation measures.

This principle is referred to in several international conventions on the environment and sustainable development with the aim of defining a reference standard that guarantees the flexibility and adaptation of the rules of a treaty to social developments. According to the mentioned principle, no technology or technique can be considered a BAT without effective research into the current State of science and technology. For example, the Helsinki Convention on the Protection and Use of Transboundary Waterways and International Lakes, of 1992, defines how to identify the best available technology through the application, among others, of the following parameters:

> "(a) Comparable processes, facilities or methods of operation which have recently been successfully tried out; (b) Technological advances and changes in scientific knowledge and understanding; (c) The economic feasibility of such technology".

The principle of BAT (or even best available technique, science, or scientific knowledge) is also referred to, for example, in the Convention for the Protection of the Atmosphere against Long-Range Transboundary Pollution (Art. 6), the UNFCC (Art. 4.1. lett. c and d),

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the Kyoto Protocol (Art. 9) and the Paris Agreement (Preamble, Arts. 4.1, 7.5, 14.1) (other references to the principle in international conventions are mentioned in Merkouris, 2012).

The BAT principle becomes even more relevant, in a system such as that devoted to fight climate change, if we consider the pace of scientific research and progress, which makes it possible that a technique considered as the best a few years ago can no longer be characterized as such. While the UNFCCC and the Kyoto Protocol explicitly refer to the principle about mitigation actions, Article 7 of the Paris Agreement recognises that adaptation actions must be based on and guided by "the best available science".

It should be noted that, however, where this principle has not been expressly referred to, it has been applied through the extensive interpretation of certain provisions of the treaties on the management of shared natural resources. There are several cases in which international tribunals have adopted dynamic and evolutionary interpretations of the provisions of a treaty. The International Court of Justice (ICJ) has recognized since 1971 the importance of adopting an evolutionary as well as systematic interpretation. In the advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), the Court affirmed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (see, inter alia, Nucera, G. G., 2022). According to the ICJ, following the use of a generic term

> "the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time".

For example, in the Gabčíkovo-Nagymaros Project case, with reference to some generic terms used in the 1977 Treaty concerning the construction of a dam on the river Danube, the ICJ highlighted that:

> "[b]y inserting […] evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law".

Furthermore, in the Pulp Mills on the River Uruguay case, the ICJ recognized the need to apply the best available technology in order to comply with the pollution prevention obligations under Article 41 of the Uruguay River Statute. Both Argentina and Uruguay agreed on the application of the BAT principle. According to Argentina, "Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques", even though this is required under Article 5 (d) of the […] Convention [on Persistent Organic Pollutants]" (ICJ, Judgement of 20/4/2010, Pulp Mills on the River Uruguay, at 220) and "the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp", while Uruguay maintains that it "has complied with its duty to prevent pollution by requiring the plant to meet best available technology ("BAT") standards" (ICJ, Pulp Mills, at 192).

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4 Duty of Care and Relevance of Climate Change Adaptation Measures

Among the many above mentioned cases, it seems appropriate to refer to some of them and to the reasoning that the court or supervisory body has carried out to adopt a decision. In most cases, the attention of the judges, and of the doctrine that has commented on these decisions, has focused on the role of mitigation measures in protecting human rights. This approach focusing on reducing greenhouse gas emissions is a relic from the past when the concept of mitigation assumed centrality in the international system.

However, the most prudent case-law has not failed to point out that adaptation measures, in line with the new approach of the Paris Agreement, are as relevant as mitigation actions. In particular, the analysis will focus on the cases Urgenda Foundation v. the Netherlands, Teitiota v. New Zealand, Neubauer, et al. v. Germany.

The fil rouge among these cases is the definition of the standard of conduct that uses as a benchmark the criterion of diligence, to be evaluated according to the need to put in place measures to ensure the exercise of the right (or rights) in question.

It should be noted that, obviously, the standard varies according to the fundamental right at stake, higher in the case of rights of an absolute nature, such as the right to life or the prohibition of torture, or inhuman and degrading treatment, and relatively less in the case, for example, of the right to respect for private and family life.

In the cases examined, the reasoning adopted by the courts leads to the conclusion that, to guarantee the exercise of the fundamental rights referred to, the State must take all the necessary measures imposed by the positive obligation. According to the Human Rights Committee, and with reference to the ICCPR,

> "[t]he duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life".

Moreover,

> "[i]n light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".

In the case of possible breaches connected to climate phenomena, these measures are to be found in the implementation of international obligations on climate change mitigation, derived from the international scientific work of reference, in particular the reports published by the IPCC, and from the relevant national documents. However, the innovative rulings also refer, in a differentiated manner, to adaptation measures.

In the case of Urgenda Foundation v. the Netherlands, the Court of Appeal has recognised the possibility of using, with a view to prevent possible violations of the right to life or the right to respect for private and family life, together with mitigation, adaptation measures "to counter the consequences of climate change, including raising dikes to protect low-lying areas". In the present case, the State had noted that

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> "adaptation and mitigation are complementary strategies to limit the risks of climate change and that Urgenda has failed to appreciate the adaptation measures that the State has taken or will take".

However, the State used this as an argument for justifying the failure in reducing its emissions and the Court concluded that "while it is certainly logical for the State to also take adaptation measures, this does not take away from its obligation to reduce CO2 emissions quicker than it has planned".

The same approach was rightly confirmed by the Netherlands Supreme Court, which, however, did not fail to point out more clearly that the positive obligations imposed by Articles 2 and 8 of the ECHR do not include the duty to take the necessary preventive measures and maintaining a certain discretion in the choice of measures, having regard to the specific circumstances of the case. The Dutch Court specifically refers to the extensive case-law of the Court of Strasbourg on Arts. 2 and 8. In particular, on Art. 2, the Court refers to the judgments: Öneryildiz v. Turkey, Budayeva et al. v. Russia, Kolyadenko et al. v. Russia. On Art. 8, the Court refers to judgments in cases: Taşkin et al. v. Turkey, and Tătar v. Romania. According to the Supreme Court, those measures

> "may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation)".

In the case Ioane Teitiota v. New Zealand, the Human Rights Committee recognized the link between climate change and the right to life, already identified by the Committee's General Comment No. 36 (view of 24/10/2019). According to the General Comment:

> "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach".

In assessing whether the expulsion of the author of the communication to his country of origin was the result of a clearly arbitrary, erroneous or unjust assessment which would create a real risk to his life, the Committee noted that the New Zealand courts had thoroughly analysed Teitiota's request and that the government of Kiribati has adopted "steps to address the effects of climate change, according to the 2007 National Adaptation Programme of Action submitted by Kiribati under the [UNFCCC]".

The Committee recognized that

> "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the

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> Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized".

Faced with such a scenario, the rise in the sea caused by the effects of climate change would fall perfectly within the hypotheses of application of the prohibition of refoulement provided by the potential violation of the right to life and/or the prohibition of torture, inhuman and degrading treatment in cases of repatriation of the person. However, the Committee did not automatically apply this hypothesis and used as a benchmark the measures which the State would have had to take, including the most extreme, in relation to the period remaining before the situation degenerates to the point of making the place uninhabitable. The Committee notes that

> "the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population",

and adds that "the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms". Precisely because of the adaptation measures already approved by the State and those that it could have put in place in the next 10 to 15 years, the Committee could not detect a violation of the right to life of the author of the communication.

The adoption of adaptation measures is therefore interpreted as a central element of the standard of protection imposed by the right to life, even to a greater extent than the possible measures to reduce greenhouse gas emissions that the Republic of Kiribati has adopted or could and should have adopted.

The duty of the State to protect the life and physical integrity of persons under its jurisdiction is also the subject of the ruling of the German Federal Constitutional Court in the case of Neubauer, et al. v Germany (order of 24/3/2021). According to the Court, the risks posed by climate change give rise to this duty to protect, to be achieved by adopting measures that contribute to stopping anthropogenic global warming. These actions must be complemented by positive measures aimed at alleviating the consequences of climate change, i.e., adaptation measures. In relation to these, the Court recognised that, although not directly aimed at limiting climate change, adaptation is key to alleviating its negative effects on people. The Court further points out that

> "[n]evertheless, alongside the duties of protection [...], a mechanism for safeguarding the ecological minimum standard could indeed acquire its own independent validity if, in an environment transformed to the point of being toxic, adaptation measures would still be capable of protecting life, physical integrity and property but not the other prerequisites for social, cultural and political life".

If, on the one hand, the State has the duty to cooperate with other States to try to solve the climate problem and to "do its part" in terms of reducing greenhouse gas emissions, on the other hand, where climate change is not preventable or has already occurred, the State is obliged to address the risks by implementing positive measures aimed at alleviating the consequences of climate change, and keep the risks at acceptable levels.

In the present case, the Court has held that it cannot be established at present that the State has violated its duty to protect with the reduction path regulated until 2030, possibly

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still oriented towards a 2 °C target. There is no evidence that the health consequences of global warming of 2 °C and the corresponding climate change in Germany could not be sufficiently alleviated by supplementary adaptation measures under constitutional law (Federal Constitutional Court, Neubauer, at 167).

The standard of protection required by the right to life is therefore linked to the combination of the two elements, the complementarity of which is fundamental to correctly assess the conduct of the State. The duty to protect fundamental rights entails a combination of mitigation and adaptation measures for which the State is responsible for the political choices made, also taking into due account the indications of the international scientific community. Referring to the indications of the scientific community, the Court recalls the reports of the IPCC. In particular, the judgment refers to the measures referred to in 5th Assessment Report.

The Court's reasoning highlights the centrality of adaptation in assessing the possible violation of the right to life, so that

> "whether or not the measures are sufficient to protect fundamental rights could only be evaluated by comparing the climate action measures taken with the possible adaptation options".

5. Conclusion

In the cases mentioned above, there is a tendency to recognize that the negative effects of climate change can cause serious repercussions on the exercise of certain human rights, both with reference to the sudden-onset climate events, such as droughts or hurricanes, and in relation to the slow-onset events, such as desertification or rising oceans.

Logically, it follows that failure to comply with international obligations to combat climate change consequently leads to a breach of the positive obligation of States to take all measures necessary to ensure the exercise of certain fundamental rights, in particular the right to life or the right to respect for private and family life, in respect of persons under their jurisdiction, in cases where a causal link between prejudice and extreme phenomena or progressive climatic deterioration can be demonstrated.

The cases analysed, on a closer investigation, also denote another trend, in the consolidation phase, namely the recognition of the complementarity of adaptation measures with respect to mitigation actions, as essential means to define the necessary standard of conduct guaranteed by the due diligence obligation.

This approach coincides perfectly with the evolution that the legal-institutional framework to combat climate change is experiencing, with a "promotion" of the issue of adaptation as a central theme of the system, as well as the mitigation and financing of cooperation, and an essential means to achieve the objective of containing the rise in temperature within 2 °C, enshrined in the Paris Agreement, subsequently updated to 1.5 °C by the Glasgow Climate Pact and reiterated by the Sharm el-Sheik Implementation Plan.

Moreover, it is clear, as pointed out in the cases of Urgenda Foundation v. the Netherlands and Neubauer et al. v. Germany, that the use of adaptation measures alone would not be sufficient in relation to the objective of protecting persons under the State's jurisdiction. Such measures alone would not be adequate to contain the risks of violation of these

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rights, but rather there must be a balance between mitigation and adaptation interventions.

It is up to the State to define the right balance between mitigation and adaptation measures, taking into account the scientific data and evidence that are regularly made available to decision-makers by the international scientific community. The balance between the two measures is therefore to be found on a case-by-case basis, due to the situation of each State, assessing its vulnerability to the effects of climate change, its economic and technological capacities, as well as the contribution that the State has historically made to the alteration of the global climate, in line with the principle of common but differentiated responsibility and their respective national capacities and circumstances.

To conclude, it should be noted that since a human rights-based approach serves generally as a catalyst for promoting the achievement of an environmentally sustainable future, adaptation measures represent a decisive criterion for the purposes of protecting climate-induced migrants by triggering the applicability of the principle of non-refoulement, which is the cornerstone of the international protection system, as a first step for the subsequent and connected applicability of reception measures and towards more stable forms of protection that also consider aspects related to integration.

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QRP

Resettlement Services: Room for Improvement in Pre-departure and Post-arrival Services[1]

Stefanie Witter[2]

Abstract

Resettlement is one of few legal pathways for refugees and offers enormous potential for stabilizing a humanitarian refugee crisis. This leads to the question as to why this program seems to be relatively unknown and how it could be improved in order to use its potential effectively. The present paper provides a deepened understanding of the resettlement process as a safe pathway for refugees and introduces possibilities for improving its pre-departure and post-arrival services. Therefore, it reflects on the resettlement strategy itself and explores the program's weaknesses and strengths. Additionally, this paper analyses the provision of pre-departure and post-arrival services: What services are provided to refugees in the phase directly before resettlement (pre-departure) and right after arrival in the resettlement country (post-arrival)? Who are their main actors and what potentials do those services have? Answering these questions will lead to first recommendations for the services. Subsequently, the theoretically based recommendations are further analyzed by using the results of two empirical expert interviews. The experts work in the field of pre-departure services in Jordan as a transit country and in the field of post-arrival services in Germany as a host country. The insights of the interviewees finally affirm and finalize the recommendations, providing a clear picture for the possibility of improvement. Moreover, this allows the identification of necessary skills for service providers that are needed to implement the recommendations. Ultimately, these results indicate the roles that social workers are able to undertake within the resettlement process.

Key Words:

social work; resettlement; pre-departure; post-arrival; services

1. Introduction

Refugees oftentimes must use illegal and dangerous pathways for reaching safe countries to claim international protection. For that reason, the development of safe and legal pathways for refugees is essential, although currently only few available options exist. One of these options is the resettlement program, a tool used to relocate refugees from a transit country to a host country.

Worldwide, several countries have established a resettlement program to respond to the need for safe pathways. This program follows a complex procedure, starting in the transit

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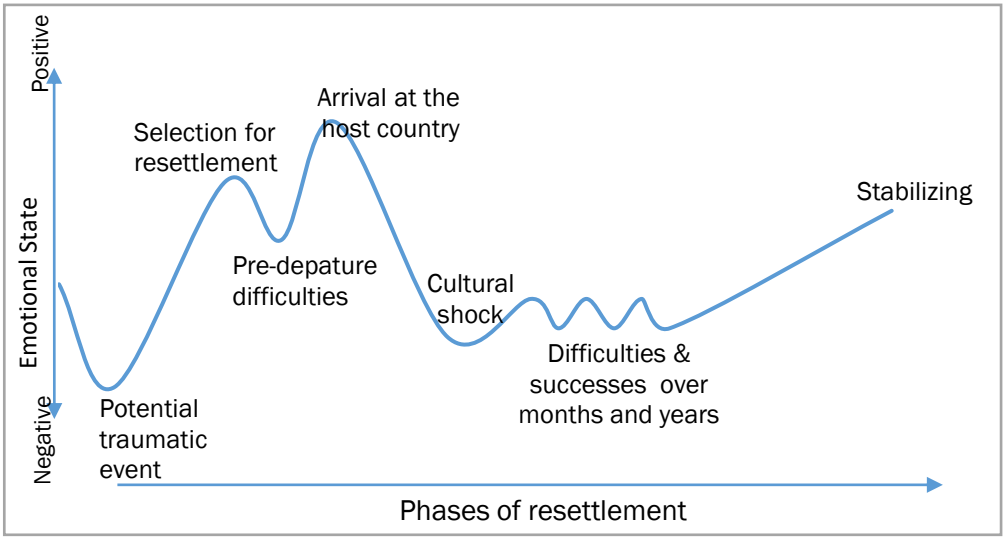
country with a selection process. After a successful approval, a pre-departure phase follows in which refugees wait for their departure. After this departure, people of concern arrive at the host country, where a reception phase takes place. During this stage, refugees can acclimatize to the unfamiliar environment, and post-arrival services are provided, such as language or orientation courses.

When refugees are resettled, the program leads to contradictory emotional states. The figure below illustrates the progression of the emotional state during the phases of resettlement (cf. Figure 1).

Figure1: Emotional state during the resettlement process (author's representation; Hazel & Phillman, 2011; Department of Education and Children's Services in Australia, 2007)



The potential traumatic event marks the first low point on the journey. It can occur due to violent conflicts, economic crises, natural disasters, or other threatening incidents. Afterwards, the positive decision received in the transit country to be resettled to a host country is a highpoint, as this increases the likelihood of improving one's own situation. Right after this highpoint, a downward-curve appears due to pre-departure difficulties. In this phase, people who will be resettled start to learn about their country of destination and start to realize the vast change in life. The realization of leaving, learning about a new culture, and raised awareness of accompanying difficulties – all this leads to a new low point. Despite such fears, the pre-departure phase can take up to two years. This extended period is perceived by refugees as exhausting (Baraulina & Bitterwolf, 2016). This phase, however, is essential, as services can be provided for gaining realistic expectations towards the country, for stabilizing the sense of well-being of the person, and for fostering the later integration process. Integration does not start in the host country, but at the exact point after the decision of the host country to resettle a person.

The arrival in the host country is usually a high point of the journey as the relief of being finally resettled is overwhelmingly positive. The remarkable downwards-curve afterwards

demonstrates the cultural-shock that is a rough awakening for refugees when realizing, for instance, that expectations are unrealistic, when noticing integration into a new society is extremely difficult, or when starting to feel lonely or homesick. This downwards-curve and the resulting low point prevent an effective and fast integration process and it might damage their mental health condition. The following ups and downs of the graphic illustrate difficulties, such as language barriers, and successes, such as passing a language course, that occur within the next period. How long this period lasts, depends on the individual and his*her environment. Only after months or even years, the individual stabilizes in the new environment. It must be noted that there are cases where refugees never reached this stage (Hazel & Phillmann, 2011).

A hindered integration-process and mental health impairment can create a downward spiral, as these factors are likely to indicate several negative results on a micro- and macro-level.

Preventing this downwards spiral is possible with rounding off the downwards curves by implementing pre-departure and post-arrival services. Effective services can later prevent mental health problems and facilitate the integration process in the host community. However, there is a lack of research on how these services are implemented concretely and how they could be developed further. This might be attributed to the lack of transparency of service provision: The services are either described roughly (see for example Caritas, 2013) or how they should be implemented ideally (see for example IOM, 2018). In both cases, there is no reflection of the reality, which makes it difficult to evaluate in order to develop services.

Therefore, this paper seeks to identify the current implementation of such services to find out if they are adequately provided – meaning, provided in a way in which the integration-process is facilitated and a stable mental health status is ensured. It focuses on the questions of how pre-departure and post-arrival services are carried out and how they can be developed. It further examines the role that social workers can undertake , and what skills are required of them to implement recommendations. To answer these questions, a theoretical analysis was conducted from which recommendations could be derived. Those recommendations were analyzed further by two empirical expert interviews with service providers, which led to the main findings of this paper.

The structure of this paper is divided into three main parts: The theoretical analysis, the empirical study, and the combination of theory and empirical results, that leads to the findings of this research. Firstly, the resettlement process and its pre-departure and post arrival services are identified by a theoretical analysis, which highlights the current state of research as well as the current implementation of services. This analysis leads to first recommendations for the services (Chapter 2). Those recommendations are further analyzed by using empirical expert interviews with two service providers (Chapter 3). The combination of theoretical analysis and empirical outcomes leads to the final recommendations. In conclusion, this paper focuses on the required skills needed from social workers to implement those recommendations (Chapter 4).

2 The Resettlement Procedure and Service Recommendations

2.1 A Safe Pathway under Critique

Resettlement means the relocation of refugees from a third country – mostly the first

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country of asylum – directly to a host country that has agreed in advance to host these persons long-term and to grant them protection. Resettlement is characterized by the component that those seeking international protection do not have to be in the host country to apply for it, as is the case for asylum applicants. The application procedure for resettlement is instead initiated in the transit country (UNHCR, 2011).

After World War I, an enormous number of people were displaced, which called for the implementation of such a program. In 1923, the first resettlement program relocated 20.000 people into 44 countries. After this success, the enhancement of migration via resettlement, not for economic reasons but for humanitarian reasons, became more likely, for example after World War II or during the Cold War (Kleist, 2016). The UNHCR, founded in the year 1950, became responsible for promoting durable solutions for refugees and thereby to coordinate resettlement (UNHCR, 2003). Nevertheless, the first Resettlement Handbook which presented concrete structures and recommended procedures was published relatively late, in 1996 (UNHCR, 1996).

In 2022, 23 countries provided resettlement locations for refugees in cooperation with UNHCR, and 58.457 refugees were received by host countries. The U.S.A. is the leading host country in this regard with 21.915 admissions, followed by Canada with 11.014 admissions. Germany resettled 4.787 refugees in the previous year (UNHCR, 2023). For the year 2023, Germany plans to resettle 6.500 refugees (BMI, 2023).In fact, since 2017 the United Kingdom and Germany have started to provide resettlement places in a similarly high amount like Australia, Sweden and Norway, who are main providers already since 2004. However, the U.S.A and Canada have remained as the two main destinations between 2004 and today (UNHCR, 2023).

Host countries decide for themselves whether to take part in the resettlement program. The European Commission offers support for countries that decide to become active. Since 2015, there has been legislation for the resettlement in the EU (ASIM 62 RELEX 633, 11130/15), which aims to stabilize safe pathways to EU territory and to strengthen a common policy amongst the Member States. As there is no distribution key with which the relevant quota for each country could be calculated, Member States can set their quota themselves and can even change those goals during the year (Solf & Rehberg, 2021). Resettlement countries can therefore set their quotas low which makes it easy for them to meet self-set targets

Even though the EU has established a voluntary framework for resettlement, in the end, the decision to resettle lies within the Member State's jurisdiction. Therefore, the single governments and their ministries for migration are the main actors for the resettlement procedure in the host countries. They decide on the procedure and the arrangements in their countries after refugees have arrived. Before the arrival phase, UNHCR is the main actor in the transit countries, examining and deciding on who can be submitted as a resettlement candidate. These submissions are sent to the governments' ministries for a final decision. The International Organization for Migration (IOM) is another main actor, playing a key role after the final decision is made, as its Department of Operations and Emergencies coordinates case processing, health assessments, pre-departure orientation and the actual journey of the refugees from the transit country to the host country (IOM, n.d.).

Summarizing this, at first sight, resettlement seems to be a solution with a promising

future. It establishes a safe pathway for refugees to a host country, which in advance has agreed to grant these persons protection, to prepare the arrival and the stay, and to guarantee access to necessary services on-site (UNO-Flüchtlingshilfe, 2018).

Nevertheless, resettlement is also fragmentary, and the coordination and its related legislations face critique as well. First, the numbers of resettlement departures are inadequate and do not match the increasing need for safe pathways. Second, the division of responsibility and burden-sharing is not effective as some countries are overwhelmed by irregular migration arrivals, while other member states do not take part in resettlement at all.

Moreover – and this may be the most problematic point of critique – the central goal of resettlement, the protection of "individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge" (UNHCR, 2011: 3), does not seem to be the main motivation for governments' attempts to resettle. UNHCR tries to reach this goal by applying certain resettlement submission categories to determine who is and is not eligible for resettlement. The status of vulnerability is the key criteria in this regard. Host countries have established their own criteria, such as language skills or status of education. This leads to a preference of certain refugees with no regard to their vulnerability. It might lead to a selection process where the so-called ability to integrate into the host communities outweighs the categories set up by UNHCR (Baumer et al., 2017). UNHCR itself warns host countries not to forget the initial goal of the individual's protection and reminds that resettlement is "a tool to provide protection and a durable solution to refugees rather than a migration management tool" (UNHCR, 2016b: 1). The U.S.A., Canada and Australia, those countries with the highest resettlement arrival numbers, are likely to select refugees with regard to the best prospect of integration into the societies, as has been the case for a number of years (Oxfam, 2005). Nevertheless, also the EU member states, like Germany, have established their own selection criteria, and attempt thereby to control the migration and refugee flows into their country (Baumer et al., 2017).

However, a pragmatic perspective can be taken as well, according to which the individual selection criteria used by host countries are necessary to narrow down the number of applicants. These criteria involve selecting refugees who already have a connection to the country of destination, or who have other abilities that facilitate the integration process; in turn, this affects the individual well-being positively. On the other hand, an ethical analysis focuses on the resulting power imbalance in this procedure: Displaced people are passive participants who do not have a say in any decision-making process. UNHCR obtains the delicate task of balancing the interests of host countries and those of refugees, as it is responsible for the submission of resettlement candidates (Lindsay, 2017). Moreover, the selection criteria and the voluntary character of the program lead to obvious discrimination, as for instance Islamophobic portrayals of Muslim Arab men as terrorists, which is why host countries may avoid resettling them (Turner 2017). Another example of discrimination is related to the health status of applicants. Several host countries reject refugees due to their difficult health status, which is determined during their medical screening (UNHCR, 2011). People, diagnosed with for example HIV can be rejected by host countries, as there is no legal obligation to accept them. Host countries are free in their national selection policy and may reject these special cases by justifying the decision on the grounds of national security or avoiding financial burdens.

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An additional point of critique regards the power-imbalance between host and transit country within the context of resettlement arrangements. While the cooperation between those two countries is unofficially based on resettling displaced people from the respective third country, the goal to protect the individual is once again not the focus of this strategy. Instead, the third countries might be forced to change their politics into EU-desired directions to receive assistance and to share burdens.

As a consequence of these critical factors, resettlement cannot be seen as the perfect solution for safe pathways, and further procedural development is needed. Nevertheless, resettlement is a crucial tool for relocating refugees legally and safely, and therefore the continuous improvement of this durable solution must be a main goal for all actors. One way of reaching this goal is the analysis of the process in order to detect weaknesses and room for improvement. The pre-departure and post-arrival services are major steps within this process, which offer unique chances to optimize the process for both refugees and host countries.

2.2 Pre-departure Services and Recommendations

After a positive resettlement decision has been taken, the pre-departure processing starts, including services before the actual departure to the host country takes place. It is desirable to "consider the needs and concerns of each refugee, their health and well-being, arrangements for their safe travel and the prospect of their meaningful integration" (Swing, 2017: 5), not only because of the mental stability of the person but also because of economic reasons, since a facilitated integration process fosters this person becoming an contributing member of society. In order to ensure this, pre-departure services are offered to refugees that aim to assist during the travel and to provide preparations for life in the host community. Pre-departure training programs for migrants are not a novelty of this century. In fact, such programs were already used in the early 1960s to encourage a first orientation among labor migrants (Chindea, 2015). Pre-departure services for resettlement refugees should ideally include coordination regarding the travel arrangements and medical screening, including follow-ups. Additionally, specific cultural pre-departure courses should be offered.

These services enhance newcomers to become self-sufficient members of the host society which increases the likelihood of successful integration (Gray, 2008; Chindea, 2015; UNHCR, 2011). Beside this, pre-departure services have positive impacts on host countries as well, since labor market information is shared and assistance in credential recognition processes is given. For transit countries, pre-departure services have the advantage of reducing the stressful impact of the exhausting waiting period for refugees, which can prevent possible tensions or criminal behavior on-site (Baraulina & Bitterwolf, 2016).

Actors in the pre-departure service provision are governmental institutions, private sector organizations, and NGOs, but the main actors in pre-departure services are UNHCR and IOM (Gray, 2008; Chindea, 2015). The actual implementation of these services is carried out by the workers on-site, although there are no general job-requirements defined for this working field.

The arrangements for the departure vary concerning their duration and expenditure, depending on the host country to which the person will be resettled (Gray, 2008). In general, the three main objectives of pre-departure services are the following: medical

screening, which includes the examination of the mental and physical health status (Ekholm et al., 2005; IOM, 2014), coordinating travel arrangements, including assistance for visa matters and flight organization (UNHCR, 2011), and providing pre-departure orientation (UNHCR, 2011; IOM, 2015). The pre-departure orientation can be divided into four broad thematic categories. First is the provision of information about the host country, like daily life circumstances, social norms and values, and basic information about the labor market. Second is the development of certain skills which are needed to be a self-sufficient member of society, such as language training. The third category is defined as enhancing employment chances, which includes active job search and entrepreneurship guidance. Lastly, the thematic field of the labor market in the host country is covered, which includes the recognition of skills and competences, since recognition of foreign accredited credentials facilitates the integration, and it saves resources of the host countries in terms of social services. The coverage of all this information is the ideal, but does not imply that pre-departure services commonly cover all this in their content. However, most pre-departure orientation services cover more than one category (Chindea, 2015). A holistic pre-departure orientation program should cover all four categories, as all of them ultimately contribute to a successful transition. In the case of most host countries, the exact content provided during a specific orientation course is not documented in detail. In general, content and length of pre-departure orientation courses vary with regard to the responsible host country and its policies (Westerby & Ngo-Diep, 2013).

Germany subcontracts IOM with the task of pre-departure service implementation. Therefore, IOM provides the medical screening services and travel arrangements. As far as orientation is concerned, it initiates cultural orientation courses and certain travel arrangements (IOM 2015). Furthermore, information is provided on visa processes and news from Germany, with a special focus on integration-related services. There is a so-called integration class, which covers daily life aspects in Germany, and rights and responsibilities concerning the national law. The development of certain skills is mentioned in this context (without defining them closely) for the successful adaptation into German society (IOM, n.d.; UNHCR, 2016a). Orientation courses are usually implemented by either IOM or Diakonie, and last a maximum of 20 hours, in the countries of first asylum. According to the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* – BAMF), they cover basic information about the country and life in Germany, regulations regarding the residency, dealing with local authorities, accommodation information, and basic knowledge of the German language. Furthermore a BAMF information sheet about Germany and its legislation is handed out in several languages to the newcomers (Grote et al., 2016).

Besides these pre-departure courses, Germany provides several services on the internet via apps, videos, or webpages. These services contribute during the pre-departure and post-arrival phase, and are further examined in the analysis of post-arrival services below.

Reviewing pre-departure services leads to several recommendations for service organizers and providers. Although these services have already existed for decades, the implementation still leaves room for criticism and thus for further improvement. The discussion that follows outlines several recommendations for pre-departure services. These focus on the necessity of a linkage between pre-departure and post-arrival services (PDS1-linkage), inclusion of counseling on several levels (PDS2-counseling), establishment of an effective waiting period (PDS3-waiting period), empowerment of

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refugees to become active participants throughout the process (PDS4-empowerment), inclusion of prevention of radicalization (PDS5-radicalization), acknowledgement of credentials (PDS6-credentials), evaluation of the services for improvement (PDS7-evaluation), and the establishment of other, informal sources of information (PDS8-informal sources).

With respect to establishing an effective linkage (PDS1-linkage) between these two stages, the combined outcomes of both will be more effective than the results of each single stage on its own. Pre-departure services can prepare refugees more appropriately if service providers know the specific procedure of the arrival phase. They must be continuously updated to always provide the most current information to refugees. Post-arrival services need to know the content of pre-departure services, as this enables providers to continue services at the specific level on which the prior services have stopped. An example of evidence for this missing linkage is the referral of pre-resettlement educational experiences as a "black box" (Dryden-Peterson, 2016). With this linkage, however, language courses would not have to start from point zero and information provision could continue at an advanced level. IOM confirms the relevance of this recommendation, as it perceives this linkage as one core principle for any resettlement operation (IOM, 2018).

The lack of attention to counseling for refugees generates a second recommendation (PDS2-counseling). Counseling should not just be part of the medical screening services but must be integral to the field of pre-departure orientation, as anxiety or depression can arise and expectations can be changed through orientation courses. When IOM introduces its role in pre-departure orientation, it does not mention counseling as a task, although it names the aspect as a challenge (IOM, 2014). However, appropriate counseling is a necessary aspect for stabilizing the psychosocial well-being of participants (Backer & Stephen, 2014).

Furthermore, the waiting period is perceived by refugees as frustrating, without any active possibilities (Baraulina & Bitterwolf, 2016). This period leads to the third recommendation concerning the waiting period (PDS3-waiting period). It is important for service providers to act speedily but precisely. The waiting period should be bridged effectively and adequately for refugees: Awareness regarding fast and at the same time careful processing needs to be raised among the responsible staff.

The fact that refugees do not have the chance to actively participate in the resettlement process – except for paying for a transfer in some cases – is another point of critique. They are not their own agents of change, and instead they can only hope for a better future, feeling powerless, and often not even knowing the status of their resettlement application (Baraulina & Bitterwolf, 2016). Consequently, the empowerment of refugees should also be listed as a recommendation (PDS4-empowerment). IOM confirms this recommendation, as well as the establishment of refugee-centered programs, which is named as one core principle (IOM, 2018).

Additionally, the topic of extremism and radicalization is not included in pre-departure services. However, there is a risk of refugees becoming radicalized in refugee camps (IOM, 2017; Sude, 2021). Pre-departure services must react to this challenge (PDS5-radicalization), by including approaches, first for the prevention of radicalization, and second for the detection of already radicalized refugees.

Another point of critique that implies a recommendation is the rarely covered service of the recognition of credentials (PDS6-credentials) (Chindea, 2015). Services in this regard must be included, as they are indispensable for successful integration in the host country, thereby facilitating employment. The refugee's resources, like knowledge, networks, and motivation can be used as a driving factor in successful preparation for the labor market. Ideally, the accreditation of credentials should take place already in the transit country, as the waiting period provides enough time for such a procedure which then can be saved in the host country.

The content of pre-departure orientation courses is difficult to review critically, as the exact content (not just the ideal case of what should be included), the implementation and the service providers themselves, cannot be examined accurately through literature review. This indicates the need for a recommendation to conduct continuous evaluation and monitoring, because this would ensure optimal implementation (PDS7-evaluation). Nevertheless, all of this is only possible with given transparency throughout the process of service provision.

The eighth recommendation concerns the various channels of information (PDS8-informal sources), since refugees use informal channels to inform themselves. Private networking for example, is one of the main means to gather information about the host country, as well as the usage of internet platforms and accessing available forums (Chindea, 2015). Host countries usually already provide the necessary data at internet platforms established for this purpose in several languages. Such platforms should be promoted strongly. Plus, as refugees tend to use private networks, this indicates the need for raising awareness among those refugees who are already in the host country, so that they can provide correct information to friends and family members who are still in the transit or home country.

These recommendations are meant to give advice for amendments to pre-departure services for further improvement. Although these results are extracted on the basis of, inter alia, the analysis of pre-departure services for Germany, they can be applicable for other host countries. Therefore, host countries must reflect their currently provided services and adapt where necessary.

2.3 Post-arrival Services and Recommendations

During the reception phase, post-arrival services are offered to refugees, implemented by NGOs at a reception center in the host country. Those services have several potentials for people of concern and for the host country. One major potential is the enhancement of the integration process for refugees, since they can receive a primary orientation and information about important services. Second, the mental health status can be stabilized, since expectations can be further clarified, and orientation can be given to prevent or at least decrease the impact of the cultural shock. Further potential improvements in post-arrival services are the coverage of immediate needs, and being granted access to general health care. Additionally, language skills and orientation courses foster the integration process. Moreover, considerations for the future life of refugees can be taken in this reception phase, such as employment and education. Post-arrival services prepare refugees specifically for their future life in the host country. Provision of counseling in several areas can ensure an optimal outcome of the reception phase. Ultimately, the protection of family unity, on the one hand, and protection of individuals, on the other

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hand, can prevent further harm (UNHCR, 2009; 2013). The relevance of the reception phase is acknowledged in several studies (Ekholm et al., 2005: 65; Hazel & Phillmann, 2011; UNHCR, 2001). However, as with the pre-departure services, the implementation of services vary due to the host countries regulations and possibilities.

The reception center *Grenzdurchgangslager Friedland* (GDL) is the reception center for resettlement refugees in Germany. At the GDL, refugees are provided with basic needs like accommodation and nutrition. Besides this, they receive financial resources as a welcoming gift, provided by the BAMF. Refugees receive access to the orientation course, *Wegweiser für Deutschland* (engl.: A Guide to Germany) (Niedersächsisches MI, 2013: 3). Data processing, distribution of clothing and hygiene articles, social care for children, coordination of interpreters, and the further distribution of refugees, are the main services provided in GDL. The costs of all services, accommodation, and care are covered by the federal level of Germany (Grote et al., 2016).

The *Wegweiser* orientation course aims to provide an overview of life in Germany. The course lasts for five days, and is always a full-day program. During the first half of each day, the intercultural language-studio takes place. This is not a customary language course, but a first orientation for an understanding of the language structure. As the time frame is extremely tight, co-teaching with someone speaking the native language of the newcomers often features in the language learning process. Besides language skills, improvement of intercultural competencies and provision of general orientation are the main emphases during the second half of each day. Thereafter, the course continues by covering certain topics that are crucial for daily life in Germany (Landesaufnahmebehörde Niedersachsen, n.d.).

The content for orientation provision is separated into several sub-topics. The course starts with explaining the free, democratic constitutional foundations of the Republic. The themes of basic values, tolerance, and security dominate the session. The content of the second day is practically orientated, covering issues of mobility, specifically how to use public transportation, and learning the rules of traffic. The third day focuses on education and employment. The schooling system, kindergarten, universities and information about the labor market are explained. On the fourth day, the main subject is the health system in Germany, focusing on the procedures for doctor's visits, hospital visits, and prevention of harmful drug use and other diseases. The last and fifth day of this course concentrates on the migration procedure in Germany, and covers how to deal with authorities and procedures; further regulations and duties are discussed. The aims of integration and related services are introduced, and at the same time, the possibility of returning is outlined. Participants receive a textbook which contains all the topics that were discussed during the course, so that they have the opportunity to deepen their knowledge independently (Landesaufnahmebehörde Niedersachsen, n.d.).

In the GDL there are two NGOs providing these services for refugees – Caritas Friedland and Inner Mission Friedland (IM Friedland). Both NGOs provide counseling services, mainly migration counseling for adult migrants which focuses on integration services in Germany, the right of residence, accreditation of credentials, material security, and personal or similar problems (Caritas Friedland, 2018). The principle of enabling the refugees to help themselves, in German commonly known as "*Hilfe zur Selbsthilfe*" (Paul, 2018), is at the center of attention.

Apart from services provided by the NGOs at GDL, there are online services for refugees and migrants available, with the goal of fostering the integration process. The Goethe Institute is the main provider of these services, being the main developer of apps and webpages. There are, for instance, the arrival-app (German title: *Ankommen-App*), the German language trainer A1 app (German title: *Deutschtrainer A1*), the city of words app (German title: *Die Stadt der Wörter*), or the language-guidance welcome app (German title: *Sprachführer Willkommen*). All these apps concentrate on transmitting German language skills, in either a professional way for adults, or in a playful way for children. Webpages for learning German are categorized for employers, with a webpage called German at the working place (German title: *Deutsch am Arbeitsplatz*), for the daily life the My-way-to-Germany website (German title: *Mein Weg nach Deutschland*) and for absolute beginners the German-for-you website (German title: *Deutsch für dich*). For children, there is the additional possibility to download podcasts of audiobooks for German tales in the Arabic language, so as to enhance the integration process by spreading knowledge about famous German children's stories that may provide insights to life in Germany and related, common values (Goethe-Institute 2018). The BAMF provides information for newcomers on their webpage called Welcome to Germany (German title: *Willkommen in Deutschland*). The webpage provides information regarding language courses, integration courses, accommodation, employment, education etc. (BAMF, 2018).

All these services are the main approaches to facilitate the start in Germany and to foster integration processes. There are various other service providers at the municipalities that offer counseling or implement integration and community work at a local level. However, these services are not part of the reception phase and therefore do not belong to the post-arrival services during the resettlement process.

Ultimately, it must be mentioned that the annual budget for resettlement provided by the federal state for resettlement services has increased significantly. In the year 2012 the budget was 450,000 Euro and in 2015 it more than doubled to 1,004,000 Euro (Grote et al., 2016). These numbers on their own indicate the value and status of the resettlement program for the future. Following this trend, Germany was the second biggest sponsor of the UNHCR in 2021 (after the U.S.A.), which suggests that supporting refugee programs is considered important (Auswärtiges Amt, 2022).

Reviewing existing services, guidelines, and principles, several recommendations for the reception phase at GDL can be extracted. First, information flow and cooperation must be ensured with a transparent linkage between provided services (PAS1-linkage). Furthermore, there must be continuous evaluations of post-arrival services and their effectiveness to ensure improvement (PAS2-evaluation). In addition, the municipalities need time to prepare themselves for the new arrivals and their specific needs (PAS3-municipalities). The option of differentiating services from resettlement refugees and other refugees and migrants during the reception phase must be explored, as this could lead to advanced courses (PDS3-differentiation). The establishment of a men's center at GDL should be considered to provide a safe space for men, similar to the existing example of the women's center (PAS5-men center). Finally, the development of bottom-up approaches (PAS6-bottom-up) should be part of the post-arrival service development.

As already outlined above in the recommendations for pre-departure services, a linkage between the pre- and post-phase is extremely relevant for adequate service provision, but also important is the interplay within the post-phase, meaning between GDL, online

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service providers, governmental authorities, and service providers for the time after the reception phase at GDL (PAS1-linkage).

In order to establish such a transparent flow of information, documentation and evaluation needs to be implemented on a regular basis (PAS2-evaluation). So far, there are only a few evaluation reports about the GDL in Friedland, (c.f. Niedersächsisches MI, 2013; Ministerium für Soziales und Verbraucherschutz – Sachsen, 2014); there were no new insights, reflections or evaluations about the procedure at GDL. Services in the reception phase should be evaluated to access whether they meet the needs of refugees. For this, transparency at all stages must be ensured so researchers can document and evaluate holistically.

Moreover, municipalities are often informed at short notice about who will arrive, at what time, and what possible special needs there may be (PAS3-municipalities). It is especially important to arrange medical treatment and services in advance; without information about respective needs, this cannot be done (Grote et al., 2016). Municipalities should also have advance awareness of counseling or education needs. The coordination of the resettlement process needs to become more structured and definite in order to enable preparation in advance.

A further recommendation concerns the equal service provision of resettlement refugees and other refugees and migrants at GDL (PDS4-differentiation). The pre-experiences of resettlement refugees are different from those who migrated via unsafe or illegal pathways. Resettlement refugees may have different expectations or fears, because their migration history differs from those who have entered the host country via another pathway. Because of this, Munich, for example, provides counseling exclusively for resettlement refugees and in Aachen there is a specialized department with social workers responsible for this group of refugees (Hergenröther & Kaufmann, 2015). Especially, some differentiation within the *Wegweiser* course seems an obvious necessity, as this first orientation should already have taken place during pre-departure services. Therefore, resettlement refugees would be in a position to start at an advanced level. Moreover, a differentiation due to age, gender, language abilities, or educational background must be considered when providing services.

Gender roles need special attention during the reception procedure. Refugees arrive in a new environment in which gender roles might be different compared to their home country. One initiative designed to strengthen the women's situation at GDL is the establishment of the women's center. However, this raises the question of why there is no men's center established yet (PAS5-men center). Men also experience the pre- and post-migration stressors and might develop difficulties coping with them. Refugees often come from patriarchal societies in which men have the role of the protector and being strong for the families. Therefore, it might be challenging for them to admit worries, doubts, or sadness openly. Furthermore, the cultural change they must face in Germany, due to the value of gender equality, may be difficult for them to understand.

Refugees want to build up a stable life in Germany and to establish a daily routine, including employment and education. This motivation must be used for fostering integration with bottom-up approaches instead of exclusively top-down measures (PAS6-bottom-up). Women for instance, even though their integration motivation is as high as that of men, on average integrate later into society than men because of family obligations

(Baraulina & Bitterwolf, 2016). Sufficient information should be provided for childcare opportunities and, and obviously such child-care opportunities should also be available. Aspects like this can only be involved in post-arrival services by including the ideas and skills of refugees in the service development.

All these recommendations must be taken into consideration when developing the reception phase. As the number of resettled people in Germany has been growing every year – except in 2020 due to the Corona Pandemic (UNHCR, 2023) – and the option of resettlement as a safe and legal pathway becomes more attractive – not at least because of the absence of alternatives – the improvement of existing structures and services is indispensable. The recommendations can be adapted to other host countries' situations, always taking into account the social, economic, and political situations specific to each.

3 Empirical Methods

The results of this paper are based not only on the theoretical analysis and literature review of the services but also on two expert interviews. First, desk research on pre-departure and post-arrival services was conducted, followed by a theoretical analysis to derive recommendations, as outlined above. Those recommendations were derived from a theory-based approach, yet without having considered practitioners' expertise. Practitioners, who work in pre-departure and post-arrival services are close to the clients, recognize strengths in their working fields, as well as deficits in the implementation. Therefore, adding practitioners' insights is indispensable to reconsider recommendations, add points of critique, or detect other discrepancies. Therefore, expert interviews were conducted with service providers in both, the pre-departure and the post-arrival phase. Even though requests were sent to several staff members of service providers (IOM, UNHCR, Caritas and Diakonie) only one of the pre-departure and one of post-arrival phase replied. This small number of interviewees places certain limitations on this research, since only one point of view for each phase is examined. Other staff members might describe the working field differently, and there is the chance that they would have other or no points of critique. However, since the questions about service implementation were very fact-based and non-emotional, the referring answers were objective rather than subjective. Therefore, the validity of the collected data can still be graded as high.

As the expert interview generates information about a definite field or aspect, which is neither biographical nor related to personal values (Kaiser, 2014), it is the appropriate methodology for this research, since the focus lies on gathering information about the service provision in the pre- and post-phase. A social worker, working in a transit country at IOM directly in the field of pre-departure services was chosen as the expert for those services. For the thematic field of post-arrival services, a staff member of GDL was willing to be interviewed.

For the interview with Exp-Departure, the procedure itself as well as the theoretically derived recommendations of the services were the basis for the interview. However, not all eight recommendations were discussed in this interview, as one of these did not fall under the scope of the interviewee (PDS8-informal sources). For the interview with Exp-Arrival, the strategy to establish theme blocks for the manual was the same as for the pre-departure field, by using the theoretical analysis and recommendations of the post-phase. However, the recommendation to open a men's center, similar to the existing women's center (PAS5-men center), has been considered as part of a backup question block – that

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could be used either for filling gaps or if the dialogue flow provided an opportunity for it – as this recommendation only marked a service extension and not a general interdisciplinary change on several levels. Information on the role of the social workers, working in the expert's organization was sought throughout these several blocks in both interviews.

Since the method of qualitative content analysis is often quoted as the most suitable method for evaluating expert interviews (Bogner et al., 2014: 72; Wassermann, 2015: 61; Kaiser, 2014: 90), this method was used for the evaluation, and followed the nine steps proposed by Mayring (2000) for establishing a category system. For the evaluation process, the computer software MAXQDA was used, which is – especially in the German-speaking scientific area – commonly used for the analysis of expert interviews.

4 Findings

The combination of the theoretical analysis and the evaluation of the empirical interviews leads to a finalization of recommendations, for both pre-departure and post-arrival services. These recommendations are outlined further, based upon the information provided by the experts during the interviews.

By examining the recommendations, one can derive the specific skills needed to implement them, and offer guidance for service providers. This leads to an identification of the role of Social Work in this field, and allows conclusions to be drawn regarding the potential of the profession.

4.1 Room for Improvement

Germany has not established a linkage between pre-departure and post-arrival services yet (PDS1, PDS2). One option to facilitate this linkage would be to employ service providers for both stages – pre-departure and post-arrival. This approach is not a new one, since it has already been implemented by IOM for other host countries. Such employees not only strengthen the linkage, but additionally they accompany refugees throughout the whole process, which provides stability to people of concern. Another option for establishing a linkage would be to initiate annual conferences in which providers of both stages participate, like Australia already does (Chindea, 2015). According to Exp-Departure, the UK provides another example, as it offers training courses for the IOM staff in transit countries. Moreover, contact could be established between a social worker providing post-arrival services and refugees in the transit country in the form of a video call, which can build up trust and confidence (Swing, 2017). The other way around, the contact between refugees in the host country and their former social workers in the transit country gives refugees the chance to report first-hand experiences. This might be also possible as an online peer-to-peer approach from refugee to refugee. All these considerations demonstrate possibilities on how to improve the linkage between services. The examples of other host countries indicate the potential of such linkages and can be used as a blueprint for Germany.

Counseling (PDS2) as such is implemented in pre-departure services. However, according to Exp-Departure, there is not a relevant expert for each field of counseling; instead all fields are covered by one session. The recommendation to include more intense counseling opportunities in several fields is justified, as it is not possible to at once adequately counsel on all fields, such as legal aspects, health access, labor market,

accreditation of credentials (PDS6), and mental health issues. Furthermore, guidelines for each of these fields facilitate adequate service provision, such as the one already established for HIV counseling. Moreover, the requirement for counselors to have a university degree in academic disciplines related to counseling ensures that responsible staff have the necessary expertise.

The time duration between the resettlement decision and the departure can take up to two years (PDS3). Orientation courses take place shortly before departure and take three to five days. The rest of the period has to be adequately bridged equally well, as otherwise valuable time for preparation is lost. Therefore, the counseling services discussed in the paragraph above must be offered and made available already during this waiting period (PDS2). Implementing measurements of community work with the refugees selected for resettlement enables them, first to become active participants (PDS4, PAS6) and, second provides meaningful approaches during this transition period. This can, for instance, take place in the form of weekly meetings among refugees, comparable with a self-help group, supervised by a social worker. Host countries can provide material, which can be worked through without a teacher. Furthermore, experts from host countries can attend the first session to give input on how the sessions could be held in future. This also can enhance the linkage between pre- and post-phase (PAS1, PDS1). Such an approach needs a scientifically-based concept, as well as pilot projects that measure the effectiveness. Moreover, Exp-Departure pointed out that the time for the orientation courses is too short to provide an adequate orientation for refugees. This is confirmed by Exp-Arrival, who criticizes the fact of refugees being not adequately prepared for the labor market in Germany and for everyday life. Therefore, related orientation courses need to be extended, from few-days courses to few-weeks courses. To save resources, sessions do not have to take place every day, but weekly sessions with homework would ensure both adequate use of the waiting period and more time available for the orientation courses.

Exp-Departure confirmed the observation of refugees as being passive throughout the process (PDS4) and therefore empowerment strategies are needed. This recommendation is connected to the advice for post-arrival services to establish bottom-up approaches (PAS6), as both aim for refugees to be active participants in the program. The above outlined self-help group would be one strategy of empowerment in the pre-phase. A further consideration for this is fostering transparency about the status of the procedure, because knowledge of the procedure is the first step for involvement in the process. Moreover, refugees should be involved in the creation process of the orientation courses. There may be interests or relevant concerns that are considered by people of concern, and not by service providers. Staff members must furthermore perceive refugees as individuals at a strength-based level and therefore use empowerment strategies throughout the process, because according to Exp-Arrival, otherwise it will lead to dependency as a consequence.

Certain host countries continuously evaluate their pre-departure services by conducting regular visits, for example the UK or Australia (PDS7, PAS2), but German actors do not evaluate service provision directly on-site. This direct interaction and supervision enables the implementation of holistic evaluations for further improvement. As a side effect, it fosters the linkage between the phases (PAS1, PDS1). For post-arrival services in Germany, so far, no continuous holistic evaluation takes place. To ensure this evaluation in both phases, guidelines for documentation must be established. For the evaluation, measurable goals for services must be set. Moreover, feedback forms, complaints

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procedures, or group consultations with refugees, can be strategies to monitor and evaluate (Hazel & Phillmann, 2011). All this is only possible with demonstrated transparency about content, structure, and coordination.

The information flow throughout the whole resettlement process needs to be improved. Municipalities in Germany must get to know who will be sent to their region and when (PAS3). As Exp-Arrival explained, it is not possible to receive the information earlier than two weeks beforehand, because the *Königssteiner* Schlüssel, a quota system to distribute refugees and resettled among the Federal States, can only be applied after their arrival in Germany. This would support the recommendation to establish a system within which the *Königssteiner Schlüssel* can be applied, already before the actual arrival of refugees, so that all stakeholders know during the pre-phase where they are bound to live. Nevertheless, this recommendation must be extended, since according to Exp-arrival not only municipalities are informed about arrivals at short notice, but also the actors at GDL. Therefore, the information flow among stakeholders must be improved in general, and not only with regard to municipalities (PAS1, PDS1).

The *Wegweiser* course at GDL is already differentiated with regard to resettlement refugees and other refugees. However, the course's content is the same for both, instead of starting at a more advanced level for resettlement refugees, who have taken part already in an orientation course during the pre-departure phase. This needs to be changed by providing a *Wegweiser* course part-one in the transit country, and continuing at GDL with a part-two. This recommendation is connected to the advice for establishing a stable linkage (PAS1, PDS1), as this is necessary to create courses that build up on each other.

Finally, the recommendation to establish a men's center (PAS5) must be reviewed, since according to Exp-Arrival, the number of refugees in need for such a center is small. Nevertheless, arrival centers should evaluate the need for such measures in order to prevent integration barriers or reduce mental health problems, for example, depression.

These finalized recommendations need to be further researched and implemented in pre-departure and post-arrival services, so as to grant effective and holistic service provision. Obviously, implementing all recommendations requires structured planning and implies a financial burden. However, host countries must calculate the costs and potential benefits of this implementation. Moreover, the mental well-being of refugees would be stabilized, which would help them to become self-sufficient members of the society and less dependent on medical care. Finally, an effective implementation of these recommendations can only be achieved by employing and tasking service providers who are specifically skilled in this regard.

4.2 The Role of Professionalized Social Work and the Required Skills

The connection between Social Work and resettlement is self-evident due to the challenges that occur along with refugee movements perceiving resettlement as a facilitator of such movements. These challenges are linked to professional fields of Social Work, and refugees are a target group of the profession (Heilmann, 2021). The achievement of outlined potentials of pre-departure as well as post-arrival services connect to several goals of Social Work, like, for instance, a stable mental status or successful integration processes.

Indeed, there is evidence of social workers being employed in post-arrival services of

certain countries, such as Belgium, the Netherlands, France, and Sweden. In other countries however, like the UK or Romania, no specific university degree is required, only appropriate experience and skills (Hazel & Phillmann, 2011). In Germany, social workers are employed, but not exclusively so. Regarding pre-departure services, Exp-Departure insists on a university degree in Social Work being crucial for an adequate provision. Regardless of this, according to the expert, there are still staff members employed at IOM who do not have a university degree.

Nevertheless, the staff clearly do need to have special skills to work within these services, especially to implement the recommendations summarized above. In the following discussion, those skills are connected to the recommendations. Additionally, it is shown that professionals of social work possess those skills.

The monitoring of the services requires documentation and evaluation skills (PDS7, PAS2), and the establishment of the linkage requires networking skills (PDS1, PAS1). These skills do not simply foster the linkage between the two stages, but also enable cooperation with stakeholders in general. Stakeholders are, for instance, ministries and departments responsible for education, health, or labor, local authorities, providers of integration services, or civil society representatives (UNHCR 2013). Social workers are trained to monitor and evaluate in order to improve the work in their fields, and to contribute with respective results to social sciences. Additionally, they develop a personal and communicative competence, which enable the required networking tasks (Leinenbach, 2009).

In addition, the ability to establish new scientifically-based concepts is required, as is the capacity to make them applicable for other target groups. With this skill, services can be changed so that they become suitable for different target groups and serve their diverse needs. Social workers are able to work scientifically, since social work education requires scientific understanding and its application (Bieker & Westerholt, 2021).

Clearly, diversity sensitivity and intercultural competences are also required skills in order to meet the needs of those different target groups. Social Workers learn and reflect such competences during their studies (Anish et al., 2021) and this could allow an adequate *Wegweiser* course to be created (PAS4).

The empowerment of clients is a central element of service provision, and therefore a further required skill is to be able to conduct the related relevant approaches (PDS4, PAS6). The effective bridging of the waiting period also requires abilities to create empowering concepts (PDS3). Empowerment, being a central element of social work, is always considered by social workers, and enabling the clients to be part of social work concepts (Herriger, 2020). Therefore, social workers are also able to empower refugees along their resettlement process.

The challenges of providing information to municipalities in advance can be managed with a distribution system that calculates the final destination of resettlement refugees before their actual arrival. In order to lobby for the policies to be changed, being familiar with the legal and political system is crucial (PAS3). Social workers must develop legal and political competences in general, since those are needed to represent their clients and to inform them about legal and political frames (Leinenbach, 2009). Since social work in the field of migration and refugees acts within a special legal framework, social workers have to be aware of international legal instruments of law, in order to apply and promote them

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adequately (Roßkopf, 2021). This is why legal issues need to be part of each social work curriculum (DGSA, 2016).

As shown above, social work trains its professionals to develop those required skills which enables them to be employed as service providers during the resettlement process. Due to their skills, they can play various roles during that process:

Social workers can be implementers of the orientation courses, as these require cultural sensitivity, empowerment strategies, and approaches for enhancing integration. Furthermore, social workers always must be researchers in all their working fields, who document, monitor, and evaluate, so as to uncover irregularities or deficits, and possibly to create new concepts. Professionals must additionally be creators of access to services for people who cannot lay claim to the access by themselves. Refugees are passive participants in the resettlement procedure who often do not have access to information, transparency, or certain services. Additionally, social workers must take the role of human rights' promoters, as these rights are a central element of the profession that needs to be protected (Spatscheck, 2018). Moreover, professionals ought to be networkers who establish linkages between both phases, and who cooperate with other stakeholders. Professionals can be counselors in several fields if they have gained the necessary expertise by putting the main emphasis on the related field. Social workers can take the role of counselors due to their academic education, as required counseling skills are part of their curriculum (DGSA, 2016). This curriculum provides further justification for the identified roles above, as its content requires the teaching of relevant skills within the Social Work study program (cf. DGSA, 2016). Ultimately, social workers are always advocates for change and must be critical analysts of political and economic aspects, as it is a primary task of the profession to promote social change and development (IASW, 2014).

Considering all these needed skills and the fact that social workers gain those skills and can therefore perform the necessary roles of the resettlement process, responsible institutions should establish requirements for their employees to be degree holders in Social Work or at least to have a related educational background. According to Exp-Departure, there are employees who have not graduated from a university. In their opinion, the academic education of Social Work is enormously valuable for this field, and employers ought to recognize these advantages. They emphasized that Social Work education develops the ability to combine theory and practice with each other, and to apply theory to a field of practice. This skill is unique for social workers and it enables professionals to fulfill their tasks and roles.

Therefore, the employment of volunteers or peers must be reviewed critically, as unprofessional service provision might fail to take advantage of available services (Hazel & Phillmann, 2011). Volunteers are usually not trained and therefore increase the risk of inflicting harm. This indicates the special need for closely supervising volunteers during their work. The peer-to-peer approach is useful, to bridge the language barrier. Peers are also aware of cultural circumstances and flight experiences. However, this approach must be supervised carefully as well, as it quickly establishes a hierarchy among refugees, which may lead to tensions. In conclusion, this means that even though volunteers and peers are necessary workers in this field, their employment needs careful examination and awareness of possible pitfalls. Lastly, it must be added that a thematically related educational background, such as a Social Work degree, should always be favored over

employees without this background.

Summarizing all of the above, this means that there is not one specific role, but there are several roles for social workers in the resettlement framework, specifically in the areas of pre-departure or post-arrival services. Social workers can be implementers of orientation courses, researchers who conduct evaluations, creators of access for refugees to necessary services, promoters of human rights, networkers who establish linkages, advocators for change who continuously reflect the current situation. Finally, professionals can be counselors in several fields if they have placed an emphasis on the respective field of counseling during their studies.

5 Conclusion

Resettlement is a promising legal pathway for refugees. Even though it "appears to be the proverbial drop in the ocean when regarded in purely quantitative terms" (Popp, 2018: 17), it provides a mechanism for immigrating legally and for gaining protection with a long-term perspective (ibid). Still, the resettlement program is not yet an alternative to irregular arrivals. To become such an alternative, regulations regarding admission and exclusion criteria would need to be established, as well as fixed quotas for host countries being clarified.

The program as conducted today does not meet the main goal of resettlement completely, which is to provide a safe pathway to the most vulnerable refugees. Politics and economics influence resettlement admissions, as cooperation between third countries and EU Member States determine quotas. Furthermore, certain selection criteria require the capacities to integrate into the host society to foster the labor market. Although resettlement must always be initiated with the aim to relocate the most vulnerable refugees, requesting the capacity for integration is not wrong in itself. Clearly, it does make sense to resettle, for instance, a French-speaking person in France, while a person with a connection to Germany should be resettled to Germany. Nevertheless, the integration potential can only play a secondary role. As a priority, refugees with the highest vulnerability concerns must be selected.

Even in case of successful application of such selection criteria, there is still the bottleneck of fixed quotas. Host countries decide among themselves on the number of resettlement places, and the current quota demonstrates the consequences. For example, just 2% of people in need for resettlement have been resettled in 2020 (Solf & Rehberg, 2021). This answers the question as to why resettlement might be relatively unknown; it simply does not have a big impact yet. The number of available resettlement places must be raised enormously for the program to be taken into consideration as an alternative for irregular pathways.

Services provided during the pre-departure and the post-arrival phase are essential for refugees and host countries. All of the findings and recommendations target different changes and developments, but in the end, they relate to each other. The adequate use of the waiting-period (PDS3) in the pre-phase can, for example, be combined with the accreditation of credentials (PDS6), strategies to prevent radicalization (PDS5), distribution of informal sources (PDS8), provision of holistic counseling (PDS2), and adequate, long-lasting orientation courses, on which the host country can continue to build (PAS1, PDS1). Moreover, such courses require a framework based on evaluations (PDS7, PAS2) conducted during current service provision. The framework must consider several

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target groups to be effective. Hereby, not only differentiation due the different pathways must be acknowledged, but also diversity aspects (PAS4). Gender, for instance, is a highly sensitive factor, as men require in certain circumstances other services than women. A men's, or women's center could respond to special needs (PAS5). Being blind to diversity aspects can result in gaps in the service provision. Besides diversity aspects, holistic concepts for service provision must always be established on the basis of empowerment (PDS4) to prevent dependency amongst refugees, and on bottom-up approaches (PAS6), so as to increase motivation. However, if the courses provided in the post-phase should build up on the prior one in the pre-phase, a linkage between the phases is necessary (PAS1, PDS1). The connection between service providers in the pre- and in the post-phase does not just increase the effectiveness of the services but enables a quick and simple information flow among all stakeholders (PAS3).

After reviewing all these recommendations, there are two central main points that should be focused on by service providers. First, one of the greatest potentials of these services seems to be the given time in the pre-phase before resettlement takes place, because most recommendations are feasible during this period. While refugees who travel via unsafe pathways are not known before they cross the borders of host countries, the data of resettlement refugees is available in advance. Responsible actors in host countries know who is going to be resettled, and therefore they could evaluate special needs in advance. They could detect certain abilities and skills in advance and develop strategies of how and where these skills can be used best. These examinations would lead to a win-win-situation for both, because people of concern are integrated more easily and better prepared, which stabilizes their mental health, while at the same time they become self-sufficient members of society faster, which relieves the burden on the state. This is a unique opportunity to facilitate the resettlement process. Currently, however, Germany neglects this chance as there is no sufficient linkage, and services do not build up on each other. This does not exclusively apply to Germany, but seems to be an international problem. As Exp-Departure explained, similar situations exist amongst other host countries. Therefore, all host countries need to reflect upon their service provision critically, to detect whether this applies to them as well.

The second main point, which is connected to nearly all recommendations, is the lack of research in the field, combined with the lack of transparency of the services. Literature provides information on how services should ideally be implemented, but not on current service provision in the field. When doing research, it can be easily assumed that publications intend to convince the reader to approve services. Details about the exact implementation of these, including transparent information on the responsible staff, the procedure, the content of orientation courses, is either not available to the public, or it does not exist at all. Scientific evaluations that can prove or disprove specific service provision do apparently not exist, but are obviously crucial for improvement. This indicates the clear need for further research.

In conclusion, it becomes obvious that implementing all the connected recommendations, enhancing improvement of services, and paying special attention to those two highlighted points, special skills are required by the staff, which you would typically find in the professional skill set of Social Workers. Therefore, one last recommendation can be derived according to which actors of pre-departure and post-arrival services should set relevant professional requirements for their employees, most notably an academic degree

in Social Work.

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QRP

Gender, Migration, and Education: An Intersectional Analysis of a Labor Market Integration Project for Women with Migration Background[1]

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Abstract

Women with a migration background (WMB) are disadvantaged on the German labor market as multiple studies attest (e.g., Ferenschild, 2019; OECD/EU, 2018). Initiatives at regional, state, and federal levels have been commenced in recent years to support WMB's entry into the labor market, thereby also addressing the shortage of skilled workers in health and social care sectors in Germany. Within an intersectionality framework, this study examines the role of migration background as well as educational/occupational background in furthering or hindering WMB's chances of attaining educational qualifications and finding employment. Using data from a four-year evaluation of a labor market integration project for WMB, the study aims to answer the following questions: What is the educational and migration background of women in the project and how are both related? Are educational and migration background predictive of project success? Analysis is based on final monitoring data for the 234 women who had entered the project during the data collection period. Descriptive data confirm a highly heterogenous group of women in terms of all sociodemographic characteristics. Bivariate analysis showed statistically significant relationships for and between most migration and educational/occupational variables, pointing to clusters of advantage (e.g., permanent residency, high language level, recognized degree) and disadvantage (e.g., no formal schooling, time-limited stay permits) that are hypothesized to affect entry into the labor market. However, regarding project success – operationalized as case status outcomes and goal attainment outcomes – these variables did not play a statistically significant role, except for 'degree recognition' and 'language skills.' This suggests that the supportive and individualized approach of the project may equalize factors that would otherwise contribute to disadvantage. It also indicates that factors beyond migration background and educational/occupational background may be more salient for outcome.

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Explanations for the results are discussed from an intersectionality perspective and implications considered.

Key Words:

labor market integration; migrant women; program evaluation; labor market integration programs and services; intersectionality

1. Introduction

Women with a migration background (WMB) are one of the most disadvantaged groups on the German labor market (Ferenschild, 2019; OECD/EU, 2018). In comparison to German women as well as men with a migration background, WMB have the lowest job rate, the highest rate of unemployment as well as under-employment and are more likely than either group to be looking for employment (Federal Employment Agency, 2022a). WMB experience hurdles in the recognition of educational qualifications, receive lower earnings, and encounter language barriers. These barriers can be compounded by insecure residence status, diverse forms of discrimination, and other psychosocial problems, such as elevated stress, lack of social networks, and higher rates of mental health problems (e.g., Farrokhzad et al., 2022; Kogan, 2016; Lutz & Amelina, 2017; Mackroth & Mühlbach, 2022). As such, WMB are a prime target group for current labor market integration efforts in Germany. Such efforts have been more focused in recent years due to demographic changes in Germany as well as political and legislative developments aimed at modernizing the current immigration law and reducing bureaucratic hurdles to improve labor market participation (Federal Ministry of the Interior and Community, 2022).

Given the considerable challenges experienced by WMB on the labor market, it is worthwhile to examine their situation from an intersectional perspective. Central to the concept of intersectionality is the attempt to consider the reciprocal influences of multiple determinants rather than considering them as isolated dimensions (Crenshaw, 1989). In short, to understand the position of WMB on the labor market, it is necessary to examine at which level discrimination or disadvantages occur or intersect, and to explore how such barriers are created or maintained by service structures and practices (e.g., Crenshaw, 1989; Degele, 2019; Kurz, 2022). Such knowledge could be used to target integration efforts and reduce barriers.

In this paper, we will draw on data from a four-year evaluation of a model labor market integration project for WMB in a midsize city in Germany to examine, through an intersectional framework, factors that shape WMB's experiences as they prepare to enter the labor market. Specifically, within the context of a specific project, it will be determined what role migration background as well as educational/occupational background play – alone and taken together – in furthering or hindering WMB's chances of attaining educational qualifications and finding employment. Before describing key features of the labor market project and presenting methods and results of the evaluation study, relevant contextual information and conceptual considerations will be presented.

2 Relevant Background and Context

2.1 The Political Context

Current labor market strategies in Germany are guided by several developments at the federal level, of which two in particular are relevant to WMB's employment prospects. First, Germany's approach to the integration of persons who migrate to Germany has changed significantly in the last fifteen years. The strategy was encapsulated in the 2007 National Integration Plan, which formulated a new path forward. In this plan, labor market integration is viewed as a central stabilizing factor in migrants' life that would foster greater independence and social integration. Traditional restrictions to entering the job market, which are often in place for migrant groups, were seen as having adverse effects (Marbach et al., 2018). To remove such barriers, a range of new concepts and projects to support the labor market integration for various groups emerged and were initiated at state and regional/communal levels (Federal Ministry of Labor and Social Affairs, 2020; Hessian Ministry for Social Affairs and Integration, 2018; The Federal Government Commissioner for Migration, Refugees, and Integration, 2019). Women who have traditionally been viewed as dependent on their husbands, have only recently become a focus of such efforts (e.g., The Federal Government, 2007; Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2019). Instead of viewing them as locked in conventional roles, their agency and individual resources are now emphasized, and concepts and methods sought to activate or support this potential (Hessian Ministry of Social Affairs and Integration, 2018). Furthermore, women are viewed as crucial actors in the social integration process of their families, particularly their children (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2019; Hessian Ministry for Social Affairs and Integration, 2018). In other words, it is assumed that the successful integration of women also increases the opportunities for future generations.

The second major thread influencing labor market strategies for WMB involves the growing shortage of skilled labor in Germany. This is in part due to an aging population, with people aged 65 and over accounting for about 22% of the total population in 2021 (Federal Statistical Office, 2022a). In addition, projections by the German Federal Statistical Office (2022b) indicate that around 30% of the current workforce will retire by the year 2036, a percentage which cannot be compensated by the employment of young people alone and would further contribute to critical labor shortages.

While the shortage of skilled labor is apparent in many industries, it is particularly salient in the so-called social economy sector, which includes social services jobs in elderly care, in child welfare organizations (e.g., daycare, kindergarten), and household care and assistance – jobs that traditionally have been occupied by women (Seyda et al., 2021). Particularly in long-term elderly care considerable need has been documented, fueled by the growing longevity of Germans (Federal Statistical Office, 2020c), and has further been amplified during the Covid-19 pandemic (Federal Employment Agency, 2022b).

To meet the demand for skilled workers, the political approach has been to fill labor gaps with foreign workers. The federal Skilled Labor Strategy ["Fachkräftestrategie der Bundesregierung"] was presented in November 2018 (Federal Ministry of Education and Research, 2018; The Federal Government, 2020). The overall objective is to attract potential domestic, European, and international laborers and to remove barriers toward their integration into the labor market (Federal Ministry of Labor and Social Affairs, n.d.).

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The Skilled Labor Strategy has been supported through a number of legislative changes and reforms (The Federal Government, 2019) such as the Skilled Immigration Act for qualified professionals ["Fachkräfteeinwanderungsgesetz"] (Federal Office for Migration and Refugees, 2021). In 2018, an initiative called Concerted Action Care ["Konzertierte Aktion Pflege"] was launched that aims to improve the critical shortages in the health care sector in close cooperation with community partners (e.g., hospitals, churches, care organizations, vocational training schools). Women with migration background are a particular target of these efforts. The federal strategy of recruiting workers from abroad into the care sector is, however, not without critics and has been described by some as the "feminization of migration" (e.g., Ehrenreich & Hochschild, 2003; Lutz & Amelina, 2017; Ruokonen-Engler, 2019).

Data on the development of labor market recruitment in the care sector is reported annually (Federal Institute for Vocational Education and Training, 2022; Federal Ministry of Health, 2021). The most recent report suggests that current initiatives are bearing some fruit, with the number of people employed in the health care sector and those entering vocational training rising (Federal Institute for Vocational Education and Training, 2022).

2.2 Germany's Dual Vocational Education Training System

Some of the problems experienced by various groups as they attempt to enter the skilled labor market are related to the system of German Vocational Education Training (VET), which will be briefly described here. The German VET system is quite unique as well as complex and involves different opportunities to participate in vocational training (e.g., Granato et al., 2015). The so-called dual VET ["duale Ausbildung"] is most common in Germany. It is organized and regulated at the regional level (Michaelis et al., 2022). The duration of the VET as well as its content might thus vary across regions within Germany but generally consists of a 2- to 3-year apprenticeship that is accompanied by structured learning in VET schools (Federal Ministry of Education and Research, 2022). The dual VET programs generally take place in specialized companies, which cooperate with specialized vocational schools or other forms of vocational schooling. This cooperation assures the teaching and learning of practical skills as well as theoretical knowledge (Kitzler, 2022). To enter dual VET, a school degree is not always a prerequisite (Michaelis et al., 2022). In other words, in certain professional areas the German VET system provides the opportunity to participate in an apprenticeship without a formal degree, which provides opportunities for entry with certain qualifications. In the context of the project described here, this refers, for instance, to the education in the field of home economics ["Hauswirtschaft"] or elderly care, for which a basic school degree [Hauptschulabschluss] is recommended but generally not a prerequisite.

It should also be noted that VET in the health care sector has recently been subject to modernization and change (Zöller, 2022) and that the training of educators (who work primarily in kindergartens) is undergoing a process of academization, which means that requirements in the VET are becoming more and more similar to university studies (Authoring Group Educational Reporting, 2022). In addition to the dual VET system, specialized academies and schools offer opportunities to obtain vocational training in the health and social care sector (Authoring Group Educational Reporting, 2022). Entering these schools and this system ["Schulberufssystem"] generally requires some form of formal education. Vocational training within this system normally takes between one and

three years (Authoring Group Educational Reporting, 2022). Lastly, possibilities for shorter trainings exist in certain fields (e.g., training courses in the field of home economics/household assistance or elderly care). Those courses seem especially relevant for project participants who want to quickly enter the labor market or who – for different reasons – do not have the possibility for longer trainings.

2.3 WMB in the Labor Market

WMB in Germany are a highly diverse group consisting of women with their own migration experience and those who are second- or third-generation migrants. As variable as the reasons for their migration are, so are their sociodemographic profiles (Berr et al., 2019; Spörlein et al., 2020). However, commonalities in educational background, family status, etc. have been noted in subgroups, such as refugees (e.g., Mackroth & Mühlbach, 2022). As already alluded to in the introduction, WMB, particularly mothers, encounter a broad range of challenges that present barriers on the way into the labor market. These include educational gaps, hurdles in the recognition of existing qualifications, lower professional status than actual qualifications would warrant, low wages, challenges in language acquisition, uncertainty regarding their residency status, diverse forms of discrimination inside and outside the family, social isolation as well as elevated rates of stress and mental health problems (e.g., Díaz, 2022; Farrokhzad et al., 2022; Ferenschild, 2019; Kogan, 2016; Liebig & Tronstad, 2018; Lutz & Amelina, 2017; Mackroth & Mühlbach, 2022). Also, institutional racism, discrimination, or exploitation have been noted (e.g., Felbo-Kolding et al., 2019; Férnandez-Reino et al., 2022; Khan-Gökkaya & Mösko, 2021). Beyond country of origin or ethnicity, reasons for disadvantages of migrant women may also be associated with traditional gender roles, religion or family situation (Knize Estrada, 2018). A review of the literature by Elo and colleagues (2020) suggests that migrant women are often affected by "brain waste," a term referring to "the non-recognition of the skills (and qualifications) acquired by a migrant outside of the EU, which prevents them from fully using their potential" (European Commission, n.d.). Institutional barriers, sociocultural values and self-perceptions may all stand in the way of recognizing available potential and skills.

Not surprisingly, relative to other disadvantaged groups, WMB are more likely to be affected by (unwanted) unemployment as well as under-employment (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2019; Federal Statistical Office, 2022b), often despite considerable motivation to work or obtain an education (Federal Employment Agency, 2022a; Schouler-Ocak & Kurmeyer, 2017). In representative surveys of refugees in Germany, Brücker and colleagues (2016) and Brenzel and colleagues (2019) found that both men and women have considerable aspirations for further education in Germany (Brenzel et al., 2019) and that they are highly motivated to enter the German labor market (Brücker et al., 2016). In fact, 85% of refugee women stated that they are probably or surely interested in entering the labor market (Brücker et al., 2016). Schouler-Ocak and Kurmeyer (2017) indicate that refugees' primary desire for the future includes stability and the possibility to work or study. Whether such findings are generalizable beyond refugees to other subgroups of WMB needs to be investigated in further studies. But it seems safe to assume that labor market integration projects for WMB do not simply reflect political mandates but are in line with the personal aspirations of women. Along with a recognition of their desire to work, women's resources and capabilities are increasingly being addressed in the literature, shifting the focus from a

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deficit-oriented perspective to one that attempts to focus on their strengths (Gericke et al., 2018; James et al., 2021; Walther et al., 2021).

3 Conceptual Considerations

3.1 Intersectionality and WMB on the Labor Market

Crenshaw introduced the construct of intersectionality as it provided a way of considering the interconnectedness of factors contributing to disadvantage and discrimination (e.g., Crenshaw, 1989). According to Carasthathis (2014), "intersectionality has become the predominant way of conceptualizing the relation between systems of oppression which construct our multiple identities and our social locations in hierarchies of power and privilege" (p. 304). Race, class, and gender are the classic analytic categories in debates on intersectionality as they have been shown to be primary determinants of inequality across societies. However, there is disagreement about the selection, number, and weighting of analytic categories. Lutz and Wenning (2001), for instance, proposed 13 categories, which include age, health, and culture. However, Winkler and Degele (2009) warn that more than three categories become unmanageable in analytic models. They argue that the choice of categories should depend on the focus of the analysis and the chosen level of inquiry. The effect of multiple dimensions of inequality is generally not considered to be additive. Instead, the focus should be on categories that mutually reinforce, weaken, or even change each other through their interconnectedness (Winkler & Degele, 2009). An analysis of discrimination and disadvantage can take place on different levels, involve various components and refer to different typologies (Degele, 2019; McCall, 2005). It should be noted that the intersectionality framework has been criticized by some for lacking a coherent theoretical foundation (for a critique see Cole, 2020; Settles et al., 2020). An intersectional framework seems particularly applicable in understanding the situation of WMB (Dederich, 2022; Kurz, 2022, Lutz et al., 2011).

> "The intersectionality approach challenges us to look at the different social positioning of women (and men) and to reflect on the different ways in which they participate in the reproduction of these relations. As we do this, intersectionality serves as an instrument that helps to grasp the complex interplay between disadvantage and privilege, a requirement to which objections have sometimes been raised" (Lutz et al., 2011: 8).

The authors further stress that women's reality is not only shaped by gender, but that other aspects such as migration experiences, education, and family status may play a crucial role and ought to be considered as intersectional determinants. In the context of the current project and analysis, we will focus on women's migration background and their educational and occupational experiences.

3.2 Previous Research on Intersectionality and Labor Market Integration

The relevance of the intersectionality framework to understanding challenges in the labor market integration of migrants and refugees has previously been addressed at a conceptual level (e.g., Browne & Misra, 2003; Moore & Ghilarducci, 2018) but has also been tested empirically in quantitative, qualitative as well as mixed-methods studies. For instance, Paul and colleagues (2022) used the categories of race and gender to analyze wage gaps of employers in the United States. Findings indicate that the wage penalty needs to be viewed in a nuanced way but also that black women are particularly affected by wage gaps. Di Stasio and Larsen (2020) applied an intersectional approach to a quantitative study on discrimination in the employment sector in five different European

countries. The categories of gender and race were analyzed to understand hiring preferences of employers. Di Stasio and Larsen (2020) found that while white women were preferred in "female typed" jobs, women of color did not have any advantages over men of color. Men of color or men from the Middle East were most discriminated in "male type jobs" (Di Stasio & Larsen, 2020). The authors summarized their main finding as follows:

> "The most glaring finding is that across occupations, members of racial or ethnic minorities face substantial discrimination, and race trumps gender as the target of discriminatory behavior by employers" (p. 243).

Lichtwardt (2016) used mixed methods within an intersectional framework to examine the experiences of WMB during the transition from school into the vocational training system. Lichtwardt's (2016) central finding with regard to the concept of intersectionality was that inequality-promoting structures and processes became apparent in the transition process from school to training/work among young WMB with a low level of education. While none of the specific categories had a dominant influence, the interrelation of factors contributed to a better understanding of the situation of WMB. Examples of qualitative studies in this area include research by Díaz (2022) who researched the labor market participation of women in Chile as well as Knappert and colleagues' work (2020) who examined challenges that refugees face in the labor market in the Netherlands. Rodriguez and Scurry (2019) used the intersectional framework to examine the situation of skilled migrant women in Qatar. Findings of such studies indicate barriers and facilitators at various intersecting levels. Those intersecting components include, for instance, strict language requirements or confrontation with stereotypes (organizational level) as well as legislative hurdles or lack of recognition of previously obtained education (country level) (Knappert et al., 2020). The "interdependency and simultaneity of gender and foreignness" classified WMB as outsiders and was noted to have a negative impact on them (Rodriguez & Scurry, 2019: 493). The authors further identified a contrast of WMB being included in the labor market on the one hand while at the same time being excluded with regard to other opportunities such as promotions. They emphasize that the intersection of gender and foreignness is inseparable yet needs to be understood in a nuanced way. Apart from the study by Lichtwardt (2016), empirical studies of WMB in the German labor market using an intersectional framework have, to the knowledge of the authors, not widely been taking place.

4 The Model Project and the Current Study

4.1 Overview of the Model Project

Initiated in 2018, the city of Kassel's model project "New Opportunities in the Social Economy – Qualification Perspectives for Migrant Women" (abbr. SoWi) is a labor market integration project for WMB with state funding until 2022. With some modifications, SoWi has been integrated permanently into the local labor market structures of the city of Kassel after the model project phase expired in the summer of 2022. SoWi was funded by the Hessian Ministry of Social Affairs and Integration's Social Economy Integrated ["Sozialwirtschaft Integriert"] funding program and implemented by the city of Kassel's Municipal Employment Promotion Department ["Kommunale Arbeitsförderung"] (www.kassel.de/sozialwirtschaft-integriert). In addition, the German Job Office

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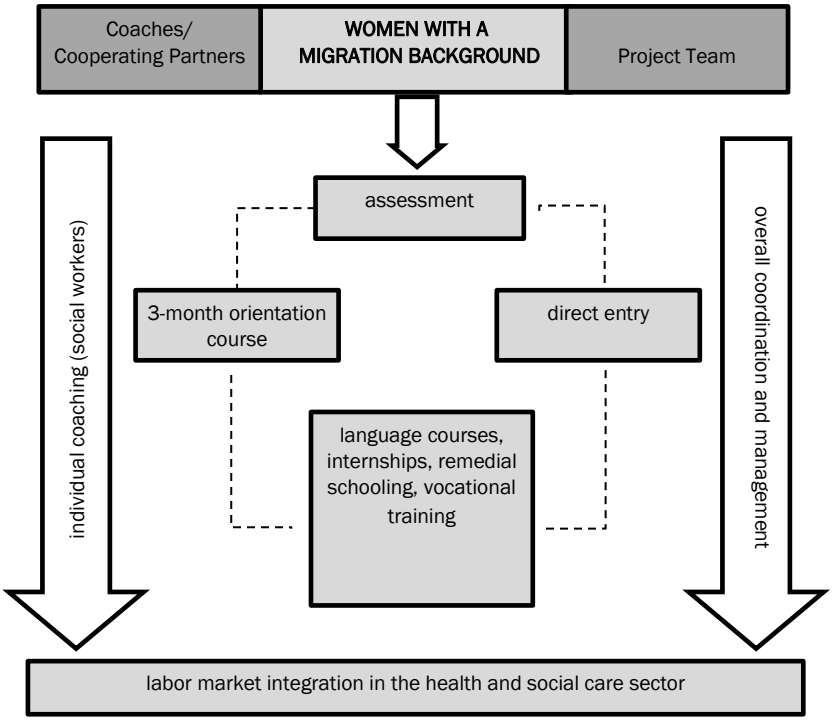
["Jobcenter"], as a cooperating partner, has become involved in the financing and implementation of the project.

The target group for the project are WMB (ages 18 to 45) who are seeking to (re)enter the labor market or who are interested in attaining further education with regard to the social (health-) care sector. Core elements of the project include support toward formal qualifications via remedial classes (e.g., secondary school courses toward attainment of the basic required school degree, language courses), internships, and vocational training in the social economy sector (especially childhood education, elderly care, home economics). Central to the project is the provision of individual coaching by female social work professionals from various cooperating organizations (Hessian Ministry for Social Affairs and Integration, n.d.). The coaching is intended to be individualized and to provide regular support with regard to logistic as well as personal challenges. A secondary objective includes strengthening the resilience and self-efficacy of women toward greater independence.

The entry requirements for participation in the project are basic German language skills (generally B1 level) a certain level of learning and educational experience, and requisite motivation, which all are determined during the assessment period. The inclusion criteria are deliberately broad to offer different women a pathway into the labor market. Interested women can either register on their own or be referred by cooperating organizations or the job center. A majority of WMB started the program with a three-month orientation phase, others entered without this project element. Following the orientation phase, women enroll in the various program elements, based on aptitude and interests, and receive coaching. The process from entry into the project until completion of qualifications or entry into the labor market can take from a minimum of about one year to more than three years. In collaboration with various cooperation partners (e.g., migrant organizations, job center, evaluation team) and based on emerging needs and changing policies, the concept of the project has been modified several times (to be addressed in a subsequent paper). Figure 1 provides an overview of the project concept and approach. Stated aim at the onset of the project was to support 50 women toward labor market entry during the four-year project period. Completion of vocational training is counted as meeting project aims as the successful completion of VET qualifies women for the skilled labor market.

Figure 1: SoWi Project Concept



4.2 Purpose of the Current Study

To contribute to the empirical academic discourse on intersectionality as well as WMB and labor market integration, the current study will explore intersectional influences within the context of the SoWi labor market integration project. Using final evaluation data, the current study will expand preliminary analyses that were conducted at the project midpoint. Specifically, the analysis will focus on variables related to migration background as well as educational/occupational background as these are hypothesized to affect women's chances of entering the labor market. Since project participants are women, gender is a constant in this analysis, which allows for a deepened examination of the variables of interest and their intersecting relationships. The focus on these constructs was in part guided by the intersectional literature but also drew on findings from preliminary analyses that had examined the profiles of the women in the project (Fromm, 2020; James et al., 2020, 2021, 2022). While not encompassing of all possible factors that may further or hinder labor market entry (e.g., age, number of children, family status), the analysis is viewed as an important starting point for examining intersectional influences within the project.

The following research questions guided the analysis:

- What is the migration and educational/occupational background of women in the project and how are both related?

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- Are migration and educational/occupational background predictive of project outcome?

5 Methods

5.1 Evaluation Design and Overall Objectives

The SoWi project has been evaluated since its inception to give it scientific grounding. Due to the dynamic nature of the project concept, the evaluation pursued primarily formative objectives but also generated data that allows the reporting of summative findings. The overall evaluation was guided by several broad aims, which included (1) establishing a profile of the women and their individual situations, (2) identifying participating women's psychosocial resources and stressors, (3) examining trajectories through the project, and (4) examining predictors of project success. Prior to commencing, the evaluation study was reviewed and approved by the Ethics Committee of the Faculty of Human Sciences at the University of Kassel.

5.2 Data Collection and Variables of Interest

Data were collected from multiple sources over the course of three-and-a-half years, using quantitative as well as qualitative methods, with a final date for (most) data collection set in April 2022. Data included monitoring (administrative) data, standardized surveys at two timepoints with participating women as well as coaches, casefile data, and repeated expert interviews. Additionally, a survey of women who dropped out of the project prematurely took place as well as a survey with questions related to the Covid-pandemic. Since monitoring data are available on all 234 women who entered the project between the fall of 2018 and the spring of 2022 and contain complete sociodemographic information, these data served as the basis for the current intersectional analysis. Several variables were available in the monitoring data and broadly captured the constructs of interest.

- Migration background: country of origin, country of citizenship, residency status, since when in Germany, German language level
- Educational/occupational background: years of schooling outside of Germany, school degree from outside of Germany, degree recognition in Germany, vocational training outside of Germany, job experience outside of Germany, type of school degree in Germany, vocational training in Germany, job experience in Germany

Existing variables in the data served as the basis for constructing new variables that could then be used in the analysis.

5.3 Data Analysis

Monitoring data was managed by the project team, provided to the evaluation team as an Excel File and exported to SPSS 28.0, which after careful screening for missing data and cleaning of all relevant variables was used for all analysis. As stated, several variables had to be newly computed and/or recoded in order to be useful for analysis. Descriptive analysis was conducted to describe the 234 women at time of entry into the project in terms of basic demographic characteristics, particularly their migration and educational background, and in terms of their outcome by April 2022. Bivariate analysis, using chi-square analysis, Pearson correlation analysis, t-tests and one-way analysis of variance,

examined associations between variables within the main constructs and then across. This served to examine the constructs of interest and explore initial intersectional relationships with regard to outcome. Due to the results of the bivariate findings, model building through multivariate analysis was not deemed to be sensible at this time.

6 Results

6.1 Descriptive Statistics

Women were almost 34 years old on average when they started the project, ranging in age from 18 to close to 53 years. Over half were married upon entry into the project while more than a quarter (27.4%) were single and another 17% were either divorced or separated. The vast majority (81%) have children (M = 2.3, SD = 1.1). Within this group, 138 (73.1%) women have children that are younger than age 12. Close to 60% of the women are Muslim, 31% identify as Christian.

Table 1 describes the women in terms of their migration background. Participating women come from 48 different countries across six different continents. Syrian women make up one-fifth of the women followed by women from Afghanistan (9.0%) and Turkey (8.6%). On average, women have lived in Germany for about 8.4 years (SD = 8.0), with some entering the country less than a year ago and others having been born in Germany (range about 41 years). Close to 70% are in Germany on a time-limited residence permit. Another four percent hold a temporary stay permit, and 2.1% have a fictional certificate. Less than one percent have a permanent residence permit. 18%, from very diverse countries, have obtained German citizenship and another 4.7% are citizens of another EU country.

Table 1: Women's Migration Background (N = 234)

	N (%)	M (SD)
Country of origin		
Syria	47 (20.2)	
Afghanistan	21 (9.0)	
Turkey	20 (8.6)	
Eritrea	19 (8.2)	
Somalia	14 (6.0)	
Iran	14 (6.0)	
Iraq	12 (5.2)	
Other	87 (37.2)	
Years in Germany		8.4 (8.0)
Residency status		
German citizenship	43 (18.5)	
Citizen of an EU country	11 (4.7)	
Permanent residence permit	3 (1.3)	
Time-limited residence permit	161 (69.4)	
Temporary stay permit	9 (3.9)	
Fictional Certificate	5 (2.2)	

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Language level	
A1	2 (0.9)
A2	25 (11.0)
B1	137 (60.4)
B2	39 (17.2)
C1	6 (2.6)
(like) mother-tongue	18 (7.9)

Note. Some variables may have missing cases.

Close to sixty percent of women entered the project with the required B1-language level. Almost 12% had a lower language proficiency level at entry into the project. However, almost 28% had language levels above B1, of which 7.9% spoke German as a mother tongue.

With regard to educational and occupational background (see Table 2), 59.2% of the women had obtained an academic degree outside of Germany, 12.4% finished school in Germany and 28.6% had no formal school degree, which could indicate a lack of formal schooling but could also imply missing requisite school records. Of the women, who obtained a degree outside of Germany, the average number of years in school was 11.4 years (SD = 1.6). Only 12.4% of women had graduated from schools in Germany while 40.2% had obtained foreign degrees that had been recognized in Germany. Another 5.1% were in the review process for degree recognition. Of the 123 women with recognized degrees, 33% had the basic 9-year school degree [Hauptschule], which is sufficient for entry into many vocational fields; 37% had a 10-year degree [Realschule], which in Germany is a type of intermediate secondary school degree, and another 30% had the university-qualifying high school diploma [Abitur]. Five women had obtained a bachelor degree.

With regard to formal or informal vocational training, professional studies and occupational background, 90 women (38.8%) indicated having learned a vocation or trade outside of Germany, an additional three had received such training both in Germany as well as abroad. Seven women were trained in Germany. Areas of training were very diverse and included being trained as accountants, electricians, hairstylists, teachers, midwives, educators, etc. Over half of the women (56.9%) indicated not having received vocational training. Almost three-quarters of the women reported having worked before (again, in very diverse fields) – 36.4% percent outside of Germany, about one-fifth in Germany, and another 17.3% in both Germany as well as abroad. More than one-quarter (27.3%) reported no job experience.

Table 2: Women's Educational/Occupational Background (N = 234)

	N (%)	M (SD)
Secondary School/Academic Degree		
Outside of Germany	138 (59.2)	
Years of schooling outside of Germany		11.4 (1.6)
From Germany	29 (12.4)	
No formal degree	67 (28.6)	
Degree recognition		
Yes, graduated in Germany	29 (12.4)	
Yes, foreign degree but recognized	94 (40.2)	
Under review	12 (5.1)	
No	99 (42.3)	
Type of degree (n = 123)		
9-year degree [Hauptschule]	41 (33.3)	
10-year degree [Realschule]	45 (36.6)	
High School diploma [Abitur]	32 (26.0)	
University degree/BA	5 (4.1)	
Vocational training		
Outside of Germany	90 (38.8)	
In Germany	7 (3.0)	
Both, in and outside of Germany	3 (1.3)	
None	132 (56.9)	
Job experience		
Outside of Germany	84 (36.4)	
In Germany	44 (19.0)	
Both, in and outside of Germany	40 (17.3)	
None	63 (27.3)	

Note. Some variables may have missing cases.

6.2 Bivariate Analysis

A series of bivariate tests were first conducted between variables within the main constructs and then across. This served to examine the constructs of interest and explore initial intersectional relationships. For ease of presentation, these results are shown in two tables (Table 3a and Table 3b). Table 3a displays bivariate results with continuous dependent variables and Table 3b presents crosstabs and chi-squares. The left column of both tables shows which variables' relationship was tested; the middle column displays relevant descriptive results while the results of the statistical tests are shown in the right column. Most of the tested relationships were statistically significant.

Findings for the construct migration background indicated that language level (operationalized as a continuous variable from A1-level to mother tongue) was positively correlated to a higher number of years in Germany. Residency status differed by language

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level as well as years in Germany, with greater permanency being associated with a higher language level and more years in Germany.

When examining the relationship between variables related to migration background and those related to educational/occupational background, several statistically significant findings emerged: Women who had recognized degrees in Germany had lived in Germany significantly longer – on average 21 years. Women with recognized degrees from outside Germany had been in Germany on average for six years. Of interest is the group of women who had lived in Germany for over seven years, yet had no recognized degree. The relationship between type of degree and years in Germany was not statistically significant. However, language level was significantly associated with having degree recognition as well as type of degree, with having a degree recognized in Germany and having a higher degree being associated with at least a B2-C1 language level. Language level was also associated with having obtained vocational training, with women with at least a C1 level being more likely to completing vocational training in Germany. Job experience, interestingly, was not related to language level at baseline. Lastly, both vocational training and job experience were associated with more years in Germany, with notably more years reported for women who had either in Germany. Notable are the women with neither vocational training or job experience who in both cases had the second longest stay in Germany.

Table 3a: Bivariate Relationships (Within Migration Background; Between Migration Background and Educational/Occupational Background) (N = 234)

	M (SD)	Stat.
Within Migration Background		
Language level x Years in Germany		r=.566; p<.001***
Residency status x Language level	*(language level)*	F(2) = 11.9; p<.001***
Temporary stay permit/fictional certificate	3.0 (0.6)	
Time-limited residence permit	3.2 (0.8)	
Citizenship/permanent residency	3.9 (1.4)	
Residency status x Years in Germany	*(years in Germany)*	F(2) = 30.3; p<.001***
Temporary stay permit/fictional certificate	3.0 (1.5)	
Time-limited residence permit	6.7 (5.8)	
Citizenship/permanent residency	14.6 (10.5)	
Migration Background x Educational/Occupational Background		
Recognized degree x Years in Germany	*(years in Germany)*	F(3) = 44.1; p<.001***
Graduated in Germany	21.1 (12.4)	
Recognized degree from outside Germany	6.0 (4.3)	
No recognized degree	7.3 (5.7)	
Under review	6.7 (4.0)	

Type of (recognized) degree x Years in Germany	*(years in Germany)*	F(4) = 2.2; p = .075
No recognized degree	7.3 (5.7)	
9-yr. degree/Hauptschule	11.1 (10.4)	
10-yr. degree/Realschule	9.0 (9.6)	
High school diploma and higher	8.4 (8.4)	
Recognized degree x Language level	*(language level)*	F(3) = 28.2; p<.001***
Graduated in Germany	4.8 (1.5)	
Recognized degree from outside Germany	3.3 (0.7)	
No recognized degree	3.0 (0.8)	
Under review	2.9 (0.7)	
Type of (recognized) degree x Language level	*(language level)*	F(3) = 6.0; p<.001***
9-yr. degree/Hauptschule	3.6 (1.4)	
10-yr. degree/Realschule	3.6 (1.1)	
High school diploma and higher	3.7 (0.8)	
No recognized degree	3.0 (0.8)	
Vocational training x language level	*(language level)*	F(2) = 7.191;
Yes, in Germany	4.5 (1.7)	p<.001***
Yes, outside of Germany	3.3 (0.7)	
No vocational training	3.3 (1.1)	
Job experience x Language level	*(language level)*	F(2) = 32.260; p = .107
Yes, in Germany	3.5 (1.1)	
Yes, outside of Germany	3.2 (0.7)	
No job experience	3.5 (1.2)	
Vocational training x Years in Germany	*(years in Germany)*	F(2) = 14.978;
Yes, in Germany	19.8 (13.0)	p<.001***
Yes, outside of Germany	6.4 (4.9)	
No vocational training	9.0 (8.5)	
Job experience x Years in Germany	*(years in Germany)*	F(2) = 13.473;
Yes, in Germany	11.3 (9.3)	p<.001***
Yes, outside of Germany	5.2 (3.4)	
No job experience	9.0 (9.1)	

*Note. ***p<.001*
Some variables may have missing cases.

Table 3b shows results from chi-square analysis within educational/occupational background and between migration background and educational/occupational background. Findings indicated that having job experience in Germany was neither statistically significantly related to having received vocational training nor having obtained job experience outside of Germany. On the other hand, analysis on residency status, which (for purposes of sufficient cell size) was limited to the 218 women who had either time-limited stay permits or had permanent residency or citizenship, yielded several statistically significant findings. Degree recognition, vocational training and job experience were related to residency status. Solely with regard to type of degree no difference in residency status could be detected. Specifically, half of the women with time-limited stay permits had no recognized degree. Of those with citizenship or permanent residency, slightly below one-third (31.5%) had no degree, another 31.5% had graduated in Germany and 37% had degrees from abroad that were recognized. With regard to vocational training, more than

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half the women with citizenship or permanency had no vocational training and only eight women in this group had obtained vocational training in Germany. In terms of job experience, about 31% of women with time-limited stay permits reported job experience in Germany. Only about half the women with citizenship or permanency had job experience in Germany.

Table 3b: Bivariate Relationships (within Migration Background and between Migration Background and Educational/Occupational Background)

		N (%)	Stat.
Within Educational/Occupational Background			
Job experience in Germany (n= 227) x	*Yes* (n=84)	*No* (n=143)	
Vocational training outside Germany			$x^2(1)=.328$; p=.567
Yes	32 (38.1)	60 (42.0)	
No	52 (61.9)	83 (58.0)	
Job experience outside Germany			$x^2(1)=2.013$; p=.156
Yes	40 (47.6)	82 (57.3)	
No	44 (52.4)	61 (42.7)	
Educational/Occupational Background x Migration Background			
Residency status (n=218) x	Time-limited stay permit (n=161)	Citizenship/ permanent residency (n=57)	
Recognized degree			$x^2(2)=19.148$; p<.001***
Graduated in Germany	12 (7.8)	17 (31.5)	
Recognized degree from outside of Germany	65 (42.5)	20 (37.0)	
No recognized degree	76 (49.7)	17 (31.5)	
Type of degree			$x^2(3)=5.703$; p=.127
9-yr degree	27 (17.6)	12 (22.2)	
10-yr degree	27 (17.6)	12 (22.2)	
High school diploma and higher	23 (15.0)	13 (24.1)	
No formal degree	76 (49.7)	17 (31.5)	
Vocational training			$x^2(2)=15.640$; p<.001***
Yes, in Germany	2 (1.3)	8 (14.0)	
Yes, outside of Germany	63 (39.4)	20 (35.1)	
No vocational training	95 (59.4)	29 (50.9)	

Job experience			$x^2(2)=6.562$; p=.038*
Yes, in Germany	49 (30.8)	28 (49.1)	
Yes, outside of Germany	65 (40.9)	15 (26.3)	
No job experience	45 (28.3)	14 (24.6)	

*Note. *p<0.5; ***p<.001.*
Some variables may have missing cases.

Although women were highly diverse in terms of their country of origin, sub-analysis were conducted on the 107 women from the four countries with the greatest representation – Syria (n=47), Afghanistan (n=21), Turkey (n=20) and Eritrea (n=19) – to explore whether country of origin might be a possible explanatory factor for variability in the various areas (see Table 4). Statistical testing is not reported due to small cell sizes, but findings are of interest descriptively. Women from Turkey had been in Germany by far the longest and also had the highest language level. Syrian women had the second highest language level although they had spent the shortest number of years in Germany on average. They also had the highest rate of being in Germany with a time-limited stay permit, followed by women from Eritrea. Despite their many years in Germany, 80% of Turkish women were on time-limited stay permits in Germany. With regard to degree recognition, Eritrean women had the highest rate of having no degree recognition (68.4%), followed by Turkish women (57.9%), Syrian women (41.3%) and women from Afghanistan (30.0%). Over two-thirds of women from Eritrea (72.2%) and Turkey (70.0%) had no vocational training, followed by Afghan (57.1%) and Syrian (55.3%) women. A considerable percentage of Syrian (42.6%) and Afghan (38.1%) women had received some vocational training outside Germany. Lastly, women from Afghanistan had the highest rate of not having job experience (47.6%), whereas between 70% to 80% of women in the other three groups were reported to have job experience, either in Germany or abroad.

Table 4: Differences by Country of Origin (N=107)

	Syria (n=47)	Afghanistan (n=21)	Turkey (n=20)	Eritrea (n=19)
	N (%) or M (SD)			
Years in Germany	4.0 (2.7)	7.5 (6.4)	17.3 (12.2)	5.5 (2.7)
Language level	3.4 (0.74)	2.9 (0.5)	4.0 (1.5)	2.9 (0.6)
Residency status				
Citizenship/Permanent	2 (4.4)	5 (25.0)	4 (20.0)	1 (6.2)
Time-limited stay permit	43 (95.6)	15 (75.0)	16 (80.0)	15 (93.8)

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Recognized degree				
Graduated in Germany	0 (0)	3 (15.0)	5 (26.3)	3 (15.8)
Recognized degree from abroad	27 (58.7)	11 (55.0)	3 (15.8)	3 (15.8)
No recognized degree	19 (41.3)	6 (30.0)	11 (57.9)	13 (68.4)
Vocational training				
Yes, in Germany	1 (2.1)	1 (4.8)	1 (5.0)	0 (0)
Yes, abroad	20 (42.6)	8 (38.1)	5 (25.0)	5 (27.8)
No vocational training	26 (55.3)	12 (57.1)	14 (70.0)	13 (72.2)
Job Experience				
Yes, in Germany	10 (21.3)	5 (23.8)	11 (55.0)	7 (38.9)
Yes, abroad	23 (48.9)	6 (26.8)	5 (25.0)	7 (38.9)
No job experience	14 (29.8)	10 (47.6)	4 (20.0)	4 (22.2)

Note. Some variables may have missing cases.

6.3 Intersectional Influences on Project Outcome

Further analysis examined whether the variables of interest had an impact on outcome. Outcome can be operationalized and measured in different ways depending on interest, perspective, and availability of data. For instance, case status outcomes describe women's status in a project at a particular point in time – in case of this analysis, as of April 2022. Outcome could, however, also be described in terms of goal attainment as assessed by the SoWi Team or by the women themselves. For this analysis, case status outcome and goal attainment outcomes will be considered based on the availability of such information in the monitoring data (which is the best data source for this analysis).

6.3.1 Case status outcome

Women's status in the project is not easy to determine and varies significantly by time in project ($p < .001$), i.e., depending on when women entered and which vocational track they chose, their time in the project will necessarily vary. As such, time in the project is an important control variable for any analysis related to outcome. Table 5 shows outcomes for April 2022. For 83 women the outcome remains undetermined as they were still active in the program, which means they receive coaching and/or participate in preparatory activities or are in vocational training. Of the 151 women with a known outcome, 26 had found jobs within or outside of SoWi and another 9 had completed vocational training. The remainder had left the project prematurely for a range of reasons that will be examined in depth in a future publication. Bivariate analysis will focus on the 151 women for whom the outcome was known.

Table 5: Case Status Outcomes as of April 2022 (n=234)

	N (%)
Found job as part of *SoWi* objectives	15 (35.5)
Completed vocational training	9 (3.8)
Found job outside of *SoWi*	11 (4.7)
Left *SoWi* – broke off vocational training	18 (7.7)
Left *SoWi* – new orientation, referred elsewhere	17 (7.3)
Left *SoWi* – further preparation (e.g., language classes) outside of *SoWi*	12 (5.1)
Left *SoWi* – other reasons (e.g., family situation, moving away)	69 (29.5)
Outcome still undetermined, still active in project	83 (35.5)

6.3.2 Goal attainment outcome

From the beginning, the SoWi project pursued important secondary goals, which included the empowering of women and strengthening of their resilience toward greater independence. While 35 women had reached the official case status outcomes, even women leaving the program without reaching these goals had made important gains toward greater independence as assessed by the SoWi-Team. Assessment was based on professional judgment and occurred in the context of the helping relationship. Eighty-eight (58.3%) of the 151 women with a known outcome had fully or partially reached their goals.

For purposes of this analysis, the predictive influence of the migration and educational/occupational variables was examined with regard to the 151 women for whom the outcome was known. Analysis were conducted for both case status and goal attainment outcomes. To facilitate analysis, case status outcome was dichotomized as women who left the program prematurely and those who reached intended aims. Goal attainment outcome was dichotomized as women who partially or fully reached secondary goals (as appraised by the SoWi-Team) and those who did not. Results are shown with time in project included as a control variable (see Table 6). They show that the variable "recognized degree" was statistically significant for both case status as well as goal attainment outcomes. The variable "language level" reached statistical significance with regard to goal attainment. Specifically, compared to women with no recognized degree women with a degree recognized in Germany were almost three times as likely to have a positive case status outcome (i.e., complete vocational training and enter the job market) ($p<.01$) and 80% more likely to reach primary or secondary goals partially or fully as assessed by the SoWi team ($p<.01$). A higher language level improved the odds of attaining primary or secondary goals by 43% ($p<.05$). None of the other intersectional variables reached statistical significance. Given these results, further multivariate analysis was not conducted.

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Table 6: Bivariate Relationships Between Intersectional Variables and Outcome with Time in Project as a Control Variable (N = 151)

		B	SE	Wald	df	p	Exp(B)
Time in project (Control) †					1	(<).001	
Years in Germany	Case status outcome	.023	.022	1.130	1	.288	1.023
	Goal attainment outcome	.031	.023	1.821	1	.177	1.031
Language level	Case status outcome	.047	.189	.062	1	.803	1.048
	Goal attainment outcome	.364	.185	3.878	1	.049*	1.439
Residency status (ref=time-limited)	Case status outcome	-.161	.464	.120	1	.729	.852
	Goal attainment outcome	.106	.418	.065	1	.624	1.226
Recognized degree (ref=no recognized degree)	Case status outcome	.203	.415	.240	1	.006**	2.944
	Goal attainment outcome	1.080	.392	7.592	1	.007**	1.797
Type of degree (ref=9-yr degree)	Case status outcome	-.001	.001	.399	1	.528	.999
	Goal attainment outcome	-.002	.001	2.974	1	.085	.998
Vocational training (ref=no vocational training)	Case status outcome	.372	.406	.841	1	.359	1.451
	Goal attainment outcome	.322	.379	.721	1	.396	1.380

Job experience (ref=no job experience)	Case status outcome	.576	.487	1.400	1	.237	1.776
	Goal attainment outcome	.777	.418	3.447	1	.063	2.175

Note, † Time in project was statistically significant at .001 or <.001 for all predictor variables. As Beta values, Standard Errors, Wald values and Odds ratios varied somewhat they are not listed for each variable. *p<0.5; **p<.01

7 Discussion

On the basis of three-and-a-half years of empirical data from a labor market integration project for WMB in the city of Kassel, Germany, this paper examined the intersections of gender (being a constant), migration background and educational/occupational background. The evaluation and this analysis took place in a broader sociopolitical context that is in the process of reforming modern immigration law (Federal Ministry of the Interior and Community, 2022) and views WMB as a target group for labor market integration efforts. Examining the relationship between factors which prove to be particular barriers for WMB may contribute to a deeper understanding of the possibilities and limitations of labor market integration projects. It may further serve to improve such projects (e.g., their underlying concepts and program elements) so they are better able to address existing barriers. In this context, the intersectionality approach holds promise. It has been used and promoted in social science/social work research to investigate how categories known to be associated with disparity interact and amplify inequality and disadvantage (e.g., Khelifa & Mahdjoub, 2022).

Two research questions guided this analysis and were answered using monitoring data available for April 2022, the date at which data collection for the evaluation study ended. Several points need to preface the discussion of the results: First, the end of the evaluation does not mark the end of the project. Instead, following the end of the model project phase (in 2022), SoWi became part of the regular spectrum of services offered by the city of Kassel. Thus, conclusions presented here are limited to those women who participated in the project during its model project phase. Second, many women, who entered the project at varying timepoints during that period (and were captured in the evaluation), are still active in the project. This means these women are still in the process of going through the various phases and program elements of the projects (e.g., remedial work, internships, vocational training) as indicated by their qualifications and goals. As such, the outcome for 36% of the project participants is not yet known, and summative results presented here are in fact provisional or limited to those with a known outcome at the end of the evaluation period. Third, ”time in project” is an important control variable for all analysis related to outcome. Women entered the project throughout the three-and-a-half year data collection period, meaning that those who started in 2018 and 2019 would have a much higher likelihood of having completed specific goals or to have dropped out of the project prematurely. Additionally, the duration of active participation in the project is highly variable based on what vocational training and job a woman may be pursuing, with vocational training as a home economic assistant taking only seven months and the vocational training as an educator taking from four to five years. With these limitations in mind, results for the two research questions will be synthesized and discussed.

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7.1 "What is the migration and educational/occupational background of women in the project and how are both related?"

Data confirm a highly heterogenous group in terms of the main constructs, and as such, they are representative for WMB more generally (e.g., Berr et al., 2019; Spörlein et al., 2020). Project participants come from diverse backgrounds: they are very different in terms of their country of origin and their rootedness in Germany and speak German at all levels from A1 to mother tongue. They are similarly diverse in relation to their educational/occupational background and include WMB with no formal degree as well as those who hold a university degree. As the majority of WMB with formal school degrees obtained their schooling abroad, degree recognition is a crucial issue for this group. Over 40% of the women do not have recognized degrees in Germany. While three-quarters have had job experience, less than half have gone through vocational training, which in Germany is generally a prerequisite to finding work in the skilled labor market.

Bivariate analysis showed strong relationships between most variables within each of the two constructs and across. Most of these relationships are intuitive. For instance, women, who have lived in Germany longer, speak German better, are more likely to have German citizenship, to have a German school degree or have degree recognition, to have received vocational training or prior job experience. Of interest is a sizable group of women who despite a considerable number of years in Germany (an advantage), do not have a recognized degree, have not completed a vocational training and have no job experience. Similarly, almost one-third of women with the advantage of permanency in their residency status, had no recognized degree. All this suggests that there is a constellation of factors (permanency in terms of residency status, recognized degree, higher language level, prior vocational training and/or job experience) that should position women well to attain the objectives of the labor market integration project. However, there seems to be a subgroup of women who despite advantageous factors related to migration background (more years in Germany, permanency in residency status, higher language skills) remains disadvantaged in terms of educational/ occupational background. What role other factors, such as age, number of children, psychosocial factors, etc., play in explaining differences in these subgroups deserves further investigation.

As part of the variables related to migration background, country of origin was, however, explored as a possible explanatory factor. Comparative analyses between women from the four countries most represented in this project were conducted. While findings were only presented descriptively, they suggest that country of origin may indeed need to be considered in intersectional analyses. Afghan women had a particularly high rate of "no job experience" despite a comparatively high rate of recognized degrees and even some vocational training in their country. This might indicate that other factors (e.g., precarity in residency status, factors related to migration experiences) might interfere with women's chances or ability to enter the labor market. When comparing the four ethnic groups, results also showed that Syrian women had comparatively high language levels despite the shortest number of years in Germany. This likely reflects the systematic efforts in Germany, following the 2015/2016 entry of many Syrian refugees, to provide and at times require broad-based language training. Afghan women, on the other hand, have the lowest level of job experience, which may in part be explained by prohibitions for women in Afghanistan to work outside the home but may also reflect this group's complex migration histories, which often involved extended stays in transition countries with little to no

opportunities to work. In addition, the German government never launched the type of systematic labor market integration effort for Afghan refugees that are available to more recent refugee groups. However, there is ample evidence of the aspirations of these women to enter the labor market (e.g., Conrads et al., 2020). Somewhat surprising was the elevated number of time-limited residence permits among Turkish women along with a comparatively high rate of not having a recognized degree despite a high average number of years in Germany and the highest language levels. Data suggest that the average number of years in Germany among Turkish women was affected by a number of women in their thirties and forties who had been born in Germany and speak German as a mother tongue (e.g., Doerschler & Jackson, 2010). While migration from Turkey has a long history in Germany, accompanied by changes in policy, and while average patterns can be detected, it deserves emphasizing that Turkish women (like women from other nationalities) are not a homogeneous group. They include women who grew up in Germany and those that came more recently. The needs of these women likely differ significantly and thus require different programmatic responses. Lastly, women from Eritrea had the highest rate of lacking school degrees, which presents a disadvantage on the labor market. Since policies and services are often created in response to new migrant groups, it is thus worthwhile to consider cohort effects.

7.2 "Are migration and educational/occupational background predictive of project outcome?"

As stated, data provide evidence of great sociodemographic heterogeneity among participating women. Yet, the stated goal of the project is broadly the same for all women – to enter and complete vocational training and to find a job in the social economy sector. This stated goal obscures inherent complexities, which are introduced through different vocational pathways and their respective qualifying prerequisites as well as the different starting points of the women themselves. Operationalizing outcome in various ways to do justice to this complexity is therefore justified. For this analysis, outcome was operationalized in two ways, capturing both official case status outcomes for those women for whom the outcome was known as well as goal attainment outcomes as determined through the appraisal of the professionals in the project. Undoubtedly, evaluating outcome through the eyes of professionals who are invested in the success of the project, needs to be viewed critically. Given the individualized approach of the project, however, that aims to take account of the unique situations of the women, the perspectives of the professionals have weight and ought to be considered. Future analysis will focus on also describing outcome in terms of women's initially stated goals and their attainment. The difficulties of adequately capturing outcome in labor market integration projects has been previously addressed (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2019).

Not surprisingly, the great heterogeneity of the women presents a challenge for projects such as SoWi. It would be expected that characteristics related to migration background as well as educational/occupational background, which, as shown, are closely correlated with each other, would amplify advantages and disadvantages toward the goals of the project. Yet, analysis with regard to outcomes yielded few significant findings. Except for degree recognition, which was statistically significant for both case outcome and goal attainment, as well as a small effect of language level on goal attainment outcomes, none of the other migration and educational/occupational background variables affected

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outcome in the project. This can be interpreted in two ways: For one, it could mean that the highly individualized approach the SoWi project embraces to address the individual needs of the women equalizes otherwise relevant sociodemographic differences. Through individualized coaching, flexibility in the duration of project engagement and services to remove barriers (e.g., tutoring, childcare), women regardless of their background of advantage and disadvantage are supported toward reachable goals. The project has resisted tightening of inclusion/exclusion criteria to remain accessible for all WMB that may have interest in joining the project. If this approach does indeed contribute to an equalizing of factors that may otherwise contribute to disadvantage, this could be regarded as evidence that SoWi is successful in its objectives and adherent to its open and individualized approach. However, these null findings could also be viewed critically as constellations of advantage should propel women toward positive outcomes. For instance, if having maximum advantage (e.g., high language skills, advanced degree) does not translate into a measurable advantage, it could indicate a lack of recognition of existing potential and resources.

The importance of a recognized school degree as a prerequisite to entering Germany's vocational training system and ultimately the labor market, was supported by the data and may suggest that this is a structural requirement that needs to be met regardless of the supportive services that are otherwise available. The centrality of having a recognized school degree underscores the importance of creating processes and procedures that as quickly and unbureaucratically as possible work toward the recognition of degrees. This is an issue that has been repeatedly raised in the literature (e.g., Bähr et al., 2019; Federal Ministry for Education and Research, 2019). The importance of language skills has been addressed as well and been identified as the key factor to successful integration (Bähr et al., 2019; Doerschler & Jackson, 2010). The current analysis only had one marginal finding with regard to language skills and outcome, which raises questions and deserves further investigation. It may in part reflect that some of the participants enter fields where advanced language skills may not (yet) be quite as central. It may further suggest that the SoWi project largely succeeds in providing remedial and supportive services in this area, thus again mostly equalizing the effect of this factor for the vocational paths chosen by the women. However, this issue deserves additional nuanced analysis.

Finally, results with regard to the second research question may also indicate that ultimately other factors beyond migration and educational/occupational background are more salient in relation to project success. Prior analysis of psychosocial data has indeed shown that variables such as having younger children, stress and resilience affect outcome (James et al., 2021). In addition, other intersectional factors such as economic factors like income or welfare status as well as age and family status deserve to be investigated. Unfortunately, the monitoring data, which is the most comprehensive data source available for evaluation does not include variables such as forms of disability or psychosocial factors. Such variables could, however, be drawn from other data sources in the evaluation (surveys, case records) but would only be available for some of the women. Nonetheless, further inquiry with a broader spectrum of intersectional variables is clearly needed.

7.3 Limitations and Conclusion

Program evaluation is fraught with challenges (e.g., complex data collection context, changes in policies and procedures and program concepts, non-consistent data collection

standards, etc.) that often undermine its value for knowledge generation. Despite these inherent challenges and limitations, the SoWi project and the accompanying independent evaluation stand out in multiple ways due to programmatic strengths (e.g., individualized coaching through professionals) as well as aspects of the evaluation study (e.g., length of engagement, the amount and type of data that has been collected), and are thus believed to be able to make a contribution to current discourses on WMB, labor market integration, and intersectionality. In this context, it should be emphasized that the evaluation was first and foremost formative, and summative conclusions (for reasons discussed in the paper) must be drawn with caution. Therefore, model building and more complex analysis that would deepen intersectional understanding, were neither intended nor possible.

In the German academic literature, the framework of intersectionality is frequently cited in theoretical discussions, yet it is less often used as the basis for empirical investigations. For the current paper, the intersectionality framework offered a helpful lens to approach the data and to examine profiles of participating women and characteristics related to migration background as well as educational/ occupational background. It aided in identifying clusters of advantage and disadvantage, leading to conclusions that appear to underscore the value of the SoWi project as a supportive and equalizing resource for WMB. Beyond this analysis, which is understood as an important first step, multiple other factors (as stated above) ought to be examined that are likely to shape WMB's experiences in the labor market and in the project. However, intersectional analysis, barring large sample sizes, tend to become unmanageable when too many categories are considered. For future investigation, latent class modeling or cluster analysis might offer other analytic approaches to identifying subgroups of women along intersectional categories and examining differences between them. Finally, labor market integration projects are well advised to consider the multiple intersectional influences that shape WMB's experiences inside and outside of such projects and could constitute barriers on the pathway into the labor market. As was shown here, projects have the potential of equalizing some of these hindering influences through the creation of supportive and targeted services as were implemented in SoWi-project.

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JURISDICTION

European Jurisdiction on Refugee and Complementary Protection: August-December 2022[1]

Holger Hoffmann[2]

This compilation of case law samples, summarizes and refers to jurisdiction of international relevance for the application of legal standards in the field of refugee and complementary protection by the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) in the period August to December 2023.

1. European Court of Human Rights

1.1 ECtHR, Judgement of 30/8/2022, R. v. France (no. 49857/20): Art. 3 violated because of insufficient risk assessment before the deportation of a refugee to Chechnya

A Russian national with Chechen roots was to be deported to Russia. He initially had refugee status in France. This was revoked "on the grounds of serious threat to national security" after he was sentenced to six years' imprisonment and permanently banned from living in France for participating in a criminal conspiracy to prepare a terrorist act.

He argued that his deportation violated Articles 2, 3 and 8 and that there was a risk that he would be forcibly removed or mistreated in Russia. His wife (also a Russian national with refugee status) and his minor children continue to live in France.

The ECtHR recognised the dangers that terrorism poses to a society and the importance of combating terrorism. However, the protection enshrined in Art. 3 is absolute and does not allow for any limitations or exceptions. Even if the revocation of the refugee status of the complainant did not alone constitute a risk of treatment contrary to Article 3, he was still a refugee, which had to be taken into account when determining the actual risk of expulsion. France could not rule out the possibility that Russian authorities had learned of the court proceedings leading to the expulsion and of his involvement in terrorist acts.

The French Administrative Court had indeed assessed the defendant's situation in detail – but only after his deportation to Russia. This did not remedy the inadequacy of the careful risk analysis that had been omitted before the execution.

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1.2 ECtHR, Judgement of 30/8/2022, M W. v. France (no. 1348/21): Article 3 violated by the enforcement of a deportation order against a Russian national of Chechen origin

The ECtHR had initially issued a provisional measure pursuant to Art. 39 of the Constitution, according to which the complainant could not be expelled until the ECtHR had ruled.

In its judgment, the ECtHR recognised that society is confronted with terrorist threats and that governments must take precautionary measures. The expulsion of foreigners who pose a threat to national security is, in principle, a permissible measure. The human rights situation in Chechnya does not lead to the conclusion that deportations to Chechnya generally violate the ECHR. What was required was an individual assessment. The complainant had submitted sufficient material evidence that the French authorities had been in direct contact with the Russian authorities with regard to a readmission application and had forwarded the file containing detailed information about him and his involvement in terrorist activities. Because of this, and because reliable international sources indicate that arbitrary detention and torture continue to occur in the Chechen Republic in cases involving terrorist suspects, the ECtHR decided that there were substantial grounds for finding that the complainant faced a real risk of being subjected to treatment contrary to Article 3, confirmed his stay in France, and at the same time extended the provisional measure until this judgment became final.

1.3 ECtHR, Judgement of 31/8/2022, A.N. v. Sweden (no. 32891/22): Articles 3 and 34 violated for mistreatment of Kyrgyz asylum-seekers at Kyiv airport

The Syrian applicant requested a reconsideration of his asylum application, which had already been rejected, due to a serious accident which had led to several serious health problems, wheelchair dependency, limited use of hands and arms, and the need for constant medication and assistance. His expulsion violated Article 3, as he could not be deported to Syria without serious risk to his life and had no possibility of accessing medical treatment and medication there at the required level of care. The Swedish authorities, however, rejected his application: the medical problems were not an obstacle to enforcement. It had not been proven that he needed medical care that was not available in Syria.

Pursuant to Art. 39 of the Procedural Order, the ECtHR granted a stay of deportation as a provisional measure for the duration of the proceedings before the ECtHR.

1.4 ECtHR, Judgement of 15/9/2022, O.M. and D.S. v. Ukraine (no. 18603/12): Articles 3 and 34 violated for mistreatment of Kyrgyz asylum-seekers at Kyiv airport

The 2012 case concerned a prominent journalist and politician persecuted in Kyrgyzstan (including as head of the presidential administration from 2009) and her son, who travelled with her to Ukraine to apply for international protection. They had previously lived in the Netherlands.

Upon arrival in Kiev, the first complainant was taken to the airport transit zone by border officials because she used a false identity and her son, the second complainant, did not have the necessary documents to cross the border into Ukraine. Their documents were confiscated and officials allegedly refused to process the asylum applications. The defendants were offered the opportunity to travel on voluntarily to Kazakhstan or to leave

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for another third country of their choice under threat of repatriation to Kyrgyzstan. After they refused to leave Ukraine, they were deported to Georgia.

The defendants stated that they had been mistreated by the Ukrainian officials in the transit area of the airport and complained about their deportation to Georgia, without their submission about the risk of mistreatment or refoulement being examined first.

The ECtHR stated that the procedural obligation under Article 3 had been violated because the Ukrainian officials had failed to examine the alleged risk of treatment contrary to Article 3 prior to deportation. The complainant's detailed, specific and consistent description of the relevant events in Ukraine proved that the border officials refused to accept asylum applications and that the complainant was deported from Ukraine against her will.

Furthermore, the Ukrainian authorities failed to comply with the provisional measures ordered under Article 39 of the Constitution without providing sufficient justification. This violates Article 34.

Article 5 was not violated, as the control and surveillance measures did not constitute a deprivation of liberty within the meaning of Art. 5 para. 1. The duration, extent or intensity did not go beyond what was strictly necessary for the Ukrainian officials to complete the formalities.

1.5 ECtHR, Judgement of 27/09/2022, Otite v. UK (no. 18339/19): Art. 8 not violated in case of expulsion after criminal conviction for (serious) fraud

The applicant entered the UK as the spouse of a settled person and was initially granted indefinite leave to remain. Following a criminal conviction for a serious fraud offence, he was deported. Authorities and courts in the UK considered that it would not cause undue hardship to the complainant and his family (wife and three children, all British citizens) if he were deported.

The ECtHR ruled that the national court had examined the facts of the case in detail, weighed the seriousness of the offence against the likely impact on family and private life, and referred to criteria set out in the ECtHR's case-law in Boultif v. Switzerland (54273/00) and Üner v. Netherlands (46410/99). It was true that the deportation constituted an encroachment on the rights of the complainant under Article 8 para. 1. What is decisive is whether the deportation order strikes a fair balance between the complainant's rights and the public interest. In this case, it was in accordance with national law and pursued a legitimate aim (prevention of criminal offences) within the meaning of Article 8 para. 2. The complainant had only spent eleven years in freedom in the UK (four with criminal offences) and had obviously not integrated economically. The offence of fraud had been a serious crime. The defendant's family and private life in the UK did not outweigh the public interest in his deportation. His deportation therefore did not violate Article 8.

1.6 ECtHR, Judgement of 6/10/2022, B.Ü. v. Czech Republic (no. 9264/15): Art. 3 not violated due to allegedly "insufficient" investigation into the ill-treatment of an asylum seeker during detention

The complainant, a Turkish citizen, arrived at Prague airport on 16 October 2013 and was taken into custody. He was issued with a deportation order and a re-entry ban. Due to his aggressiveness, he was placed under strict conditions in the Bělá-Jezová Detention Centre

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for Foreigners. As regards the violation of Article 3, he claims that during his detention he was ill-treated by officers, beaten with a truncheon, kicked and tear-gassed. He referred to ill-treatment at the airport as well as in detention and the resulting preliminary proceedings. He also claimed that Article 13 had been violated because there was no effective domestic remedy to pursue his claims.

The ECtHR ruled that when force is used during an arrest, it must be examined whether the use of force was strictly necessary and proportionate in view of the circumstances. Pepper spray, not tear gas, had been used against the defendant after "other manual control techniques" had had no effect. At the time of the incidents at the airport, the officers could not have known that the complainant was in a vulnerable state due to a psychosocial disorder. The Czech government had presented a plausible explanation and corresponding evidence despite the different statements on the cause of the complainant's injuries. The examining doctors at the airport and in the hospital had not mentioned any negative effects of the spray. Under the circumstances – according to the ECtHR – the use of pepper spray was neither disproportionate nor unlawful. Article 3 had not been violated either substantively or procedurally, and separate questions under Article 13 therefore did not arise.

1.7 ECtHR, Judgement of 6/10/2022, Liu v. Poland (no. 37610/18): Art. 3 violated in case of extradition to China

A Taiwanese national, charged with large-scale international fraud, was to be extradited from Poland to China. He argued that this would lead to a real risk of ill-treatment in detention. He would be denied a fair trial. His extradition detention of over four years was unreasonably long and thus arbitrary.

The ECtHR was not convinced that the complainant's allegations had been properly investigated by the Polish authorities. China had not ratified the International Covenant on Civil and Political Rights (ICCPR), nor was it a party to the Optional Protocol to the Convention against Torture. China has not recognised the power of the UN Committee against Torture (CAT) to conduct an investigation. As a result, persons claiming violations of their human rights cannot avail themselves of an independent international protection mechanism and no independent international body has the power to conduct an on-site investigation without prior invitation from China. There are still serious shortcomings in the prohibition and prevention of torture in China. The extent to which torture and other forms of ill-treatment are used in Chinese prisons, according to credible and consistent reports, can be regarded as a general situation of violence. Therefore, there is a real risk of ill-treatment in detention. The informal Chinese statements given to the Polish government (no diplomatic assurances) did not provide sufficient legal guarantees for the complainant, who therefore did not have to prove any particular personal reasons for his fear. His extradition to China would violate his human rights.

Regarding the extradition detention of more than four years, the ECtHR ruled that the domestic authorities had not acted with due diligence and had not ensured that the duration of the complainant's detention did not exceed the time that could reasonably be required for the purpose pursued. The detention had therefore violated Art. 5 para. 1.

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1.8 ECtHR, Judgement of 6/10/2022, S. v. France (18207/21): Art. 3 violated if defendant deported to Russia without proper ex nunc assessment of situation

The Russian citizen S. had initially been recognised as a refugee – as had his wife. However, this was later revoked for S. because of "threat to national security". He was to be deported to Russia.

Referring to its Khasanov and Rakhmanov v. Russia judgments (28492/15 and 49975/15), the ECtHR focused its examination on the foreseeable consequences of expulsion and deportation, taking into account the general situation, the personal circumstances of the complainant and information on the existence of a vulnerable group.

The general situation in the North Caucasus, despite reported serious human rights violations, does not lead to a finding that deportation to Russia always violates Art. 3.

As regards the individual situation of the complainant, who was involved in the Chechen resistance struggle and suspected of having been involved in terrorist activities, the ECtHR found that the group to which he was attributed was not considered to be systematically persecuted and ill-treated. Nevertheless, the authorities had not adequately assessed the risk of ill-treatment in the event of deportation, as it did not appear to have been examined whether the complainant had a profile corresponding to one of the particularly vulnerable groups. Therefore, it would violate the procedural aspect of Art. 3 to enforce the deportation order without the authorities carrying out an ex nunc assessment of the possible risk.

1.9 ECtHR, Judgement of 13/10/2022, T.Z. and others v. Poland (no. 41764/17): Art. 3 and Art. 4 of Protocol No. 4 violated due to collective expulsion to Belarus and serious risk of chain deportation and ill-treatment

For the defendants, a Russian family of Chechen origin, Polish authorities repeatedly refused to consider applications for international protection, refused entry and deported them back to Belarus.

On admissibility, the ECtHR ruled that the appeal against the refusal of entry had no suspensive effect and would not have prevented the return to Belarus. It was therefore not an effective remedy within the meaning of the ECHR.

With regard to Article 3, the ECtHR referred to its judgment in M.K. and Others v. Poland (applications nos. 40503/17, 42902/17 and 43643/17) and reiterated that the Polish State was obliged to ensure the safety of the complainants, in particular by allowing them to remain within the Polish jurisdiction and by providing guarantees that they would not have to return to their country of origin until their application had been properly examined by a competent Polish authority. A State may not refuse access to its territory to a person who presents himself at a border crossing point and alleges that he may be ill-treated if he remains on the territory of the neighbouring State, as long as he has not lodged an application for international protection, unless appropriate measures are taken to eliminate such a risk. Here, however, no procedure had been initiated to review the asylum applications. Nor did the defendants have effective safeguards against the real risk of being subjected to inhuman or degrading treatment and torture. The fact that the complainants were not allowed to remain in Poland pending the outcome of the examination of their application exposed them to the serious risk of chain deportation from Belarus and treatment prohibited under Article 3.

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A violation of Art. 4 Protocol No. 4 to the ECHR and Art. 13 ECHR in conjunction with Art. 3 and Art. 4 Prot. Art. 3 and Art. 4 Protocol No. 4 also existed, as the defendants were deported to Belarus without examining their asylum application.

1.10 ECtHR, Judgement of 20/10/2022, M.T. and others v. Sweden (no. 22105/18): Art: 8 not violated due to 3-year time limit for family reunification for beneficiaries of subsidiary protection

The Swedish authorities had refused to grant a residence permit to a mother and her son who were in Syria to reunite with another son/brother who had initially come to Sweden as an unaccompanied minor, had been living there as a beneficiary of subsidiary protection since November 2016 and had come of age in August 2018. They had applied for a residence permit at the Swedish embassy in Khartoum in February 2017 because of the son's/brother's protection status in Sweden. Their right to family reunification was suspended for three years due to a change in the law that applied to persons with subsidiary protection status since 24.11.2015, which provides for different treatment than for recognised refugees.

The ECtHR referred to its judgment M.A. .v. Sweden (6697/18), in which Art. 8 had been held to have been violated because a long-term married couple had been refused reunification on the basis of the three-year waiting period for persons with temporary protection status. In contrast, in M.T., the waiting period had been gradually reduced. The defendants had de facto only been affected by the suspension from 17 February 2017 to 8 August 2018, i.e. for less than two years. There were no indications that the Swedish Act on Fixed-term Employment did not allow for an individual assessment of the interests of family unity in the light of the specific situation of the persons concerned or that such an assessment was not carried out in the case of the complainants. Taking into account the margin of appreciation, the ECtHR was convinced that the authority had struck a fair balance in the suspension between the interest of the complainants in being reunited in Sweden and the interest of the general public in protecting the economic well-being of the country by regulating immigration and controlling public expenditure.

The ECtHR then examined a possible violation of Art. 14 in conjunction with Art. 8. The conditions for persons fleeing a general situation of danger differ significantly, as they generally have a more "temporary" need for protection than persons with refugee/asylum status. The number of asylum seekers claiming a general situation in Syria is higher and the procedure for granting status is different. Also in EU law, norms restrict the right to family reunification for beneficiaries of subsidiary protection and distinguish them from recognised refugees. Therefore, with regard to the need for protection and the need for family reunification, there are factual and legal arguments that persons fleeing from a general situation in their country of origin are not in the same situation as those who have fled from persecution or ill-treatment due to individual danger. Art. 14 in conjunction with Art. Article 8 has therefore not been violated.

1.11 ECtHR, Judgement of 31/10/2022, Camara v. Belgium (no. 49255/22): Provisional measure under Article 39 of the Constitution for accommodation and granting of social benefits

Mr. Camara, a Guinean national, had not received accommodation from the Federal Agency for the Reception of Asylum Seekers (Fedasil) since his application for international protection because the reception centres for asylum seekers in Belgium

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were allegedly overcrowded. Belgian courts had already ordered Fedasil to accommodate the complainant in a reception centre, a hotel or another suitable facility, but this was not implemented.

The ECtHR ruled that Belgium must comply with the court order and provide the complainant with accommodation and material support to meet his basic needs. Similar to this measure, the decision obliges Belgium to comply with the orders of the Brussels Labour Court and provide each of the 148 asylum seekers with accommodation and material support to cover their basic needs while the procedure is ongoing.

1.12 ECtHR (Grand Chamber), Judgement of 14/6/2022, Sanchez-Sanchez v. UK (no. 22854/20): Article 3 not violated by extradition of Mexican suspect from UK to USA

Mr Sanchez, a Mexican national, was arrested in the UK at the request of the USA on suspicion of being involved in drug trafficking in the USA. He claimed that his extradition was in breach of Article 3 as he was facing life imprisonment without the possibility of parole.

The Grand Chamber stated that the imposition of life imprisonment on an adult offender is not prohibited by or incompatible with Article 3 or any other article of the ECHR. However, the imposition of a sentence without the prospect of release may be disproportionate in individual cases. The principles established in Vinter and others v. UK (66069/09, 130/10 and 3896/10) for domestic criminal cases would have to be adapted for extradition proceedings. However, a defendant would then have to show substantial grounds for believing that he would face life imprisonment without parole if convicted. Article 3 was not violated if the sentence could be reduced both de jure and de facto by a review mechanism that enabled the domestic authorities to take into account progress made by the person concerned in his rehabilitation or other grounds for release based on his conduct or other relevant personal circumstances.

With regard to Article 3, however, the complainant had not submitted any evidence that his extradition to the USA would expose him to the real risk of treatment that would reach the threshold of Article 3, since it had not yet been decided that he would be sentenced to life imprisonment. Therefore, his extradition was compatible with Article 3. The suspensive measure pursuant to Art. 39 of the Constitutional Regulation was lifted.

Note: The ECtHR has thus developed a new approach for extradition cases to non-treaty states in which neither a conviction nor a sentence has been handed down, but the prohibition of extradition would at the same time prevent the judicial proceedings.

1.13 ECtHR, Interim Measure of 8/12/2022, M.K. and others v. France (no. 34349/18, 34638/18 and 35047/18): Article 6 para. 1 violated for failure to comply with interim measures to allocate emergency accommodation

The complainant in case 34349/18, a Congolese national, had fled her country of origin accompanied by her three daughters (aged 3, 5 and 14 – the other three complainants). Her 5-year-old daughter had been the victim of rape. All the defendants entered France on 29/5/2018 and applied for asylum on 01/6/2018. It was certified that the application had been made but would have to be reviewed in the Dublin procedure. On the same day, she accepted the material reception conditions offered by the Office for Immigration and Integration.

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From 2-21/6/2018, the first defendant contacted social services fourteen times in order to obtain accommodation in a shelter for the homeless with her three daughters. However, this was always refused again. In the individual notes, the staff noted the vulnerability of the family, that one of the girls was ill and that the first complainant was afraid for her eldest daughter, who had allegedly been threatened by men in the park where they slept. The social services mentioned the exhaustion of all family members several times. On 11/6/2018, a doctor wrote a certificate expressing concern about the five-year-old girl's health and indicating that safeguarding through accommodation was essential. The girl was provided with psychological care, as evidenced by the reports of the on-call health care access service from 15-27/6/2018 and 20/7/2018. From 12/6/2018, the complainant spent their nights in the entrance hall of a hospital on seats or on the floor. From 26/6-3/7/2018, they were again living on the street and contacted the Social Welfare Office a total of nine times about their accommodation. Notes from the social welfare office mentioned the urgency of accommodation but did not propose a solution.

On 25/6/2018, the first complainant applied to the Administrative Court for an interim injunction to order the administration to accommodate her and her daughters. Her application was directed, on the one hand, against the social welfare authority with regard to the accommodation provided for in the asylum procedure and, on the other hand, against the prefecture of the department with regard to the emergency accommodation provided for by law. By decision of 27/6/2018, the judge of the Administrative Court ordered the prefect of the department to immediately assign the complainant to emergency accommodation – under threat of a penalty payment of €200 per day of delay.

With regard to Article 6 para. 1, the ECtHR stated that a right to emergency accommodation exists in France and can be claimed. This is not a decision relating to immigration, entry, residence or deportation of aliens. Granting or refusing a place in emergency accommodation is a civil right similar to housing or social assistance. Since the Administrative Court had recognised that the complainants fulfilled the requirements for the granting of emergency accommodation, the state had not fulfilled its duty and had obviously violated the fundamental right to emergency accommodation. The right of access to the courts guaranteed in Art. 6 para. 1 would be illusory if the domestic legal system allowed a final court decision to remain ineffective. Enforcement is an integral part of the right, since it is primarily the task of state authorities to ensure the enforcement of a court decision. Lack of funds could not be an argument for not enforcing. Delays should not violate the core of the protected right.

The regional authorities had not taken the action required by the Administrative Court during the enforcement phase, but had remained completely passive, although the protection of human dignity was at stake. The complainants had made diligent efforts to enforce the orders. This was shown by their numerous applications, although the state should have enforced the measures ex officio. Although the periods of non-compliance with the orders were not excessively long (between 12 and 27 days), the authorities had not only acted with delay, but had openly refused to comply with court orders, so that enforcement had only taken place after the interim measures ordered by the ECtHR. Consequently, Article 6 para. 1 had been violated.

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In those particular circumstances, the applicants are also exempt from the obligation to exhaust the remedies available under national law, since, in view of the steps taken by the applicants to enforce the court decisions granting them emergency accommodation, it would constitute a disproportionate obstacle to the effective exercise of their right to an individual remedy within the meaning of Article 34 to require them to go back to the national courts in order to obtain compensation

1.14 ECtHR, Judgment of 15/12/2022, W.A. and others v. Hungary (no. 64050/16, 64558/16, 66064/16): Article 3 violated due to insufficient assessment of the risks of returning third-country nationals to Serbia

The complainants came from Serbia to Hungary to the Röszke transit zone on the border between the two countries. They immediately applied for asylum. However, the asylum authority rejected the applications as inadmissible within a few hours and ordered their expulsion. The complainants applied for a judicial review, which was unsuccessful. The Hungarian border police deported them to Serbia without consulting the Serbian authorities.

The ECtHR referred to Ilias and Ahmed .v. Hungary (47287/15 - 21.11.2019), which summarised the procedural obligations of the expelling State under Article 3. The domestic law and the applicable country information are identical. The only difference was that the defendants did not have access to legal assistance here, which aggravated their situation.

Hungary has not sufficiently demonstrated that Serbia is generally a safe third country and that the UNHCR report on asylum in Serbia is unreliable. Since Hungary did not assess the risk of her treatment there before deporting the complainant to Serbia, it violated its procedural obligations under Article 3.

1.15 ECtHR, Judgement of 20/12/2022, S.H. v. Malta (no. 37241/21): Articles 3 and 13 violated due to inadequate international protection procedures

The accused, S.H., arrived in Malta by boat and was immediately arrested. He claimed to be a journalist in Bangladesh who was persecuted by the ruling party for his coverage of irregularities during the 2018 national elections. His asylum application was rejected at first instance and on appeal. S.H. complained under Articles 3 and 13 that the Maltese authorities had not properly examined his asylum application, that the procedure had been flawed and, in particular, that no effective remedy had been available.

On Art. 13, the ECtHR firstly noted that people like the complainant in Maltese prisons do not have access to legal counsel. This access had been further restricted during the Covid 19 pandemic. Secondly, the ECtHR reaffirmed the principle of a "factual necessity" to be granted to asylum seekers when assessing their credibility, especially when they are – like the complainant – without legal counsel and also detained. Malta would have had to give detailed reasons why the complainant's submissions and evidence had been disregarded.

In this case, however, the national decisions had been taken within 24 hours and only brief and stereotypical reasons had been given. Effective asylum procedures required reliable communication between the authority and the complainant. However, S.H. was only informed several months after the decision. The communication system was therefore clearly deficient – according to the ECtHR. The Maltese constitutional remedy

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was not an appropriate remedy as it had no suspensive effect. S.H. therefore did not have access to an effective remedy under Article 13 for the Article 3 claim.

With regard to Art. 3, the ECtHR ruled that it would be violated if the complainant were deported to Bangladesh without re-examining his claim that, as a journalist who had reported on the irregularities in the 2018 elections, he would be at risk of being treated contrary to Art. 3 if returned.

1.16 ECtHR-typical patterns of interpretation of the principle of proportionality (judgments 2020 - 2022)

1.16.1 Administrative detention for (young) children is almost always disproportionate

Z. E.g. Bilalova and others ./. Poland - 23685/14 - U. v. 26.03.2020; N.B. and others ./. France - No. 49775/20 - 31.03.2021; R.R. and others ./. Hungary - 36037/17 - U. v. 02.03.2021; M.D. and A.D. ./. France - No.

57035/18 - U. v. 22.07.2021; M.H. and Croatia - No. 15670/18 - 18.11.2021; M.B.K and a. ./. Hungary -

73860/17 - 24.02. 2022; Nikoghosyan and others ./. Poland - 14743/17 - 03.03 2022; H.M. and others ./. Hungary -

38967/17 - 02.06.2022

1.16.2 Administrative detention for adults, especially after filing an asylum application, is permissible in principle, but the procedure must then be expedited (max. 2-3 months).

Cf. above; for detention pending deportation: Feilazoo v Malta - 6865/19 - judgment of 11.03.2021; M.B.K. and others v Hungary - 73860/17 - 24.02.2022; Muhammad Saqawat v Belgium - 54962/18 - judgment of 30.06.2020.

1.16.3 Detention pending deportation for more than six months is always problematic, often disproportionate

M.D. and others ./. Russia - 71321/17 - U. v. 14.09.2021; Ali Reza ./. Bulgaria - 35422/16 - U. v. 17.05.2022

1.16.4 States (such as Hungary or Poland) whose borders are at least partly external borders of the Schengen area must allow "real" and "effective" access to legal entry, especially to asylum procedures at the border.

M. K. and others ./. Poland - 40503/17, 42902/17, 43643/17 - U. v. 23.07.2020; D.A. and others /. Poland - No. 51246/17 - 08.07.2021.

1.16.5 Legal remedies against administrative decisions must be provided for by law, and must be factually accessible and effective for those affected (also: interpreters available, possibly lawyers).

D. ./. Bulgaria - 29447/17 - 20.07.2021; H.H. v. Malta - 37241/21 - 20.12.2022

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1.16.6 Art. 8/rooting: deportation and re-entry ban up to six years is ok, lifelong requires special justification, otherwise disproportionate

Abd i./. Denmark - 41643/19 - U. v. 14.09.2021; Savran ./. Denmark - 57467/15 - U. v. 07.12.2021; Munir Johanna ./. Denmark - 56803/18 U. v. 12.01.2021; Khan ./. Denmark - 26957/19 - U. v. 12.01.2021.

1.16.7 Living conditions in homelessness: 63 days of homelessness are proportionate, more than 90 days are not

N.H. et al. /. France - 28820/13 - U. v. 02.07.2020

1.16.8. Sexual orientation: No one should be obliged to hide their sexual orientation in order to avoid persecution:

C and B. ./. Switzerland - Nos. 43987/16 and 889/19 - U. v. 17.11.2020

1.16.9. Family reunification (especially with refugees): Three-year statutory waiting period for family reunification for persons with subsidiary or temporary protection status violates Art. 8 ECHR:

M.A. ./. Denmark - 6697/18 - U. v. 09.07.2021; dissent: M.T. and others ./. Sweden - 22105/18 - U. v. 20.10.2022

1.16.10. Behaviour of refugees that could mean a "storm on Europe" (crossing the border in Ceuta/Mellia; March of Hope in Northern Macedonia, application for a visa to carry out an asylum procedure in the EU) must be rejected.

N.D. and N.T. ./. Spain- Nos. 8675/15, 8697/15 - U. v. 13.02.2020; Asady and others ./. Slovakia - 24917/15 - U. v. 24.03.2020; M.N. and others ./. Belgium - 3599/18 - 05.05.2020; A.A. and others ./. Northern Macedonia - 55798/16, 55808/16, 55817/16 - U. v. 05.04.2022

2. European Court of Justice

2.1 ECJ, Judgment of 1/8/2022, RO v. Germany (C-720/20): On the responsibility for asylum in the case of "children born after" (preliminary ruling - reference VG Cottbus)

The asylum application of a Russian girl born in Germany was rejected as inadmissible because her parents and siblings had been granted asylum in Poland before her birth and before the family entered Germany. According to the Dublin III Regulation, Poland was responsible for the examination. The girl appealed to the Cottbus Administrative Court, which referred the case to the European Court of Justice.

The Court ruled: The Member State that granted asylum to the family members is only responsible for the examination according to the Dublin III Regulation if this wish was expressly expressed in writing. According to the clear wording of the Dublin III Regulation, this requirement could not be deviated from because the family left the Member State that had granted asylum and entered the Member State where the person had applied for asylum illegally. If such a wish had not been expressed in writing and if no other Member State could be determined as responsible on the basis of the criteria of the Dublin III Regulation, the first Member State in which the asylum application had been lodged was responsible for its examination. Also on the basis of the Asylum Procedures Directive

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(2013/32/EU), a person's application cannot be declared inadmissible on the grounds that his parents enjoy international protection in another Member State. The ground of inadmissibility that protection has already been granted in another Member State only applies if the applicant himself already enjoys international protection.

2.2 ECJ, Judgement of 1/8/2022, I. and S. v. NL (C-19/21): An unaccompanied child has the right to a judicial remedy against the refusal of an application for admission under the Dublin system (reference for a preliminary ruling from the Rechtbank Den Haag)

I., an Egyptian citizen, applied for international protection in Greece as a minor and at the same time that he wanted to be reunited with his uncle S., who is legally resident in the Netherlands and can take care of him. The Greek authorities then applied to the Dutch authorities to take custody of him; this was refused. I. and S. lodged an appeal, which was inadmissible because the Dublin III Regulation does not provide for applicants for international protection to appeal against a decision rejecting a request to take charge. I. and S. applied for annulment of the decision, claiming that they were entitled to initiate legal proceedings. The referring court wanted to know from the ECJ whether Art. 27 of the Dublin III Regulation or Art. 47 d CFR granted the applicant and his family member a judicial remedy against the rejection of the application for admission by the Members State.

The ECJ commented: One of the aims of Dublin III is to protect the applicant by means of judicial guarantees. An unaccompanied minor must therefore be able to appeal not only if the requesting Member State issues a transfer decision, but also if the Member State refuses to take him in. The interest that an unaccompanied minor may have in being reunited with members of his extended family for the examination of his application is protected by the provisions of the Dublin Regulation and the Charter. Art. 27 para. 1 Dublin III Regulation in conjunction with Art. 7, 24 and 47 CFR obliged the Member State to which an application for admission had been submitted to grant a refugee applying for international protection the right to appeal against its negative decision. However, the same does not apply to a relative of the minor, in this case the uncle.

2.3 ECJ, Judgement of 1/8/2022, T.O. v. Italy (Ministry of the Interior) (C-422/21): Applicants for international protection may not be sanctioned with withdrawal of all material reception conditions if this deprives them of their most basic needs (on the interpretation of Art. 20 para. 4 and 5 of the Reception Conditions Directive No. 2013/33/EU)

T.O., applicant for international protection, was initially granted the material reception conditions guaranteed in the Reception Conditions Directive and Italian standards. He lived in a temporary accommodation centre. The police reported an incident in which T.O. had verbally and physically assaulted a railway employee and two municipal police officers. After T.O. failed to comment on the matter after being asked to do so, the competent authority decided to withdraw his material reception conditions.

Art. 20 para. 4 and 5 of the Reception Directive empower the Member State to determine sanctions to be applied in case of serious violations of the rules of the accommodation centres and in case of serious violent behaviour. These may include withdrawal or restriction of material reception conditions. But: Does the term "serious violence", which can be sanctioned according to the Directive, also include acts committed outside an

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accommodation centre? From the ECJ's perspective, the term "serious violence" covers any such conduct, regardless of where it occurred.

Furthermore, the Italian court wanted to know whether Art. 20 para. 4 and 5 of the Directive precluded sanctioning the withdrawal of material reception conditions in cases where an applicant for international protection had committed serious violent conduct against public officials.

The ECJ ruled that the Reception Directive does not allow for sanctions in the form of withdrawal of material reception conditions for applicants for international protection who have behaved in a seriously violent manner against officials with regard to accommodation, food or clothing, if this would have the effect of depriving them of the possibility to meet their most basic needs.

All other sanctions must comply with the conditions laid down in the Directive, including respect for human dignity and the principle of proportionality (reference to C-233/18 - Haqbin). The principle of proportionality enshrined in the Directive would not be met if the most severe sanctions deprived a branch of the possibility of satisfying its most basic needs, regardless of how serious and reprehensible its conduct was.

Member States may, depending on the circumstances of the case and subject to the requirements set out in the Directive, impose sanctions that do not result in the applicant being deprived of material reception conditions, such as placement in a separate part of the accommodation centre, a ban on contact with certain residents of the centre, transfer to another accommodation centre or accommodation, or even detention.

2.4 ECJ, Judgement of 1/8/2022, SW (C-273/20), BL, BC (C-355/20) and XC (C-279/20) v. Germany: On family reunification with (formerly) minor child

All procedures concern Syrian nationals. SW, BL and BC applied for national visas for family reunification with their respective son, who was recognised as a refugee in Germany. XC applied for a family reunification visa with her father, who was recognised as a refugee in Germany. All applications were rejected because the children reached the age of majority during the application procedure. In February 2019 (15 K 936/17 V), the Berlin Administrative Court (VG Berlin) obliged Germany to grant the visas, as all applicants were to be considered minors according to the ECJ's case law. Following an appeal by the BAMF, the BVerwG referred the cases to the ECJ for a preliminary ruling.

The ECJ explains (as already in the U. v. 12.04.2018, A. and S. v. Netherlands, C-550/16; and BMM and others v. Belgium - C-133/19, C-136/19 and C-137/19 - 16.07.2020 and 09.09.2021 - C-768/19 - S.E. v. Germany), the aim of the directive is to favour family reunification and, in particular, to grant protection to minors. The directive is to be interpreted in the light of the right to respect for private and family life in conjunction with the obligation to protect minors. in conjunction with the obligation to take into account the best interests of the child. It was neither consistent with the objectives of the Directive nor with the requirements arising from the EU Charter of Fundamental Rights to take as the relevant point in time for the assessment of the age of the applicant or sponsor for the purpose of granting reunification the date on which the authority of the Member State decided on an application. National authorities and courts would otherwise have no reason to give priority to applications by the parents of minors with the urgency required to take account of the need for protection. On the contrary, they could act in such a way

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as to jeopardise the right to family life of both a parent with his or her minor child and the child with a family member.

It is therefore contrary to European Union law to refuse a visa for family reunification to the parent of an unaccompanied minor refugee who has come of age during the procedure. The same applies if such an application is made by a child who has reached the age of majority before one of the parents has been recognised as a refugee and has applied for family reunification.

Otherwise, the success of an application for family reunification would depend mainly on circumstances in the sphere of the national authorities or courts (more or less rapid processing or decision on appeals against a refusal), but not on circumstances in the sphere of the applicant. Therefore, the time of the administrative decision is not decisive for the assessment of minors. Being a minor was not a "condition" that a Member State could refuse an application if it was not fulfilled. The Directive also precludes a national regulation according to which the parents' right of residence ends when the child reaches the age of majority.

With essentially the same reasoning, the ECJ ruled in C-279/20: The decisive factor for the question of whether the child of a sponsor recognised as a refugee is still a minor if he or she came of age before the parent was recognised as a refugee and before the application for family reunification was filed is the time at which the parent filed his or her asylum application. The application for reunification must be filed within three months of the reunifier(s) being recognised.

In the case of family reunification of a parent and a minor recognised as a refugee or of a (former) minor child with his or her parent recognised as a refugee, the relationship in the direct ascending line of the first degree or the legal parent-child relationship is not sufficient for the assumption that actual family ties exist between the parent in question and the child in question if the child has reached the age of majority before the decision on the application of this parent is issued or before the reunifying parent is recognised as a refugee and before the application for family reunification is filed.

However, it was not necessary for the refugee and the other family member to live together in the same household for the parents or child to be entitled to family reunification (thus already: ECJ U. v. 09.09.2021 - C - 768/19 - S.E. v. Germany: The term "family member", in order to obtain derived international protection, required, according to Art. 2 j Qualification Directive 2011/95 in conjunction with Art. Article 23 paras. 2 and 7 CFR do not presuppose that the parent with the right of origin and his or her child actually live together). The granting of protection status should therefore not be dependent on the "resumption of family life" between parents and child. Casual visits and regular contact may be sufficient to assume that they are rebuilding personal and emotional relationships and as evidence of the existence of actual family ties.

Note: In an instruction dated 9/9/2022 (No. 508-543.53/2), the Federal Foreign Office implements the above-mentioned case law and instructs its visa offices accordingly as follows:

If parents apply for a visa to join a child and the child is no longer a minor when the decision on the visa application is made, the child is still considered a minor within the meaning of § 36 of the Residence Act (AufenthG) if

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- the child was a minor at the time of his or her asylum application,
- the child was unaccompanied at the time of his asylum application,
- the visa application is submitted within three months of the child's refugee status.

If a child applies for a visa to join his or her parents and becomes of age after the parents have applied for asylum, but before he or she can apply for a visa himself or herself, the child is still considered to be of minor age within the meaning of § 32 of the Residence Act (AufenthG) if the visa application was filed within three months of the parents' refugee recognition.

In its instructions to the competent ministries and senate administrations of the Länder (circular letter of 7/11/2022, M3-21002/1#73), the Federal Ministry of the Interior refers to an instruction of the Foreign Ministry of 28/9/2022. This is not available here, but appears to be identical to the one cited above.

2.5 ECJ, Judgement of 7/9/2022, I E.K. v Staatssecretaris van Justitie en Veiligheid (NL) (C-624/20): Conditions for long-term resident status

A Ghanaian woman is the mother of a son with Dutch nationality and was therefore granted a residence permit for the Netherlands in 2013 pursuant to Art. 20 TFEU as a family member of a Union citizen on the basis of the existing dependency relationship. In 2019, she applied for a long-term residence permit under the Dutch regulations transposing the Permanent Residence Directive 2003/109/EC. The Dutch authorities refused because the right of residence as a family member of a Union citizen was only temporary and therefore excluded from the scope of the Directive. The woman sued. The Dutch court asked the ECJ whether the residence permit as a family member of a Union citizen precluded the acquisition of long-term resident status.

The ECJ commented: No. A third-country national who enjoys a right of residence as a family member of a Union citizen must fulfil the requirements of the Directive in order to obtain long-term resident status. In addition to five years of uninterrupted legal residence in the territory of the Member State concerned immediately prior to submitting the relevant application, he must therefore prove that he has stable and regular resources for himself and his dependent family members which are sufficient to maintain himself and his family members without recourse to the social assistance system of the MS, as well as sickness insurance covering all risks in that Member State which are normally also covered for its own nationals. Similarly, the Member State in question could require third-country nationals to meet the integration requirements laid down by its national law. The primary objective of the Directive was the integration of third-country nationals who were long-term residents in the Member State. Such integration results above all from the duration of uninterrupted legal residence of five years.

The Directive only excludes third-country nationals from the scope of application who reside exclusively on a temporary basis, for example as au pairs, seasonal workers or posted workers, or whose residence permit has been formally limited. Their common objective characteristic is that these stays are strictly temporary and of short duration and do not enable a third-country national to become a long-term resident in the territory of the Member State concerned.

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In the present case, the right of residence of the third-country national mother as a family member of a Union citizen is justified if the residence is necessary in order for that Union citizen to be able to effectively enjoy the core of the rights conferred by that status for as long as the relationship of dependency continues. In principle, this is not intended to be of short duration, but can extend over a considerable period of time. With regard to the relationship of dependency between a third-country national and his or her child, who is a citizen of the Union, the duration of residence in the territory of the Member State can go well beyond five years.

2.6 ECJ, Judgement of 22/9/2022, T.L., N.D., V.H., Y.T. and H.N. v. Germany (C-497/21): No inadmissible subsequent application in the case of a previous asylum procedure in Denmark (reference for a preliminary ruling from the VG Schleswig-Holstein)

The applicants in the main proceedings, Georgian nationals, left Georgia in 2017 and went to Denmark, where they applied for asylum. This was rejected with final effect in April 2020. The BAMF examined the asylum applications filed later in Germany as "second (subsequent) applications" within the meaning of section 71a of the Asylum Act and rejected them as inadmissible pursuant to section 29 para. 1 no. 5 of the Asylum Act by decision of 3/6/2021. The applicants had already filed applications for asylum in Denmark, which according to the judgment of 20/5/2021 - L.R. (C 8/20, EU:C:2021:404 - application for asylum rejected by Norway) was to be regarded as a "safe third country" within the meaning of section 26a of the Asylum Act. The requirements for further proceedings were not fulfilled, as the arguments put forward by the applicants in support of their applications did not show any change in the factual situation compared to that on which they had based their application rejected by the Danish authorities.

According to the VG Schleswig-Holstein, it had to be clarified whether Art. 33 para. 2 lit. d in conjunction with Art. 2 lit. q of Directive 2013/32 was applicable. Art. 2 lit. q of Directive 2013/32 is applicable if a final decision on an earlier application for international protection has been issued in another Member State. Denmark certainly is an EU Member State. However, according to the Protocol on the position of Denmark, it is not bound by Directives 2011/95 and 2013/32. As is clear from the definitions in Art. 2 of Directive 2013/32 and the judgment of 20/5/2021, L. R. (asylum application rejected by Norway - C-8/20), a further application for international protection can therefore only be classified as a "subsequent application" within the meaning of the Directive if the previous application by the same applicant sought refugee status or subsidiary protection status under Directive 2011/95. The term "Member State" within the meaning of Directive 2013/32 must be interpreted restrictively to the effect that it only covers those Member States which participate in the CEAS and are bound by Directives 2011/95 and 2013/32. This does not apply to Denmark.

According to the ECJ, a subsequent application filed in a Dublin State other than Denmark may not be rejected as inadmissible under Article 33 para. 2 lit. d of the EU Asylum Procedures Directive if the previous asylum application was filed and rejected in Denmark. Neither the Qualification Directive nor the Asylum Procedures Directive are applied by Denmark. Therefore, the application made in Denmark is not an asylum application within the meaning of Art. 2 lit. b of the Asylum Procedures Directive. This applies both to refugee status and to subsidiary protection under the Qualification Directive.

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Note: Regarding Norway - as a non-EU MS - the ECJ had similarly decided the question in its judgment of 20.05.2021 (C-8/20).

2.7 ECJ, Judgement of 22/9/2022, M.A., P.B., L.E. v. Germany (C 245/21 and C 248/21): Dublin III transfer deadline is not interrupted due to COVID-19 pandemic (submission BVerwG, B. v. 26.01.2021 - 1 C 52.20)

In both cases, German authorities had requested transfer to Italy. The execution had to be suspended because it was impossible during the COVID 19 pandemic. The questions for a preliminary ruling concerned the interpretation of Article 27 para. 4 of the Dublin III Regulation: Does the provision cover the situation in which a requesting Member State decides, during pending appeal proceedings, to suspend enforcement solely on the basis of (temporary) material impossibility of enforcement due to the COVID 19 pandemic and is the transfer period thereby interrupted?

The ECJ ruled that Article 27 para. 4 of the Dublin III Regulation does not provide for an interruption or suspension of the transfer deadline, but only for an exceptional possibility of extension. This required a narrow interpretation and excluded the application to other cases of impossibility to enforce the transfer decision. It is true that Article 27 para. 4 of the Dublin III Regulation provides that the execution of a transfer may be suspended until the conclusion of an appeal or a review – but only in direct connection with the judicial protection of the person concerned. If the scope of application of Article 27 para. 4 of the Dublin III Regulation were to be extended further, the transfer deadline mentioned in Article 29 para. 1 could be deprived of any effectiveness. The division of responsibilities between the Member States provided for in the Regulation could change and the processing of applications for international protection could become permanently protracted.

However, a decision to suspend enforcement on the ground that it is materially impossible because of the COVID 19 pandemic cannot be regarded as directly linked to judicial protection. The transfer period is therefore not interrupted when the competent authority of a Member State takes a revocable decision to suspend the enforcement of a transfer decision on the ground that it is materially impossible because of the COVID 19 pandemic. The Union legislator had not been of the opinion that the practical impossibility of executing a transfer was suitable for justifying the interruption or suspension of the transfer period referred to in Article 29 para. 1 of the Dublin III Regulation. Rather, the Regulation was intended to guarantee the expeditious processing of asylum applications, for which purpose the Union legislature had provided the reception and readmission procedures conducted in application of the Dublin III Regulation with a series of mandatory time limits in order to ensure that the procedures were carried out without unjustified delay.

2.8 ECJ, Judgement of 06/19/2022, I.L. v. Estonia (C-241/21): Return Directive does not allow detention of third-country nationals without clear legal basis

The subject of the preliminary ruling was the interpretation of Article 15 para. 1 of the Return Directive. In particular, the referring court wanted to know whether the provision was to be interpreted in such a way that the Member State could detain a third-country national solely on the basis of the criterion of "risk of impeding the enforcement of removal", without one of the specific grounds for detention defined in the standards being present.

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The ECJ ruled that detention under the Return Directive was only permissible "for the purpose of preparing the return and/or carrying out the removal procedure". This measure is aimed at ensuring the effectiveness of the return procedure and does not have a punitive purpose. Any detention may only take place in strict compliance with the principle of proportionality, meet the requirements of clarity, predictability and protection against arbitrariness and respect the fundamental rights of third-country nationals. According to Art. 52 para. 1 CFR, any restriction on the exercise of the right to liberty must be provided for by law, respect the essence of that right and be subject to the principle of proportionality.

A general criterion based on the risk that the effective enforcement of removal will be impaired does not meet these requirements. Due to the lack of precision of such a criterion, the persons concerned cannot foresee with the necessary degree of certainty under which circumstances they may be taken into custody. Thus, there is no adequate protection against arbitrariness. Article 15 para. 1 of the Refugee Directive therefore does not allow a third-country national to be detained solely on the basis of a general criterion "because of the risk of impeding effective enforcement of removal" without one of the specific grounds for detention defined in the standard being met.

2.9 ECJ, Judgement of 22/9/2022, GM v. Hungary (C-159/21): No blanket withdrawal of international protection on grounds of national security

Regulations in Hungarian law according to which secret reasons of national security are supposed to lead to the subsequent denial of international protection in a host country, but the competent asylum authority does not know what is at stake, but is obliged per se to follow a reference to such secret reasons, are not compatible with the Procedures Directive and the Qualification Directive.

If international protection is withdrawn, the person concerned or at least his or her legal representative must have access to the case file and be able to obtain knowledge of the essential content. The rights of defence of the person concerned are not respected if such access can be granted upon request but the information obtained may not be used in administrative or judicial proceedings. Moreover, the competent asylum authority must itself examine a decision on the withdrawal of international protection in the knowledge of all relevant facts and circumstances and may not be obliged to do so in a blanket manner, especially since it must state the reasons leading to the withdrawal of international protection in its decision.

2.10 ECJ, Judgement of 20/10/2022, UP v. Belgium (C-825/21): Return Directive does not preclude national rules under which a right to stay results in the implicit withdrawal of a return decision

The Belgian authorities rejected the application of a Congolese asylum seeker for international protection and a residence permit on medical grounds. She was ordered to leave Belgium. The Higher Labour Court of Liège later held that the effect of the order to leave was temporarily suspended when the applicant permissibly applied for residence, but later became enforceable again when she was no longer granted a residence certificate. The applicant argued that she had been entitled to reside "irregularly" in Belgium following her application for a residence permit and that the exit order should be revoked. The Belgian court made a reference to the ECJ for a preliminary ruling on the interpretation of Articles 6 and 8 of Directive 2008/115 (Return Directive).

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The ECJ ruled that it follows from the wording of Art. 6 para. 4 of the Directive that Member States may grant a right of residence at any time to third-country nationals who are unlawfully present on their territory, not only for the reasons expressly mentioned, but for any other reason they deem appropriate, and that Member States have a broad discretion in this respect. Moreover, it follows from the wording of the Directive that the granting of a right of residence may result in the implicit withdrawal of a previously issued expulsion decision.

In previous rulings, such as N (C-601/15 PPU), the ECJ had stated that the effectiveness of the Directive required that deportations be carried out as quickly as possible. However, this interpretation could not be applied to the present case, because according to the last sentence of the Directive, Member States can provide that the granting of a residence permit results in the revocation of a return decision. Article 6 para. 4 of Directive 2008/115 must be interpreted as not precluding a provision of a Member State according to which the granting of a right of residence to a third-country national who is unlawfully present on its territory results in the implicit revocation of a return decision until the processing of an application for a residence permit has been completed on the basis of the admissibility of that application.

2.11 ECJ, Judgement of 08/11/2022, C and B. v. Netherlands (C-704/20 and C 39/21): On the scope of review of the conditions for detention pending deportation (reference for a preliminary ruling NL - Grand Chamber)

The cases involved nationals from Algeria, Sierra Leone and Morocco who were detained in the Netherlands in preparation for their deportation. They filed a complaint against this. According to the Dutch court, there is no obligation in Union law to examine all conditions for the lawfulness of detention *ex officio*.

The ECJ disagreed: Courts of a Member State must examine all conditions of detention of third-country nationals *ex officio*. This includes whether detention is lawful against an asylum seeker or a third-country national who is illegally in the country. This also applies if the non-existence of the circumstances justifying detention was not contested by the person concerned in the proceedings, the decision on detention is made by the authority and the court decides (only) on the basis of the application, the documents submitted and the oral hearing. The starting point is that the detention of a third-country national constitutes a serious interference with his or her right to liberty under Art. 6 of the European Convention on Human Rights and can only be justified under the narrow conditions that EU norms (including the Return Directive) attach to it. The EU provisions on detention pending deportation in conjunction with Article 6 (right to liberty) of the European Convention on Human Rights. Art. 6 (right to liberty) and Art. 47 CFR (guarantee of effective legal remedy), it follows that courts have to examine *ex officio* any violations of the conditions of lawfulness of detention or its maintenance. If the conditions are not or no longer fulfilled, the person must be released immediately

2.12 ECJ, Judgement of 17/11/2022, X. v. Belgium (C-230/21): On the interpretation of Art. 2 lit. f and Art. 10 para. 3 lit. a of the Family Reunification Directive

X., a Palestinian, has a daughter born on 2/2/2001. On 8/12/2016, this daughter, then 15 years old, married Y.B. in Lebanon. On 28/8/2017, the daughter entered Belgium to move in with Y.B., who had a residence permit there. On 29/8/2017, the Belgian guardianship service considered the daughter to be an unaccompanied alien minor and

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appointed her a guardian. On 20/9/2017, she applied for international protection. On the same day, the Aliens' Office refused to recognise the marriage certificate on the grounds that it was a child marriage. Such a marriage was considered incompatible with public policy under the provisions of Belgian private international law. On 26/9/2018, the daughter was then recognised as a refugee. On 18/12/2018, X. applied to the Belgian Embassy in Lebanon for a visa to reunite with her daughter and for humanitarian visas for her minor sons Y. and Z. The applications were rejected.

X. filed a complaint against this, claiming that neither the Belgian Aliens Act nor Directive 2003/86 stipulated that a refugee had to be unmarried in order for the right to family reunification with his parents to arise. Moreover, her daughter's marriage certificate had not been recognised in Belgium, which was why it had no legal effect there. Her daughter had to fulfil only two conditions in order to exercise the right to family reunification with her parents. Those conditions were met because her daughter was a minor and unaccompanied within the meaning of Art. 2 lit. f of Directive 2003/86. The referring Belgian court asked:

1. Is EU law, in particular Art. 2 lit. f in conjunction with Art. 10 para. 3 lit. a of Directive 2003/86, to be interpreted as meaning that an 'unaccompanied minor' refugee residing in a Member State must be unmarried under its national law in order for a right to family reunification with relatives in the direct ascending line in the first degree to arise?
2. If so, can an underage refugee whose marriage contracted abroad is not recognised on grounds of public policy be regarded as an 'unaccompanied minor' within the meaning of Article 2 para. f and Article 10 para. 3 of Directive 2003/86?

The ECJ ruled that Art. 10 para. 3 lit. a in conjunction with Art. 2 para. f of Directive 2003/86/EC must be interpreted as meaning that an unaccompanied minor refugee residing in a Member State does not have to be unmarried in order to obtain sponsor status for the purpose of family reunification with his or her first-degree relatives in the direct ascending line.

2.13 ECJ, Judgement of 22/11/2022, X. v. Netherlands (C-69/21): On the conditions for deportation in the case of life-threatening disease

A Russian national, 16 years old, is suffering from a rare form of blood cancer and is receiving medical treatment in the Netherlands, including cannabis for pain relief. This is forbidden in Russia. After unsuccessful asylum applications, he was to be deported to Russia. The Dutch court asked the ECJ whether EU law prevented the issuance of a return decision or a measure terminating residence, in particular whether a significant increase in the intensity of pain due to the lack of medical treatment after deportation violated the CFR.

The ECJ ruled that the Return Directive in conjunction with the CFR must be interpreted as precluding the return of a third-country national who is irregularly present in a Member State, suffers from a serious illness and would be exposed to the risk of a significant increase in pain caused by the illness because the only effective pain-relieving treatment is prohibited in the destination state. With respect for private life, which includes medical treatment, a return decision or deportation may only take place if the health condition of the person concerned has been taken into account. As a threshold for the seriousness of

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the illness, there must be valid reasons to show that the return entails a real risk of a substantial reduction in life expectancy or a rapid, substantial and lasting deterioration in health and that the lack of treatment exposes the person concerned to a real risk of a rapid, substantial and lasting deterioration in health.

The patient should not be exposed to an increase in pain of such intensity that it would be contrary to human dignity, as it could lead to severe and irreversible psychological consequences or even induce suicide. It is not necessary for the disease to aggravate itself.

Although the prohibition of return also applies if the removal in the strict sense cannot be organised in a way that ensures that the risk of a significant and lasting aggravation of the disease or pain during the removal is excluded, it cannot be assumed that adequate treatment during the removal is sufficient for a Member States to be allowed to take a return decision. The Member State must ensure that the person receives the medical care required by his or her state of health not only during the deportation but also in the country of destination after the deportation.

A Member State should not set a strict time limit within which the aggravation of pain must occur in order to preclude a return decision or removal order. Time limits do not exempt from the actual examination of the third-country national's situation, taking into account all relevant factors, in particular his or her medical condition.

On the question of whether Member States are obliged to grant a residence permit in this situation, the ECJ ruled that the Return Directive does not contain a provision on residence rights. The state of health of the person concerned and the care received in the Member State together with other relevant factors (e.g., social ties, dependency and health vulnerability) would have to be taken into account by the authority when considering whether to grant a right of residence.

2.14 ECJ, Judgement of 1/12/2022, B.U. v. Germany (C-564/21): On the conditions for effective electronic transmission of asylum files

After the application for international protection was rejected, the lawyer requested the BAMF to send the complete administrative file to the applicant in the form of a single file in PDF format with consecutive pagination. The BAMF refused. He then applied to the Wiesbaden Administrative Court for a temporary injunction. The VG (6 L 582/21.WI.A 6 L 582/21.WI.A) asked the ECJ by way of a preliminary request whether a fair (asylum) procedure is guaranteed if access to the complete electronic authority file is not granted in a way that is possible for BAMF employees but not for the VG or a lawyer, as well as whether, in the case of a decision signed in the original and destroyed after scanning, the decision continues to be in writing pursuant to Art. 11(1), 45(1)(a) of the Asylum Procedures Directive.

The ECJ stated that the Asylum Procedures Directive protects the right of access to the file in proceedings for international protection and implements the principle of effective judicial protection by ensuring that an effective remedy allows for a full and ex nunc examination of both the facts and the legal issues. The right to a fair trial according to Art. 47 CFR obliges the submission of complete and paginated administrative documents, also in electronic form, so that any amendments are comprehensible.

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However, there was no uniform standard for transmission at EU level. Union law does not prevent national administrations from transmitting to the applicant's representative a copy of the electronic file in the form of a series of separate files in PDF format, without sequential pagination, the structure of which can be consulted using free software freely available on the internet, provided that two conditions are met: 1) the method of disclosure ensures access to all information relevant to the defence; 2) the transmission provides as faithful a representation as possible of the structure and chronology of the file, subject to cases where public interest prevents disclosure of certain information.

It is for the national court to verify that the structure and chronology of the file is reflected as faithfully as possible in the various documents, so that the representative of the applicant can verify that all documents relevant to his defence are included and, if necessary, request disclosure of missing documents or the reason for their absence.

The handwritten signature of the competent official who took the decision was not necessary to be considered as having been sent in writing. It only had to be an explicit decision.

2.15 ECJ, Judgement of 1/12/2022, S.M. v. Germany (C-237/21): The conditions for extradition of a Union citizen to a third State for the purpose of execution of a sentence

Bosnia and Herzegovina has requested Germany to extradite a Bosnian for the execution of a prison sentence. The person concerned is a citizen of the Union, as he also holds Croatian citizenship. According to the Munich Higher Regional Court (OLG), Germany is in principle obliged to extradite Bosnia because of the obligations entered into under the European Convention on Extradition. However, it was questionable whether Union law precluded extradition with regard to the right of Union citizens to move and reside freely within the territory of the Member States and in view of the prohibition of discrimination on grounds of nationality.

Article 16 para. 2 cl. 1 of the Basic Law prohibits the extradition of a German to a third country. In such circumstances, Union law only permits unequal treatment between Germans and nationals of other Member States if this is based on objective considerations and is proportionate to the purpose legitimately pursued by the national law. Due to its doubts, the OLG Munich turned to the ECJ: The German authorities had informed the Croatian authorities of the request for extradition without the latter having reacted to it. If Bosnia and Herzegovina agreed, the person concerned could serve his sentence in Germany according to German law.

The ECJ ruled that in such a situation the requested MS (Germany) must actively seek such consent so that the sentence is served on its territory and thus the risk of impunity can be countered if a measure is taken against the citizen concerned that is less detrimental to his freedom of movement than if he were extradited to a third country.

If this consent is not given, however, the right of EU citizens to move and reside freely in the territory of the Member States and the prohibition of discrimination do not preclude extradition in application of an international convention. Otherwise, there would be a risk that the person concerned would remain unpunished. However, extradition would be excluded under the CFR if there was a serious risk of the death penalty, torture or other inhuman or degrading punishment or treatment in the third country.

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NEWS & NOTES

Selected Developments related to Migration: Update from Europe[1]

Holger Hoffmann[2]

This is a compilation of news and notes of relevance for the field of migration.

1. Discussions and Decisions at EU level

1.1 EU Commission: Migration and Asylum Report 2022 - 6 October 2022

It sets out what the Commission considers to be the "most important" developments in the field of migration and asylum, and takes stock of the "progress" allegedly made in 2022 "under the new migration and asylum package". It also identifies the "main challenges ahead" and stresses "the need for further progress towards a responsible and fair migration management system in the EU".

It highlights the "unprecedented solidarity with Ukraine": Member States have welcomed millions of people fleeing the Russian war of aggression against Ukraine on an unprecedented scale, including by activating the Temporary Protection Directive for the first time, setting up a solidarity platform and implementing a ten-point plan for a coordinated European response.

Vice-President Schinas:

> "The EU has shown the common strength and collective political will to act swiftly and decisively in situations where it has been confronted with dramatic events that have had a significant impact on migration, asylum and border management. Outside the EU, our determined and united action can deliver impressive results. Within the EU, the kind of solidarity we have shown to Ukrainians must continue to be present in our migration debate and serve as inspiration for our future actions."

Demanded in this regard: *"Ensuring external border management"* as a central element. This is to be achieved:

> "by implementing the new IT architecture and interoperability, by taking important steps towards the establishment of a common EU return system, including the appointment of a return coordinator and the implementation of a strategic and structured visa policy" –

whatever one might think of this in detail.

Cooperation with international partners: In 2022, the EU had intensified its efforts to engage in mutually beneficial cooperation on migration. The EU is a leading global actor

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and donor in improving protection and assistance to displaced persons and their host countries, in saving lives [note: see below: the real situation on migration routes!!] and in laying the foundations for durable solutions.

"Progress in addressing return, readmission, border management and smuggling networks" has been achieved through partnerships with key third countries that balance the needs of those countries with those of the EU.

"Countering hybrid threats": Rapid, determined and united cooperation between the EU and its partners can deliver impressive results, as the response to the instrumentalisation of migrants by the Belarusian regime has shown. The Commission has been working with countries of origin and transit, as well as with airlines and civil aviation authorities, to build a coalition to combat this hybrid attack.

Further steps: In May, the Return Coordinator started work at the Commission to promote a more coherent and effective approach to return and repatriation. In June, the Member States agreed on negotiating mandates for the Screening Regulation and Eurodac Regulation. The proposals are intended to lead to better and more effective procedures to combat irregular migration, to increase the number of returnees and to better support the asylum system. Also in June, the Member States reached a political agreement in the Council to start implementing the voluntary solidarity mechanism. What “better” means in the sense of the report is not specified. In any case, the aim is to “ensure the solidarity-based reception of people by countries with available reception capacities”. As the most important next step, the Commission calls on the Member States to apply the “voluntary solidarity mechanism”. It also invites the Parliament and the Council to implement the common roadmap so that all proposals presented can be adopted by March 2024.

1.2 "Emergency Meeting" of EU Interior Ministers - 25.11.2022

In June, two-thirds of the EU Member States had agreed to participate in the “voluntary solidarity mechanism”, which is linked to a functioning sea rescue service in order to relieve the burden on the countries of arrival in the Mediterranean. In November, the governments in Rome and Paris fell out over the reception of shipwrecked people. The French Interior Minister Darmanin then demanded an emergency meeting. The meeting was called at such short notice that numerous ministers (including BMI Faeser) did not appear. The immediate reason was the Italian government's refusal to allow a private rescue ship flying the French flag to land in Italy. As a result, French President Macron revoked the promise to take over 3,500 refugees who had landed in Italy. The new Italian government demands that the flag states of the ships take in all those rescued. MP Meloni said:

> “The selection is carried out at sea by the smugglers who operate the migrant boats. This is no longer acceptable. We must stop this trade. Italy cannot be the only country to bear the cost of the waves of migration from Africa.”

Italy received support for this from Greece, Malta and Cyprus. In a joint statement, these Member States refused to be “the only landing places for illegal migrants” especially if this is done in an uncoordinated way based on the decision of private ships and independent of state authorities. The new Italian government wants to undermine the principle of helping people in distress at the nearest port. Among other things, it called for a "code of conduct" for NGOs that would oblige them not to sail into Libyan waters. She

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also proposed a sea blockade in the Mediterranean and camps in North Africa where migrants would be taken to assess their chances of asylum in Europe.

The EU Commission presented an "action plan" for the Mediterranean route at the emergency meeting. Point 1: People in Egypt, Tunisia and Libya who are planning to cross the Mediterranean with the help of escape helpers are to be persuaded to return home. Point 2: Cooperation between rescuers in the Mediterranean should be better coordinated, and the rules for private rescue ships should also be discussed. Point 3: The voluntary solidarity mechanism should be set in motion, distribution procedures should be speeded up, countries of origin should take back more migrants, and coastal and flag states should exchange more closely.

NGOs, but also various government representatives criticised the plan for not containing any new ideas.

In October, the German government decided to support a sea rescue NGO (Sea Eye, Sea Watch and SOS Humanity) with 2 million euros each over the next four years – financed from the budget of the Foreign Ministry. Germany had agreed to provide 3,500 places as part of the solidarity mechanism – like France. A total of 8,000 places were planned for 2022. By the end of November, only 117 people had been reallocated, 74 of them to Germany – according to EU Commissioner for Home Affairs Johansson. The reason given is the cumbersome selection and screening procedures. But it also has to do with mistrust of the receiving countries. The accusation is that they do not register all migrants properly and let them move on unregistered to countries of their choice. In Italy, for example, 60,000 asylum applications were registered, while there were over 93,000 (according to the latest Italian figures: 98,000) arrivals.

The largest criminal case related to Italy's crackdown on civilian rescue workers has been dropped for the third time – five years after it was launched. It involves 21 people, including crew members of the search and rescue ship Iuventa and representatives of other NGOs such as Sea Watch, Save the Children and Médecins Sans Frontières (MSF), who face up to 20 years in prison for "aiding and abetting unauthorised immigration". The Iuventa crew helped save the lives of 14,000 people before their ship was seized in 2017.

1.3 Western Balkans Route/EU Negotiations with Albania, Bosnia and Herzegovina, Montenegro and Serbia to Extend Cooperation with Frontex

From January to August 2022, more than 86,000 irregular border crossings were recorded, almost three times more than in 2021 and more than ten times as many as in the same period in 2019. In view of this increase, the EU Commission is monitoring the situation through the EU Migration Preparedness and Crisis Management Network ("Blueprint Network") and strengthening its cooperation with countries in the Western Balkans and the most affected EU Member States. The EU Commission's Action Plan for the region focuses on border management, return and readmission to third countries.

Austria's Chancellor Nehammer demands that the EU fund border fences in Romania, Bulgaria and Hungary to stop illegal immigration: "We must finally break the taboo of fences," he said at the EU summit in December.

On 18 November 2022, the EU Council authorised the opening of negotiations with Albania, Bosnia-Herzegovina, Montenegro and Serbia to extend the cooperation agreements with Frontex. The challenges of migration on the Western Balkans route do

not start at the EU borders. Cooperation, including the deployment of Frontex staff, is essential to identify and prevent irregular migration at an early stage.

In the run-up to the first summit between the EU and the Western Balkans, the EU Commission published an action plan to strengthen cooperation with the region in order to address “common challenges” arising from the increase in arrivals due to the visa-free regime and the “migrant flows” via the Eastern Mediterranean route. The plan contains a series of measures based on five pillars: (1) strengthening border management along the routes; (2) speedy asylum procedures and support for reception capacities; (3) combating smuggling of migrants; (4) improving cooperation on readmission and repatriation; and (5) aligning visa policies.

The EU had already concluded agreements with Albania, Montenegro and Serbia under the previous Frontex mandate. However, these only allowed Frontex to conduct joint operations and deploy teams in the regions of these countries bordering the EU. Frontex operates on the EU borders with Albania, Serbia and Montenegro, but not with Bosnia-Herzegovina. An agreement with this State had not yet been signed at the time.

From the press release on the Council Decision:

> "The agreements negotiated under the new Frontex mandate will allow Frontex to support these countries in their efforts to manage migration flows, combat illegal immigration and fight cross-border crime throughout their territory. The new agreements will also allow Frontex staff to exercise executive powers, such as border controls and registration of persons. On the basis of these mandates, the Commission can now start negotiations with the four countries".

In the meantime, Frontex stands ready to assist DG Migration and Home Affairs in reducing the "irregular flows in the Western Balkans".

> "Frontex currently has 500 officers in the Western Balkans region. We are ready to provide additional support to reduce irregular flows and fight cross-border crime, including firearms trafficking and people smuggling",

Frontex management tweeted.

As a result of the summit on 6 December, the "Tirana Declaration" was agreed to increase financial support by more than 170 million euros to combat irregular migration on the Western Balkan route, including the fight against smuggling and trafficking in human beings, and to improve return systems, including readmission programmes.

1.4 No Agreement on Instrumentalisation Regulation

The proposal on the Instrumentalisation Regulation defines instrumentalisation of migration flows as a situation where a third country or a non-State actor encourages or facilitates the movement of third-country nationals towards the external borders of the EU or a Member State in order to destabilise the EU as a whole or the Member State (e.g.: Belarus towards Poland and Lithuania). New measures are to be introduced to combat this phenomenon, including fewer crossings at the external borders or the restriction of their opening hours, as well as the intensification of border surveillance.

No agreement was reached on the Regulation at the Justice and Home Affairs Council on 08 December 2022. The Council took note of "progress" made during the Czech Presidency, but there was no majority in favour of the Presidency's final compromise proposal. Latvia and Lithuania supported the compromise. Abstaining or voting against

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the proposal were: Belgium, Portugal, Germany, Luxembourg. Spain and the Netherlands expressed reservations. Greece, Malta and Hungary voted against for other reasons.

2 On the Situation at the External Borders – July to December 2022

2.1 Eastern Border with Belarus

The situation remains stable, according to the EU Commission's report. Irregular border crossings were registered much less frequently than in 2021. According to Polish data, "only" about 15,900 "illegal" border crossings into Poland took place (2021: about 40,000).

Médecins Sans Frontières, which ended its mission in Lithuania at the end of 2022, said that although many people were still arriving, it was practically impossible for aid workers to reach them in the vast forests. Several 100 people - according to Médecins Sans Frontières - try to enter the EU via Lithuania every month. Lithuania and Poland have finished building steel walls and barbed wire fences in 2022. Latvia is still working on it. If the border police intercepted refugees in Lithuania, they would be pushed back to Belarus without any further procedure or the possibility to apply for asylum. There are "up to 100 % pushbacks".

Poland also relies on walls, steel and barbed wire and completed the construction of a 187 km long border fence with Belarus in June 2022. The fence is 5.5 m high and equipped with night-vision cameras and motion detectors.

Polish courts have ruled in individual cases that the “pushbacks” at the Polish border were illegal. The Polish Ombudsman for Civil Rights has also condemned the practice. The NGO Helsinki Committee has distributed guidelines to Polish border guards on how they are liable to prosecution if they refuse humanitarian aid.

2.2 Western Balkan Route: Austria, Hungary and Serbia Agree on Measures against Illegal Migration

2.2.1 Austria, Serbia and Hungary

Austria, Serbia and Hungary, which see themselves as the "front line" of the Western Balkan route, have signed an agreement to "strengthen border security in the Balkans" and "show migrants that they cannot cross the border" because "the EU asylum system has failed". At a joint "migration summit" on 12 December 2022, the two EU states therefore promised Serbia, among other things, to contribute to the deportation costs for illegal immigrants in an agreement to "strengthen border security". Austria also wants to send 100 police officers to Serbia, who are to control the border to Northern Macedonia in teams with Serbian officers. Technical equipment, e.g., night vision equipment and vehicles, will also be provided for this purpose. Serbia agreed to end visa-free entry for people from Burundi, Tunisia and India. Migrants from these countries have so far used the visa-free regime to fly to Belgrade and then travel by land to the EU's external borders. Austria and Hungary now hope to reduce illegal entries from these countries via Serbia.

Austria's Federal Chancellor Nehammer said that the EU asylum system had failed. It had reached a point where individual EU States would have to look for new forms of partnership outside the EU. He went on to say that Austria could potentially see more than 100,000 asylum applications by the end of 2022 (2021: about 40,000). Austria blames

people fleeing from India and North African countries for the "asylum wave" and asks the EU for help. Austria considers India and Tunisia to be “safe” countries. People from both countries “have practically no chance of asylum”. Commission President von der Leyen said Austria's concerns were justified, adding that “Austria has been exceptionally hard hit. Austria is right to ask for solidarity and needs help”.

Serbian President Vucic: “We are ready to advance further south together with Northern Macedonia and thus protect both Europe and our own country.” About 70,000 migrants entered Serbia in 2022, and according to the Asylum Seekers Protection Centre (APC), between 600 and 1,000 people have been pushed back by Hungarian border guards every day since spring.

People use Serbia as a main transit route to the EU. There are pushbacks to Serbia from different member states. Therefore, informal settlements in the border area between Serbia and the EU external borders have increased in size and number. Most migrants settle in informal, overcrowded shelters under poor living conditions along the Hungarian border instead of being controlled in overcrowded Serbian centres. Frach Collective, one of the NGOs on the ground, said:

> “Hundreds of people on the run are still living in places made up of abandoned houses, tents and other makeshift accommodation. Conditions, especially as temperatures drop, are catastrophic and exacerbated by police violence and dangerous attempts to cross the border fence with Hungary.”

Hungary's MP Orban: Hungary recorded about 250,000 attempts of irregular border crossing in 2022: "We don't have to control migration, we have to stop it. We have to show them [migrants] that they cannot cross the border."

2.2.2 Frontex Position on the Western Balkans Route

In the first ten months of 2022, 22,300 irregular entries via the route were detected – about three times as many as in 2021 and the highest number since 2015 – according to Frontex, which stated this was due to repeated border crossing attempts by migrants already in the Western Balkans, but also people "abusing" visa-free access to the region.

An example of Frontex’s ignorance of human rights warnings is the Frontex operation in Hungary. Lighthouse published footage of “black sites” containers set up on the border with Serbia in early December 2022. There, according to the report, refugees were held without food and water and sometimes attacked with pepper spray before being deported in prison buses.

Frontex has been working continuously in Hungary since 2015, even though Frontex Fundamental Rights Commissioner Arnáez wrote in 2016 that the coercive measures (such as beatings, dog bites, pepper spray) used to deport people from the “transit zone” have led to incidents that endanger the right to human dignity, the right to life, the right to the integrity of the person and the prohibition of inhuman or degrading treatment. Arnáez referred to multiple reports to this effect, including from UNHCR. On 19 January 2021, she insisted again: In a letter to Leggeri, she recommended that operational measures at the land borders in Hungary “be suspended or terminated (…) as serious violations of fundamental rights occur time and again”. A week later, Frontex stopped its Hungary mission – but only “on the ground”, as the Frontex spokesperson said. The true meaning of this was that Frontex, contrary to the request of the fundamental rights commissioner,

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still provides assistance for deportations from Hungary – just not directly across the border to Serbia.

The Hungarian Helsinki Committee published a study to draw attention to "the worrying practice of non-implementation of asylum and migration judgments in the Czech Republic, Hungary, Poland, Slovakia and Slovenia and the impact on the rule of law". The research confirms that the "politicised nature of asylum and migration" has led to non-respect of relevant EU standards, UN conventions, the ECHR and domestic norms. Areas of non-implementation range from access to procedure to personal liberty and judicial review: immigration detention, collective expulsion and denial of access to asylum procedures, access to classified information in national security cases, statelessness, lack of effective remedies against expulsion and disregard of court orders in asylum procedures.

2.2.3 Croatia

Croatia also decided from around 2017 onwards to push masses of refugees back across the border by force, which is documented in many cases by videos. The country was waiting for full membership in the Schengen area, which was finally granted in early December 2022. In return, it wanted and was supposed to keep the Balkan route closed. Croatia had ended Frontex patrols in 2017. In 2020, the former head of Frontex, Leggeri, was therefore able to simply answer questions from the Consultative Forum "about shocking reports of systematic pushbacks" by Croatia: "We have not received any such reports. – Precisely because Frontex was no longer "on the ground".

The EU Parliament, Council and Commission have now endorsed Croatia's accession to the Schengen area, while NGOs continue to express concern about Croatia's past and ongoing illegal pushbacks of people fleeing. Sara Kekuš from of ECRE member Centre for Peace Studies (CMS) said that Croatian police continues to conduct pushbacks, "and we see proposals to legalise internal pushbacks". Another NGO reported a group of eight people bitten and threatened by Croatian police dogs. Croatia denies the allegations.

A joint statement by eight NGOs says the Council's decision to include Croatia in the zone "disregards the EU's commitment to fundamental rights" and "is a symptom of an overarching EU political imperative that repeatedly sacrifices fundamental rights for what is presented as border security". The organisations call for a focus on reforming Croatia's border surveillance mechanism, taking into account advice from the Croatian Ombudsperson and NGOs in evaluations, and ensuring Croatia's cooperation with human rights monitoring bodies.

2.2.4 Bulgaria

In mid-December, the research NGO Lighthouse-Reporting published footage of several "black sites" – secret prisons, cage-like barracks in Sredez, in southern Bulgaria, right next to the police station there. Refugees are locked up there along the EU's external border before being deported. Everything about it is illegal: the conditions of internment, the facility itself, the mistreatment, the deportation without asylum proceedings. In the middle of it all: Frontex staff. The Lighthouse investigators repeatedly visited the place and photographed "three times cars with Frontex tags parked only a few metres away from the cage", according to the report. Internal documents showed that "ten Frontex officials are stationed in Sredez as part of Operation 'Terra', the agency's largest land operation".

Lighthouse Reports also released footage showing refugee Abdallah Mohamed being shot at with live ammunition at the Bulgarian-Turkish border. Mohammed says that the way he was shot at was directly and with obvious intent to kill, as the distance between him and the border guard was only 10-14 metres. Bulgaria commented that its border guards were on the scene, but denied having fired the shot. “There are no cases of violence against migrants,” said Bulgarian Interior Minister Demerdzhiev: “Both sides (the Turkish and Bulgarian) have concluded that there is no evidence that a Bulgarian border guard fired a shot and that no active measures were taken to violate human rights,” despite testimonies from refugees and analysis by investigative media proving otherwise. The analysis of the film and eyewitness accounts prove that “the shot came from the very spot where Bulgarian guards were standing”.

The EU Commission called on Bulgaria to “thoroughly investigate” the incident. EU Home Affairs Commissioner Johansson said almost at the same time: “Bulgaria and Romania have protected External borders even better protected than at the Commission's first inspection in October."

3 Central Mediterranean Route

According to the EU Commission, the central Mediterranean route is still the most frequently used migration route. Almost all of the people travelling there arrived in southern Italy. In Malta, on the other hand, the number decreased considerably. The Italian Ministry of the Interior counted more than 98,000 people by mid-December 2022 (2021: approx. 63,000). The new Italian government continues to take intensive action against civilian sea rescuers. Their new strategy is to allocate Adriatic ports in north-eastern Italy to the ships. For example, in mid-December the "Ocean Viking" with 113 rescued refugees had to call at the Adriatic port of Ravenna, almost 1,700 km away from the place where the shipwrecked people were taken in. The journey to the assigned port takes about four days.

The central Mediterranean route remains the most dangerous: according to IOM statistics, at least 1,362 people drowned or went missing on this route in 2022. The number of unreported cases is probably much higher.

Numerous other fatal accidents occurred on the route at the beginning of December alone. At least four people, including two children aged 6 months and 6 years, are missing after a shipwreck off Lampedusa. 32 people were rescued by the Italian coast guard. The NGO hotline Alarm Phone reported several emergencies in early December: On 4 December, 39 people who had set out from Benghazi, Libya, were reported to be in distress and were rescued by the Italian Coast Guard. Another 450 people were reported in distress off Sicily on 5 December after leaving Libya and were also rescued by the Italian Coast Guard. On 6 December, 32 people were reportedly rescued off Sicily after losing contact with Alarm Phone. MSF Sea reported the rescue of 74 people, including many children, on 4 December and the rescue of another 90 people, including 35 children, on 5 December, bringing the total number of survivors on board the vessel Geo Barents to 164 survivors, including 50 children, in 24 hours. Another rescue operation on 6 December, which rescued 90 people, including two pregnant women and more than 30 children, brought the number of survivors awaiting disembarkation aboard the Geo Barents to 254. In a joint rescue operation by Louise Michel and SOS Humanity on December, 103 people were rescued. On 6 December, SOS Humanity reported another rescue

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operation, saying: “Another boat in distress was spotted this morning – this time a heavily overcrowded rubber dinghy with more than 100 people.” On 7 December, 261 survivors were still waiting to be disembarked despite several requests to the relevant authorities. In the evening it was reported: “33 people rescued from another boat in distress – the 5th rescue involving the Louise Michel in less than 2 days”.

Civilian rescuers and the people on the move are not only exposed to the challenges of the Mediterranean, but the so-called Libyan Coast Guard, supported by the EU, also provides constant harassment and danger. According to IOM: “From 27/11 to 03/12, 633 migrants were intercepted and returned to Libya". The total for 2022: 21,457 migrants intercepted and returned and 1,362 dead or missing in the central Mediterranean by 3 December. A nurse on Humanity 1 explained that survivors who had experienced Libya showed “signs of torture”, including “stab wounds, burns from cigarettes, broken ribs from repeated beatings, signs of sexual abuse. Men were also raped and gang raped, including with firearms”.

After a series of sea rescues, the SOS Humanity-operated Humanity 1 and the MSF Sea-operated Geo Barents have taken on board more than 500 survivors. After several medical evacuations and survivors stranded at sea for days in adverse weather conditions, both ships were allowed to land in Italy on 11 December. 261 survivors, including 23 children under 14 and over 60 unaccompanied children from the Humanity 1, disembarked in Bari, while 248 children, women and men rescued aboard the Geo Barents between 4 and 6 December disembarked in Salerno.

On 15 December, Alarm Phone reported on a deadly shipping accident off Tunisia: The Tunisian authorities had announced that at least 4 people had died when their boat sank near Sfax. 26 of the 30 people on board could be rescued.

With the support of Sea-Watch, the European Centre for Constitutional and Human Rights (ECCHR) recently filed a complaint with the International Criminal Court (ICC) for crimes against humanity, stating that the support and cooperation of the EU and its member states with Libya “demonstrates the crucial role played by high-level officials of EU Member States and EU agencies in the deprivation of liberty of migrants and refugees fleeing Libya”.

After the recent failure of Member States cooperation, a Commission Action Plan to “address the immediate challenges along the Central Mediterranean Migration Route” was endorsed by EU interior ministers on 25 November. NGOs consider the plan unworkable and a repetition of old mistakes.

4 Eastern Mediterranean Route

According to the EU Commission, irregular arrivals along the route have doubled compared to 2021, mainly due to increased migratory pressure in Cyprus, which accounts for about 60 % of arrivals along the route. Greek border guards and Frontex patrol the coasts of the Greek islands near the Turkish west coast. NGOs repeatedly accuse Athens of illegal “pushbacks”. Greece extended the initial 35 km long border fence with Turkey by 80 more kilometres. In the end, the border with Turkey will be almost completely sealed off.

5 Western Mediterranean/Atlantic Route

According to the EU Commission, Algeria and Morocco/Western Sahara are still the most important countries of departure towards the Spanish mainland and the Canary Islands. Around 30,000 migrants reached Spain by December 2022. Most of them cross from West Africa to the Canary Islands.

On 10 December 2022, the NGO Caminando Fronteras reported a fatal shipwreck off Marocco in which at least 49 people died and 56 people, including three babies, were missing after trying to reach the Canary Islands. On 8 December 2022, Spanish authorities confirmed the recovery of the bodies of three people off the coast of Murcia in southern Spain who had died after leaving Algeria. Six other people were reportedly rescued.

In October, the IOM - Missing Migrants Project reported: "On the West African-Atlantic route to the Spanish Canary Islands, 1,532 deaths were documented during the reporting period, a number that is already higher than in any other period since IOM began documenting deaths in 2014. Since 2014, more than 2,000 dead or disappeared migrants have been recorded in the Western Mediterranean, most of them in shipwrecks on the overseas route to the Spanish mainland.

Crossings by land to the enclaves of Melilla and Ceuta are also dangerous. The MMP recorded several dozen deaths due to violence, disease and lack of access to medical care. In several cases, accidents occurred at the border fences in connection with attempted border crossings.

6 Illegal Border Crossings/Frontex Statistics

Despite new fences and controversial cooperation to keep migrants out, illegal border crossings into the EU increased in 2022, according to Frontex. Frontex recorded around 308,000 attempts in the first eleven months – around 68% more than in 2021. If Frontex figures are to be believed, around 140,000 migrants entered EU states via the Balkans and the countries of the former Yugoslavia by November – 2 ½ times as many as in 2021 and the highest figure since 2015.

A new investigation shows that Frontex has facilitated interception and repatriation to Libya, suggesting complicity in human rights abuses. In early December 2022, Human Rights Watch reported that Frontex was using its drones and aircraft in the Mediterranean to provide the Libyan coastguard with coordinates of refugee boats. The boats are then picked up at sea and brought back to Libya. EU states are still prohibited from deporting refugees to Libya themselves.

"Le Monde" has analysed images together with Member of the German Bundestag Clara Bünger (Fraktion "Die Linke") and found out that Frontex is supplying the Libyan coast guard with images – which it is not actually allowed to do. Frontex, which unlike the Libyan coast guard is equipped with drones, spots refugees in distress in the central Mediterranean and informs the Libyan coast guard. The coast guard then enters European territorial waters, intercepts the refugees and takes them back to Libya. This practice is called pull-back. Frontex does not take part in illegal pushbacks – becausethat would mean that they themselves intercept the refugees and deport them again without the possibility of an asylum procedure. Frontex "only" helps Libya to bring the people back.

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According to a report by Human Rights Watch and Border Forensics, more than 32,400 people have been captured at sea and forced back to Libya by Libyan forces or the "coast guard" since 2021. The organisations state: “Our analysis shows that almost a third of these apprehensions were facilitated by information gathered by Frontex through aerial surveillance. Frontex's use of aerial surveillance to enable the Libyan Coast Guard to intercept migrant boats, knowing full well that migrants and asylum seekers are subject to systematic and widespread abuse when forcibly returned to Libya, makes Frontex complicit in this abuse”.

IOM said that from 4 to 10 December 2022, a total of 1,079 people were apprehended and returned to Libya, for a total of 22,544 people in 2022, including 752 children.

The new Black Book of Pushback study documents 25,000 violent pushbacks across the EU. The research highlights the systematic violence against refugees and exposes the role of EU funds and agencies in perpetuating it. The Black Book contains only the testimonies recorded by the Border Violence Monitoring Network (BVMN). The actual number of people pushed back at the borders and experiencing violence is probably much higher, BVMN said in a press statement, adding that the following countries are involved in these practices: Austria, Italy, Greece, Slovenia, Croatia, Poland, Hungary, Romania, Serbia, Bosnia-Herzegovina, Montenegro, Kosovo, Bulgaria, Northern Macedonia and Albania.

On Frontex operations in Hungary and Croatia, Lighthouse Reports on 8 December showed further footage of a cage in which refugees are detained and then forced back, as well as shipping containers in Hungary and prison vans in Croatia that are routinely used by authorities to detain people on the run and prevent them from claiming asylum. The investigation found that these practices and equipment are partly funded by EU money and in some cases operated “under the eyes of Frontex”. Human Rights Watch wrote, "[t]he EU institutions have turned a blind eye to abuse and violence by border guards at the EU's external borders," and called on the Commission to stop funding Frontex.

Nevertheless, a clear majority of MEPs voted in favour of denying Frontex discharge for the 2020 budget year: 345 MEPs voted against discharge, 284 in favour, eight abstained.