Special Issue
Constitutional Dimensions of the Refugee Crisis

Forced Migration Governance: In Search of Sovereignty

By Anuscheh Farahat[*] & Nora Markard[**]

Abstract

The European Union (EU) Member States have experienced the recent refugee protection crisis in the EU as a de-facto loss of control over their borders. They find themselves unable to subject entry into their territory to a sovereign decision. In response, the Member States have sought to regain full sovereignty over matters of forced migration, both unilaterally and cooperatively, seeking to govern a phenomenon—forced migration—that by definition defies governance. Unilateral measures include forced migration caps and a search for ways to circumvent responsibility under the Dublin system. Cooperative efforts by EU Member States include the search for ways to more effectively govern forced migration at the EU level and beyond. Supranational EU efforts include the introduction of an internal relocation scheme and support for Italy and Greece in processing asylum claims in so-called "hotspots." Beyond the EU, Member States are seeking to externalize protection responsibility to third world countries under international agreements, in particular, by returning asylum seekers to Turkey. This Article outlines the unilateral and cooperative governance efforts undertaken and shows that states' sovereign decisions over migration are significantly limited in the case of forced migrants, both by EU law and by international law.

[*] Anuscheh Farahat is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

[**] Nora Markard is a Junior Professor for Public Law, International Law, and Global Constitutionalism at the Faculty of Law of the University of Hamburg. The authors wish to thank Anna Katharina Mangold and Boldizsár Nagy for their comments and criticism.

A. Introduction

Traditionally, one of the characteristic features of modern nation states is their sovereignty over the entry and residence of non-nationals.[1] As such, migration is a legitimate area of sovereign regulation and governance in accordance with political goals and imperatives. Over the last decades, however, international legal obligations have significantly curtailed the exercise of this sovereignty. For one, human rights law considerably restricts a state's powers to socially and economically exclude or deport a migrant legally residing in its territory. But international law also limits states' sovereignty to regulate entry. The most fundamental norm in that respect is the *non-refoulement* principle. The keystone of the 1951 Refugee Convention,[2] concretized by the EU Qualification Directive,[3] obliges states not to return or expel migrants who would otherwise suffer persecution. In addition, Article 3 of the European Convention on Human Rights (ECHR) prohibits returning a person to a country where he or she would be risking torture or inhuman or degrading treatment or punishment. While states are still, in principle, sovereign over their borders, this sovereignty is significantly restricted in cases of forced migration. This type of migration, which is spontaneous and involuntary by definition,[4] cannot be governed in pursuit of sovereign policy choices; instead, it is a matter of individual rights and international state obligations.

---

[1] The control of entry became a core feature of the nation state in the 19th century. Before then, movement between sovereign states was hardly restricted. *See* JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 40 (2000); *See also* ANDREAS FAHRMEIR, CITIZENS AND ALIENS 101 (2000).

[2] Convention relating to the Status of Refugees, 189 U.N.T.S. 150 [hereinafter the Convention or the Refugee Convention], http://hrlibrary.umn.edu/instree/v1crs.htm.

[3] Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on the Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2001 O.J. (L 337) 9.

[4] The International Organization for Migration (IOM) defines forced migration as:

> A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects).

http://www.iom.int/key-migration-terms#Forced-migration.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

The recent refugee protection crisis in the EU, however, which states have experienced as a *de facto* loss of control over their borders, has fueled an opposite trend. Member States have increasingly tried to regain sovereignty over matters of forced migration at and beyond their borders, both unilaterally and cooperatively. This Article argues that these two developments, explored in Part B and C, are part of a larger strategy of states to regain full control over their borders. States thereby at least partially bypass their international responsibility for the protection of refugees. By labeling this strategy "forced migration governance," this Article highlights how EU Member States try to actively govern an area of migration that, by definition, defies regulation, and in which a regime of rights and obligations significantly limit sovereign governance. Part C explains that despite the far-reaching legal limits on such efforts, sovereignty is not at all lost, but has long taken cooperative and functional forms.

B. Governing Forced Migration Unilaterally

When the refugee protection crisis in the EU reached its peak in the fall of 2015, several governments of the Member States discussed the idea of establishing immigration caps for forced migrants. The idea is simple: Once the cutoff number is reached, the state would no longer accept and process applications for international protection. In January 2016, the Austrian government passed an annual cap of 37,500 applications for 2016 and declared the intention to gradually reduce the limit to 25,000 per year—1.5% of the Austrian population—by 2019.[5] In Germany, politicians of the Bavarian Christian Social Union (CSU) threatened the federal government with a constitutional complaint against its refugee policy and favored more rigorous border controls with forced migration caps as an option.[6] Most prominently, former constitutional court Justice Udo Di Fabio supported this enterprise with an expert report prepared on behalf of the Bavarian government, in which

[5] Der Standard, *Obergrenze bis 2019 Fixiert, Umsetzung Völlig Offen* (Jan. 20, 2016), http://derstandard.at/2000029410115/Asylgipfel-Obergrenze-bis-2019-fixiert-die-Umsetzung-ist-voellig-offen (last visited Oct. 29, 2016); Gemeinsame Vorgehensweise von Bund, Ländern und Gemeinden (Jan. 20, 2016), No. 4 (2016), http://www.bmwfw.gv.at. Moreover, the Austrian legislator adopted a new emergency rule for the asylum procedure for situations of threats to public order and security, particularly because of a massive influx of immigrants. The new law facilitates the pushback of asylum seekers, but does not establish a formal immigration cap. BUNDESGESETZBLATT [BGBL Teil I] [Für die Republik Österreich] Jan. 2016, at No. 24.

[6] Julia Heißler, *Streit in der Union um Flüchtlingspolitik: Erklagt Seehofer Grenzkontrollen?*, TAGESSCHAU (Jan. 12, 2016, 6:05 PM), https://www.tagesschau.de/inland/csu-klage-101.html.

he argued that the federal government was constitutionally obliged to effectively protect the German border against the massive influx of potential refugees.[7]

These proposals have generated a heated political debate. While they did not lead to the introduction of immigration caps in Germany, the reintroduction of border controls alone created a domino effect along the so-called Balkan route. Austria, Slovenia, and finally Macedonia soon reintroduced border controls as well.[8] As a result, thousands of asylum seekers were stuck at the border between Macedonia and Greece in Idomeni[9] and later evacuated to other camps in Greece.[10]

In all of this, a crucial question has gained surprisingly little attention: What happens when the cutoff number is reached? Enforcing the cap would require denying entry and returning every single asylum seeker who arrives at the border after the limit has been reached. Such returns are a necessary consequence of all forms of refugee caps, whether they serve to limit the number of asylum applications to be processed in a Member State or to avoid responsibility for substantive protection.[11] From a legal point of view, the

---

[7] Udo Di Fabio, *Migration als Föderales Verfassungsproblem* (2016), http://www.bayern.de/wp-content/uploads/2016/01/Gutachten_Bay_DiFabio_formatiert.pdf. For a critique, see Jürgen Bast & Christoph Möllers, *Dem Freistaat zum Gefallen*, VERFASSUNGSBLOG (Jan. 16, 2016), http://verfassungsblog.de/dem-freistaat-zum-gefallen-ueber-udo-di-fabios-gutachten-zur-staatsrechtlichen-beurteilung-der-fluechtlingskrise/.

[8] For a legal assessment see Evelien Brouwer, *Migration Flows and the Reintroduction of Internal Border Controls: Assessing Necessity and Proportionality*, EU IMMIGRATION AND ASYLUM LAW POLICY (Nov. 12, 2015), http://eumigrationlawblog.eu/migration-flows-and-the-reintroduction-of-internal-border-controls-assessing-necessity-and-proportionality/; Opinion on the Necessity and Proportionality of the Controls at Internal Borders Reintroduced by Germany and Austria, EUROPEAN COMMISSION (Oct. 23, 2015), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/general/docs/commission_opinion_necessity_proportionality_controls_internal_borders_germany_austria_en.pdf.

[9] Wolfgang Landmesser, *Athen Hofft auf Weniger Flüchtlinge*, TAGESSCHAU (Feb. 28, 2016, 6:47 PM), https://www.tagesschau.de/ausland/griechenland-mazedonien-103.html; Helena Smith, *Marooned in Idomeni: Despair as Refugees Find Their Way Blocked*, THE GUARDIAN (Mar. 2, 2016, 4:26 PM), https://www.theguardian.com/world/2016/mar/02/idomeni-greece-refugee-march-abruptly-cut-short.

[10] Marianna Karakoulaki & Dimitris Tosidis, *Shattered Dreams for rRefugees Stuck in Greece*, DEUTSCHE WELLE (June 5, 2016), http://www.dw.com/en/shattered-dreams-for-refugees-stuck-in-greece/a-19304254.

[11] This would only be different if an effective relocation mechanism between the Member States were in place. On responsibility sharing, see Part C of this Article. On the distinction between denial of access to procedure and to protection, see Andreas Funke, *Obergrenze ist nicht gleich Obergrenze – und warum es trotzdem keine gibt*, VERFASSUNGSBLOG (Feb. 4, 2016), http://verfassungsblog.de/obergrenze-ist-nicht-gleich-obergrenze-und-warum-es-derzeit-trotzdem-keine-gibt/.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

critical question inquires whether such denial of entry would be compatible with international protection standards—discussed in section I—and with EU law—discussed in section II.

I. Are Immigration Caps Compatible with International Protection Standards?

The core provision of international refugee protection is the principle of non-refoulement. According to Article 33 of the 1951 Geneva Convention relating to the Status of Refugees, no state shall "expel or return (*refouler*) a refugee in any manner whatsoever to the borders of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[12] This prohibition also applies at the border[13] and in relation to indirect refoulement.[14] Importantly, this principle does not confer a right to asylum, which is an institute of domestic law not regulated by the Geneva Convention.[15] But it does protect the right to effectively seek asylum, recognized by Article 14 of the Universal Declaration of Human Rights (UDHR).[16] A state may also come to the conclusion that a person does not meet the Convention's definition of a refugee, but it must provide for a procedure in which the protection claim can be examined.[17] During such a status determination procedure, the principle of non-refoulement applies in full.[18] This principle protects potential refugees from expulsion or return to a country where they might be risking persecution. Exceptions

[12] Refugee Convention art. 33 (1).

[13] JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 317 (2005).

[14] JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 36–38 (2d ed. 2014).

[15] PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY 342 (1995); Walter Kälin, Martina Caroni & Lukas Heim, *Article 33*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL para. 108 (Andreas Zimmermann ed., 2011).

[16] Kälin, Caroni & Heim, *supra* note 15, paras. 127–131; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12 (May 31, 2001), paras. 4–5, http://www.refworld.org/pdfid/3b36f2fca.pdf [hereinafter UNHCR Asylum Processes]; UNHCR, Executive Committee, No. 99, (LV), General Conclusion on International Protection (2004), para. (l), http://www.unhcr.org/en-us/excom/exconc/41750ef74/general-conclusion-international-protection.html [hereinafter ExCom].

[17] UNHCR, Handbook on Procedures para. 192 (2011), http://www.unhcr.org/3d58e13b4.pdf; UNHCR, Asylum Processes, *supra* note 16, at 4–5; ExCom, *supra* note 16, at (l).

[18] At least until the first instance decision is taken. EU Asylum Procedures Directive art. 9(1) [hereinafter Asylum Procedures Directive].

only apply if the individual in question constitutes a danger to the security of the receiving state.[19] Crucially, situations of mass-influx do not justify a departure from the principle of non-refoulement.[20] States may, however, resort to (positive) group determination instead of individual eligibility procedures, as long as strict protection against non-refoulement is ensured.[21]

International human rights law also contains non-refoulement obligations. In particular, Article 3 of the European Convention on Human Rights (ECHR) prohibits the expulsion or return of a person to a country where she would face torture or inhuman or degrading treatment.[22] This prohibition is absolute, even in cases of an emergency,[23] and generates a procedural obligation to thoroughly examine arguable claims under this provision.[24] In its 2011 judgment in *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights (ECtHR) clarified that Article 3 does not require that a person has already physically reached the territory of a State Party in order for the principle to be applied. Instead, the ECtHR found it sufficient that a state authority exerts effective control, even at high sea.[25] Hence, if a person is intercepted at sea by officials of a State Party, this state is obliged to at least examine whether she is entitled to international protection in light of asserted or known threats in the country to which the state wishes to return her. This right to an individual examination is also protected by the prohibition of collective expulsion under Protocol Number 4 of Article 4 to the ECHR[26] and by the right to effective remedy in Article

---

[19] Refugee Convention art. 33 (2).

[20] Kälin, Caroni & Heim, *supra* note 15, at paras. 135–36.

[21] UNHCR, The Scope of International Protection in Mass Influx, EC/1995/SCP/CRP.3 (June 2, 1995), para. 12, http://www.unhcr.org/en-us/excom/scip/3ae68cc018/scope-international-protection-mass-influx.html; Kälin, Caroni & Heim, *supra* note 15, at para. 137.

[22] This equally forbids indirect refoulement. T.I. v. United Kingdom, 2000 III Eur. Ct. H.R. 435, 456–57 (Mar. 7, 2000).

[23] European Convention on Human Rights art. 15(2) [hereinafter ECHR].

[24] Soering v. UK, Series A no. 161, para. 88 (July 7, 1989); recently confirmed in M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 108, paras. 108, 342 (Jan. 21, 2011); Hirsi Jamaa and Others v. Italy, 2012-II Eur. Ct. H.R. 97, para. 146 (Feb. 23, 2012).

[25] Loizidou v. Turkey, Ser. A no. 310, para. 63 (July 28, 1998); Bankovic and Others v. Belgium and Others, App. No. 52207/99, 2001 XII Eur. Ct. H.R. para. 73 (Dec. 12, 2001); *Hirsi Jamaa*, 2012 II Eur. Ct. H.R. 97 at paras. 76–82.

[26] *Hirsi Jamaa*, 2012 II Eur. Ct. H.R. 97 at para. 186; Sharifi v. Italy and Greece, App. No. 16643/09, paras. 214–29 (Oct. 21, 2014), http://hudoc.echr.coe.int/; Khlaifia v. Italy, App. No. 16483/12, paras. 153–58 (Sept. 1, 2015), http://hudoc.echr.coe.int/ (pending in the Grand Chamber); on recent jurisprudence and pending cases regarding

13 ECHR.[27] According to this jurisprudence, individual and collective push back-operations are prohibited by the ECHR.

As the core principle of international refugee law and a cornerstone of international human rights law, non-refoulement effectively restricts the sovereignty of nation states to make decisions about entry to and expulsion from their territory. While this sovereignty still exists in principle, the prohibition on refoulement implies a right to enter at the border if it is the only way by which an effective procedure on the individual protection claim can be guaranteed.[28] Article 31 of the Refugee Convention even prohibits the criminalization of illegal entry in such a situation. Without such an implicit right to enter the country, international refugee protection would be eviscerated.[29] Against this background, it becomes apparent that caps on forced migration undermine the very core idea of international refugee protection.

II. Are Immigration Caps Compatible with EU Law?

Harmonizing the application of international law, the EU has developed a high standard of protection that limits the sovereignty of EU Member States in migration matters even further.

First, the EU Charter of Fundamental Rights (CFR) imports key human rights guarantees into EU law: Article 18 CFR guarantees the "right to asylum" with a reference to the Geneva Convention as well as to the Treaty on the Functioning of the European Union

---

collective expulsion, Angelika Nußberger, *Flüchtlingsschicksale zwischen Völkerrecht und Politik*, 35 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 815, 821 (2016).

[27] *Hirsi Jamaa*, 2012 II Eur. Ct. H.R. 97 at paras. 204–05.

[28] Nora Markard, *Das Recht auf Ausreise zur See*, 52 ARCHIV DES VÖLKERRECHTS [AVR] 449, 458 (2014) (forthcoming English version in EUROPEAN JOURNAL OF INTERNATIONAL LAW); Kay Hailbronner, *Comments on the Right to Leave, Return and Remain*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 109, 114 (Vera Gowland-Debbas ed., 1996). On the relevance of effective access to the EU, *see also* Pauline Endres de Oliveira, *Legaler Zugang zu internationalem Schutz—zur Gretchenfrage im Flüchtlingsrecht*, 2 KRITISCHE JUSTIZ [KJ] 167, 169–171 (2016); for a principled argument, *see* Boldizsár Nagy, *Indeed: Why? Thoughts on the Reasons and Motivations for Protecting Refugees*, *in* PROTECTING THE RIGHTS OF OTHERS 583, 585 (Thomas Gammeltoft-Hansen et al. eds., 2013).

[29] Markard, *supra* note 28, at 603.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

(TFEU);[30] Article 19(1) CFR prohibits collective expulsion;[31] and Article 47 CFR guarantees the right to an effective remedy.[32] The Charter binds both EU organs and Member States implementing EU law.[33] According to Article 52(3) CFR, these rights shall be interpreted in accordance with the corresponding rights in the ECHR and, as the Charter's preamble clarifies, in light of ECtHR jurisprudence.[34] An EU fundamental rights analysis therefore leads to similar, if not identical, results as outlined in the preceding section.

Second, the EU has developed detailed protection standards in the area of asylum law. The EU Qualification Directive implements the commitment to develop EU migration and asylum policy with the Geneva Convention. [35] This Directive concretizes and harmonizes the criteria for international protection in the Member States and the protection status to be granted. Moreover, Articles 6 and 8 of the Asylum Procedures Directive oblige Member States to provide information on asylum procedures and to ensure that access to a fair procedure is effectively provided.[36] These high standards apply if an EU Member State is responsible for conducting the asylum procedure and leave no leeway for denying access to procedure or unilaterally returning a person. Specifically, the Asylum Procedures Directive also applies at the border.[37]

But could an EU Member State nonetheless rely on immigration caps in cases where another EU Member State is responsible for conducting the asylum procedure?

1. Denying Entry Under the Dublin Regulation

The Common European Asylum System guarantees every person seeking protection in the EU access to a fair asylum procedure in only one Member State. Article 7 of the Dublin Regulation provides a hierarchy of criteria for determining the responsible Member

[30] EU Charter of Fundamental Rights art. 18 [hereinafter EU CFR].

[31] *Id*. at art. 19(1).

[32] *Id*. at art. 47.

[33] *Id.* at art. 51(1).

[34] *Id*. at art. 52(3).

[35] Treaty on the Functioning of the European Union art. 78(1) [hereinafter TFEU].

[36] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L 180) 60, paras. 6, 8.

[37] Asylum Procedures Directive, *supra* note 18, at art. 3(1).

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

State.[38] In most cases, it is the Member State where an asylum seeker first entered the EU, often irregularly, that is responsible for the asylum procedure.[39] If the person later moves on to another Member State and applies for asylum there, that second state can transfer her back under Article 23 of the Dublin Regulation. Given these clear criteria for attribution of responsibility, one might ask: If a Member State finds itself not responsible for most of the asylum seekers arriving in its territory, can it legally establish a cutoff and deny entry to asylum seekers coming from another Dublin state?[40] At first glance, it appears convincing to hold those Member States responsible that allowed asylum seekers to illegally move on, flouting their obligation to register them and process their claims. Upon closer inspection, however, things are much more complicated.

According to Articles 20–25 of the Dublin Regulation, any return decision must follow strict procedural standards.[41] Fundamentally, a Member State deeming itself not responsible for processing an application must formally request the responsible Member State to take back or take charge of that person. Only once such a procedure has taken place is a Member State allowed to return an asylum seeker to another Member State. Moreover, Articles 26–27 of the Dublin Regulation provide for several procedural safeguards, including a right to an effective remedy against the return decision.[42] It is crucial to recognize that the Dublin system establishes numerous procedural and substantive checks in order to prevent so-called "refugees in orbit"—refugees without access to protection because all states deny their responsibility to actually provide a recognition procedure and merely point to other states without having positively established their responsibility. This rationale is also expressed by another core provision: Article 3(2) of the Regulation provides that when no other responsible Member State can be designated, the Member State where an application has first been lodged is responsible by default.[43] Crucially, this also applies if the transfer of an asylum seeker to the responsible Member State is

[38] Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing 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, 2013 O.J. (L 180) 31, art. (7) (EU) [hereinafter Dublin Regulation, the Regulation].

[39] *Id*. at art. 13(1).

[40] This is the question underlying the distinction of different forms of forced migration caps discussed by Funke, *supra* note 11.

[41] Dublin Regulation, *supra* note 38, at arts. 20–25.

[42] *Id.* at arts. 26–27.

[43] *Id.* at arts. 3(2).

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

impossible due to "systemic flaws in the asylum procedure and in the reception conditions in that Member State, resulting in a risk of inhuman or degrading treatment . . . ."[44]

Domestic immigration caps would run counter to this complex and sophisticated system of attribution of responsibility. Not only would they undermine the procedural guarantees in place to guarantee effective protection of each individual asylum seeker, they also would increase the probability of refugees in orbit. A simple denial of responsibility by one Member State also fundamentally violates a core principle of EU law, namely the principle of sincere cooperation.[45]

2. A Special Regime for Checkpoint Applications?

Some seek to avoid this conclusion by relying on Article 20(4) of the Dublin III Regulation.[46] This provision states that where an application is lodged with the authorities of a Member State by an asylum seeker who is on the territory of another Member State, it is the Member State in which the asylum seeker is present that shall conduct the Dublin procedure. This, however, does not imply that Member States may unilaterally deny their responsibility for all applications lodged at their border without conducting a Dublin procedure. Such an interpretation would ignore the historical background and rationale of this nowadays exceptional provision.

The rule enshrined in Article 20(4) of the Regulation was already part of Article 12 of the 1990 Dublin Convention, before the Schengen area was established. At the time, Member States were only starting to establish joint border controls at their internal borders as a first step to more cooperation. They did this through jointly patrolling on one another's territory. In that situation, the provision made perfect sense as it allocated responsibility to the Member State where the refugee was actually present. Today, in an area without internal borders, where the re-establishment of border controls is a unilateral act on just one Member State's territory, Article 20(4) has little, if any significance. According to

---

[44] Dublin Regulation, *supra* note 38, at art. 3 (2); *see also* Cases C-411/10, N.S. v. SSHD, 2011 E.C.R. 611 (Dec. 21, 2011) and C-493/10, M.E. v. Refugee Applications Commissioner, 2011 E.C.R. I-13905 para. 86 (Dec. 21, 2011). For the more individualist standard of Article 3 ECHR, see *M.S.S.*, 2011-I Eur. Ct. H.R. 108, paras. 223–34; Tarakhel v. Switzerland, App. no. 29217/12, paras. 103–04 (Nov. 4, 2014), http://hudoc.echr.coe.int.

[45] Treaty on European Union art. 4(3) [hereinafter TEU].

[46] Alexander Peuckert, Christian Hillgruber, Ulrich Foerste & Holm Putzke, *Einreisen Lassen Oder Zurückweisen? Was gebietet das Recht in der Flüchtlingskrise an der Deutschen Staatsgrenze?*, 36 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK [ZAR] 131, 132–135 (2016); *see also* Alexander Peuckert, Christian Hillgruber, Ulrich Foerste & Holm Putzke, *Nochmals: Die Politik offener Grenzen ist nicht rechtskonform*, VERFASSUNGSBLOG (Mar. 2, 2016), http://verfassungsblog.de/nochmals-die-politik-offener-grenzen-ist-nicht-rechtskonform/.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

Article 2(p) of the Asylum Procedures Directive and in keeping with international law, this territory includes "the border and transit zones" of that state.[47] The same phrasing is used in Article 3(1) of the Dublin III Regulation, where Member States shall examine all applications for international protection on their territory "including at the border . . . or in the transit zones."[48] Finally, the Dublin III Regulation categorically forecloses a unilateral denial of responsibility at a checkpoint; this is clear from its Article 20(5),[49] which requires a formal take-back request before a return can be undertaken, and from Article 3(2),[50] which makes the determining state responsible if a return would be incompatible with the CFR.

It would undermine the entire rationale and the integrity of this cooperative system of attribution of responsibility if Member States could circumvent their procedural—and, as the case may be, substantive—responsibility by automatically returning any person at their borders to neighboring Member States. Despite all of its deficits and flaws, one of the most important achievements of the Dublin system is that Member States can no longer unilaterally deny their responsibility. Member States must ensure access to an asylum procedure for each individual asylum seeker in a cooperative procedure. They must get involved themselves if needed. This core principle would be at stake if Member States were allowed to establish upper limits and return asylum seekers at their borders without having determined the responsible Member State in a proper procedure.

C. Governing Forced Migration Through Cooperation

As Member States have been seeking to unilaterally regain control over forced migration—creating a domino effect of border closures for refugees—the EU has stepped up its cooperative governance efforts. The Commission began to push these efforts well before the refugee protection crisis climaxed, starting with its May 2015 European Agenda on Migration.[51] The mechanisms envisaged therein include a "hotspot" and relocation scheme

---

[47] Anna Lübbe, *Ist der deutsche Transit österreichisches Hoheitsgebiet?*, VERFASSUNGSBLOG (Mar. 4, 2016), http://verfassungsblog.de/ist-der-deutsche-transit-oesterreichisches-hoheitsgebiet/.

[48] Constantin Hruschka, *"Rückkehr zum Recht" an der deutsch-österreichischen Grenze?*, FLÜCHTLINGSFORSCHUNGSBLOG (Mar. 2, 2016), http://fluechtlingsforschung.net/ruckkehr-zum-recht-an-der-deutsch-osterreichischen-grenze/.

[49] Dublin Regulation, *supra* note 38, at art. 20(5).

[50] *Id.* at art. 3(2).

[51] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, EUROPEAN COMMISSION,

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

to relieve the pressure on Italy and Greece; a resettlement scheme to directly receive refugees from Northern Africa, the Middle East and the Horn of Africa; increased resources for external border control operations coordinated by FRONTEX; and cooperation with third countries. The Commission's governance aims are twofold: (1) Preventing spontaneous secondary movements within the EU to obviate the Member States' perceived need for unilateral action at their borders—that is, regaining control over forced migration movements within the EU; (2) drastically reducing spontaneous arrivals at the EU's outer borders with the goal of replacing, as far as possible, individual applications with a well-planned resettlement scheme—that is, regaining control over the EU's external borders.

I. Regaining Control Within the EU Through Cooperative Measures

In September 2015, the Commission initiated a number of mechanisms to relieve some of the pressure on Italy and Greece. The aim of the mechanisms was to share responsibility more equally among the Member States and prevent spontaneous secondary movements of forced migrants within the EU.

In places of disproportionate migration pressure—so-called hotspots—EU agencies have begun to support Member State efforts to identify, register, and debrief arriving migrants. They have also begun to classify migrants into categories: (1) Individuals with clear protection needs—to be processed with priority; (2) migrants "who can be returned immediately"; and (3) individuals requiring a regular status determination procedure in the domestic asylum system.[52] Those "in clear need of international protection" are supposed to benefit from the temporary relocation scheme also set up in September 2015.[53] So far,

---

COM(2015) 240 final, 1 (May 13, 2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf.

[52] Communication from the Commission to the European Parliament, the European Council and the Council: Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures Under the European Agenda on Migration, EUROPEAN COMMISSION, COM(2015) 490 final, 5–6 (Sept. 23, 2015); details in European Commission, Explanatory Note on the "Hotspot" Approach 4–5 (July 15, 2015), http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf. The flowchart contained in the latter document reveals that the scheme was designed to heavily rely on detention. This also plays out in practice; *see* Nora Markard & Helene Heuser, *"Hotspots" an den EU-Außengrenzen: Menschen- und europarechtswidrige Internierungslager*, 36 ZAR 165, 166 (2016). *See also* Raoufi and Others v. Greece, App. no. 22696/16 (case communicated May 26, 2016), http://hudoc.echr.coe.int/.

[53] Council Decision (EU) 2015/1523, art. 4, 2015 O.J. (L 239/146) 152, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN, and Council Decision (EU) 2015/1601, recitals 17, 26, 2015 O.J. (L 248/80) 82–83, http://eur-lex.europa.eu/legal-

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

however, that scheme hardly works at all.[54] Several Member States, especially in Eastern Europe, resist the expectation that they assume responsibility over their share of refugees. Their share is calculated in accordance with the size of their population (40%), their total GDP (40%), their past protection efforts (10%) and their unemployment rate (10%).[55] As of July 2016, less than a tenth of the agreed 98,255 relocations from Italy and Greece have been formally pledged by the Member States and only 2,804 individuals have been relocated.[56] This casts into doubt the permanent crisis relocation mechanism proposed as an amendment to the Dublin Regulation, which would apply a similar quota system once a Member State has been receiving a disproportionate share of refugees over a short period of time.[57]

Meanwhile, in May 2016, the Commission has presented a proposal to reform the entire Dublin Regulation[58] that seeks to enforce the notion "that the right to apply for

---

content/EN/TXT/PDF/?uri=CELEX:32015D1601&from=EN (establishing provisional measures in the area of international protection for the benefit of Italy and of Greece).

[54] *See* Communication from the Commission to the European Parliament, the European Council and the Council: Fifth Report on Relocation and Resettlement, EUROPEAN COMMISSION, COM(2016) 480 final, 3, Annexes I–II (July 13, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/fifth_report_on_relocation_and_resettlement_en.pdf.

[55] *See* Agenda on Migration, *supra* note 51, Annex, 19.

[56] Fifth Report on Relocation and Resettlement, EUROPEAN COMMISSION 4–5, Annexes I and II (July 13, 2016). In 2015, 856,700 refugees have arrived in Greece by sea and 153,800 in Italy. *Global Trends. Forced Displacement in 2015*, UNHCR 32–33 (2016), http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

[57] Proposal for a Regulation of the European Parliament and of the Council Establishing a Crisis Relocation Mechanism and Amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing 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, EUROPEAN COMMISSION COM(2015) 450 final, 19–23 (Sept. 9, 2015), http://eur-lex.europa.eu/resource.html?uri=cellar:92b8154b-56cd-11e5-afbf-01aa75ed71a1.0007.02/DOC_1&format=PDF (including quota in Annex III, http://eur-lex.europa.eu/resource.html?uri=cellar:92b8154b-56cd-11e5-afbf-01aa75ed71a1.0007.02/DOC_2&format=PDF).

[58] Proposal for a Regulation of the European Parliament and of the Council Establishing 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, EUROPEAN COMMISSION, COM(2016) 270 final (May 4, 2016), http://eur-lex.europa.eu/resource.html?uri=cellar:92b8154b-56cd-11e5-afbf-01aa75ed71a1.0007.02/DOC_1&format=PDF [hereinafter Proposal].

international protection does not encompass any choice of the applicant which Member State shall be responsible for examining the application for international protection."[59] In light of the above, however, it appears unlikely that the proposal will pass, or that it will be able to address the systemic flaws of the Dublin system.[60]

First, and surprisingly, the proposal adheres to the existing catalog of responsibility criteria, including that of the first country of arrival, prompting one expert to comment: "Dublin is dead! Long live Dublin!"[61] The Commission's strategy is to make these criteria even stricter, limiting options for Member States to avoid or unilaterally assume responsibility,[62] and to discourage secondary movements by way of sanctions against the applicants in the area of reception conditions—which raises severe concerns in terms of constitutional and human rights standards.[63]

Second, to balance out Dublin's structural inequalities, it includes a "corrective allocation mechanism," modeled on the—as of yet unsuccessful—relocation mechanisms just discussed.[64] This mechanism is supposed to automatically apply once a Member State has received 150% of its share of refugees, calculated on the basis of its population size (50%) and total GDP (50%).[65] Every application received from that point on will be automatically allocated to a Member State who has not yet filled its quota until the number falls below the threshold again.[66] Taking into account the lack of enthusiasm among Member States

---

[59] *Id.* at art. 6(1)(a) (recasting Article 4 of the regulation).

[60] *See* Julian Lehmann, *Excuse Me, What's the Fastest Way Out of Dublin?*, GLOBAL PUBLIC POLICY INSTITUTE (June 18, 2016), http://www.gppi.net/publications/human-rights/article/excuse-me-whats-the-fastest-way-out-of-dublin.

[61] Constantin Hruschka, *Dublin is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission*, EU MIGRATION LAW BLOG (May 17, 2016), http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission.

[62] For example, the responsibility for illegal arrivals is no longer supposed to cease after twelve months. Proposal, *supra* note 58, at art. 15 (recasting Article 13 of the Regulation). Also, Member States will no longer be allowed to unilaterally assume responsibility under the "sovereignty clause"—relieving another Member State of its responsibility—once the responsible Member State has been established, except for family reasons. *Id*. at art. 19 (recasting Article 17 of the regulation).

[63] Hruschka, *supra* note 61; Steve Peers, *The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals*, EU LAW ANALYSIS (May 6, 2016, 6:49 AM), http://eulawanalysis.blogspot.de/2016/05/the-orbanisation-of-eu-asylum-law.html.

[64] Proposal, *supra* note 58, at arts. 34–43.

[65] *Id.* at arts. 34(2), 35.

[66] *Id.* at arts. 34–36, 43.

for relocation, the proposal also creates a new opt-out mechanism that will hardly find consensus, or even a Council majority: During a twelve-month period, a Member State can temporarily not take part in the scheme by agreeing to pay €250,000 for each applicant for whom it would otherwise have been responsible for under the allocation mechanism, and give that money to the Member State that received the person instead. [67]

Finally, the Proposal envisages a "pre-Dublin" admissibility procedure, examining whether the individual can be returned to a "safe third country."[68] This points to the second strategy: Externalizing protection.

II. Regaining Control Over the EU's External Borders Through Cooperation with Third Countries

The EU and its Member States have cooperated with third countries for years, seeking among other things to enhance those countries' capacity for migration management and control.[69] Efforts were strongly intensified in October 2015,[70] resulting in a deal with Turkey, the main country of transit for Syrian refugees.[71] According to this agreement—its legal character not quite clear[72]—all migrants arriving in Greece illegally from Turkey will be returned to Turkey, but for each Syrian returned, another Syrian will be resettled from

[67] *Id.* at art. 37.

[68] In that case, the examining Member State becomes the responsible state. *Id.* at art. 3(4); this may make Member States reluctant to apply Article 3(3); *see* Hruschka, *supra* note 60; Proposal, *supra* note 58, at art. 3(3)(a).

[69] *See* Markard, *supra* note 28, at 479–89.

[70] Fact Sheet: EU-Turkey Joint Action Plan, EUROPEAN COMMISSION MEMO/15/5860 (Oct. 15, 2015), http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm; on further developments, see Steve Peers & Emanuela Roman, *The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?*, EU LAW ANALYSIS (Feb. 5, 2016), http://eulawanalysis.blogspot.de/2016/02/the-eu-turkey-and-refugee-crisis-what.html.

[71] European Council Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016, 5:30 PM), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/; European Council Press Release 143/16, Conclusions, 17–18 March 2016 (Mar. 18, 2016, 4:45 PM) http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/.

[72] *See* Rainer Hofmann & Adela Schmidt, *Die Erklärung EU-Türkei vom 18.3.2016 aus rechtlicher Perspektive*, 35 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ]–EXTRA 1, 2–3 (2016).

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

Turkey to the EU.[73] Once the arrival numbers in the EU decrease, a larger Voluntary Humanitarian Admission Scheme is envisaged. Moreover, Turkey has agreed to prevent irregular migration to the EU, all in return for visa liberalization for Turkish citizens and €3 billion in financial support. Further efforts with other countries—with even more doubtful human rights records than Turkey—are already underway.[74]

Immediately following the EU-Turkey deal, Greece turned the "hotspot" centers into de-facto detention facilities for new arrivals.[75] While the legality of the detention practice is doubtful in itself,[76] the return and non-departure practices raise severe concerns under international law with respect to (1) "protection elsewhere" requirements and (2) the right to leave.

1. Turkey as a Safe Third Country?

While the 1951 Refugee Convention does not limit a refugee's choice of asylum country, it is also generally accepted that it does not prohibit returns or transfers to states other than the refugee's country of origin—a premise that also underlies the Dublin system.[77] Sharing

---

[73] This is no new commitment; instead, the Member States will rely on the general resettlement scheme agreed on July 20, 2015. *See* Conclusions of the Representatives of the Governments of the Member States Meeting Within the Council on Resettling Through Multilateral and National Schemes 20,000 Persons in Clear Need of International Protection, 4 (July 22, 2016), http://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf. A further, voluntary arrangement for an additional 54,000 persons is envisaged, but any commitments undertaken would reduce a Member State's contribution to the relocation scheme of September 22, 2015 (*supra*, note 53). EU-Turkey Statement, *supra* note 71, at para. 2.

[74] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries Under the European Agenda on Migration, EUROPEAN COMMISSION 5–7, 13–16 (June 7, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_ompact_en.pdf; sixteen countries are under review for possible compacts: Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan; *see* ibid., at 8. *See also* Nikolaj Nielsen, *EU to Use Aid and Trade to Stop Africa Migration*, EU OBSERVER (June 28, 2016, 9:29 AM), https://euobserver.com/migration/134067.

[75] *Greece: Refugees Detained in Dire Conditions Amid Rush to Implement EU-Turkey Deal*, AMNESTY INT'L (Apr. 7, 2016, 4:13 PM), https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/.

[76] *See* Markard & Heuser, *supra* note 52, at 171.

[77] In particular, Article 32 of the Convention grants protection against expulsion only once a refugee is "lawfully present,"—that is, when he or she has entered the asylum procedure. For a concise review of the arguments, *see*

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

responsibility for refugees among states through cooperative schemes is therefore not prohibited by the Geneva Convention, or for that matter, by human rights law. This does not mean that such returns are not subject to legal requirements which prevent states from evading their protection responsibilities at the expense of refugees.[78] Of course, a return must not violate human rights-based non-refoulement, such as Article 3 ECHR and Article 4 CFR.[79] It also requires that the refugee will in fact find "protection elsewhere."[80]

The exact requirements for "protection elsewhere" are disputed.[81] Certainly, a transfer may not result in indirect or chain refoulement to the country of origin.[82] This presupposes that the third country has a status determination procedure in place that properly applies the refugee definition and to which the refugee will have access, and that the third country respects the non-refoulement principle in practice.[83] But protection is more than non-refoulement; in fact, Articles 3–34 of the Convention contain an entire catalog of rights. A number of rights are already acquired even before a refugee even enters the asylum procedure, but the Convention also promises the acquisition of additional rights as the

---

Michelle Foster, *Responsibility Sharing or Shifting? "Safe" Third Countries and International Law*, 25 REFUGE 64, 65–66 (2008); HATHAWAY, *supra* note 13, at 668 (2005).

[78] *See, e.g., T.I. v. United Kingdom*, 2000-III Eur. Ct. H.R. 435, 456–457 (2000) (discussing the Dublin regime); Cruz Varas and Others v. Sweden, Ser. A no. 201, para. 69 (Mar. 20, 1991). For a narrower complicity argument, see Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 619–20 (2003).

[79] For Dublin transfers, see *M.S.S.*, 2011-I Eur. Ct. H.R. 108, at paras. 223–34, and *N.S.,* C-411/10, and *M.E.*, C-493/10, at para. 86.

[80] Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 MICHIGAN J. OF INT'L LAW 223 (2007); HATHAWAY, *supra* note 13, at 328–333; Rainer Hofmann & Tillmann Löhr, *Introduction to Chapter V: Requirements for Refugee Determination Procedures*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL. A COMMENTARY 1081, 1111–14 (Andreas Zimmermann ed., 2011).

[81] See the discussion in *Expert Seminar Series Report: Shared Responsibility in International Refugee Law*, SHARES 9–10 (2012), http://www.sharesproject.nl/publication/expert-seminar-report-shared-responsibility-in-international-refugee-law/.

[82] *See* HATHAWAY & FOSTER, *supra* note 14, at 36–38; *see T.I. v. United Kingdom*, 2000-III Eur. Ct. H.R. at para. 456–57.

[83] Foster, *supra* note 77, at 70–71.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

attachment to the host state strengthens.[84] Both acquired and potential rights must be available in the receiving state, as established in a good-faith assessment by the sending state.[85] Finally, an applicant must be able to challenge the transfer decision on individual grounds.[86]

EU law addresses this issue under the label of "safe third countries."[87] According to Article 33(2)(c) of the Asylum Procedures Directive and Article 3(3) of the Dublin Regulation, Member States can consider an application for international protection inadmissible if the applicant arrived from such a country.[88] The Commission Proposal mentioned above will make this consideration obligatory. Such a country must fulfill the minimum requirements set out in Article 38(1) of the Directive, namely: (a) Absence of a risk of persecution or severe harm; (b) respect for the principle of non-refoulement under the Geneva Convention and international human rights; and (c) the possibility to apply for refugee protection and to obtain protection in accordance with the Geneva Convention. Pursuant to Article 38(2), the individual Member States pass rules on the application of this concept, including rules on the kind of attachment that makes it appear reasonable for the person to go back, methods for ascertaining the safety of the third country for that particular applicant, and individual remedies. Evidently, the crucial point is that the country will in fact respect the Geneva Convention if the applicant turns out to be a refugee; for countries that are not even members of the Convention, this will be "difficult, if not impossible" to ascertain.[89]

---

[84] Foster, *supra* note 77, at 67; *see generally* HATHAWAY, *supra* note 13, at 154–55; on social rights specifically, see LINEKE SLINGENBERG, THE RECEPTION OF ASYLUM SEEKERS UNDER INTERNATIONAL LAW: BETWEEN SOVEREIGNTY AND EQUALITY 100–33, 244–51 (2014).

[85] Foster, *supra* note 80, at 270, 274; Colloquium, *The Michigan Guidelines on Protection Elsewhere*, 28 MICHIGAN J. OF INT'L LAW 207, 211, at para. 3 (2007) [hereinafter *Michigan Guidelines*]; HATHAWAY & FOSTER, *supra* note 14, at 39–49.

[86] Foster, *supra* note 79, at 278–83; *Michigan Guidelines*, *supra* note 85, at para. 12.

[87] Another mechanism is the "country of first asylum," Asylum Procedures Directive, *supra* note 18, at art. 35, where an applicant has already found protection.

[88] For Dublin situations, *see* Case C-695/15 PPU, Mirza v. Hungary 2016 E.C.R. 146, paras. 53 and 63 (Mar. 16, 2016), http://curia.europa.eu/.

[89] Jens Vedsted-Hansen, *Asylum Procedures Directive 2013/32/EU*, *in* EU IMMIGRATION AND ASYLUM LAW 1284, 1363 (Kay Hailbronner & Daniel Thym eds., 2d ed. 2016).

The problem starts with the fact that Turkey is a party to the Refugee Convention, but has retained its geographic limitation to "events in Europe."[90] As a result, Syrians do not count as Convention refugees in Turkey and cannot claim the attending rights, including protection against refoulement and under domestic law, they receive "temporary protection."[91] Turkey is a member to the ECHR and has to respect Article 3 both within its borders and in its own return policies, but has not ratified Protocol No. 4, which prohibits collective expulsions. Recent legal developments have reduced the gap to the Geneva Convention,[92] but much is left to be desired when it comes to applying these rights in practice.[93] Moreover, Turkey has repeatedly been accused of pushbacks to Syria.[94]

As a result, the review procedure of the transfer decisions is a crucial bottleneck that needs to be resolved in order for the EU-Turkey deal to work as intended. Greek review panels have already halted returns to Turkey in a number of cases.[95] A complaint is also

---

[90] The 1951 Convention allowed state parties to restrict the Convention's application to events in Europe before 1951. The 1967 Protocol lifted these restrictions but allowed existing state parties to retain geographic limitations. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267, art. 1(3), http://hrlibrary.umn.edu/instree/v2prsr.htm.

[91] For details, see Oktay Durakan, *Country Report: Turkey, First Update,* ASYLUM INFORMATION DATABASE (ECRE ed., Dec. 2015), http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf [hereinafter AIDA]; Öslem Gürakar Skribeland, *Seeking Asylum in Turkey: A Critical Review of Turkey's Asylum Laws and Practices*, NORWEGIAN ORGANISATION FOR ASYLUM SEEKERS, 15 (Apr. 2016), http://www.asylumineurope.org/sites/default/files/resources/noas-rapport-tyrkia-april-2016_0.pdf.

[92] In particular, Syrian refugees now have the right to work. Regulation 2016/8375 on Work Permits for Syrians (Jan. 11, 2016), http://www.asylumineurope.org/sites/default/files/resources/regulationworkpermits.pdf. On practical difficulties, see AIDA, *supra* note 91, at 84–85.

[93] Dutch Council for Refugees & ECRE, *The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey* 4, 5 (May 20, 2016), http://www.refworld.org/docid/575525234.html; Human Rights Watch*, Turkey: Syrians Pushed Back at the Border* (Nov. 23, 2015, 12:01 AM), https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border.

[94] Amnesty International Press Release, Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal (Apr. 1, 2016, 12:01 AM), https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/; *Struggling to Survive: Refugees from Syria in Turkey*, AMNESTY INT'L 9–10, 14 (Nov. 20 2014), https://www.amnesty.org/en/documents/EUR44/017/2014/en/.

[95] Pro Asyl Press Release, Appeals Committee on Lesbos Stops Deportations to Turkey (June 1, 2016), https://www.proasyl.de/en/pressrelease/appeals-committee-on-lesbos-stops-deportations-to-turkey/.

pending at the ECtHR.[96] Greece has reacted by reforming the appeals committees and removing the possibility for a personal hearing at appeal.[97]

2. Violating the Right to Leave

Another point of strong concern has been addressed in detail elsewhere[98] and will only be mentioned briefly here: Engaging third countries, such as Turkey, in keeping migrants from moving onwards will in most cases be incompatible with the right to leave. This human right, the right to leave any country including one's own, is contained in a large number of human rights instruments, beginning with Article 13(2) of the 1948 Universal Declaration of Human Rights (UDHR).

Of course, the right to leave is not absolute, nor is it a right to enter another state's territory.[99] Because a state can secure its borders against illegal entry, one might therefore assume that it cannot be illegal for its neighboring state to assist it by preventing illegal departures. This, however, would be missing an important function of the right to leave, which its immediate vicinity to the right to seek and enjoy asylum, as per Article 14 UDHR, shows. The right to leave secures access to asylum and non-refoulement—the one very exception to a state's right to deny entry to an undocumented alien.[100]

III. A Framework for Cooperative Forced Migration Governance

As explained in Part B of this Article, unilateral action resulting in a purely negative decision on protection responsibility without ensuring that another state is examining the protection claim instead cannot be reconciled with international refugee law and international human rights law, nor with EU law. However, it is not by chance that neither the Geneva Convention nor Article 14 UDHR contain a right to receive asylum or a state obligation to grant it. EU Member States may not return refugees to their country of origin

---

[96] Pro Asyl Press Release, EU-Turkey Deal: Deportation of Homosexual Syrian Threatened by ISIS Looming (June 3, 2016), https://www.proasyl.de/en/pressrelease/eu-turkey-deal-deportation-of-homosexual-syrian-threatened-by-is-looming/.

[97] Francesca Pierigh, *Greece Amends its Asylum Law After Multiple Appeals Board Decisions Overturn the Presumption of Turkey as a 'Safe Third Country*,' EUR. COUNCIL ON REFUGEES AND EXILES (June 24, 2016), http://www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-as-a-safe-third-country/.

[98] Markard, *supra* note 28.

[99] Peltonen v. Finland, DR 80-A, 43, para. 31 (Feb. 2, 1995).

[100] Details in Markard, *supra* note 28, at 456–60.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

and must treat them in accordance with the Convention rights, but, as laid out in the preceding sections, they are allowed to share responsibility. In fact, the Geneva Convention's preamble notes the need for cooperation in express terms: "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."

EU Member States are seeking to use cooperative schemes to regain control over arrival numbers both within the EU and in its external relations. Sovereignty over how to deal with forced migrants, however, is limited also within such cooperative schemes. States cannot simply use such schemes to rid themselves of protection obligations without ascertaining whether the effective protection will in fact be available in the third state. They remain bound by human rights and the principle of non-refoulement. Moreover, it must remain possible for an individual migrant to legally contest the transfer decision on the grounds that the third country is not a "safe country" in general or for that person individually, or that other grounds—such as family unity—stand in the way of a transfer. Again, no denial of entry or removal can be made without granting access to at least a minimal procedure.

Resettlement has also been discussed as an alternative to merely reacting to spontaneous arrivals. It is a way to govern forced migration in a well-planned manner. This, however, will never fully replace individual arrivals of forced migrants which, as a matter of definition, cannot be planned.

Finally, for a cooperative scheme to work in practice, fairness and solidarity are key. This, as the Dublin system demonstrates, applies both with respect to the forced migrants and to the cooperating states. A system that completely ignores the preferences and integration chances of refugees will have to deal with secondary migration as long as the conditions in the cooperating states are as radically different as they are within the EU; options for sanctions are strictly limited by human rights. And a system that continues to distribute the burden unequally among states will find that they begin to evade their responsibility or sabotage the system by unilateral action. Unfortunately, the Commission's July 2016 Proposal does not promise to resolve these problems, as Steve Peers observes:

> For over twenty-five years now, the EU and its Member States have been attempting to get the Dublin system to work. The continued abject failures of those attempts to get this pig to fly never seem to deter the next attempt to launch its aviation career. With this week's proposals, the Commission is in effect trying to

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

> get the poor beast airborne by sticking a rocket up its backside. It might be best to stand back.[101]

D. Implications for the Territorial Integrity and Sovereignty of the State

If international and European legal standards substantially curtail a state's ability to govern the influx of forced migrants both unilaterally and cooperatively, what does that imply for our understanding of sovereignty? Does this mean that EU Member States have lost their sovereignty? Does it mean that they can no longer effectively protect their territory, such that the influx of potential refugees is literally "unrestricted" or "beyond control"? What about the limiting and regulative function of national constitutions? Are we really experiencing a crisis in which the constitution remains silent?[102] In the very limited scope that this Article allows, we will highlight two crucial aspects that respond to the fears and concerns underlying these questions.

First, sovereignty is no static concept. Its meaning and function have radically changed over the last decades. While in former times it was still possible to claim that everything could be explained "through sovereignty and from sovereignty,"[103] this is no longer the case today. Sovereignty has been transformed into a functional concept.[104] It no longer "constitutes the foundation of the entire doctrinal or legitimating construct, but serves other principles," such as human rights or self-determination.[105] Consequently, sovereignty today is often exercised jointly and through cooperation. The Common European Asylum system is a perfect example. Therefore, while the unrestricted sovereignty of nation states no longer exists, it is not true that European and international refugee law have destroyed sovereignty as such. Instead, international and supranational law are one element in a larger development leading to cooperative and functional forms of sovereignty. Given the strong interdependencies between states in a globalized world, it is rational that they

---

[101] Peers, *supra* note 63.

[102] Martin Nettesheim, *Staatsverantwortung durch Verfassungsrecht am Beispiel von Migration*, *in* DER STAAT IN DER FLÜCHTLINGSKRISE 55, 56 (Otto Depenheuer & Christoph Grabenwarter eds., 2016). For a more nuanced version, see Uwe Volkmann, *Krise der Politik–Krise der Verfassung?*, 14 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN [ZSE] 16, 18 (2016).

[103] GERHARD JELLINEK, DIE LEHRE VON DEN STAATENVERBINDUNGEN 16, 36 (Walter Pauly ed., introd., 1996 [1882]).

[104] Armin von Bogdandy, *Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area*, 12 INT'L J. OF CONSTITUTIONAL LAW 980, 985 et seq. (2014).

[105] *Id.* at 986. A proposal for an even broader understanding of sovereignty in the light of global interdependence is presented by Eyal Benvinisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. OF INT'L LAW 295 (2013).

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

pursue their aims through international and supranational institutions that at the same time restrict the available regulatory options on the domestic level. In that way, sovereignty is not lost, but has been transformed, serving—in our context—the goal of collectively securing the human rights of refugees and the integrity of the European migration area. Collective action, however, does not justify an outsourcing of international obligations by shifting the responsibility to countries outside of Europe. Instead, shared sovereignty aims at collectively establishing new infrastructures and mechanisms to deal with challenges that states face together.

Second, international and European refugee law both presuppose territoriality.[106] Of course, effective protection of refugees requires a minimum of public order that guarantees the safety of refugees in the host territory. Moreover, as Hannah Arendt famously expressed in her claim for the "right to have rights," the existence of human rights in general is useless if there is no entity providing for their realization.[107] The dilemma between the universality of human rights on the one hand and, on the other hand, the necessity to realize these rights within a given territory that necessarily has borders and rules for admission, is a classic theme of the human rights discourse.[108] At the occasion of the refugee protection crisis, Member States of the seemingly borderless Schengen area have come to correctly realize that they have only given up border controls but not their borders. It is therefore not so much the idea and necessity of territoriality that are currently being discussed, but rather the question of how and according to which criteria borders may be controlled.[109]

Underneath the territoriality argument often lurks the fear of unrestricted immigration and the feeling that the nation state has lost its capacity to effectively regulate and govern

---

[106] Klaus F. Gärditz rightly emphasizes the necessity of borders also for matters of inclusion in this issue.

[107] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 et seq. (1968).

[108] This question is already discussed by IMMANUEL KANT, PERPETUAL PEACE, *Third Definitive Article of a Perpetual Peace: Cosmopolitan Right Shall be Limited to Conditions of Universal Hospitality* (1795), who argued that there must be a right to hospitality according to which a state may only deny entry and temporary residence to a person "if this can be done without causing his destruction." On this discussion and the democratic ambivalences of refugee law, see Dana Schmalz, *Der Flüchtlingsbegriff zwischen kosmopolitischer Brisanz und nationalstaatlicher Ordnung*, 48 KJ 390, 398, 400–02 (2015); *see also* Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, *in* LIBERAL DEMOCRACY 13, 13–47 (J. Ronald Pennock & John W. Chapman eds., 1983); Sarah Song, *Denaturalizing Citizenship: A Symposium on Linda Bosniak's The Citizens and the Alien and Ayelet Shachar's the Birthright Lottery*, 9 ISSUES IN LEGAL SCHOLARSHIP 1, 16 et seq. (2011).

[109] Gärditz, in this issue, therefore rightly emphasizes the "re-politicization of the border."

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

these movements.[110] Of course, no one would deny that the regulation of migration should be subject to democratic decision-making, within the confines of the law. What is less clear however is that it should be a matter of national self-determination.[111] One of the possible ways to reconcile the universality of human rights and the necessity of territorial political orders is to establish cooperative arrangements and institutions at a supranational and international level to collectively solve problems that nation states face together.[112] If we accept that treaties such as the Geneva Convention, the ECHR, and the TFEU establish a collective responsibility of state parties to attain the protection standards enshrined in these documents, then national self-determination can no longer be the gold standard of decision-making. Instead, international challenges require cooperative solutions. Hence, while Germany's policy preferences with respect to immigration must of course be determined in a democratic fashion, these decisions cannot be taken independently of international obligations and decision-making rules to which the German legislature has agreed. Under the conditions of increasing interdependencies, global mobility, and universal human rights, territoriality needs to be conceptualized as a form of embedded territoriality.[113] While a full elaboration of the concept of embedded territoriality would be beyond the scope of this Article, its core idea denotes the fact that decisions regarding control over a territory, most fundamentally about access to it, are no longer purely domestic decisions; rather, they are taken in the context of supranational and international cooperation.[114] The territoriality of EU Member States is thus embedded in supra- and international law with their respective structures of cooperative decision-making. Therefore, both territoriality and democratic decision-making can no longer be conceptualized only with reference to national communities. In an interdependent world, they can only be realized by way of cooperation.

---

[110] Volkmann, *supra* note 102, at 27; Uwe Volkmann, *Der Flüchtling vor den Toren der Gemeinschaft*, 49 KJ 180, 191 (2016) [hereinafter Volkmann, *Der Flüchtling*].

[111] National self-determination seems to be the concern of Uwe Volkmann, who criticizes the factual opening of borders and argues that the capacity to effectively regulate migration should be regained. Volkmann, *Der Flüchtling*, *supra* note 111, at 191.

[112] Astrid Wallrabenstein, *"Ich sehe was, was du nicht siehst": Wahrnehmungsunterschiede in der Flüchtlingsdebatte. Replik auf Volkmann "Der Flüchtling vor den Toren der Gemeinschaft,"* 49 KJ 407 (2016).

[113] On new forms of territoriality, see Ulrike Jureit & Nikola Tietze, *Postsouveräne Territorialität: Eine Einleitung*, *in* POSTSOUVERÄNE TERRITORIALITÄT: DIE EUROPÄISCHE UNION UND IHR RAUM 7, 23 (Ulrike Jureit & Nikola Tietze eds., 2015).

[114] This insight expressly marks the German Basic Law. *See* von Bogdandy, *supra* note 104, at 985. On the absence of a clear definition of borders in the Basic Law, see Wallrabenstein, *supra* note 113, at 413. For a seminal work on the relevance of international cooperation under the Basic Law, *see* KLAUS VOGEL, DIE VERFASSUNGSENTSCHEIDUNG DES GRUNDGESETZES FÜR EINE INTERNATIONALE ZUSAMMENARBEIT (1964).

Today's international refugee law is an expression of this longstanding development, which has resulted in a transformation of traditional constitutional concepts. Sovereign decision-making is embedded today in a multilayered web of norms and institutions. Isolationist notions of sovereignty and territoriality can no longer serve to justify unilateral deflection politics; instead, the way forward is to deepen cooperation, in an effort to share responsibility for forced migrants without undercutting their individual rights.

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press

https://doi.org/10.1017/S2071832200021532 Published online by Cambridge University Press