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Quarterly on Refugee Problems – AWR Bulletin

thws Technical University of Applied Sciences Würzburg-Schweinfurt

Association for the Study of the World Refugee Problem

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Vol. 63 No. 3 (2024)
Open Access Publication
https://doi.org/10.57947/qrp.v63i3

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 3, 204-206
ISSN 2750-7882, Section: Editorials
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.196

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Editorial

Confronting the Nexus of Climate Change and Migration: Challenges for Refugee and Human Rights Law[1]

Simone Emmert[2]

The summer of 2024 has emerged as a stark reminder that climate change is not a distant threat; it is a current reality reshaping our planet at an alarming pace. As recorded temperatures soar beyond historical averages, the evidence is irrefutable: the repercussions of climate change are manifesting swiftly and devastatingly. From the rapid melting of glaciers and polar ice caps to unprecedented temperature anomalies exceeding 3°C in various regions, the global community faces a crisis that transcends national boundaries and demands immediate attention (Copernicus Climate Change Service, 2024).

In Australia, the Bureau of Meteorology declared the onset of the El Niño weather phenomenon in September 2023, forecasting severe heat and the threat of wildfires during the following summer months. Indeed, by late December 2023, the nation experienced unusual heatwaves causing catastrophic bushfires. Simultaneously, other regions endured heavy rainfall and flooding, illustrating the complex interplay of climatic extremes fuelling crises. Such weather events are symptomatic of a broader trend wherein climate breakdown exacerbates existing vulnerabilities, leading to multifaceted crises that affect food security, public health, and overall stability (Röhrlich, 2024).

The hydrological outcomes of August 2024 further highlight this instability. Most of continental Europe, including the southern UK and Ireland, endured drier-than-average conditions, leading to droughts and wildfires. Conversely, areas of northern Europe, Western Russia, and Turkey were inundated with above-average precipitation and subsequent floods. Globally, the scenario was similarly dire, with regions such as eastern North America and Australia experiencing extreme weather related to hurricane activity and monsoonal flooding, respectively. These climatic disruptions highlight the pressing need for comprehensive adaptation strategies that integrate varied weather patterns and long-term implications (Bündnis Entwicklung Hilft & IFHV, 2024).

Equally alarming is the state of global sea ice, which, as of August 2024, plunged to its fourth lowest extent in recorded history, with Arctic regions witnessing a 17% decrease in sea ice. This loss not only signifies ecological degradation but also has serious implications for global weather patterns, further accelerating climate change through feedback mechanisms that enhance warming trends (Bündnis Entwicklung Hilft & IFHV, 2024).

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Quarterly on Refugee Problems, 2024, Vol. 63, Issue 3, 204-206
ISSN 2750-7882, Section: Editorials
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.196

Compounding these environmental challenges is the intricate web of socio-political factors that exacerbate vulnerabilities to climate change. The humanitarian sector grapples with the rise of "multiple crises", wherein extreme weather, armed conflict, and public health emergencies converge. Recent analyses suggest that disasters triggered by natural events may escalate tensions among communities already susceptible to conflict, pinpointing regions where poverty, ethnic exclusion, and weak governance intersect with environmental vulnerability (Bündnis Entwicklung Hilft & IFHV, 2024).

Migration presents a critical response to these intertwined crises. While often perceived as an adaptation failure, the decision to migrate can also reflect a proactive strategy for resilience amid slow-onset environmental changes. For many, migration emerges as a necessary adaptation to climate stressors, driven by the need for viable employment opportunities and social stability. Labor migration can facilitate economic empowerment through remittances, skills transfer, and entrepreneurial ventures, yet it remains essential that such migration is governed by robust legal frameworks that uphold rights and ensure safety (International Labour Organization, 2024).

The interconnected crises spurred by climate change, demographic shifts, and socio-economic challenges necessitate holistic approaches to resilience and adaptation. Integrating innovative risk assessment methods that consider compound hazards will prove indispensable in managing the complexities of these multiple crises. As we navigate these tumultuous times, it is imperative that global leadership takes decisive action to foster equitable and sustainable futures for all.

To enhance the global discussion, you will find in this issue the request for an advisory opinion presented to the Inter-American Court of Human Rights by the Republic of Chile and the Republic of Colombia on January 9, 2023, with regard to “Climate Emergency and Human Rights” and the answer of the Court to hold two in-person public hearings during the 166th and 167th regular sessions of the Court. Colombia and Chile aim to have clarified the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, especially the right to a healthy environment and refugee law. They plead for an urgent response based on the principles of equity, justice, cooperation and sustainability, with a human rights-based approach.

Also the General Assembly of the United Nations requested an advisory opinion from the International Court of Justice (ICJ) in December 2023 on the questions what obligations States have

> “under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations”

and

> “what […] the legal consequences under these obligations [are] for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment” (ICJ, 2023).

The public hearings on the request for an advisory opinion are scheduled by the ICJ to open on Monday, December 2, 2024.

Emmert, S. (2024). Confronting the Nexus of Climate Change, Migration
Quarterly on Refugee Problems, 2024, Vol. 63, Issue 3, 204-206
ISSN 2750-7882, Section: Editorials
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.196

The perspectives from Latin America and the United Nations are expected to open up new legal arguments that can also enrich the discussion in other countries and may lead to a needed change in policies.

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ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.155

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RESEARCH ARTICLES

The Extraterritorial Protection of Migrants' Human Rights: An Integrated Reading of the Italy-Albanian Protocol and Article 25 of the Visa Code[1]

Elisabetta Belardo[2] and Sara Squadrani[3]

Abstract

This article stems from the approval of the law ratifying the Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania, which took place on February 21, 2024. The contribution aims to analyse the delicate issue of the extraterritorial application of rights enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights in the implementation of the Protocol. This presents multiple challenges. Foremost among them is the absence of a clear and defined regulatory framework, which raises concerns about potential derogations from fundamental rights and guarantees. The extension of Italian jurisdiction ensures that the activities envisaged by the Protocol are subject to compliance with international humanitarian and human rights law. The analysis of the Protocol is carried out through an integrated reading with Art. 25 of the Visa Code, which provides for the issuance of humanitarian visas. Unlike the Protocol, the issuance of humanitarian visas by EU Countries is limited by jurisdictional issues, although it is capable of ensuring effective protection of the fundamental rights of migrants. Thus, the article aims to critically explore possible perspectives for migration policies that ensure safe and regular access to the EU and to examine requests for international protection on the territory of a third State.

Key Words:

extraterritorial, human rights, Protocol, Italy, Albania, humanitarian visa

1. The Italy-Albania Protocol: Origins, Purpose, and Key Aspects

1.1 Legislative Context and Motivations for the Adoption of the Protocol

On April 29, 2024, a communiqué of the Ministry of Foreign Affairs and International Cooperation (MAECI) published in the Italian Official Gazette reported the entry into force of the Memorandum of Understanding (or and hereinafter Protocol) between the

 The authors contributed equally to this work, while Elisabetta Belardo was responsible for chapters 1-2 and Sara Squadrani for chapter 3-4. The conclusions were written jointly.

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ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.155

Government of the Italian Republic and the Council of Ministers of the Albanian Republic for the strengthening of cooperation in migration matters. The communiqué reads: "ratification was authorised by Law No. 14 of 21 February 2024 (…). In accordance with its Art. 13(1), the Protocol entered into force on 25 March 2024". Therefore, from that date onwards, the bilateral treaty assumed full legal existence in the international regulatory system and in the legal systems of the States Parties. The Protocol was signed in Rome on November 6, 2023, with the aim of strengthening bilateral cooperation between Italy and Albania on the management of migration flows from third countries (Art. 2 of the Protocol).

As is well known, the Protocol is not the first attempt to combat irregular immigration stipulated between the two countries. Over the years, there have been numerous bilateral agreements signed between Italy and Albania for this purpose (see for this purpose Chaloff 2008). In fact, Italian Prime Minister Giorgia Meloni in her statements to the press recalled the historical cooperation that underpins the relationship between the two countries:

> "This agreement enriches the historical friendship, as you know, the deep cooperation between our two nations. Ours is a strategic partnership developed through not only excellent trade relations (Italy is Albania's largest trading partner and our trade exchanges are worth around 20% of Albania's GDP), but also exchanges between our communities in Italy and Albania, intense cultural and social relations and the very close cooperation that already exists in the fight against all forms of illegality, with a significant presence of Italian public security forces and judicial officers in Albania" (Presidency of the Council of Ministers, 2023).

It is evident that the two countries share a profound historical and cultural understanding. The Protocol aligns with the prevailing trend of outsourcing migration policy, with its genesis rooted in the imperative to counter irregular immigration: Italy has been contending with a protracted asylum crisis for years. However, the latest bilateral Protocol introduces novel and contentious legal considerations. Indeed, the most recent Italian-Albanian *entente* is characterized by multifaceted critical dimensions, not only pertaining to the constitutionality of each country's legislation but also concerning adherence to standards delineated by EU law and international human rights conventions.

It appears noteworthy to underscore that initially, the Protocol originated as an informal agreement between Italy and Albania. This would have implied that it could have come into effect simply through an exchange of notes between the two countries. However, numerous jurists, human rights activists, and a significant portion of the academic community had emphasized the unconstitutional nature of not subjecting the Protocol to parliamentary scrutiny. In particular, the Italian Association for Legal Studies on Immigration (ASGI), in a press release dated November 2023, recalled the Italian constitutional framework governing the ratification of international treaties and the importance of democratic oversight over foreign policy by both chambers of Parliament (ASGI, 2023).

Indeed, Art. 80 of the Italian Constitution declares that

> "The Chambers authorize, by law, the ratification of international treaties that are of a political nature, or provide for arbitration or judicial regulations, or entail changes to the territory or burdens on finances or modifications of laws."

The Italy-Albania Protocol on cooperation in migration matters falls within the cases foreseen by Art. 80 of the Constitution and making it imperative to subject it to a

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ratification law. If this had not been done, the agreement could never have been implemented or considered binding in the Italian legal system. In fact, according to Art. 117 para. 1 of the Constitution, it would not have represented an international obligation. Furthermore, Art. 72, para. 4 of the Constitution prescribes that ratification projects must be examined through the ordinary legislative procedure.

It is therefore clear, that a serious constitutional issue would have arisen if the Protocol had bypassed parliamentary scrutiny. The intention to implement such a significant border externalization migration policy without genuine parliamentary scrutiny would have undermined the democratic framework and the rule of law of the Italian Republic.

1.2 Stated Objectives and Key Aspects of the Protocol

The Protocol comprises 14 articles and two appendices. As previously mentioned, Art. 2 outlines the purpose of the Protocol: "to enhance bilateral cooperation between the Parties in managing migratory flows from third countries, in accordance with international and European law". According to Art. 4 of the Protocol, this objective will be pursued through the construction of two centres in Albanian territory under Italian jurisdiction, designated for "migrants" who have undergone border or repatriation procedures (Art. 4. para. 3). Appendix 1 identifies the two areas granted by Albania to Italy: one area located near the port of Shëngjin and the other near Gjadër. In these areas, Italy will construct two facilities entirely at its own expense. At the port of Shëngjin, the entry facility will be built where disembarkation and identification procedures will take place. In Gjadër, the second facility will be used as an accommodation centre.

Art. 4. para. 2 of the Protocol stipulates that these facilities

> "are managed by the competent authorities of the Italian Party, in accordance with relevant Italian and European legislation. Disputes that may arise between the aforementioned authorities and migrants hosted in the said facilities are subject exclusively to Italian jurisdiction".

Furthermore, the same Article establishes that the total number of migrants present simultaneously in Albanian territory cannot exceed three thousand.

Under Art. 3 of Law 14/2024, exclusively individuals embarked on vessels operated by Italian authorities outside the territorial sea of the Republic or other Member States of the European Union may be processed in the areas provided for by the Protocol, including as a result of rescue operations. Furthermore, the law defines the statuses of the areas and Albanian centres subject to Italian jurisdiction. The port area of Shëngjin and the internal area of Gjadër "are equated to Italian border or transit zones" (Art. 3, para. 3). According to Art. 3 para. 4 of Law 14/2024, the centre of Shëngjin is equated to a "crisis point", thus operating as a hotspot centre (Art. 10-ter para.1, Legislative Decree of July 25, 1998, No. 286 on Consolidated Act of Provisions concerning immigration and the condition of third country nationals). Conversely, the centre of Gjadër will function as a detention centre for repatriation (CPR) (Art. 14 para. 1, Legislative Decree of July 25, 1998, No. 286).

The interpretation of these provisions must be complemented by Art. 4 para. 3 of the Protocol, which stipulates that the conveyance of migrants to Albania may occur "solely for the purpose of carrying out border and repatriation procedures […] and for the time strictly necessary for the such procedures".

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Since the Albanian areas are legally considered as Italian border zones, border procedures are applied. It is important to highlight that border procedures are accelerated when an application for international protection is likely to be unfounded, or when there are specific grounds, such as the applicant being from a safe country of origin or presents false information. These procedures do not take into account the vulnerabilities and specific needs of asylum seekers, as they apply shorter procedural time and shift the burden of proof onto the applicant. This concerning circumstance can entail serious migrants' human rights violations.

Art. 6 outlines the collaboration modalities for maintaining the security of the two aforementioned areas. Albanian authorities ensure order within and around the perimeter of the areas and during transfers within Albanian territory. On the other hand, Italy guarantees security within the areas. Italian authorities ensure the detention of migrants in the designated facilities and prevent them from leaving Albania without authorization before and after administrative procedures. This provision, contained in Art. 6. para. 5 of the Protocol, seems to raise numerous critical issues. In fact, the lack of legal guarantees and procedural standards regarding the detention of migrants could result in the violation of their human dignity and fundamental rights. There is a risk that migrants may be subjected to inhuman and degrading treatment.

Art. 9 presents an eloquent passage of the Protocol. It states that "the period of stay of migrants in the territory of the Republic of Albania cannot exceed the maximum detention period allowed by current Italian legislation". It is necessary to highlight that the current legislation in question has been recently amended. On September 18, 2023, the Council of Ministers approved a Decree-Law (D.L.) 124/2023 containing new provisions to combat irregular migration. The Decree intervenes, in particular, regarding administrative detention (Art. 14 Legislative Decree of July 25, 1998, No. 286), extending the maximum detention time in Repatriation Centres (CPR) for foreign citizens awaiting deportation to a maximum of 18 months - compared to the previously prescribed 3 months. The new regulations do not apply to foreign citizens seeking asylum, for whom the law currently (Art. 6 Legislative Decree 142/2015) provides for a maximum detention period of 12 months. It is evident, therefore, that D.L. 124/2023 and the Protocol with Albania complement each other. To this combination, we add Law No. 50 of May 5, 2023, containing "urgent provisions regarding legal entry flows of foreign workers and prevention and combating of irregular immigration". In this context, there is no opportunity to undertake a normative analysis of these two sources, however, it is clear how this triad is animated by the same guiding principle of combating irregular immigration. Therefore, the two areas granted by Albania constitute an extension of the same national migration policy, now implemented externally.

In accordance with Art. 9. para. 2 of the Protocol, the Parties allow access to the facilities to lawyers, as well as to international organizations and European Union agencies providing assistance to applicants for international protection, within the limits provided by the applicable Italian, European, and Albanian legislation to ensure the right to defence. According to Art. 13 of the Protocol, it will remain in force for five years and is tacitly renewed for a further period of five years, unless one of the Parties communicates, with at least six months' notice before the expiration, its intention not to renew the Protocol.

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2 Analysis of the Italy-Albania Protocol and Extraterritorial Application of Fundamental Rights

2.1 Normative Ambiguities and Legal Gaps in the Protocol's Text

Having briefly examined the essential aspects of the Protocol, it now seems appropriate to offer some critical reflections. It falls within the realm of collaboration between EU countries and non-EU countries regarding the management of migratory flows. However, it appears to propose novel schemes of asylum border externalization compared to previous agreements, raising concerns about systematic violations of fundamental human rights. Border externalization in migration policies is a strategy adopted by some countries to manage migratory flows. It entails shifting border control and responsibility for migrant management to third countries, often located outside the geographical area of competence of the countries adopting this policy.

More precisely, within the EU framework,

> "the externalisation of borders consists of a set of policy and cooperation instruments that seek to impact migration and asylum flows extraterritorially, (far) beyond EU borders, within territories in which the EU and its Member States effectively offshore migration and asylum management. These policies emerged in the late 1980s and early 1990s, have grown substantially and most notably following the 2015 "migration crisis" (Jaulin, 2022: 9).

Therefore, international agreements on extraterritorial immigration management typically or generally

> "are based on the logic of burden-shifting, namely the transfer of responsibility for reception and repatriation to other countries, where, however, asylum systems and migrant protection are often lacking" (Savino, 2024: 1).

In the case of the Italy-Albania Protocol, a new paradigm of border externalization is configured, foreseeing an "extension" of Italian jurisdiction into Albanian territory. Therefore, the usual dichotomy that linked the relocation of migrants to a third country with the state's shift of responsibility is no longer present.

> "In comparison, the model of extraterritoriality outlined by the Italy-Albania Protocol innovates. However, the means employed are different: not the outsourcing of responsibilities to a third country (burden-shifting), but the creation of an extraterritorial management area for migrants, which is subject to Italian jurisdiction and presupposes the application of the same rules applied in Italian territory. It is, therefore, a formula in which extraterritoriality does not inherently imply an evasion from legality and the responsibilities falling on Italy." (Savino, 2024: 2)

The Protocol, which represents a unique case within the framework of European migration policies, opens up new possible paths for extraterritorial management of migration flows: "The idea has the characteristic of extrema ratio: the purpose of building a new model of migratory flow management" (Faggiani, 2024: 1). For example, compared to the bilateral agreements between Italy and Libya, the new Protocol presents significant differences. The novel aspect of the Italian-Albanian Protocol lies not only in the fact that Italy does not delegate the responsibility for managing migration flows to another country, as it did in the case of Libya. The political and normative framework of Albania seems to offer greater guarantees. Libya was not, and currently still is not, a party to the Convention relating to the Status of Refugees (adopted 28/07/1951, entered into force 22/04/1954, UNTS, vol. 189, p. 137, 1951 CG51). Albania, on the other hand, ratified the Convention in 1995

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and, therefore, has an obligation to apply the provisions therein: this may represent a greater assurance of human rights protection for migrants. Additionally, it is interesting to note that the Protocol between Rome and Tirana is the first bilateral agreement on border externalization involving a candidate country for European Union membership.

If we posit the greater assurance of human rights protection in Albanian territory, it now seems appropriate to question whether the framework outlined by the Protocol truly provides the necessary legal premises to ensure migrants conducted and detained in Albania receive the same guarantees as those afforded to migrants in Italy. In the opinion of the authors, it is difficult to answer this question affirmatively, considering that the regulatory framework of the Protocol appears blurred and vague. The lack of detailed legislative provisions is already a deeply problematic aspect of the Protocol. A border externalization migration policy should be rich in provisions aimed at ensuring adequate standards of human rights protection for migrants.

The only reference present in the Protocol can be found in Art. 4, which amounts to a general referral to the main legislative acts regarding immigration and asylum and to the "Italian and European regulations concerning the requirements and procedures relating to the admission and stay of foreigners in the national territory" (Art. 4 para. 1). From the reading of such a minimalist provision, the numerous legislative and procedural gaps inherent in the Protocol become evident. As noted,

> "[t]his minimalist choice determines legislative gaps that concern three main profiles: the administrative procedures applicable to migrants in Albanian sites; the right to defense; the transfer to Italy of migrants not detainable in Albania" (Savino, 2024: p. 3).

Law No. 14 of 2024 ratifying the Protocol, in Art. 4, entitled "Jurisdiction and Applicable Law", establishes that

> "The migrants referred to in Article 1, paragraph 1, letter d), of the Protocol are subject, to the extent compatible, to the consolidated text referred to in Legislative Decree No. 286 of July 25, 1998, Legislative Decree no. 251 of 19 November 2007, Legislative Decree no. 25 of 28 January 2008, Legislative Decree no. 142 of 18 August 2015, and the Italian and European regulations concerning the requirements and procedures relating to the admission and stay of foreigners in the national territory. For the procedures provided for in the provisions indicated in the first period, Italian jurisdiction applies, and the specialized section on immigration, international protection, and free movement of EU citizens of the Rome Tribunal has exclusive territorial competence. Italian law applies in cases covered by this paragraph."

It is evident that the phrase "to the extent compatible" represents a problematic passage. In fact, neither the Protocol nor the ratification law clarify what will happen if the legislation indicated as applicable is not "compatible" with the concrete situations that may arise in the application of the Protocol itself. This could leave the individuals concerned in limbo, with the risk of derogation from fundamental rights and guarantees.

2.2 A Reading of the Protocol in Light of Italian Constitutional Principles

A pivotal question that must animate the examination of the Italy-Albania Protocol is whether it complies with the constitutional precepts of the two countries. As anticipated, with reference to jurisdiction, Law 14/2024 specifies that "for the procedures provided for in the provisions indicated in the first period, Italian jurisdiction applies" and that "the specialized section on immigration (…) of the Rome tribunal and the office of the justice of the peace of Rome" have exclusive territorial competence.

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> "Given the extension, to the individual conducted in Albania and the procedures carried out there, of Italian law and jurisdiction, it is therefore a priority to question the extraterritorial effectiveness of constitutional rights and guarantees accorded by the Italian Constitution to 'non-citizens' conducted in Albanian areas" (Siccardi, 2024: 117).

Much of the doctrine finds the rationale for the extraterritorial protection of individual rights beyond the border of the State in the constitutional provisions on inviolable rights. In fact, the protection and enjoyment of fundamental rights, being coessential to human dignity, would not find limitations beyond the borders of the Republic.

> The extraterritorial extension of constitutional guarantees is consistent with the 'universalist' spirit of the Italian Constitution. In fact, the Charter embraces one of the main challenges of modern constitutionalism, that of the universalism of human rights, opening up to the international community and international conventions on human rights by recognizing to all 'individuals' (and no longer just citizens) the protection of inviolable rights (Art. 2, Art. 10 Const.)" (Siccardi, 2024: 118).

So, in accordance with the spirit that has informed the Italian Constitution and has animated numerous judgments of the Constitutional Court, fundamental rights, by virtue of their inalienable nature, belong to the individual as a human being. For this reason, these rights "must be guaranteed in the Albanian areas to all – citizens, foreign protection seekers, and irregular foreigners, regardless of status and residence permit" (Siccardi, 2024: 119).

As highlighted earlier, there are numerous doubts about the real guarantee of equal treatment of migrants within the two countries. This could imply the Protocol's failure to respect the principle of equality codified in Art. 3 of the Constitution. As is known, Art. 3 is one of the fundamental principles upon which the Italian constitutional design is built. These principles have been conceived as indivisible, and among them also lies the right to asylum, codified Art. 10 para. 3 of the Constitution. The reading of Art. 3 in conjunction with Art. 10 para. 3, therefore appears to be one of the possible hermeneutical keys to critically scrutinize the Protocol regarding the protection of human rights that the Italian constitutional charter assumes as its foundation.

Even on the Albanian front, there have been concerns about the compatibility of the Protocol with the constitutional charter. With the ratification of the Protocol, Albania granted Italy the right to use certain areas free of charge. For this reason, the bilateral Protocol was subject to a preventative constitutional review that had suspended the ratification process. On January 29, 2024, the Constitutional Court of Tirana, with five judges in favour and four against, granted approval for the ratification of the Protocol with Italy. The judges did not find any illegitimacy profiles and declared the constitutional nature of the Protocol.

As stated in the press release of the Albanian body,

> "the act would not compromise the territorial integrity of Albania, nor would it deprive Albania of jurisdiction over its own territory, but rather it would operate a 'dual jurisdiction' in human rights matters, binding both the Albanian and Italian states to respect the fundamental rights and freedoms provided for by international conventions. In this perspective, it also deemed it unnecessary to request an advisory opinion from the European Court of Human Rights (ECtHR)" (Celoria, 2024, p. 2).

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2.3 Risks of Fundamental Rights Violations and International Law Implications, Considering the EU Charter of Fundamental Rights and the ECHR

Alongside the provision for extending Italian jurisdiction into Albanian territory, the Protocol fails to clearly define the applicable legal framework. This legislative and procedural gap portends the risk of derogation from fundamental rights and guarantees. Furthermore, neither the Protocol nor the ratification law make any mention of international human rights obligations. Nevertheless, the imperative of human rights protection cannot be overlooked.

> "States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders, shall not adversely affect the enjoyment of the human rights and dignity of migrants" (OHCHR, 2014: 8)

> "The activities envisaged by the Protocol will, in any case, be subject to compliance with the 1951 Convention, the European Convention on Human Rights, and the UN treaties and agreements to which both States are parties, as well as the general principles of customary international law (e.g., the principle of non-refoulement, the prohibition of torture, etc.). The EU Charter of Fundamental Rights – which includes the prohibition of refoulement and the guarantee of the right to asylum – is also relevant to the implementation of the Protocol and the proposed ratification law" (UNHCR, 2023: 4).

Foremost among these principles is the obligation of non-refoulement, which today represents a norm of customary international law. As is known, for a norm to become part of customary international law, two elements are necessary: consistent practice by States and *opinio juris*, i.e., the belief by States that such practice is obligatory due to the existence of a norm requiring its application. A broad part of doctrine agrees that the prohibition of the refoulement of refugees, as contained in Art. 33 of the 1951 Convention Relating to the Status of Refugees and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a norm of customary international law. As such, it is binding on all States, including those that have not adhered to the 1951 Convention.

The fact that the Protocol only uses the generic term "migrants" and contains no explicit reference to asylum seekers or refugees does not alter the obligations of States under the 1951 Convention and international and regional refugee and human rights law, towards persons seeking or potentially in need of international protection. Furthermore, both Italy and Albania are parties to the 1951 Convention, and therefore the Protocol must necessarily respect its treaty provisions.

In this regard, it is interesting to examine the recommendations that had been proposed by UNHCR on Draft Law 1620 of 18/12/2023 for the ratification and execution of the Protocol. The Agency has highlighted that in the case of agreements involving the transfer of asylum seekers from one country to another for the examination of international protection claims,

> "the State exercising jurisdiction and control over the individuals concerned retains the responsibility to ensure respect for their rights, under international refugee law and human rights law. This includes ensuring adequate reception and treatment conditions, in line with relevant international standards, with particular reference to protection against refoulement and procedural guarantees necessary to ensure a fair and efficient determination of international protection needs, where relevant" (UNHCR, 2023: 2).

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Furthermore, UNHCR has pointed out in the document how the lack of clarity in the legislative framework applicable to individuals subject to the transfer regime established by the Protocol could lead to serious violations of the principle of equal treatment among applicants in the same legal situation. Concerning the Protocol, the UN Refugee Agency has also expressed deep concern about the absence of specific provisions relating to the identification and screening phases of migrants. These phases, constitute a fundamental prerequisite for a true individual assessment of the legitimacy of transfers under the Protocol.

With regard to the obligations to protect fundamental rights arising from regional sources, the Protocol will have to respect the provisions of the European Convention on Human Rights (adopted on November 4, 1950, entered into force September 3, 1953, ETS No. 5, 1950 ECHR). Under Art. 117 para. 1 of the Italian Constitution, the conventional rules are fully applicable to the Protocol. This means that Italy will have the responsibility to ensure the protection of the rights and fundamental freedoms of transferred migrants as guaranteed by the ECHR in Albanian facilities. Furthermore, Art. 1 of the ECHR establishes that the rights and freedoms provided for are ensured to all individuals within the jurisdiction of the contracting States.

Moreover,

> according to the established jurisprudence of the Strasbourg Court, starting from the leading case of 1989 Soering v. United Kingdom, the responsibility arising from the Convention rules lies not with the destination state, but with the contracting Party that exposes the individual to certain risks by delivering him to a state where there are reasonable grounds to believe that he may be subjected to inhuman or degrading treatment" (Zanghì, 2019: 310).

The Strasbourg Court (ECtHR) in its jurisprudence has often interpreted Art. 3 of the ECHR as a complement to the principle of non-refoulement, the beating heart of the 1951 Convention. In fact,

> "in the opinion of the ECtHR, although the Convention does not expressly contemplate the principle of non-refoulement under international law, it must be considered 'already inherent in the general terms of Art. 3'" (Zanghì, 2019: 310).

Despite the fact that the latest Protocol postulating the extension of Italian jurisdiction into Albanian territory, the vague and unclear legal framework of the Italian-Albanian Protocol could lead to the reemergence of violations of the ECHR by Italy, particularly Art. 3 and Art.4 of Protocol No. 4. This concern becomes more pronounced when considering the absence of any form of guarantee for the respect of the fundamental rights of the 'migrants' who will be subject to the Protocol.

Another source of regional nature concerning the respect of human rights to which the Protocol must adhere is the Charter of Fundamental Rights of the European Union (adopted on December 7, 2000, entered into force on December 1, 2009, 2000/C 364/01, 2000 CFR). The obligation of the Member States to respect the rights protected by the Charter is the necessary corollary of the EU's obligations regarding fundamental rights.

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2.4 Examination of the Extraterritorial Application of Rights under the Charter and the Convention within the Context of the Protocol, including Challenges, Opportunities, and Implications for Policy Coherence

Considering the norms of international human rights law and the postulated Italian jurisdiction in Albanian territory, it is necessary to analyse the extraterritorial application of human rights treaties, for which Italy will be responsible. The extraterritorial application of human rights treaties refers to the ability and obligation of states to respect and guarantee human rights outside their own national territory, as well as within. This means that states are required to observe the principles and obligations enshrined in international human rights treaties not only within their national borders but also in relation to their actions and policies involving individuals or territories outside their national jurisdiction.

With reference to the European Convention on Human Rights (ECHR),

> "the existence of Italian jurisdiction for violations of the convention's provisions committed in Albania (a state party to the ECHR) seems to find confirmation in the case law of the European Court of Human Rights (ECtHR), which has determined the extraterritorial application of the convention in two cases: where the state exercises effective control over a territorial area outside its borders (the so-called spatial model); and where the state exercises effective control over individuals (the so-called personal model)" (Siccardi, 2024: 119).

Both profiles are identifiable in the Protocol.

Regarding the EU framework, the European Union is obliged to uphold respect for human dignity, the rule of law, and the principles of freedom, equality, and solidarity in both its internal and external actions (Art. 2 and Art. 21 of the Treaty on European Union). In fact, the EU's primary obligations in the field of human rights are based on the universality and indivisibility of human rights, along with the promotion of democratic principles and values. For this reason, it is essential to remember the crucial role of so-called extraterritorial obligations in the field of human rights. Additionally, the EU's obligation to duly consider human rights in external relations is not limited to the Charter of Fundamental Rights. It extends, in principle, to fundamental rights recognized as general principles of EU law, which the Court of Justice ensures compliance with under Art. 6 para. 3 TEU.

> The Charter of Fundamental Rights provides the primary reference (Art. 6 TEU) for establishing the minimum set of protections with which the EU and its MSs must comply when exercising their powers and when 'implementing Union law' (Art. 51(1) CFR). […] The question of extraterritorial applicability is also dealt with, reaching the conclusion that the fundamental rights acquis applies whenever a situation is governed by EU law, whether the action/omission is undertaken within the territorial boundaries of MSs or not" (Policy Department for External Relations, 2020: VIII).
>
> There is a series of rights that the Charter recognises as being applicable to all persons, which are of particular relevance in the context of external and extra-territorial EU and MS action in the areas of migration, borders and asylum" (Policy Department for External Relations, 2020: 14).

2.5 The Protection of Asylum Seekers with Specific Needs

The concerns raised about the Protocol become even more profound when considering the vulnerable category of asylum seekers. As known, the concept of vulnerability lies at the heart of the so-called complementary protection. It is defined as such precisely

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because it should serve as the national complement to international protection. Thus, the two dimensions – the international and the national one – should integrate in order to ensure adequate protection standards for asylum seekers.

In Italy, Art. 17 of Legislative Decree No. 142/2015, which implements EU Directive 2013/33, the so-called "Reception Directive", provides an open and non-exhaustive list of persons recognized as vulnerable. The provision states

> "Reception measures provided for in this Decree take into account the specific situation of vulnerable persons, such as minors, unaccompanied minors, disabled persons, the elderly, women (, with priority for those) in a state of pregnancy, single parents with minor children, victims of human trafficking, persons suffering from serious illnesses or mental disorders, persons who have been found to have suffered torture, rape, or other serious forms of psychological, physical or sexual violence related to sexual orientation or gender identity, victims of genital mutilation."

For this reason, the Protocol should provide for derogations for the aforementioned categories. However, these are not explicitly stated, and the risk of non-procedural differentiation among asylum seekers becomes increasingly concrete. The fact that the Law No. 14 of February 21, 2024, provides for the generalized detention of persons rescued at sea by Italian military ships and transferred to Albania seems to be a reversal of perspective compared to Art. 13 of the Constitution, which always requires individual and motivated measures, resulting in a restriction of personal freedom. Furthermore, collective detention is prohibited in the Italian legal system by the Legislative Decree of July 25, 1998, No. 286 (Art. 9 et seq.).

The exclusion of minors and other vulnerable individuals from the accelerated procedure is not mentioned in the Draft Law, which has been assumed several times so far, as well as for all those for whom the accelerated border procedure does not apply in any case. These are individuals, albeit residual, who cannot be detained in centres in Albania and, if brought there, should be immediately transferred to facilities located in Italy, suitable for their reception; but the Draft Law does not address this aspect in any way, thus leaving the urgent need to fill this serious gap through a parliamentary process.

Despite the Italian Prime Minister's statement from November 6, 2023, following the signing of the bilateral treaty, "this agreement, this possibility, does not concern children, pregnant women and other vulnerable individuals" (Presidency of the Council of Ministers, 2023), questions arise about how such a statement will be translated into concrete action and guaranteed. Indeed, the Protocol and the ratification law thereof make no mention of migrants with specific needs. The Democratic Party had proposed an amendment aimed at recognizing the exclusion, but it was rejected on the pretext of preferring to maintain a concise text. It is therefore evident that it was a deliberate choice not to establish precise rules for the screening of vulnerable subjects.

For these reasons, in the author's opinion, it is difficult to find any example of complementary protection for asylum seekers in the Protocol.

3 Interconnection with Art. 25 of the EU Visa Code: Potential Precedents for Expanded Application

The extraterritorial respect of human rights, and application of the ECHR and the EU Charter of Fundamental Rights, presents a significance challenge for different migration

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policy instruments available to Member States of European Union: Art. 25 para. 1 lit. a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of July 13, 2009 establishing a Community Code on Visas (hereinafter referred to as Visa Code), which provides for the so-called humanitarian visa. It has the potential to allow third-country nationals to enter an EU country regularly and safely whether the applicants have a genuine protection need, or are reluctance to return to their own country, and therefore wish to apply for international protection.

The issuance of the so-called humanitarian visa must follow an eligibility assessment to evaluate needs deserving protection, as well as the criteria for the possible recognition of international protection. This assessment, done in the diplomatic and consular representation of an EU Member State in a third country, of which the foreign applicant may or may not be a citizen, raises the issue of the existence of an EU extraterritorial jurisdiction concerning the protection of fundamental rights, and the right of asylum among them.

Therefore, despite having opposite goals, both the Italy-Albania Protocol and the so-called humanitarian visa share the need to assess, within the territory of a third country, the requirements for recognizing international protection. This includes arranging the repatriation of migrants not entitled to entry and stay in Italian territory and issuing humanitarian visas. This is something that poses obstacles and raises potential benefits to fundamental rights protection, as already introduced in the previous paragraph. In other words, the extraterritorial extension of an EU country's jurisdiction in the field of migration and asylum, as the Italy-Albania Protocol unveils, presents both challenges and opportunities in terms of setting precedents for the expanded application of rights and regulations in migration policy such as the implementation of Art. 25 of the Visa Code, which at the time of writing presents a very limited application.

3.1 Analysis of the Provisions Concerning Humanitarian Visas and the Potential Benefits of their Issuance in Upholding Fundamental Rights, Including the Right to Asylum

According to Art. 77 and Art. 79 of the Treaty on the Functioning of the European Union (TFEU), the EU has established a common regulatory framework aimed at "facilitating legitimate travel" and "combating illegal immigration through further harmonization of national legislation and practices for the handling of visa applications at local consular representations". This represents the legal basis of Regulation (EC) 810/2009 establishing the Visa Code, which "sets out the procedures and conditions for issuing transit visas or visas for stays not exceeding three months in any six-month period in the territory of the Member States" (Art. 1).

In the Visa Code, Art. 19 para. 4 introduces the possibility to issue a humanitarian visa, whenever a visa application does not meet the requirements set out in para. 1 of the same Article: a visa application "may be considered admissible on humanitarian grounds or for reasons of national interest". However, the Article does not give a clear definition specifying what can constitute "humanitarian grounds" or "national interest".

Consequently, Art. 25 para. 1 lit a) of the Visa Code directly provides for the issuance of a limited territorial validity visa (VLT), valid for a 90-days stay, to a third-country national for "humanitarian reasons, national interest, or in accordance with international obligations", deviating from the principle of compliance with entry conditions outlined in Art. 5 para. 1

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lit. a), c), d), and e) of the Schengen Borders Code. However, once again, the Article does not provide criteria to assess humanitarian reasons and national interest, whereas the reference to the respect of international obligations should be clear. Given the humanitarian scope of the visa, there is an evident invocation of international obligations concerning the respect for human rights.

Therefore, the issuance of humanitarian visas should respect and adhere to international obligations, such as those arising from human rights treaties, and thus has a positive impact on fundamental rights. For instance, by offering a mechanism to enter a territory legally to seek refuge or assistance, humanitarian visas can potentially prevent individuals from resorting to dangerous and irregular migration routes, thus reducing the risks of exploitation, trafficking, or abuse, in line with the rights outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Additionally, humanitarian visas uphold the principles of *non-refoulement* and provide access to protection mechanisms, ensuring that individuals fleeing persecution or violence can seek asylum or other forms of international protection in a safe and lawful manner, as stipulated by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, humanitarian visas can foster international cooperation and solidarity in addressing humanitarian crises by allowing countries to share the responsibility of providing assistance to those in need, as called for in the 2030 Agenda for Sustainable Development and the Global Compact on Refugees.

Up to now humanitarian visas have been a useful instrument – although to a limited extent – for the implementation of legal pathways towards the EU for people in need of protection, including resettlement programmes, humanitarian admission programmes, protected entry procedures, facilitated entry schemes for certain nationalities or certain groups, for family reunification purposes, and for labour and study purposes[4]. Unfortunately, these mechanisms are not uniformly adopted in every EU Member State as there is no obligation for their activation, and they only constitute a minority of the entries registered in EU Member States.

On the other hand, a humanitarian visa presents several problematic aspects in its role as for the protection of human rights. First, the vagueness of the grounds for issuing humanitarian visas and the inexistence of a dedicated EU regulation creates uncertainty. This vagueness allows Member States the discretion to both decide whether to issue such a visa and to classify the reason for the request as "humanitarian", given the absence of criteria indicating the situations that can justify granting this type of visa. In relation to this, the evaluation method for visa issuance raises questions about the entity or entities responsible for examining the request, how it should be conducted, on which legal basis and following which procedure.

Second, the territorial validity and short duration of the visa (90 days) raise concerns. This, combined with the visa's limited territorial validity (LTV) to the Schengen State whose representation issued the visa has sparked debate about Member States' obligations under Art. 25, especially where the refusal to issue such a visa would expose individuals to the risk of inhuman and degrading treatment. The Court of Justice of the European

[4] For further reading, see Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the European Union: promoting resettlement, humanitarian admission, and other complementary pathways.

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Union (CJEU) in the case X and X v. Belgium (C-638/16 PPU), decided on March 7, 2017, ruled in a restrictive sense. The CJEU in its decision considered that the request for a visa to enter the territory of a Member State for the purpose of seeking asylum may be denied since more than a 90 days' stay in the Member State is required to complete the asylum application procedure, which is a longer duration than that provided for in Art. 25 of the Visa Code. Furthermore, since the EU does not provide rules governing visas allowing stays longer than 90 days, the Court considered that it is not possible to apply Union law, or the obligations enshrined in the EU Charter of Fundamental Rights. One could argue whether the limited duration truly constitutes an obstacle to the issuance of such a visa, in light of the fact that, according to Art. 33 para. 1, of the Visa Code,

> "The period of validity and/or the duration of stay of an issued visa shall be extended where the competent authority of a Member State considers that a visa holder has provided proof of force majeure or humanitarian reasons preventing him from leaving the territory of the Member States before the expiry of the period of validity of or the duration of stay authorised by the visa."

Furthermore, when the holder of the humanitarian visa applies for asylum, his/her legal status changes, no longer falling under the visa regime but rather under that of international protection (Del Guercio, 2017: 284).

The third problematic element is precisely the non-obligatory nature of visa issuance, as derived from the mentioned CJEU's judgment. According to the Court, there is no obligation for Member States under Union law to issue a humanitarian visa to persons intending to enter their territory with the intention of seeking asylum (para. 49), but they remain free to do so on the basis of their respective national law. The inexistence of an obligation to issue humanitarian visas is also strongly linked to a practical, and somehow political, risk: If an obligation to admit the entry of all people living in catastrophic situations existed, the risk would be that of "requiring the developed countries to accept entire populations from the developing world, countries at war or those ravaged by natural disasters" (ECHR, Judgment of 5/3/2020, M.N. and Others v. Belgium, No. 3599/18, para. 19).

Finally, since the issuance of the humanitarian visa requires an eligibility assessment, it is not clear to what extent a Member State can extend its jurisdiction extraterritorially for this purpose. The lack of clear and complete standards on admission for humanitarian and asylum-seeking purposes worsens the scenario. On the one hand, EU law does not regulate the extraterritorial application of asylum rules, leaving it within the residual competence of Member States. They may examine asylum applications outside their territory, applying their own laws – as the Italy-Albania Protocol aims to do – provided it does not hinder internal application and is in accordance with EU law. On the other hand, should human rights as provided for by international human rights treaties be guaranteed extraterritorially?

3.2 Examination of the Extraterritorial Application of Rights under the Charter and the Convention in light of the "M.N. and Others v. Belgium"

The extraterritorial extension of a state jurisdiction in the matter of compliance with international treaties on human rights is particularly controversial when concerning immigration matters. Moreover, "whether asylum-seekers applying for a visa at an embassy or consulate trigger the non-refoulement principle – is [...] a long-standing and contested issue in refugee law scholarship" (Gammeltoft-Hansen, 2020: 1).

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Indeed, the extraterritorial application of fundamental rights during the assessment for the issuance of the humanitarian visa has been subject to a legal debate, exemplified by the case M.N. and Others v. Belgium (No. 3599/18), adjudicated by the ECtHR on March 5, 2020. While the ECHR obliges states to respect human rights within their jurisdiction, the application of this principle to extraterritorial actions remains contentious. This raises questions about the feasibility of extraterritorial examination of asylum claims and imposes limitations on the application of Art. 25 of the Visa Code, hindering the possibilities of providing regular, safe, and orderly entry for those in need of protection.

In the case M.N. and Others v. Belgium, the ECtHR examined whether the failure to issue a humanitarian visa by Belgian authorities to Syrian citizens at the Belgian diplomatic representation in Beirut constitutes a violation of Art. 3 (Prohibition of Torture) and Art. 13 (Right to an effective remedy) of the ECHR. The applicants were a married couple with their two children, who

> "stated that in terms of both security and living conditions they were in a situation of absolute emergency on account of the armed conflict in Syria and, more specifically, the intensive bombardment of Aleppo" (para. 10 of the Decision).

First, the court had to assess whether the application could be considered admissible evaluating the question of jurisdiction within the meaning of Art. 1 of the Convention. According to Art. 1 (Obligation to Respect Human Rights), "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". As a consequence, extraterritorial application of the ECHR "refers to the recognition (French for 'securing' in Art. 1 ECHR) of ECHR rights by states parties and the identification of the corresponding duties on their part to individuals or groups of individuals situated outside their territory" (Besson, 2012: 862).

According to a restrictive interpretation of the Strasbourg Court (Gondek, 2005) in the case Banković and others v. Belgium and others (No. 52207/99), decided on December 12, 2001, jurisdiction of a state primarily coincides with its own territory because it is where the state is presumed to exercise full powers and control (see para. 61). Moreover, in the Banković case, the Court ruled out the possibility of determining jurisdiction based on a cause-and-effect link, otherwise

> "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Art. 1 of the Convention" (para. 75).

In 2011, the Court also ruled in the case Al-Skeini and others v. the United Kingdom (No. 55721/07) that the Convention may apply extraterritorially where the State exercises effective control over a part of territory beyond its borders or, through its agents, over an individual (see para. 136).

In a previous judgment, the Court applied a different, more functional criterion to determine the existence of jurisdiction, this time giving importance to the cause-effect element. In the case of PAD and others v. Turkey (No. 60167/00), decided on June 28, 2007, concerning the killing of Iranian citizens by a Turkish helicopter, the Court affirmed Turkey jurisdiction considering it unnecessary "to determine the exact location of the impugned events" since "the fire discharged from the helicopters had caused the killing of the applicants' relatives" (para. 54).

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In the case of our interest, M.N. and Others v. Belgium, decided on May 5, 2020, the Strasbourg Court followed the more restrictive trend, holding that the failure to issue a humanitarian visa cannot constitute a violation of rights under the ECHR given the inexistence of circumstances justifying the extraterritorial exercise of a Member State's jurisdiction. The Court considered that protection requests at diplomatic representations abroad are outside the scope of the Convention and, therefore, issuing a visa under Art. 25 of the Visa Code is not mandatory for protecting foreign nationals from the risk of inhuman and degrading treatment. In addition, the Court cleared that there is no general obligation for States to admit foreign citizens in their territory, as the existence of such obligation

> "would give way to an unlimited obligation on the States Parties to authorise entry to their territory to individuals who were at risk of treatment in breach of Art. 3 anywhere in the world" (para. 89).

At the same time,

> "the Court notes that this conclusion does not prejudice the endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations" (para. 126).

This judgment, together with the 2017 CJEU's, confirms that there is currently no EU obligation regarding the issuance of humanitarian visas, and such obligation does not derive from human rights protection. However, they leave open the possibility for individual Member States to use this instrument and for the EU to intervene with a legislative act to better specify the conditions for applying Art. 25 of the Visa Code. In other words, while there is no absolute obligation to respect and guarantee the rights provided for by the ECHR outside the territory and jurisdiction of a state, one could argue that there remains the possibility of issuing a humanitarian visa and thus, consequently, effectively safeguarding the rights guaranteed by the ECHR, meaning that the absence of obligation does not imply a prohibition.

The provisions of the Italy-Albania Protocol demonstrate an openness towards a concrete scenario in which Italy extends its jurisdiction beyond its national territory and will undoubtedly be called upon to respect and guarantee the rights provided for by the ECHR.

3.3 Interplay between the Italy-Albania Protocol and the Art. 25 of the Visa Code

The analysis of Art. 25 of the Visa Code and of the Italy-Albania Protocol has been conducted because both instruments carry significant implications for fundamental rights protection and asylum policies on the territory of a third country. They include ensuring compliance with international human rights standards, addressing jurisdictional issues, and balancing national security concerns with humanitarian considerations. Therefore, the integrated reading of these instruments aims at highlighting the challenges and opportunities that exist to enhance cooperation between states, strengthen asylum systems, and uphold the rights of individuals in need of protection.

However, while both the Italy-Albania Protocol and Art. 25 of the Visa Code aim to address migration-related challenges, they represent two different approaches to migration policy. Firstly, they differ in objectives, given that, albeit operating within the same framework of immigration management, they are instruments of migration policy that move in opposite directions: the strengthening of the non-entry policy to reduce immigration flows

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represented by the Italy-Albania Protocol vs. the implementation of regular channels for protection seekers towards EU Member States represented by the humanitarian visa.

Secondly, they differ in nature: the Italy-Albania Protocol is a bilateral agreement that explicitly extends jurisdiction extraterritorially, whereas Art. 25 of the Visa Code operates within the framework of European immigration law and follows the traditional determination of jurisdiction which, as explored in the previous paragraph, excludes the application of the ECHR. As already introduced, the Protocol stipulates that "border or return procedures provided for by Italian and European legislation" (Art. 4, para. 3) shall be carried out on Albanian territory, and Art. 7 states that

> "the competent Italian authorities shall bear all costs necessary for the accommodation and treatment of the persons received […], including food, medical care […], committing to ensuring that such treatment respects the fundamental rights and freedoms of man, in accordance with international law."

This also implies the extraterritorial extension of constitutional guarantees and, therefore, the adherence to international human rights law. This means the extraterritorial application of the ECHR is undeniable, given the two circumstances already mentioned: the exercise by the Italian State of effective control over a territorial area outside its borders, and the exercise of control over individuals.

In conclusion, the analysis of Art. 25 of the Visa Code in interaction with the recent Italy-Albania Protocol offers insights to reflect on the prospects for European migration policy, ensuring fundamental rights and envisaging new procedures for the extraterritorial examination of protection needs.

4. Implications for Fundamental Rights Protection and Asylum Policies

The decision to analyse the Protocol in conjunction with Art. 25 of the Visa Code is intended to critically examine potential perspectives for evaluating requests for international protection by one state on the territory of another. On the one hand, the Italy-Albania Protocol extends national jurisdiction and thus theoretically ensures the application of the ECHR, but also brings forth numerous challenges in terms of practical protection of the rights of foreign citizens entering Albania under Italian jurisdiction. On the other hand, Art. 25 of the Visa Code represents a traditional migration policy instrument, the visa, which in this case is issued for humanitarian reasons. It has the potential to facilitate safe and regular migration to the EU, protect the rights of foreign citizens with protection needs, but simultaneously encounters limitations in terms of the limited responsibilities and obligations of states that can issue it.

The primary issue under consideration is the implications of the Protocol's application for the respect of fundamental rights, although it is challenging to foresee the actual impact of the policy on individuals and their rights.

As for the implications regarding the practical protection of the rights of foreign citizens entering Albania, it is useful to refer to a recent judgment of the European Court of Human Rights: J.A. and Others v. Italy (No. 21329/18). On March 30, 2023, the court condemned Italy for violations of Art. 3 (prohibition of inhuman or degrading treatment), Art. 5 paras. 1, 2, and 4 (right to liberty and security), and Art. 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) of the ECHR. The Court found that the detention of the applicants, or deprivation of personal liberty, for 10 days at the Lampedusa hotspot

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occurred in the absence of a clear and accessible legal basis; that this constituted inhuman and degrading treatment due to the poor material conditions of the hotspot; and that the expulsion orders issued against the applicants lacked individualized and adequate assessment, thereby amounting to collective expulsion. Similar conclusions were reached by the Court in October 2023, in the cases ECtHR, Judgment of 19/10/2023, A.B. v. Italy, No. 13755/18, ECtHR, Judgment of 31/08/2023, M.A. v. Italy, No. 70583/17 and ECtHR, Judgment of 19/10/2023, A.S. v. Italy, No. 20860/20.

The choice to extend Italian jurisdiction to Albanian territory thus raises and will continue to raise questions and issues from the perspective of the extraterritorial effectiveness of guarantees protecting fundamental rights, similar to those examined in the cases just mentioned, due to the similarity of the practices in question: detention, undefined living standards and services, problematic access to legal assistance, undifferentiated standards for vulnerable people, and others. As Savino argues,

> "International agreements on extraterritorial immigration management typically postulate (already ex ante, in their conception) and fatally determine (ex post, in the implementation phase) a drastic reduction in the standards of protection of migrants' rights." (Savino, 2024: 1)

In light of the provisions of the Protocol and its implementing legislation, many scholars, academics, and jurists fear "that areas far from our eyes may become, in practice, places of deviation from constitutional guarantees" and thus deviation from associated international obligations; this fear arises from the fact that the exercise of rights will occur "in ways different from those in Italian territory" (Siccardi, 2024: 120-121)

Specifically, there is a fear and therefore a risk of violating the right to asylum and the prohibition of collective expulsions (Art. 4 Protocol 4 ECHR), the prohibition of inhuman and degrading treatment in centres (Art. 3 ECHR), the violation of guarantees protecting personal liberties (Art. 5 ECHR), and the right to defence (Art. 6 ECHR). It thus appears that the response to immigration management and border control provided by the Protocol may constitute a threat to internationally recognized fundamental human rights.

Secondly, implications for fundamental rights protection and asylum policies unveiled by the issuance of humanitarian visas are considered to be superior to those that the Italy-Albania Protocol may theoretically bring about. Effectively carrying out extraterritorial procedures to safeguard fundamental rights, and issue humanitarian visas – while the examined judgments of the CJEU and the ECtHR do not prohibit such actions but leave the option open – can lead to greater overall protection of the fundamental rights of those who are forced to migrate. This would eliminate the need to rely on traffickers to undertake the journey, reducing the risk of incidents during travel, decreasing the likelihood of exposure to violence and inhuman and degrading treatment, and increasing the possibility of protecting specific vulnerabilities, as well as reducing irregular migration – the latter being at the core of the Italian immigration policy.

The limitation of the non-mandatory issuance of humanitarian visas echoed by the judgment M. N. v. Belgium, which uses the argument of the non-extraterritorial extension of the ECHR, could be met with a change if new perspectives regarding extraterritoriality are considered by the CJEU and the Strasbourg Court. A new perspective is offered by the two communications of January 27, 2021, the UN Human Rights Committee (UNHRC) addressed to Italy and Malta: A.S. and others v. Malta (n. 3043/20179) and A.S. and others v. Italy (n. 3042/2017). The UNHRC assessed the responsibility of the Maltese and

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Italian states for violations of obligations arising from the right to life (Art. 6 International Covenant on Civil and Political Rights - ICCPR), in relation to the failure to carry out rescue operations in a shipwreck in the Mediterranean in 2013, when more than 200 migrants lost their lives at sea. In both decisions, the UNHRC adopted an innovative approach due to an extensive notion of extraterritorial jurisdiction under Art. 2 para. 1, of the ICCPR. The notion itself follows the "functional" approach introduced in General Comment No. 36 of the UNHRC on the right to life, published in September 2019. Para. 63 of the General Comment indicates that a State must apply Art. 6 of the ICCPR to

> "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. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner."

The innovative scope of the notion lies in overcoming the traditional exercise of effective control over territory or individuals, and in considering it sufficient in affecting the enjoyment of human rights (Fazzini, 2021). Certainly, this functional approach poses difficulties in determining the existence of extraterritorial jurisdiction as the assessment is less rigorous and based on both factual and legal elements. However, this interpretive novelty introduced by the Committee in 2019 and recalled in 2021 represents a precedent, albeit non-binding, capable of influencing international courts such as the European Court of Human Rights, which adopted a similar approach in the mentioned PAD and others v. Turkey in 2007, in all those situations where there is no precise territorial boundary or clear relationship between the State entitled to the application of human rights provisions and the individuals with whom it interacts outside the national territory.

In conclusion, the Protocol and its implementation demonstrate that extending jurisdiction to carry out immigration and asylum procedures is achievable with political will and despite all inherent limitations. While the application of a tool such as the humanitarian visa remains inadequate, again due to the role of political will, and given existing regulatory and jurisdictional limitations.

5 Conclusions

In light of the findings of the normative analysis of the Protocol, it seems appropriate to present some concluding remarks.

The Italy-Albania Protocol, part of the broader category of border externalization policies, represents one of the latest and most innovative attempts by European States to effectively manage migration flows towards the Union. The initiative highlights the complex interplay between migration management objectives, geopolitical interests, and ethical considerations, underscoring the need for comprehensive and rights-based approaches to migration governance both within and beyond the EU.

In the author's opinion, confronted with new political paradigms, old human rights violations will resurface. What is concerning is that the Protocol has opened an unprecedented scenario, and many EU Countries are looking at this model with interest and considering its adoption. On May 15, 2024, a group of 15 European Union Member States issued a joint letter to senior officials of the EU Executive Commission to find "new solutions" in the fight against irregular immigration. The letter mentions the Italy-Albania Protocol as a potential model for migration management to be adopted:

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> "Additionally, possible place of safety arrangements and transit mechanisms inspired by the existing Emergency Transit Mechanisms could be explored, which would be aimed at detecting, intercepting, or in cases of distress, rescuing migrants on the high seas and bringing them to a predetermined place of safety in a partner country outside the EU, where durable solutions for those migrants could be found, also building on models like the Italy-Albania Protocol (Ministers, 2024).

On the horizon, we see the dawn of a new system of agreements between the EU and non-EU countries characterized by undefined regulatory boundaries that can undermine the imperative of human rights protection. Indeed, the Protocol appears to be in open violation of inviolable rights. These rights, being coessential to human dignity, are inalienable for each individual, regardless of the territory in which they are located. The risk that this type of policy could be systematized and codified at the EU level would represent an open repudiation of the core human rights that the EU commits to uphold (Art. 2 TEU).

Conversely, a traditional migration policy instrument already available to EU Member States, such as the visa issued for humanitarian reasons (Art. 25 Visa Code), would be capable of facilitating safe and regular migration to the EU, and of protecting the rights of foreign citizens in need. However, its current regulatory and jurisdictional context, combined with a lack of political will, imposes significant limitations on the responsibilities and obligations of the states that can issue it.

By way of conclusion, the integrated analysis of these two instruments underscores the potential of extending jurisdiction beyond national borders to ensure the protection of fundamental human rights. This potential can be realized only if such extensions are embedded within a precise regulatory framework that clearly defines specific obligations and responsibilities.

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Social Welfare Benefits to Asylum Seekers: Disadvantages due to German Procedural Law[1]

Prof. Dr. Jens Löcher[2]

Abstract

Asylum seekers and other foreigners whitout permanent right of residence in the Federal Republic of Germany do not receive social welfare benefits in accordance with the Code of Social Law but in accordance with a special regulation called Asylum Seekers' Benefits Act (Asylbewerberleistungsgesetz). This leads to procedural disadvantages.

Key Words:

asylum seekers, social welfare benefits, administrative procedural law, Germany

1 The Asylum Seeker Benefit Law (AsylbLG)

Since November 1, 1993, the livelihood of asylum seekers in Germany has no longer been covered by social welfare benefits, but by a separate law, the Asylum Seekers' Benefits Act (Asylbewerberleistungsgesetz – AsylbLG)[3]. The same accords to other persons who do not have a permanent right of residence in the Federal Republic of Germany (cf. the group of persons listed in § 1 AsylbLG). The departure from the structural principles and benefits regulated in the Federal Social Assistance Law (Bundessozialhilfegesetz – BSHG),[4] a law that granted social welfare benefits to all people in need without differentiating between age, ability to work or right of residence, was made for migration policy purposes (see BVerfG [Federal Constitutional Court], Judgement of 18/07/2012, 1 BvL 10/10, 1 BvL 2/11, para. 84). By reducing subsistence benefits and converting cash benefits into benefits in kind, the economic incentive for unauthorized entry and migration of foreigners to the Federal Republic of Germany was intended to be reduced (Federal Parliament, BT-Drs. 12/4451: 1; Federal Parliament, BT-Drs. 12/5008, p. 13). In particular, asylum seekers whose applications for asylum had been rejected were to be covered by reductions in benefits in order to reduce incentives to remain in Germany (Federal Parliament, BT-Drs. 12/4451, p. 5; summarizing the legislative objectives also BVerfG, Judgement of 18/07/2012, para. 3). The explanatory memorandum to the law clearly stated: "In essence, however, this is a regulation of the right of residence and settlement

 It was developed based on a lecture given by the author on the occasion of the 5th Speyer Social Law Days 2023, which took place at the German University of Administrative Sciences Speyer under the topic "Migration and Social Benefits".

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[3] Asylbewerberleistungsgesetz (AsylbLG) of June 30, 1993, Federal Law Gazette 1993 I p. 1074.

[4] Bundessozialhilfegesetz (BSHG) of June 30, 1961, Federal Law Gazette 1963 I p. 815. The BSHG largely expired with effect from January 1, 2015 and was replaced by the Second and Twelfth Book of the Code of Social Law (SGB II, SGB XII).

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of foreigners." (Federal Parliament, BT-Drs. 12/4451, p. 5). From this, it was and still is concluded that the AsylbLG is part of aliens law. Oppermann and Filges (2024, MN 24) call it an annex to alien law. Aliens law is understood here as the entirety of legal provisions that regulate the entry and residence of persons in the Federal Republic of Germany who do not have German citizenship.

At the same time, however, the AsylbLG is part of social law in its material sense, as it provides persons entitled to benefits under § 1 AsylbLG with social security and, to a certain extent, social justice through benefits in kind, cash and services that are necessary for a dignified life in the sense of securing their physical existence and a socio-cultural minimum as a standard of living; §§ 2, 3, 3a, 4 and 6 AsylbLG guarantee benefits for subsistence, in the event of illness, need for care and in other situations of need. Benefits in accordance with §§ 5 and 5b AsylbLG – i.e. work opportunities and participation in an integration course – also ultimately pursue objectives that are part of a humane existence, namely the integration of the beneficiary into society.

Let us remember: It was not until a decision by the Federal Constitutional Court (Bundesverfassungsgericht) in 2012 that the obvious was clarified, namely that the fundamental right to be guaranteed the conditions necessary for a life in the Federal Republic of Germany in accordance with human dignity, derived from Art. 20 para. 1 Basic Law (the German Constitution – Grundgesetz [GG]) (welfare state principle) in conjunction with Art. 1 para. 1 Basic Law is a human right. As such, it is therefore not only granted to German nationals, but also to foreign nationals residing in the Federal Republic of Germany (BVerfG, Judgement of 18/07/2012, para. 63). This fundamental right therefore also extends to asylum seekers and other persons entitled to benefits under § 1 AsylbLG. The judges of the Federal Constitutional Court stated unequivocally that migration policy considerations to avoid migration movements through low benefits in no way justify a benefit assessment below the physical and socio-cultural minimum subsistence level (BVerfG, Judgement of 18/07/2012, para. 95). The human dignity guaranteed in Art. 1 para. 1 Basic Law must not be relativized in order to achieve migration policy objectives. This was confirmed in later jurisdiction of the Court (most recently BVerfG, Decision of 19/10/2022, 1 BvL 3/21, para. 56).

Since claims of asylum seekers to benefits from the other benefit systems that secure a livelihood – i.e. in particular benefits under the second or twelfth book of the Code of Social Law (SGB II, SGB XII), laws providing benefits for a living in accordance to human dignity for the majority of people in need – are excluded by law (cf. in this respect § 9 para. 1 AsylbLG, § 7 para. 1 cl. 2 no. 3 SGB II, § 23 para. 2 SGB XII), the AsylbLG alone fulfills the human right of persons entitled to benefits under § 1 AsylbLG to be guaranteed the conditions for a life in dignity. There is no doubt that the AsylbLG is therefore part of social law in its substantive sense. Quite contrary, it is doubtful whether and, if so, to what extent the AsylbLG still has the character of aliens law.

It could be argued that the sanction norms continue to justify classification as aliens law. These sanction undesirable actions by those entitled to benefits in order to persuade them to leave the Federal Republic or to create the conditions for this, or to motivate those entitled to benefits to take part in an integration course (i.e. in particular § 1a and 5a para. 2 AsylbLG). However, if one looks at the law as a whole, it becomes clear that it consists predominantly of provisions dealing with benefits that ensure human dignity, which are only supplemented by procedural and responsibility-related standards. A few provisions

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that merely regulate the consequences of breaches of obligations can hardly determine the character of an entire law. To interpret it the other way around would mean to determine the rule via the exception, which would be an illogical, unsystematic interpretation.

Furthermore, even a restricted entitlement to benefits that ensure human dignity in accordance with § 1a AsylbLG is still an entitlement to benefits that should (and must) serve the fundamental right to guarantee a life that corresponds to human dignity.

Since the decision of the Federal Constitutional Court in 2012, the AsylbLG can therefore no longer be counted as part of aliens law, but solely as part of social law in the substantive sense. The purpose of the law has changed, or, if you want to apply a quote of the Court from a different context: “The law can be smarter than the fathers of the law.” (BVerfG, Decision of 29/1/1974, 2 BvN 1/69, para. 46).

2 Administrative Procedure Law vs. Social Procedure Law: (L)VwVfG vs. SGB I and SGB X

What at first glance appears to be a purely academic classification under aliens law or social law – in the sense: "It's nice, but useless" – at second glance reveals far-reaching consequences that relate to administrative procedural law: Since the legislator has not designated the AsylbLG - as its official title already shows - as one of the books of the Code of Social Law (Sozialgesetzbuch, SGB), and as it is also not referred to via § 68 SGB I as to be considered as an integral part of the Code of Social Law, it is not part of social law in the *formal* sense. As a result, administrative procedural law is by and large not governed by SGB I – though this is challenged by Siefert (2020, MN 19), who considers it possible to analogously apply provisions of the SGB I – and SGB X (cf. in this respect § 37 cl. 1 SGB I). Instead it is ruled by the administrative procedure law of the responsible federal state (Land) as the Federal Social Court (Bundessozialgericht – BSG) has clarified (BSG, Judgement of 25/10/2018, B 7 AY 2/18 R). This is consistent from the perspective of the legislator, who on the one hand created the AsylbLG as aliens law and on the other hand wanted to enable flexible handling of the law by the federal states (Federal Parliament, BT-Drs. 12/4451, p. 10, regarding § 9 of the draft bill, which corresponds to the current § 10 AsylbLG and deals in particular with local responsibility).

However, § 9 para. 3-5 AsylbLG deviates from this systematics and calls for the according application of individual regulatory complexes of SGB I and SGB X. The standards so included in particular deal with

- the revocation of administrative acts (§§ 44-49 SGB X),
- the reimbursement of wrongly provided benefits after an administrative act that gave rise to a claim has been revoked (§ 50 SGB X),
- obligations of third parties to provide information (§ 99 SGB X, § 117 SGB X),
- automated data synchronization,
- the reimbursement of services rendered between authorities (§§ 102 ff. SGB X), and last but not least,
- the obligations of those entitled to benefits to cooperate and the legal consequences of their violation (§§ 60-67 SGB I).

The fact that most of the references to SGB I and SGB X were not made when the law came into force in 1993, but only in the course of the following years, cannot be seen as

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an indication that the legislator had become somewhat uncomfortable with seeing the AsylbLG as aliens' law. There are no indications of such an examination of the legal nature of the AsylbLG in the legislative materials.

When the AsylbLG came into force, the law only contained a reference to § 102 et seq. SGB X, which was intended to simplify administration (Federal Parliament, BT-Drucks 12/4451, p. 10, on § 8).

Moreover, according to the legislative materials, the legislator had not given any discernible thought to the administrative procedure. This then changed with the First Act Amending the Asylum Seekers' Benefits Act. According to the explanatory memorandum, the lack of regulations on the benefits procedure – in particular with regard to local responsibility, reimbursement of costs, the transfer of claims and the recipients' duty to cooperate – made the implementation of the Asylum Seekers' Benefits Act more difficult (Federal Parliament, BT-Drs. 13/2746, pp. 1, 11). In addition, there were no regulations that allowed for sanctions in the event of a lack of cooperation (Federal Parliament, BT-Drs. 13/2746, pp. 17). The legislator then declared the listed provisions of SGB I and SGB X to be applicable accordingly, which also affected §§ 44-50 SGB X and §§ 60- 67 SGB I.

In other words, the focus on preventing unwanted migration initially blocked the view of procedural law; later, provisions of social administrative procedure were declared applicable in order to meet the requirements of the authorities. The partial application of social administrative procedural standards was never intended to improve the legal position of those entitled to benefits.

3 Legal and Practical Consequences

If the legislator decides to declare only very specific standards from SGB I and SGB X to be applicable accordingly, then the other standards from these codes should not be applicable. Since there is no unintended loophole in this respect, analogous application is also ruled out.

Accordingly, it has been decided in judicial decisions, for example, that § 64 SGB X, which regulates, among other things, the cost-free nature of administrative procedure and of extrajudicial remedies, is not applicable by analogy to the procedure under the AsylbLG (BSG, Judgement of 16/01/2019, B 7 AY 2/17 R, para. 7 et seq.; deviating LSG Rhineland-Palatinate, Judgment of 26/05/2011, L 1 AY 16/10). Nothing else applies to § 47 SGB I, which regulates, among other things, the free transfer of cash benefits to the account of the person entitled to benefits (LSG Berlin-Brandenburg, Judgement of 11/03/2022, L 15 AY 13/20 R, para. 47) or to § 44 SGB I (BSG, Judgement of 25/10/2018), which provides for interest on social benefits to be paid in arrears if, for example, these were initially wrongly rejected or determined to be too low. In consequence, although benefits under the AsylbLG that were initially withheld unlawfully are paid retrospectively, unlike social benefits they do not bear interest.

Even this cursory examination shows that those entitled to benefits under § 1 AsylbLG are not only treated differently from those entitled to social benefits, but are also placed in a worse position, due to the special procedural status they have because they receive benefits that belong to social law in the substantive sense only, and not also to social law in the formal sense.

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This finding can be continued.

§ 2 para. 2 SGB I obliges service providers to observe the social rights listed in SGB I when interpreting and exercising discretion and to ensure that the social rights listed in §§ 3-10 SGB I are realized as far as possible. Even if this interpretation guideline is not suitable for establishing legal positions, but rather presupposes them (BSG, Judgement of 19/03/2020, B 4 AS 1/20 R, para. 40), it does at least state that the scope for interpretation of the individual bases of entitlement should be filled with the normative content of the respective social right concerned and thus brought to bear as far as possible (BSG, Judgement of 10/11/2011, B 8 SO 12/10 R, para. 23). The Administrative Procedure Law (Verwaltungsverfahrensgesetz – VwVfG), a general administration procedure law on the federal level, and its state law equivalents on the level of the German federal states (L-VwVfG) do not contain a corresponding provision. When it comes to the interpretation of applications for benefits, the interpretation rule of § 133 Civil Code (Bürgerliches Gesetzbuch – BGB) remains applicable, according to which it is not the wording but the externally recognizable intention behind the declaration that is to be investigated and thus literal interpretation is barred (Busche, 2021: MN 7; OLG Dresden, Judgement of 18/10/2023, 12 U 484/23, para. 25). In individual cases, this can lead to results that fall short of those that would result from the application of the "principle of maximum support".

Interestingly, a look at the judicial decisions shows that many senates of the social courts – apparently influenced by their daily dealings with the "principle of maximum support" (Meistbegünstigungsprinzip) – readily apply it not only to the interpretation of procedural declarations of intent (BSG, Judgement of 30/10/2013, B 7 AY 7/12 R, para. 12; BSG, Judgement of 25/10/2018, B 7 AY 1/18 R, para. 9), but also in relation to the administrative procedure of the AsylbLG (BSG, Judgement of 26.06.2013, B 7 AY 3/12 R, para. 8; LSG Lower Saxony-Bremen Judgement of 03/11/2022, L 8 AY 55/21, para. 21; LSG North Rhine-Westphalia, Judgemet of 09/02/2012, L 9 AS 36/09, para. 88) and thus lose sight of the original justification of this principle.

§§ 13-15 SGB I, § 1 para. 3 no. 1 SGB II, § 11 SGB XII and other social or livelihood security law standards are special forms of the social law or social benefit relationship and oblige service providers to provide information, advice and information so that those entitled to benefits are aware of and assert possible social law claims. In the event of a breach of the duty to provide advice under § 14 SGB I, there is a risk of an official liability claim or a claim to remove the effects of the violation (sozialrechtlicher Herstellungsanspruch). § 17 para. 1 no. 3 SGB I obliges service providers to use generally understandable application forms, § 16 para. 3 SGB I to work towards clear and relevant applications without delay and to complete incomplete information. In contrast, the first two paragraphs of § 25 (L)VwVfG only contain "meagre" support obligations, which are not extended by the AsylbLG.

Significant differences between the administrative procedure governed by the (L)VwVfG and the administrative procedure governed by SGB X can also be found when comparing provisions that pursue fundamentally similar purposes and have similar content.

One example may suffice here:

The obligation to be heard is regulated in § 28 (L)VwVfG on the one hand and in § 24 SGB X on the other. Through a hearing, an authority informs a party that it intends to

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interfere with its rights. From the authority's point of view, the investigation of the facts has therefore been completed and the decision to interfere with rights has already matured to such an extent that the only obstacle to issuing the intended administrative act is the obligation to hold a hearing. Until the hearing, the parties involved often have no idea of the sword of Damocles that hangs over them and could adversely affect their legal position at any moment. They do not know that information has been obtained about them for weeks or months without their knowledge, that – depending on the area of law – their income and assets have been examined, possibly with the involvement of the tax office and their employer, that doctors providing treatment have been contacted and asked to provide medical opinions on their physical or mental state of health, their ability to work or earn a living, and so on. Only the hearing provides the person involved with knowledge of the proceedings and at the same time gives them the opportunity to inspect the files and thus also to access the information collected by the authority which it does not wish to include in the intended decision – perhaps to their disadvantage. Consultation and access to the file serve the self-determination of the citizen in the administrative procedure, the control of official action, a fair procedure by creating equality of knowledge and, in this respect, equality of arms, and overall ensure that the citizen is not merely the object, but the subject of the administrative procedure. In this regard it is instructive to read VGH Munich, Judgement of 17/02/1998 - 23 B 95.1954, NVwZ 1999, pp. 889, 890.

Consultation may be dispensed with under the exceptional circumstances provided for by law. A clear difference can already be seen in the fact that § 24 para. 2 SGB X defines an exhaustive catalog of exceptions, whereas the catalog in § 28 (L)VwVfG only lists standard examples of exceptions that can be extended by other, equivalent ones; the catalog of exceptions is therefore not exclusive (Kallerhoff & Mayen, 2023: MN 48, with further reference).

If the party involved is not consulted on the basis of a statutory exception, they often only become aware that an administrative procedure exists when the administrative procedure is concluded. Only the administrative act confronts the party with the results of the investigations initiated and controlled unilaterally by the authority alone. It is true that the addressee of the administrative act can defend himself against the regulation made by means of an appeal procedure – in this respect, he is generally first entitled to an objection, which triggers an internal administrative review procedure, and if the burden continues to exist, legal recourse to the social courts is open to him (Art. 19 para. 4 Basic Law, § 51 Social Court Act [Sozialgesetzbuch – SGG]) – so that he can correct untrue facts and present new facts. However, this in no way puts the person concerned on an equal footing with someone who has already had the opportunity to influence the issuing of the administrative act by submitting facts and legal arguments during the ongoing administrative procedure.

Before the administrative act is issued, the authority's legal opinion has not yet been established. If the party involved is heard, it can expose the facts already established by the authority as incorrect or incomplete. It is also possible that an evaluative decision, a balancing decision or a discretionary decision planned up to this point may turn out differently due to the new facts presented. It is particularly important here that the fact that it is now possible to inspect the files reveals which facts were collected by whom and which were not. This knowledge helps the party involved to steer their presentation of facts in a targeted manner, to supplement or correct facts, to suggest expert opinions, to

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contribute their own legal opinions and, if necessary, to change an evaluative decision or discretionary decision with the relevant facts. In such a procedural situation, it cannot be said that the party involved is merely an object of state action, that he is an object in the sense of the procedural law and understanding of the law applicable at the time of the Weimar Constitution. He is not ensnared in a relationship of domination that is derived from a great primal right to obedience (Gröschner, 2004: 414; with refence to Meyer, 1924: 101, 104, 106) and makes him an administrative object (Schuler-Harms, 2023: para. 5). He is the subject of the procedure and literally *a participant* in the administrative procedure, so that the promise of the rule of law is fulfilled. In this sense, the Federal Constitutional Court formulated in 2020:

> "In a state governed by the rule of law, the person concerned must not be a mere object of the proceedings; he or she must be given the opportunity to influence the course and outcome of the proceedings in order to safeguard his or her rights" (BVerfG, Decision of 12/11/2020, 2 BvR 1616/18, para. 34).[5]

The Federal Social Court reiterated this almost passionately in 2022 to justify the right of a party to be accompanied by a counselor during a court-ordered medical examination. Both courts also emphasized the right to a fair trial (BSG, Judgement of 27/10/2022, B 9 SB 1/20 R, para. 25 to 34).

Anyone who now thinks that the non-heard party has the same opportunities to influence the decision through the possibilities for factual and legal submissions opened up in the appeal and legal proceedings is mistaken. They overlook the fact that public authority employees are not "service delivery machines", but human beings. It does not seem far-fetched that the person who has spent a great deal of time and intellectual effort investigating and legally assessing the facts of the case will not regard an appeal against the administrative act in redress proceedings as the assertion of a right based on the rule of law or even the Basic Law. Instead, they might strive to defend their decision against the attack they have encountered, while still aiming to make as objective an assessment as possible based on the aspects presented in the objection.

In appeal proceedings, with the exception of cases of evident illegality of the contested administrative act, a priming effect (Myers & DeWall, 2023: 375) must be assumed, which will lead to an influence by the decision already made, particularly in the case of discretionary decisions and decisions made on the basis of a balancing of interests; a completely independent assessment of the factual and legal situation by the appeal authority, detached from the previous assessment, can therefore not be expected. In legal proceedings, judicial review is in any case only limited to the legality of a discretionary decision; neither the fact that an official in charge in the original proceedings would have

[5] At the same time, the Court made it clear that the requirements of an effective administration of justice must also be taken into account as part of the overall view of procedural law to be taken (with reference to BVerfG, Decision of 14/2/1978, 2 BvR 406/77, BVerfGE 47, 239 <250>; BVerfG, Decision of 14/9/1989, 2 BvR 1062/87, BVerfGE 80, 367 <375>; BVerfG, Decision of 15/1/2009, 2 BvR 2044/07, BVerfGE 122, 248 <272>; BVerfG, Judgement of 19/3/2013, 2 BvR 2628, 2883/10, 2155/11, BVerfGE 133, 168 <200 f.>). Procedural arrangements that serve the requirements of an effective administration of justice therefore do not already violate the right to a fair trial if the procedural positions of the person concerned are set back in favor of an effective administration of justice (see BVerfG, Decision of 15/1/2009, <273>; BVerfG, Judgement of 19/3/2013, <201>). This is to be applied to the requirements of a functioning state administration

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personally made a different lawful discretionary decision if all the facts had been known in good time, nor any priming that the regulation of the administrative act and its justification may have triggered in the persons appointed to make the opposition decision, would lead to the administrative act being set aside by the court.

The difference is even more dramatic when one considers that it can be assumed that "people with a migration background have higher thresholds to overcome in accessing justice (…) and are therefore more likely not to assert their rights adequately" (Wrase et al. 2022: 70).

Regardless of the language barrier that may stand in the way of legal action, a person who has grown up in a totalitarian system and who is unfamiliar with the rule of law in its German form will in all likelihood not question decisions of the State with the same naturalness as someone who has grown up in the Federal Republic of Germany by lodging an objection and/or filing a lawsuit and will not dare to make a factual and/or legal submission against a state authority. It takes experience of the rule of law and an imprint of the rule of law before people can oppose state decisions without fear of reprisals. If people are reluctant to defend themselves against an official decision by lodging an objection or taking legal action, withholding a hearing means that the decision-makers decide solely on the basis of the facts that are the result of their own investigations.

To return to the initial question: Whether the authority becomes aware of one and the same factual or legal submission *before* or *after* the administrative decision is issued, can lead to different decisions in individual cases. It therefore makes a considerable difference whether the applicable administrative procedural law only allows a hearing to be dispensed within very exceptional cases (as in § 24 para. 2 SGB X) or whether it defines the circle of exceptions broadly (as in § 28 [L]VwVfG). This difference is particularly painful when, as in the case of the AsylbLG, it comes to legal interventions with regard to benefits that guarantee human dignity.

The list of differences between SGB I and SGB X on the one hand and (L)VwVfG on the other could be continued. The finding is always the same: The provisions of SGB I and SGB X that characterize the administrative procedure are more "citizen-friendly" in that they help the legal manifestations of the welfare state principle to unfold and contribute to ensuring that even those who – whether due to mental illness, disability, intellectual overload, lack of literacy or language skills or for other reasons – are unable to pursue their legal interests in a proper, goal-oriented and self-responsible manner can nevertheless assert and enforce their claims to social benefits.

The self-responsibility required by the legislator in social law, which is characterized in particular by the need to find one's way through the maze of different benefit systems under social law, to submit applications according to the respective needs, to fill out application forms (correctly), to respond (correctly) to official inquiries, to fulfil obligations to cooperate, to seek legal remedies, etc., is often only made possible, or at least made considerably easier, by the social administrative procedure law regulated in SGB I and SGB X. Those involved are less reliant on private aid organizations or charities to provide support, as the respective authorities have the task of helping social rights to develop as far as possible, regardless of the costs involved.

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4 Legal Policy Requirements and Necessities

It is not surprising that there are voices in the literature calling on the legislator to wrest the AsylbLG from the regime of the (L)VwVfG (Groth, 2020: MN 21; Löcher, 2022, AsylbLG, MN 501)[6] - even if they do not express this quite so drastically. In other words, they demand the application of not only individual provisions, but of the entire SGB I and SGB X for the administrative procedure under the AsylbLG.

This demand is justified. The legislator has responded to the special challenges of social law matters with the SGB I and SGB X. Social law is the social and constitutional response to the occurrence of dramatic life situations in the lives of individuals that are characterized by hunger, housing shortage, illness, need for care, disability, unemployment and other situations of need that threaten financial existence, a dignified life or participation in life in society in order to achieve social security, social justice or socio-political goals. Quite a few people entitled to benefits are not in a position to bear the burden of the social responsibility imposed on them by the legislator. Through the administrative procedural law SGB I and SGB X, the legislator has created a "social" procedural law that is far more supportive of the parties involved than the provisions of the VwVfG, which is *aimed* in particular at ensuring that social benefits are claimed and guaranteed and not, for example, at conserving the official budget.

Particularly when it comes to benefits that secure a livelihood and enable a dignified life for people in need of protection who neither speak German nor understand German culture or the German constitutional State, and who are not capable of legally navigating on their own, the administrative procedure should be based on SGB I and SGB X rather than on the (L)VwVfG. The legislator has not yet noticed the special procedural needs of those entitled to benefits under the AsylbLG, who are probably in even greater need of protection than those entitled to benefits under the Code of Social Law, or at least has not taken the opportunity to order the application of SGB I and SGB X in their entirety. A change in the law is more than desirable.

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ISSN 2750-7882, Section: Commentary
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.197

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COMMENTARY

Rejections at the Border: A Derailed Debate with the Potential to Destroy the European Union[1]

Ralf Roßkopf[2]

Abstract

The migration debate has become even more heated since the admission of refugees from Ukraine and the simultaneous general humanitarian and irregular migration pressure. It impacts national and European discourses as well as election results, government constellations and policies. In Germany, a dispute has arisen over the implementation of rejection of asylum seekers at internal borders. This has the potential to indirectly jeopardise the Common European Asylum System as well as the Schengen freedom of movement in Europe as a whole and eventually the European project itself. The following article aims to familiarise a European and international readership with the explosive force of this debate.

Key Words:

EU Law; Dublin III; national sovereignty; asylum seekers; rejection

1 Introduction

Since the mass influx of refugees in 2014-2016, migration and its management has been a core issue that has dominated elections and discourses in Europe. The flight of several million Ukrainians to the European receiving countries has updated and further intensified the debate. Right-wing parties have emerged or strengthened. The public debate has become polarised, brutalised and in some cases dehumanised. Institutions and people feel overwhelmed. The dysfunctional European asylum responsibility system Dublin III and its supremacy over national border regimes is no longer understood by the population. Member states are further undermining the system by ignoring and profiting from systemic deficiencies related to reception conditions and asylum procedures. In Germany, an asylum debate is intensifying that could have repercussions for the entire European Union (EU). Many are no longer struggling to find strategies that comply with European law, but are instead turning away from European rules or intentionally accepting their violation knowing that European control and sanction mechanisms are mostly slow and sometimes inefficient. The effects will be pan-European and threaten to shake the EU to its core - which is also the aim of its internal and external opponents.

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Open Access Publication, https://doi.org/10.57947/qrp.v63i3.197

The intention of this article is therefore to Europeanise the German debate, because this corresponds to its actual dimension and solutions can only be found at a pan-European level. Firstly, the explosive force of the current discussion is outlined (2.), then an overview of the requirements and functioning of the European asylum responsibility system is given (3.), the legal arguments in favour of refoulement at borders are examined (4.) before alternatives are suggested (5.), and finally a summary with an outlook is given (6.). The discussion focusses on persons seeking international protection or German constitutional asylum at the border. Possibilities of refoulement under the Schengen Borders Code in relation to other migrants are therefore only recalled here but not further elaborated. The relevant Schengen Borders Code declares that the transfer procedure regulated therein does not apply to persons who have applied for international protection, see Art. 23a para. 1 subpara. 2 of Regulation (EU) 2024/1717.

2 Current German Debate and its Explosive Potentials for Europe

If Dublin III were to function according to the rules, this would lead to the final collapse of the asylum systems at the external borders in the south and east of the EU and, as a result, to further political radicalisation. This is because it almost purely relies on the responsibility of the border states for securing the common external borders and - on paper - relieves the burden on the often economically and financially stronger Member States of Central and Northern Europe. Nevertheless, the new EU migration pact of 2024 leaves the Dublin responsibility system untouched at its core. It relies on an even more extensive shift of responsibilities to the external borders and a complex compensatory solidarity mechanism; whether it will ever be effectively implemented remains to be seen but is already put in question by certain Member States (Roßkopf, 2024: 186-188). Hardly anyone in politics is likely to hope that this would lead to a fairer distribution, a functioning system and a pacification of public discourse.

The legal complexity of the multi-level system is incomprehensible to the population. However, the failure of the system is "felt" and discredits trust in established parties, institutions and the state. This makes the simplistic slogans of right-wing and left-wing parties all the more receptive. Their sometimes inhuman basic assumptions become are about to develop into mainstream. The elections of the last decade in the Member States are a clear evidence. At EU level, the 2024 European elections were the latest proof. In the Netherlands, the new right-wing government just announced its plan to declare an asylum crisis, tighten border controls, introduce the strictest asylum procedure ever and apply for an opt-out from the European asylum rules (Kazmierczak, 2024). In Germany, the Election for the European Parliament was followed by elections in federal States, from which the far-right Alternative for Germany (Alternative für Deutschland – AfD) party emerged as the strongest party in Thuringia and narrowly missed out on this goal in Saxony; forecasts see it coming first in the upcoming election in the State of Brandenburg.

Against this backdrop, the governing coalition in Germany (SPD, Greens, FDP) is backing the reintroduction of continuous border controls, extended detention and accelerated transfer procedures (Litschko, 2024) after a long period of resistance. The largest opposition group (CDU/CSU) additionally insists on the immediate rejection at German borders of people who have already been accepted in another EU Member State or the Schengen Area or who can also apply for asylum in a country from which they wish to enter (Deutscher Bundestag, 2024). Dogmatically, it does not argue outside of EU law, but rather within EU law by relying on Art. 72 of the Treaty on the Functioning of the EU (TFEU)

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(Thym, 2024). Those who see a basis for rejections in Art. 20 para. 4 Dublin III Regulation argue in a similar way, based on the primacy of European law. Others, on the other hand, see the systemic failure of European law as a justification for disregarding it and resorting to purely national border protection regulations (Fritzsch & Haefeli, 2024).

The German debate has European significance. Whatever the justification for the rejections at Germany's borders, considering the sheer absolute number of applicants destined to go to Germany, they are more than likely to trigger a domino effect on the other Member States – just as the introduction of the safe third country approach by Germany did in the 1990s. It is to be expected that Germany's neighbouring states would eventually resort to the same means. This would conceptually achieve the transfer of responsibilities to the external borders intended by the Dublin III Regulation - and at the same time in reality the complete collapse of the asylum system there, of humanitarian reception standards, of Member State solidarity and thus of a European asylum responsibility system.

In reality, however, this presupposes that the rejected persons are then treated by the respective neighbouring states in accordance with the applicable provisions of the Asylum Responsibility System. However, experience to date suggests that those applicants affected would continue to try to cross the green border into their destination country without being prevented from doing so by the neighbouring countries. The goal of easing the situation could therefore only be achieved by further expanding border controls, border facilities and border surveillance at Europe's internal borders. However, this would be the definitive end of a border control-free Schengen Area and thus the end of one of the main arguments in favour of a Europeanised asylum law as a whole (see also Rat für Migration, 2024).

The shocks that are to be expected from the collapse of these achievements of the European idea will hardly be limited to the migration context. They have the potential to throw the basic architecture of the EU back from a supranational community to an international organisation oriented towards the respective national self-interests. Frankly, this is the real goal of the various alliances of European right-wing parties and the hope of the economic, political and military opponents of the European Union globally. In the end, this desolidarisation would not stay limited to nationals of third countries. It is likely to eventually spread to nationals of other Member States, too. The often forgotten and at the same time so successful essence of the European Union, the establishment of a European peace order through supranational integration, would be jeopardised.

3 The Requirements of the European Asylum Responsibility System

The European asylum responsibility system is currently governed by the Dublin III Regulation (EU) No. 604/2013 of 26 June 2013 (Dublin III Regulation) and in future by the Management Regulation (EU) 2024/1351 of 14 May 2024 (Management Regulation). The latter leaves the core of the Dublin III Regulation fundamentally unaffected and, in its parts relevant here, will essentially only enter into force on 1 July 2026 (Art. 85 Management Regulation). The following explanations are therefore based on the Dublin III Regulation.

This

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> "lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person"

(Art. 1 Dublin III Regulation). In this respect, it promises that every application for international protection will be examined but only by a single Member State (Art. 3 para. 1 Dublin III Regulation). The criteria for determining the Member State responsible are set out in the order of priority (Art. 7 Dublin III Regulation) in Art. 8-15 Dublin III Regulation. Subject to the proviso that provisions on the protection of minors (Art. 8 Dublin III Regulation) or family protection (Art. 9-11 Dublin III Regulation) are not relevant and no Member State has already issued a residence permit or visa for the applicant, the Member State whose land, sea or air border an applicant from a third country has crossed illegally is generally declared responsible (Art. 13 para. 1 Dublin III Regulation). This gives rise to the main responsibility of the Member States with external borders and the large number of migration routes in the south and south-east of the EU for carrying out the procedure and securing these external borders.

In fact, however, reality shows that many protection seekers move on to other Member States unnoticed, unregistered or even after registering in one of these countries. Germany is the country most affected by this in absolute terms. In 2022, three quarters of the 217,774 first-time applicants in Germany had not yet been registered in any EU country, although almost all of them travelled via these countries (Reiche, 2024).

The Dublin III Regulation is not blind to this but establishes a formal admission and readmission procedure. However, this provides for relatively long deadlines of generally three months or, in the case of a Eurodac match, two months for the request to take charge (Art. 21 para. 1 Dublin III Regulation) or for the request to take back (Art. 23 Dublin III Regulation) regularly two months or, in urgent procedures, one month for the response to the request to take charge (Art. 22 para. 1 and 6 Dublin III Regulation) or one month or, in the case of a Eurodac match, two weeks for the response to the request to take back (Art. 25 Dublin III Regulation). There is a right of appeal against the transfer decision (Art. 27 Dublin III Regulation). The transfer itself should take place as soon as this is practically possible and at the latest within a period of six months after the acceptance of the application to take charge or take back, or a final decision on an appeal or a review, if these have suspensive effect (Art. 27 para. 3 Dublin III Regulation) (Art. 29 para. 1 Dublin III Regulation). If the aforementioned deadlines are not met, responsibility is transferred to the defaulting Member State. Additionally, the procedure is highly dependent on the cooperation and compliant registration by the Member States, which is often lacking in practice (see above) and therefore leads to the State of residence assuming responsibility once the deadline expires.

Furthermore, a transfer to the Member State actually responsible cannot take place if there are substantial grounds for believing that the asylum procedure and the reception conditions for applicants in this Member State have systemic weaknesses that entail a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights. In this case, the Member State examining responsibility continues the examination of the criteria set out in Chapter III in order to determine whether another Member State can be designated as responsible and, in case of doubt, becomes responsible itself (Art. 3 para. 2 subparas. 2 and 3 Dublin III Regulation). Conversely, if the violations of the law are not sanctioned immediately and consistently, this exception,

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which is required under human rights law, creates a false incentive for the Member State with a systemic problem (thereby violating its obligations under European law) not to remedy the irregularities in the first place. The fact that this is not happening to a sufficient extent in the case of Greece, even after a decade, can at best be explained but never be justified by referring to the financial and economic situation there, unless one wants to assume that the catastrophic humanitarian conditions at the external borders are intended to serve as a deterrent.

The asylum responsibility system, itself, provides for a separate mechanism for early warning, prevention and crisis management involving the European Commission and the European Union Agency for Asylum (Art. 33 Dublin III Regulation), which should provide a remedy. In addition, infringement proceedings could be initiated by both the European Commission (Art. 258 of the Treaty on the Functioning of the European Union - TFEU) and the other Member States (Art. 259 TFEU).

As part of EU law, the regulations of the European asylum responsibility system described above have priority of application compared to national laws. This is not only established case law of the European Court of Justice (see below) but also accepted by the Federal Constitutional Court (Federal Constitutional Court [Bundesverfassungsgericht – BverfG], Decision of 22 October 1986, 2 BvR 197/83); the exception made by the Court for the case of insufficient protection of fundamental rights at Union level is currently neither applicable nor conceivably relevant in the cases discussed here. The Basic Law itself gives priority not only indirectly to the obligation of the Federal Republic to participate in the development of a European Union, which is committed to democratic, constitutional, social and federal principles and to the principle of subsidiarity, in order to realise a united Europe, and which guarantees a protection of fundamental rights that is essentially comparable to this Basic Law (Art. 23 para. 1 Basic Law [Grundgesetz – GG]). Specifically in the area of the fundamental right to asylum, the primacy of relevant European law is expressly enshrined in Art. 16a para. 5 GG.

4 Rejections at the Border: Analysing the Legal Argumentation

There are essentially four lines of argumentation for the legal justification of intended refoulement at the borders with corresponding variations. These have already been analysed in detail by Markus Rau (2018) and can be followed up there in all their ramifications. Thus, when analysing the interpretative approaches below for their justifiability, the explanations will be limited to the main lines of thought, citing recent literature. Assuming for the sake of argument that these lines of argument were in fact convincing and rejections could be applied, the minimum human rights standards to be observed are outlined in conclusion. They could impair the efficiency and often intended deterrent effect of envisioned rejections.

4.1 Lines of Argument

4.1.1 Justified Recourse to National Regulations due to System Failure

Some argue that recourse to national regulations for the implementation of refoulement (in Germany: Section 18 (2) Asylum Procedure Act) is justified because the European asylum responsibility system has lost its priority of application due to its failure already referred to (most recently Fritzsch & Haefeli, 2024).

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However, such a reservation of sovereignty would not only be contourless and arbitrary. It would contradict the primacy of application of EU law, the Basic Law as well as the case law of the European Court of Justice and the Federal Constitutional Court (see 3. above). For example, the ECJ, Judgement of 26/7/2024, C-646/16, paras. 93-100, stated that the Dublin regulations would also have to be complied with in the event of a mass influx and an overburdening of the Member State responsible:

> "The fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation.
>
> It should be noted, in the first place, that the EU legislature has taken account of the risk that such a situation may occur and therefore provided the Member States with means intended to be capable of responding to that situation appropriately, without, however, providing for the application, in that case, of a specific body of rules for determining the Member State responsible.
>
> Thus, Article 33 of the Dublin III Regulation establishes a mechanism for early warning, preparedness and crisis management designed to implement preventive action plans in order, inter alia, to prevent the application of that regulation being jeopardised due to a substantiated risk of particular pressure being placed on a Member State's asylum system.
>
> In parallel, Article 3(1) of the Dublin III Regulation provides for the application of the procedure established by that regulation to any application for international protection by a third-country national or a stateless person on the territory of any one of the Member States, without precluding applications which are lodged in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection.
>
> In the second place, that type of situation is specifically governed by Directive 2001/55, Article 18 of which states that, in the event of a mass influx of displaced persons, the criteria and mechanisms for deciding which Member State is responsible are to apply.
>
> In the third place, Article 78(3) TFEU empowers the Council of the European Union, on a proposal from the European Commission and after consulting the European Parliament, to adopt provisional measures for the benefit of one or more Member State confronted by an emergency situation characterised by a sudden inflow of third-country nationals.
>
> Accordingly, the Council has previously adopted, on the basis of Article 78(3) TFEU, Council Decisions (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146) and (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).
>
> In the fourth place, irrespective of whether such measures are adopted, the taking charge in a Member State of an unusually large number of third-country nationals seeking international protection may also be facilitated by the exercise by other Member States - unilaterally or bilaterally with the Member State concerned in a spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation - of the power provided for in Article 17(1) of that regulation, to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation."

Apart from its irrelevance, it would also not be justifiable, as European law provides Germany with sufficient options to counter perceived losses of sovereignty and control. This can be done on several levels: Contractually, by participating in the amendment of primary law; legislatively, by participating in the amendment of secondary law; judicially,

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by initiating infringement proceedings (such as those successfully conducted by the European Commission against Poland, Hungary and the Czech Republic for failing to cooperate in the resettlement of refugees, ECJ, Judgement of 2/4/2020, C-715/17, C-718/17, C-719/17); administratively by speeding up its own procedures or invoking the mechanism provided for early warning, prevention and crisis management, however inadequate they may be (see Wegge, 2024). However, the German government has only just confirmed the existing regulations by approving the migration pact. How could it possibly deviate from them immediately after. It is also not making use of the other existing mechanisms.

4.1.2 Bilateral Administrative Agreements

Some argued that bilateral administrative agreements with neighbouring countries could lead to accelerated procedures and transfers. Germany has indeed concluded some of these. However, these so-called "pre-Dublin procedures" are not covered by European law in accordance with Art. 36 para. 1 of the Dublin III Regulation as they do not merely regulate the practical modalities of implementing the Regulation. Rather, they contradict the Regulation and may therefore not be applied due to the primacy of European law (Wegge, 2024: 129-130; see also VG Munich, decision of 4/5/2021, M 22 E 21.30294, para. 88).

4.1.3 The Responsibility Rule of Art. 20 para. 4 Dublin III Regulation

In some cases, Art. 20 para. 4 Dublin III Regulation is seen as a suitable basis for the implementation of border refoulement. The provision reads:

> "Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged."

In some cases, the provision is only considered applicable to asylum applications in an embassy located in a Member State. Based on the wording and probably also the drafting history, applicability at internal borders cannot be ruled out. However, the scope of application is extremely limited, as it would only apply to cases in which the refusal took place, for example, in the context of joint advanced border controls on the territory of the neighbouring State or directly at the border, while the applicant is still on the territory of the neighbouring state. Only then would the meaning and purpose of the provision be fulfilled, namely to declare the Member State responsible that can exercise effective control over the person on the basis of territorial sovereignty, which would render any transfer procedure with all its formalities and the need for consensus between the Member States involved superfluous. This is also the aim of an EU Commission recommendation on alternatives for border controls (Reiche, 2024; see also on the current status European Commission, 2024).

For the same reason, attempts to reinterpret the "territory" defined under international law for the purposes of applying Article 20(4) of the Dublin III Regulation must be rejected in order to take account of the reality that border controls in the Schengen Area – insofar

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as they (may) still be carried out at all – regularly take place back from the border on national territory (Wegge, 2024).

4.1.4 The Responsibility Rule of Art. 72 TFEU

Art. 72 TFEU, which is subject to the general provisions of Title V of the TFEU, provides a legal basis for the implementation of refoulement that is conceivable in principle under European law, and thus concerns not only policies on border controls, asylum and immigration, but also the provisions on the area of freedom, security and justice in general. It states:

> "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

It would therefore be conceivable in principle to justify refoulement with the aim of maintaining public order and security (Fritzsch & Haefeli, 2024). However, it would have to be taken into account that the regulations of the European asylum responsibility system aim to achieve precisely this. It would therefore have to be an extraordinary crisis situation from the outset (cf. Thym, 2024). As explained above, they themselves and treaty law also provide options for action that can be used to address extraordinary stress and crisis situations or behaviour by other Member States that is in breach of the treaty (Thym, 2013). A justifiable situation therefore first requires that the legally available means are exhausted. Even then, burdens would generally have to be accepted as inherent in the regulations, unless they were so exceptional that the European legislator failed to recognise them in this dimension or apparently did not take them sufficiently into account and additionally are almost unbearable.

The ECJ, Judgement of 2/4/2020, C-715/17, C-718/17 and C-719/17, paras 144-147, explains in this respect:

> "In addition, the derogation provided for in Article 72 TFEU must, as is provided in settled case-law, inter alia in respect of the derogations provided for in Articles 346 and 347 TFEU, be interpreted strictly (see, to that effect, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783, paragraph 52, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 63).
>
> It follows that, although Article 72 TFEU provides that Title V of the Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities (see, by analogy, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783, paragraph 53, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 64).
>
> The scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the European Union (see, to that effect, judgments of 11 June 2015, Zh. and O., C-554/13, EU:C:2015:377, paragraph 48, and of 2 May 2018, K. and H.F. (Right of residence and alleged war crimes), C-331/16 and C-366/16, EU:C:2018:296, paragraph 40 and the case-law cited).
>
> It is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security (see, by analogy, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783,

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paragraph 55, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 66)."

However, the Federal Republic of Germany has not yet activated the other management mechanisms granted to it under European law. On the contrary, this year it has virtually agreed to the extension of the current asylum responsibility system in the form of the Management Regulation. In 2022 and extended since then, it has agreed to accept Ukrainian refugees after activating the special mechanism of the Temporary Protection Directive 2001/55/EC, taking in over a million of them and providing them with benefits that exceed the minimum required under EU law. The resulting burdens can hardly be cited to justify a deviation from European regulations on international protection. Moreover, European law would also leave room for manoeuvre, for example in lowering the national admission requirements to European minimum standards. Finally, the admission of a threat to security and order would also be an admission by the government that it loses control.

In any case, the justifying exceptionality would subsequently have to be demonstrated to the European Commission and the European Court of Justice. No Member State has yet succeeded in doing so by invoking Art. 72 TFEU. No better arguments for exceptional justification can be derived for Germany from the above. Nevertheless, to do so with a view to a judgement by the European Court of Justice at a much later date in the expectation that the deterrent effect could lead to a significant reduction in immigration figures by then (at least pointing to the possibility, Thym, 2024) would not only be based on no solid scientific assumption of the facts (Rat für Migration, 2024), but would also bear traits of an intentional breach of the law.

4.1.5 Interim Result

Refoulement at the German border cannot be justified dogmatically on the basis of system failure or bilateral administrative agreements and, with the exception of joint, border controls on the neighbouring countries side of the border, also not on the basis of Art. 20 para. 4 Dublin III Regulation. As for Art. 72 TFEU, its inherent requirements are not met.

4.2 Minimum Human Rights Standards in Rejection Cases

Even if it is assumed that there was sufficient justification for carrying out refoulements at the border, minimum human rights standards would have to be observed. In particular, the European Court of Human Rights (ECtHR) has derived corresponding requirements for refoulement at territorial borders from the European Convention on Human Rights (ECHR). Germany as a signatory state and the European Union on the basis of primary law (Art. 6 para. 3 of the Treaty on European Union - TEU) are obliged to comply with this Convention.

Actions by border officials or police officers at the land border fall within the scope of the European Convention on Human Rights (Art. 1 ECHR). This applies both to events at border fences erected by the contracting state on its territory (ECtHR, Judgement of 13/2/2020, N.D. and N.T. v. Spain, no. 8675/15 and 8697/15, para. 104-111), as well as to the refusal to accept asylum applications or to deny access at border control (ECtHR, Judgement of 11/12/2018, M.A. and Others v. Lithuania, no. 59793/17, para. 70; ECtHR, Judgement of 23/7/2020, M.K. and Others v. Poland, no. 40503/17, para. 129-132; ECtHR, Judgement of 8/7/2021, D.A. and Others v. Poland, no. 51246/17§§ 33-34).

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Therefore, there is an obligation on the returning state to assess the risk that the rejected asylum seeker (the application does not have to be explicit or formal, ECtHR, Judgement of 23/2/2012, Hirsi Jamaa and Others v. Italy, no. 27765/09, para. 123-136) is granted an adequate asylum procedure and protection from direct or indirect return to his or her country of origin in the neighbouring country without sufficient assessment of the risk of torture or inhuman or degrading treatment or punishment there (ECtHR, Judgement of 14/3/2017, Ilias and Ahmed v. Hungary, no. 47287/15, para. 130-138). To this end, the generally available information about the neighbouring state and its asylum system must be examined in an appropriate manner and on the asylum seeker's own initiative. In addition, the asylum seeker must be given the opportunity to demonstrate that the neighbouring state is not a safe third country in their particular case (ECtHR, Ilias and Ahmed v. Hungary, para. 139-141, 148, 152). This also applies to detention conditions and living conditions if this is precisely what constitutes a danger in the individual case (ECtHR, Ilias and Ahmed v. Hungary, para. 131).

Prohibitions on rejections must also be examined with regard to generally inadequate reception conditions (ECtHR, Judgement of 21/1/2011, M.S.S. v. Belgium and Greece, no. 30696/09, para. 362-368) or with regard to particular vulnerability (ECtHR, Judgement of 4/11/2014, Tarakhel v. Switzerland, no. 29217/12, para. 100-122). Insofar as asylum seekers clearly demonstrate the risk that their asylum application will not be treated seriously in the neighbouring country and that there is a risk of a violation of Art. 3 ECHR, the asylum seeker must be granted residence until the allegations can be properly verified (ECtHR, M.K. and Others v. Poland, para. 178-179). The mere reference to the responsibility of another member state for conducting the asylum procedure in accordance with the provisions of the Dublin III Regulation does not release the rejecting state from an individualised examination of potential violations of the ECHR (ECtHR, Judgement of 21/10/2014, Sharifi and Others v. Italy and Greece, no. 16643/09, para. 223).

Refoulement at the border therefore requires an administrative and documented verification procedure in individual cases. General exceptions for certain groups of particularly vulnerable persons are also conceivable. Germany would not be exempt from this obligation to check with neighbouring countries, even with regard to their status as EU Member States. However, the risk situation could be pre-checked in abstract terms and then concretised and updated on the basis of the individual claims of those seeking protection. As these are all states for which no systemic deficits have currently been identified, the review should be realisable in most cases with a reasonable amount of effort and in a way that will stand up in court.

5 Alternatives: European Solutions

Even if, from a human rights perspective, refoulement at the border appears conceivable and administratively manageable, this presupposes a legal justification for the refoulement in accordance with Art. 72 TFEU that is not yet apparent, as well as the actual acceptance of persons seeking protection by the neighbouring states. Their willingness to do so is likely to be low, at least in the event of uncoordinated measures. In any case, the Austrian Minister of the Interior Gerhard Karner has already positioned himself to this effect (Reiche, 2024).

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What remains beyond the possibilities of demonstrating an extraordinary threat to security and order are measures that – in line with the idea of the European Union – often require coordination and cooperation with the other Member States as well as third countries, some of which could also be implemented by the Federal Government alone. They can only be listed here in rudimentary form and in bullet points:

- Implementation of joint border controls in the territory of neighbouring states
- Initiating infringement proceedings against Member States that do not fulfil their legal obligations
- Changing the basic concept of the European asylum responsibility system towards a quota-based distribution of asylum seekers and further shortening of time limits in the transfer procedure
- Utilisation of the planned mechanism for early warning, preparedness and crisis management
- Expansion of European responsibilities for border security and asylum procedures
- Conclusion of further migration agreements with countries of origin and transit countries, granting legal access routes in exchange for the readmission of own nationals and third-country nationals who are obliged to leave the country
- Speeding up Dublin and asylum procedures by increasing the necessary human resources

In many cases, the key lies in the latter point of speeding up procedures – while at the same time safeguarding the interests of particularly vulnerable asylum seekers. Reception conditions that are conducive to further concentration of the procedure and at the same time counteract false incentives for economically motivated migration could be justified for rather short procedure periods of only a few days and weeks.

At the same time, it must be explained to the populations of the Member States that, in a globalised world from which they benefit in many ways, they are also negatively affected by realities in distant countries. This requires increased investment in international cooperation and development aid and the acceptance of migration as a reality. Migration must be shaped, but it cannot be barred out or completely stopped or controlled beyond one's own borders - except at the cost of losing one's own set of values, which isolationist agitators falsely try to make us pretend to be true out of carelessness or with the intention to deceive.

6 Conclusions and Outlook

The migration debate has become exacerbated, polarised and partially off the trail. It has the potential to destroy not only humanitarian migration law, but also the European Union as a supranational institution and peace order, as well as the constitution of its member states. After a decade of heated debates, growing disenchantment with politics and the delegitimisation of state institutions and their representatives, democratic, pro-European forces are called upon to finally find solutions that are both humanitarian and effective. Compromises from all sides are unavoidable. Too much is at stake. Unilateral state action, however, will not solve the problems but will only exacerbate them in the medium term.

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JURISDICTION

Recent Jurisdiction Relevant for the Contexts of Migration and Displacement
A Compilation of Court Cases[1]

Simone Emmert,[2] Ralf Roßkopf[3]

This compilation of case law samples, summarizes and refers to recent jurisdiction of international relevance for the application of legal standards in the field of refugee and complementary protection.

1. United Nations

1.1 International Court of Justice, Request for an Advisory Opinion in respect to climate change submitted by the General Assembly of the United Nations (A/77/L.58), No. 2023/20, and Call to a public hearing, Press Release of August 16, 2024.

Climate change develops into a main root cause for migration (see the editorial of this issue (Emmert, 2024). More and more courts get involved in individual cases or as illustrated below and in section 2.1 in requests for advisory opinions. The first is on request by the UN General Assembly (UNGA Res. 77/276) and summarized by the Court as such

> "On 29 March 2023, the General Assembly of the United Nations adopted resolution A/RES/77/276 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on "the obligations of States in respect of climate change". The following questions are put to the Court by the General Assembly in its resolution:
>
> > "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
> >
> > (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

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> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

Meanwhile, the time limit for written statements by the United Nations and its Member States has expired, a number of organizations have been authorized to participate and the Court scheduled the public hearings to open on 2/12/2024 (International Court of Justice, 2023).

1.2 International Court of Justice, Advisory Opinion of 19/7/2024 in respect to the Legal Consequences Arising form the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem

On 30/12/2022 the United Nations General Assembly had adopted Resolution 77/247 in respect to Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem. Among others, it requested an advisory opinion from the International Court of Justice:

> "18. Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 6 5 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
>
> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?" (UNGA Res. 77/247).

The International Court of Justice delivered its advisory opinion on July 19, 2024. The Court, first, argues "that there are no compelling reasons for it to decline to give the opinion requested by the General Assembly (paras 30-49). The Court confirms that the Palestinian territories are still to be considered under *occupation* (paras. 86-94). Therefore, the applicable rules and principles of international law include the prohibition of the acquisition of territory by threat or use of force and the right of peoples to self-determination (para. 95), humanitarian law and human rights obligations (para. 96-101). "[T]he Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory" (para. 102).

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The Court then puts Israel's policies and practices in the occupied Palestinian territory under scrutiny. It starts with stressing: "The fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law." (para. 109).

> "The fact of the occupation cannot result in the transfer of title, regardless of the duration of the occupation. Therefore, the passage of time does not release the occupying Power from the obligations that it bears, including the obligation to refrain from exercising acts of sovereignty, nor does it expand the limited and enumerated powers that international humanitarian law vests in the occupying Power" (para. 108).

Settlement Policy

The ICJ then turns to the Israeli s*ettlement policy* that is seen as a continuum "throughout its occupation of the Occupied Palestinian Territory" (para. 113). It obseres a violation of Art. 49 para. 6 of the Fourth Convention that requires: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

Israel's policy of *confiscation and requisitioning of land*, is found to be in contradiction of Art. 46, 52 and 55 Hague Regulations, calling for protection of private property (Art. 46), limiting requisitions (Art. 52) and establishing the "duty to administer public property for the benefit of the local population or, exceptionally to meet the demands of army of occupation" (Art. 55) (para. 122)s

Regarding the Israeli *exploitation of natural resources* of the occupied territories, the Court finds more violations of international law:

> "On the basis of the evidence before it, the Court considers that Israel's use of the natural resources in the Occupied Palestinian Territory is inconsistent with its obligations under international law. By diverting a large share of the natural resources to its own population, including settlers, Israel is in breach of its obligation to act as administrator and usufructuary. In this connection, the Court recalls that the transfer by Israel of its own population to the Occupied Palestinian Territory is contrary to international law (see paragraph 119 above). Therefore, in the Court's view, the use of natural resources in the occupied territory cannot be justified with reference to the needs of that population. The Court further considers that, by severely restricting the access of the Palestinian population to water that is available in the Occupied Palestinian Territory, Israel acts inconsistently with its obligation to ensure the availability of water in sufficient quantity and quality (Article 55 of the Fourth Geneva Convention)" (para. 133).

The Opinion recalls that the occupying Power must in principle *respect the laws in force* in the occupied territory unless absolutely prevented (Art. 43 Hague Regulations), namely "to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them" (Art. 64 of the Fourth Geneva Convention) (para. 134). The Court concludes:

> "In the present case, the Court is not convinced that the extension of Israel's law to the West Bank and East Jerusalem is justified under any of the grounds laid down in the second paragraph of Article 64 of the Fourth Geneva Convention. In this connection, the Court recalls that the transfer by Israel of its civilian population to the West Bank and East Jerusalem is contrary to the Fourth Geneva Convention (see paragraph 119 above); therefore, it cannot be invoked as a ground for regulation in these territories. Furthermore, the comprehensive application of Israeli law in East Jerusalem, as well as its application in relation to settlers throughout the West Bank,

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> cannot be deemed "essential" for any of the purposes enumerated in the second paragraph of Article 64 of the Fourth Geneva Convention.
>
> The arrangements agreed upon between Israel and the PLO in the Oslo Accords point in the same direction. […] It follows that Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation" (paras. 139, 140).

Related to *forced displacement of the Palestinian population*,

> "[t]he Court observes that the large-scale confiscation of land and the deprivation of access to natural resources divest the local population of their basic means of subsistence, thus inducing their departure. Furthermore, a series of measures taken by Israeli military forces has exacerbated the pressure on the Palestinian population to leave parts of the Occupied Palestinian Territory against their will (see paragraphs 180-229 below)" (para 143).
>
> "The Court considers that Israel's policies and practices, which it discusses in greater detail below (see paragraphs 180-229), including its forcible evictions, extensive house demolitions and restrictions on residence and movement, often leave little choice to members of the Palestinian population living in Area C but to leave their area of residence. The nature of Israel's acts, including the fact that Israel frequently confiscates land following the demolition of Palestinian property for reallocation to Israeli settlements, indicates that its measures are not temporary in character and therefore cannot be considered as permissible evacuations. In the Court's view, Israel's policies and practices are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention" (para. 147).

The Court further notes that Israel's settlement policy has given *rise to violence by settlers and security forces against Palestinians* (para. 148).

> "The Court considers that the violence by settlers against Palestinians, Israel's failure to prevent or to punish it effectively and its excessive use of force against Palestinians contribute to the creation and maintenance of a coercive environment against Palestinians. In the present case, on the basis of the evidence before it, the Court is of the view that Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians, is inconsistent with the obligations identified in paragraph 149 above" (para. 154).

Summing up, it concludes:

> "In light of the above, the Court reaffirms that the Israeli settlements in the West Bank and East Jerusalem, and the régime associated with them, have been established and are being maintained in violation of international law" (para. 154).

Annexation of the Occupied Palestinian Territory

The ICJ then looks at the question of annexation and defines the term:

> "By the term "annexation", in the present context, the Court understands the forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power. Annexation, then, presupposes the intent of the occupying Power to exercise permanent control over the occupied territory" (para.158).

It stresses that the law requires the occupier to preserve the status quo in the occupied territory.

> "Regardless of the circumstances in which the occupation was brought about, the fact of the occupation alone cannot confer sovereign title to the occupying Power. Consequently, conduct

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> by the occupying Power that displays an intent to exercise permanent control over the occupied territory may indicate an act of annexation" (para. 159).
>
> "[The Court is of the view that Israel's policies and practices, including the maintenance and expansion of settlements, the construction of associated infrastructure, including the wall, the exploitation of natural resources, the proclamation of Jerusalem as Israel's capital, the comprehensive application of Israeli domestic law in East Jerusalem and its extensive application in the West Bank, entrench Israel's control of the Occupied Palestinian Territory, notably of East Jerusalem and of Area C of the West Bank. These policies and practices are designed to remain in place indefinitely and to create irreversible effects on the ground. Consequently, the Court considers that these policies and practices amount to annexation of large parts of the Occupied Palestinian Territory" (para. 173).

The ICJ confirms that any annexation of occupied territory would be unlawful, deriving this principle from the non-intervention principle of Art. 2 para. 4 UN Charta and the so called Friendly Relations Declaration of the UN General Assembly, Res. 2625 (XXV) of 24/10/1970 (para. 175), and pointing to several relevant resolutions of the Security Council (para. 176) and the General Assembly (para. 177) emphasizing the principle. Thus, "the Court has found that Israel's policies and practices amount to annexation of large parts of the Occupied Palestinian Territory" (para. 179).

Discriminatory Legislation and Measures

At the outset, the Court refers to a vast set of norms of international law prohibiting discrimination and giving proof of a clause of customary international law (para. 185-189).

> "Common to all of these provisions is the concept of differential treatment between persons belonging to different groups. The Court observes, in this connection, that the existence of the Palestinian people is not at issue. Thus, in the Court's view, differential treatment of Palestinians can give rise to discrimination" (para. 190).
>
> "However, not all differentiation of treatment constitutes discrimination. Accordingly, if the Court affirms the existence of differential treatment, it must, at a second stage, determine whether this differentiation of treatment is nevertheless justified, in that it is reasonable and objective and serves a legitimate public aim" (para. 191).

After investigating the different aspects in details, it comes to the following conclusions:

- *Residence permit policy:*

> "In the Court's view, the differential treatment imposed by Israel's residence permit policy in East Jerusalem is not justified, because it does not serve a legitimate public aim. In particular, the permit system is implemented as a result and in furtherance of Israel's annexation of East Jerusalem, which the Court has already considered to be unlawful (see paragraph 179 above). The Court thus considers that no differential treatment can be justified with reference to the advancement of Israel's settlement policy or its policy of annexation" (para. 196).
>
> " In light of the above, the Court is of the view that Israel's residence permit policy amounts to prohibited discrimination under Articles 2, paragraph 2, 23 and 26 of the ICCPR, and Articles 2, paragraph 2, and 10, paragraph 1, of the ICESCR" (para. 197).

- *Restrictions on movement:*

> "On the basis of the evidence before it, the Court considers that, through its practice of restricting movement, Israel differentiates in its treatment of Palestinians with reference to their freedom of movement. With respect to the question of the potential justification of Israel's differentiation in treatment, the Court has taken note of Israel's security concerns, as identified by some

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participants in the proceedings, that might justify restrictions on movement. To the extent that such concerns pertain to the security of the settlers and the settlements, it is the Court's view that the protection of the settlers and settlements, the presence of which in the Occupied Palestinian Territory is contrary to international law, cannot be invoked as a ground to justify measures that treat Palestinians differently. Moreover, the Court considers that Israel's measures imposing restrictions on all Palestinians solely on account of their Palestinian identity are disproportionate to any legitimate public aim and cannot be justified with reference to security" (para. 205).

"In the Court's view, the entire régime of restrictions on the movement of Palestinians throughout the Occupied Palestinian Territory has a discriminatory effect on their enjoyment of these rights, as well as to the right to be protected from arbitrary or unlawful interference with family life, as guaranteed under Article 17 of the ICCPR. In light of the above, the Court is of the view that Israel's policies restricting freedom of movement amount to prohibited discrimination under Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD" (para. 207).

- *Demolition of property:*

"Israel's practice of punitive demolitions of Palestinian property, being contrary to its obligations under international humanitarian law, does not serve a legitimate public aim. The Court considers that, because this practice treats Palestinians differently without justification, it amounts to prohibited discrimination under Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD" (para. 213).

"On the basis of the evidence before it, the Court considers that Israel's planning policy in relation to the issuance of building permits, and its practice of property demolition for lack of a building permit, constitutes differential treatment of Palestinians in the enjoyment of their right to be protected from arbitrary or unlawful interference with privacy, family and home, as guaranteed under Article 17, paragraph 1, of the ICCPR.

In the Court's view, this practice cannot be justified with reference to reasonable and objective criteria nor to a legitimate public aim. In particular, there is nothing in the material before the Court to indicate that the refusal of building permits to Palestinians, or the demolition of structures for lack of such permits, at such a sweeping scale, serves a legitimate aim. This conclusion is further supported by the fact that, in so far as Israel grants building permits for settlers and settlements, it acts in breach of international law (see paragraphs 119 and 155 above).

In light of the above, the Court considers that Israel's planning policy in relation to the issuance of building permits, and in particular its practice of property demolition for lack of a building permit, which treats Palestinians differently from settlers without justification, amounts to prohibited discrimination, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD" (para. 220-222).

- *Conclusion:*

In the light of these findings, the ICJ concludes:

"that a broad array of legislation adopted and measures taken by Israel in its capacity as an occupying Power treat Palestinians differently on grounds specified by international law. As the Court has noted, this differentiation of treatment cannot be justified with reference to reasonable and objective criteria nor to a legitimate public aim (see paragraphs 196, 205, 213 and 222). Accordingly, the Court is of the view that the régime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory constitutes systemic discrimination based on, inter alia, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD.

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It finally turns to the allegation of a number of parties calling Israel's policies segregation or apartheid according to Art. 3 CERD. The court confirms racial segregation and therefore already for this reason a breach of said provision relieving it to further argue about the alternative normative element of apartheid:

> A number of participants have argued that Israel's policies and practices in the Occupied Palestinian Territory amount to segregation or apartheid, in breach of Article 3 of CERD.
>
> Article 3 of CERD provides as follows: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." This provision refers to two particularly severe forms of racial discrimination: racial segregation and apartheid.
>
> The Court observes that Israel's policies and practices in the West Bank and East Jerusalem implement a separation between the Palestinian population and the settlers transferred by Israel to the territory.
>
> This separation is first and foremost physical: Israel's settlement policy furthers the fragmentation of the West Bank and East Jerusalem, and the encirclement of Palestinian communities into enclaves. As a result of discriminatory policies and practices such as the imposition of a residence permit system and the use of distinct road networks, which the Court has discussed above, Palestinian communities remain physically isolated from each other and separated from the communities of settlers (see, for example, paragraphs 200 and 219).
>
> The separation between the settler and Palestinian communities is also juridical. As a result of the partial extension of Israeli law to the West Bank and East Jerusalem, settlers and Palestinians are subject to distinct legal systems in the Occupied Palestinian Territory (see paragraphs 135-137 above). To the extent that Israeli law applies to Palestinians, it imposes on them restrictions, such as the requirement for a permit to reside in East Jerusalem, from which settlers are exempt. In addition, Israel's legislation and measures that have been applicable for decades treat Palestinians differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem (see paragraphs 192-222 above).
>
> The Court observes that Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities. For this reason, the Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD" (paras. 224-229).

Self-determination

Last but not least, the Court addresses the question of the effects of Israeli's policies and practices on the exercise of the Palestinian people's right to self-determination, "one of the essential principles of contemporary international law" and "owed *erga omnes*" (para. 231).

> "The Court considers that Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory." (para. 237).

The Court then affirms violations of four significant elements of self-determination of particular relevance in the present case, namely territorial integrity, integrity as a people, the right to exercise permanent sovereignty over natural resources, and the right to freely determine its political status and to pursue its economic, social and cultural development.

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> "In addition to the injury inflicted on individual persons, the violation of Palestinians' rights — including the right to liberty and security of person, and the freedom of movement — has repercussions on the Palestinian people as a whole, frustrating its economic, social and cultural development. […] The Court thus considers that Israel's policies and practices obstruct the right of the Palestinian people freely to determine its political status and to pursue its economic, social and cultural development.
>
> "The prolonged character of Israel's unlawful policies and practices aggravates their violation of the right of the Palestinian people to self-determination. As a consequence of Israel's policies and practices, which span decades, the Palestinian people has been deprived of its right to self-determination over a long period, and further prolongation of these policies and practices undermines the exercise of this right in the future. For these reasons, the Court is of the view that Israel's unlawful policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination. The manner in which these policies affect the legal status of the occupation, and thereby the legality of the continued presence of Israel in the Occupied Palestinian Territory, is discussed below (see paragraphs 255-257)" (paras. 242, 243).

Effects of Israel's Policies and Practices on the Legal Status of the Occupation

The General assembly had also asked whether and, if so, the manner in which the policies and practices of Israel have affected the legal status of the occupation. In this regard, the Court concludes:

> "The Court considers that the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the continued presence of Israel, as an occupying Power, in the Occupied Palestinian Territory. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful.
>
> This illegality relates to the entirety of the Palestinian territory occupied by Israel in 1967. This is the territorial unit across which Israel has imposed policies and practices to fragment and frustrate the ability of the Palestinian people to exercise its right to self-determination, and over large swathes of which it has extended Israeli sovereignty in violation of international law. The entirety of the Occupied Palestinian Territory is also the territory in relation to which the Palestinian people should be able to exercise its right to self-determination, the integrity of which must be respected.
>
> Three participants have contended that agreements between Israel and Palestine, including the Oslo Accords, recognize Israel's right to maintain its presence in the Occupied Palestinian Territory, inter alia, in order to meet its security needs and obligations. The Court observes that these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs.
>
> The Court emphasizes that the conclusion that Israel's continued presence in the Occupied Palestinian Territory is illegal does not release it from its obligations and responsibilities under international law, particularly the law of occupation, towards the Palestinian population and towards other States in respect of the exercise of its powers in relation to the territory until such time as its presence is brought to an end. It is the effective control of a territory, regardless of its legal status under international law, which determines the basis of the responsibility of a State for its acts affecting the population of the territory or other States (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West

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Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 118)" (paras. 261-264).

Legal Consequences for Israel

The ICJ draws the following legal consequences for Israel:

- to end the illegal continued presence in the Occupied Palestinian Territory "as rapidly as possible" (para. 267).
- "to immediately cease all new settlement activity" (para. 268).
- "to repeal all legislation and measures creating or maintaining the unlawful situation, including those which discriminate against the Palestinian people in the Occupied Palestinian Territory, as well as all measures aimed at modifying the demographic composition of any parts of the territory" (para. 268).
- "to provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned. […] Reparation includes restitution, compensation and/or satisfaction" (para. 269)
    - "Restitution includes Israel's obligation to return the land and other immovable property, as well as all assets seized from any natural or legal person since its occupation started in 1967, and all cultural property and assets taken from Palestinians and Palestinian institutions, including archives and documents. It also requires the evacuation of all settlers from existing settlements and the dismantling of the parts of the wall constructed by Israel that are situated in the Occupied Palestinian Territory, as well as allowing all Palestinians displaced during the occupation to return to their original place of residence" (para. 270).
    - "In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons, and populations, where that may be the case, having suffered any form of material damage as a result of Israel's wrongful acts under the occupation" (para. 271).

Legal Consequences for other States

The ICJ draws the following legal consequences from obligations *erga omnes* violated by Israel for other States

- to cooperate with the United Nations to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination (para. 275).
- "not to recognize any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem, except as agreed by the parties through negotiations" (para. 278)
- "to distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967" encompassing inter alia
    - "the obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part

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thereof on matters concerning the Occupied Palestinian Territory or a part of its territory"
  - "to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory"
  - "to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory"
  - "to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory" (para. 278)
- "not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory" (para. 279)
- "not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory" (para. 279)
- "to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end" (para. 279)
- to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Legal Consequences for the United Nations

Finally, the Court outlines the following legal consequences for the United Nations

- "not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory" (para. 280)
- "to distinguish in their dealings with Israel between the territory of Israel and the Occupied Palestinian Territory" (para. 280)
- "specifically for the General Assembly and the Security Council to consider what further action is required to put an end to the illegal presence of Israel, taking into account the present Advisory Opinion" (para. 281).

2. America

2.1 Inter-American Court of Human Rights, Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted by Chile and Colombia of January 9, 2023, OC-32, and Call for a public hearing, Order of the President of February 22, 2024.

Climate change becomes a dominant topic for juridical procedures not only on the universal level (cf. section 1.1) but also on the regional one. On January 9, 2023, the Republic of Chile and the Republic of Colombia presented to the Inter-American Court of Human Rights a request for advisory opinion on nothing less than

> "to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet" (Republic of Colombia & Republic of Chile, 2023).

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Outlining the climate emergency and its consequences from a human rights perspective and deriving from this the need for inter-American standards to accelerate the response to the climate emergency, the questions posed were manifold (Republic of Colombia & Republic of Chile, 2023; footnotes omitted):

> *A. Regarding State obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency*
>
> Bearing in mind the State duty of prevention and the obligation to guarantee the right to a healthy environment, together with the scientific consensus reflected in the reports of the Intergovernmental Panel on Climate Change (IPCC) concerning the severity of the climate emergency and the urgency and duty to respond adequately to its consequences, as well as to mitigate its pace and scale:
>
> 1. What is the scope of the State's duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events, based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5°C?
>
> 2. In particular, what measures should States take to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention? In this regard, what differentiated measures should be taken in relation to vulnerable populations or based on intersectional considerations?
>
> 2.A. What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan, and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency?
>
> 2.B. What principles should inspire the actions of mitigation, adaptation and response to the losses and damage resulting from the climate emergency in the affected communities?
>
> *B. Regarding State obligations to preserve the right to life and survival in relation to the climate emergency in light of science and human rights*
>
> Taking into account the right of access to information and the obligations concerning the active production of information and transparency reflected in Article 13 and derived from the obligations under Articles 4(1) and 5(1) of the American Convention, in light of articles 5 and 6 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement):
>
> 1. What is the scope that States should give to their obligations under the Convention vis-à-vis the climate emergency, in relation to:
>
> i) Environmental information for every individual and community, including such information related to the climate emergency;
>
> ii) The climate adaptation and mitigation measures to be adopted to respond to the climate emergency and the impacts of such measures, including specific "just transition" policies for groups and individuals who are particularly vulnerable to the effects of global warming;
>
> iii) Responses to prevent, minimize and address economic and non-economic damage and losses associated with the adverse effects of climate change;

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iv) Production of information and access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers; analysis of activities and sectors that contribute to emissions, or other factors, and

v) Determination of human impacts, such as human mobility – migration and forced displacement – effects on health and on life, non-economic losses, etc.?

2. Pursuant to State obligations under the American Convention, to what extent does access to environmental information constitute a right the protection of which is necessary to guarantee the rights to life, property, health, participation, and access to justice, among other rights that are negatively affected by climate change?

C. Regarding the differentiated obligations of States in relation to the rights of children and the new generations in light of the climate emergency Pursuant to Article 19 of the American Convention, in light of the corpus iuris of international human rights law, including article 12 of the Convention on the Rights of the Child, and recognizing the consensus of the scientific community which identifies children as the group that is most vulnerable in the long term to the imminent risks to life and well-being as a result of the climate emergency:

1. What is the nature and scope of the obligation of a State Party to adopt timely and effective measures with regard to the climate emergency in order to ensure the protection of the rights of children derived from its obligations under Articles 1, 4, 5, 11 and 19 of the American Convention?

2. What is the nature and scope of a State Party's obligation to provide children with significant and effective means to express their opinions freely and fully, including the opportunity to initiate or, in any other way, to participate in any administrative or judicial proceedings concerning prevention of the climate change that represents a threat to their lives?

D. Regarding State obligations arising from consultation procedures and judicial proceedings owing to the climate emergency

Based on Articles 8 and 25 of the American Convention, and taking into account that scientific research has indicated that there is a limit to the amount of greenhouse gases that we can continue to emit before reaching dangerous and irreversible climate change, and that we could reach this limit within the current decade:

1. What is the nature and scope of a State Party's obligation in relation to the establishment of effective judicial remedies to provide adequate and timely protection and redress for the impact on human rights of the climate emergency?

2. To what extent should the consultation obligation take into account the consequences of an activity on the climate emergency or the emergency projections?

E. Regarding the Convention-based obligations of prevention and the protection of territorial and environmental defenders, as well as women, indigenous peoples, and Afro-descendant communities in the context of the climate emergency

Pursuant to the obligations arising from Articles 1(1) and 2 of the American Convention and in light of article 9 of the Escazú Agreement:

1. What measures and policies should States adopt to facilitate the work of environmental human rights defenders?

2. What specific considerations should be taken into account to guarantee the right of women human rights defenders to defend a healthy environment and the territory in the context of the climate emergency?

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> 3. What specific considerations should be taken into account to guarantee the right to defend a healthy environment and the territory based on intersectional factors and differentiated impacts, inter alia, of indigenous peoples, peasant farmer communities, and Afro-descendant persons in the context of the climate emergency?
>
> 4. With regard to the climate emergency, what type of information should the State produce and publish in order to establish the capability to investigate different offenses committed against defenders, including, reports of threats, kidnappings, murders, forced displacements, gender-based violence, and discrimination?
>
> 5. What are the measures of due diligence that the States should take into account to ensure that attacks and threats against environmental defenders in the context of the climate emergency do not go unpunished?

F. Regarding the shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency

> Taking into account that the climate emergency affects the entire world, and that obligations to cooperate and also to provide redress arise from the American Convention and other international treaties:
>
> 1. What considerations and principles should States and international organisations take into account, collectively and regionally, when analyzing shared but differentiated responsibilities in the context of climate change, from the perspective of human rights and intersectionality?
>
> 2. How should States act, both individually and collectively, to guarantee the right to redress for the damage caused by their acts and omissions in relation to the climate emergency, taking into account considerations of equity, justice and sustainability?
>
> Bearing in mind that the climate crisis has a greater impact on some regions and populations, including the Caribbean countries and territories, as well as on the coastal areas and islands of our region and their inhabitants:
>
> 1. How should inter-State cooperation obligations be interpreted?
>
> 2. What obligations and principles should guide State actions in order to ensure the right to life and survival of the most affected regions and populations in the different countries and in the region?
>
> Considering that one of the impacts of the climate emergency is to intensify the factors that lead to human mobility – migration and forced displacement:
>
> 3. What obligations and principles should guide the individual and coordinated measures that the States of the region should adopt to deal with involuntary human mobility, exacerbated by the climate emergency?"

Following this request, according to the Court, it "received an unprecedented number of briefs with relevant observations on the request for an advisory opinion, within the established time frame, all duly signed and accompanied by the required documentation" (Inter-American Court of Human Rights, Order of the President of 22/2/2024).

The President of the Court considered that

> "[t]he importance and breadth of the questions submitted to the Court's consideration suggest the need for diverse and participative opportunities for direct dialogue that will contribute to informing the Court" (Inter-American Court of Human Rights, Order of the President of 22/2/2024).

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 3, 252-265
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i3.198

also giving the opportunity to those OAS Member States that had not yet presented written observations to present them during the oral phase of the procedure.

Therefore, on February 22, 2024, the President decided "to hold two in-person public hearings during the 166th and 167th regular sessions of the Court. The first of these hearing was supposed to be held in Bridgetown, Barbados, on April 23, 24 and 25, 2024. The second was scheduled for Brasilia, Brazil, on May 24, 2024, and for Manaus, Brazil, on May 27, 28, and 29, 2024.

Given the universal impact of the climate change in all its dimensions and having become a dominant root cause also for global migration the expected opinion of the Court is likely to become a most significant reference point for the international judicial and political discourse.

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