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Kotzur | Moya | Sözen | Romano (eds.)

The External Dimension of EU Migration and Asylum Policies

Border Management, Human Rights and Development Policies in the Mediterranean Area

Nomos

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Having reached the final step of this project which started in 2018, we would like to express our deepest gratitude to the *Deutscher Akademischer Austauschdienst* (DAAD) for the financial support provided and in particular for publishing this volume. We are also grateful to the authors who contributed to the realisation of this project for having accepted our invitation as well as for their cooperation and understanding throughout the publication process. Last but not least, we owe special thanks to Amelie Bruhn and Bastian Richter, whose editing work has been extremely helpful.

Table of Contents

Preface 9
Markus Kotzur, David Moya, Andrea Romano and Ülkü Sezgi Sözen

Migration Management by the Means of Human Rights in Times of Crisis 13
Markus Kotzur and Leonard Amaru Feil

PART ONE
THE EXTERNAL DIMENSION OF EU MIGRATION AND ASYLUM POLICIES: EVOLUTION AND FEATURES

A General Overview of the Legal Framework of the EU External Action on Migration and Asylum 37
Claudia Candelmo

The External Dimension and the Management of Irregular Migration in the EU: A Human Rights Approach 59
Annalisa Morticelli

The External Dimension and Access to International Protection in the European Union: Resettlement and Humanitarian Visas 97
Andrea Romano

Development and Cooperation in the Field of Migration 121
Claudia Pretto

PART TWO
THE EUROPEAN UNION'S "GATEKEEPERS": COUNTRY FOCUS

EU–Turkey Relations in Migration Matters 145
Ülkü Sezgi Sözen and Chad Heimrich

The European and International Response to the Human Rights Situation of Migrants in Libya: The Humanitarian Evacuation Programmes Run by the African Union, the European Union and the United Nations 163
Francesco Luigi Gatta

Balkan Migration to the EU: From Countries of Origin to Countries of Transit and to a Chaotic Exterior Guardian of the Schengen Area! 195
Arolda Elbasani and Senada Šelo Šabić

Morocco and Spain Bilateral Legal Relationship on Migration and Asylum Issues 217
Francisco Javier Donaire Villa

PART THREE
NEW STRATEGIES AND CHALLENGES

The Integrated EU Hotspot Administration and the Question of the EU's Liability 253
Catharina Ziebritzki

Regulation 2019/1896 on the European Border and Coast Guard (Frontex): The Supranational Administration of the External Borders? 295
David Fernandez-Rojo

The Financial Dimension of EU External Policies on Migration 325
Carmine Conte and Valentina Savazzi

Notes on Contributors 351

Preface

Prof. Dr Markus Kotzur, Prof. Dr David Moya, Dr Andrea Romano and Ülkü Sezgi Sözen

At a time when humanitarian crises and warfare scenarios are enduring or emerging in a number of areas bordering Europe, the internal migratory policies of the EU and its Member States are increasingly unfit to provide for long-term answers to multiple challenges posed by international mobility in present times. Establishing a network of partnerships, agreements and soft-law instruments between the EU and third countries has long been recognised as crucial in order to guarantee the effectiveness of a common migration and asylum policy. Yet it has taken on a new momentum following the crisis of 2015, exacerbating the relevance of EU external action in this area and the need to ensure coherence between the latter and internal migration and asylum policies. This volume aims at tackling the implications for the EU's external action in the area of migration and asylum posed by such a crisis in perspective, reflecting on existing features of this subject and elaborating on challenges ahead. In particular, it aims to reap the harvest of the reflections and discussions generated over the 2018 summer school and to channel them into one introductory chapter and three parts covering the most salient and urgent aspects as far as EU external migration policies are concerned. The introductory chapter of *Markus Kotzur and Leonard Amaru Feil* lays the theoretical background of the volume, offering a reflection on the conflictive nature of migration law and the institutional and normative framework of international migration law. Hence, the first part draws on the structural elements of the external dimension in the field of migration and asylum, by looking upon its main features and evolution. To this end, *Claudia Candelmo* provides a detailed analysis of both primary and secondary legislation in this area and elaborates on the multiple instruments of cooperation between the EU and third countries, with a particular focus on visa, readmission agreements and non-binding measures. Ultimately, the chapter highlights their relevance in the reduction of the push factors of international mobility and in the management of migration flows. Two further chapters enlarge upon the architecture of the external dimension. On the one hand, *Annalisa Morticelli* focuses on the relationship between the external dimension and ir-

regular migration by addressing the number of measures that prevents migrants from accessing the territory of the EU and their implications on human rights. From this perspective, after having discussed the relevant international legal framework on human rights, the chapter provides for an attentive analysis of the origin of the concept of irregular migration and the tools adopted under the EU legislation. On the other hand, *Andrea Romano* engages in the controversial issue of the legal pathways for accessing international protection, tackling one of the main pitfalls of the EU asylum regime, which is represented by the fact that it applies only insofar as asylum seekers are on the borders of the State that will grant protection. Hence, the chapter focuses the analysis on resettlement and humanitarian visas considering the relevance that both instruments have gained at the EU level. Finally, *Claudia Pretto*'s contribution closes the second part by providing a diachronic analysis of development and cooperation in the area of migration, tackling a further central piece of the EU external dimension. In particular, the contribution puts in perspective the policies and instruments adopted in this area – with especial attention paid to the Global Approach on Migration and Asylum – and discusses their effectiveness from the perspective of human rights protection.

One of the most important roles in the context of the EU external dimension belongs to the neighbouring countries which the EU use as a shield for its external migration and asylum policies. Therefore, it is fundamental to understand the essential function of some third countries with regard to migration law and policies in the Mediterranean area. For this reason, the second part shines a spotlight on the gatekeepers of the European Union. One of the crucial players and an EU partner in the Mediterranean area is Turkey. In this section's first chapter, *Ülkü Sezgi Sözen* and *Chad Heimrich* examine relations between the EU and Turkey in migration matters, which have never been straightforward, as the past 50 years have clearly demonstrated. In light of this, they place special attention on the EU–Turkey readmission agreement as the official starting point of Turkey's gatekeeper role in this relationship as well as the EU–Turkey deal, in order to offer some perspectives on this highly disputed issue. In the second chapter, *Francesco Luigi Gatta* analyses the European and international response to the human rights situation of migrants in Libya. In this context, he concentrates on Libyan detention centres as well as giving an overview of several European and international cooperation programmes in Libya in order to show some shortcomings regarding the EU's external migration policies towards Libya. In the third chapter, *Arolda Elbasani* and *Senada Selo Sabic* change compass direction towards the Balkans in terms of the EU external dimension. They embed the manifold migratory trends in the

Balkans' case because of their simultaneous role as countries of origin and countries of transit, which, in the authors' words, define the Balkans as a chaotic exterior guardian of the Schengen area. In the last chapter of the third part, *Francisco Javier Donaire Villa* discusses external migration and asylum policies from a Member State perspective and examines, in this regard, the bilateral legal relationship between Spain and Morocco. After sketching a historical background, he focuses on the factual and legal problems of pushbacks at the borders between the two countries and the European exceptional legal status of the Spanish–Moroccan borders at Ceuta and Melilla according to the Schengen acquis. He also pays special attention to the bilateral legal framework on migration and asylum between the two countries, such as the agreements on labour migration, readmission and unaccompanied minors.

The third part entails a forward-looking perspective, focusing on the multiple problems, strategies and challenges that analysis of the external dimension policy opens up for the coming years. *Catharina Ziebritzki* tackles a new problematic aspect of EU policies that places itself at the crossroads between the internal and the external dimension, such as the legal framework of hotspots in Greece and, in particular, the responsibility for potential human rights violations carried out therein. The analysis elaborates on the administrative legal framework of such asylum processing centres, explores the applicability of EU public liability law to that context and engages with the jurisprudence of the Court of Justice of the European Union. *David Fernández Rojo*'s contribution addresses a further current challenge that interrogates the external dimension: integrated management of the EU's external borders. From this perspective, the chapter provides a detailed explanation of the reform that transformed Frontex into the European Border and Coast Guard Agency and critically examines whether the new legal framework is capable of achieving complete supranational administration of the external borders. Finally, in their chapter, *Carmine Conte* and *Valentina Savazzi* look at the budgetary aspects of the external dimension of migration and asylum. In particular, the authors perform a comprehensive analysis of the conditionality approach in the management of EU external funding policies and examine in detail how resources are allocated under the main EU instruments adopted so far, namely the EU–Turkey statement, the EU Emergency Trust Fund for Africa and the new Multiannual Financial Framework. This chapter thus closes the volume on a crucial yet underestimated subject, putting the in-

struments and policies examined throughout the previous chapters in perspective with the decisions over their funding.

The editors.

Migration Management by the Means of Human Rights in Times of Crisis

Markus Kotzur[*] *and Leonard Amaru Feil*[**Y]

I. Migration and its conflicts

Migration law is often described as a law of conflict. And indeed, migration, and especially international migration[1], is a potentially conflictual phenomenon. Conflicts almost inevitably arise when persons, groups, or even masses start to move in search of bare chances for survival or better conditions for life. When this happens, movements can become encounters and encounters can become confrontations. In such situations, migration law is likely to be interpreted in a preventive way and to be used as an instrument of defence against unwanted migration in order to prevent – alleged or existing – conflicts. This is illustrated by the European Union's reaction to the crisis of the European asylum system in 2015/2016. An agreement with Turkey was concluded which obliged Turkey to prevent irregular migration from Turkey into the EU,[2] thereby following this preventive logic just described. However, the humanitarian situation on the Greek islands in March 2020 and at the Greek–Turkish border after Turkey stopped complying with the agreement, as well as the aggravation of the situation due to the COVID-19 pandemic which resulted in the fire destroying Greece's largest refugee camp Moria on the island of Lesbos in

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Y Another version of this article will be published in the Handbook of Culture and Migration, edited by *J. H. Cohen* and *I. Sirkeci*, forthcoming in 2020.

1 The term migration encompasses all kinds of migration: voluntary and forced migration (on these aspects see *P. Boeles/M. den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2nd edition, 2014, 49 ff. and 243 ff.), internal and external/international migration. Human rights certainly always play a role for migration, but for the purpose of this essay, migration shall be understood as international migration.

2 EU-Turkey statement, 18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

September 2020, show that a purely preventive strategy does not avoid conflicts permanently and cannot be upheld in the long term.

But the area of conflict encompasses more than that. While, from the perspective of world history, migration represents a continuum of human socialisation,[3] migration always takes place in the light of ever-changing social, political and economic conditions: in the real-world context. Rooted in their own time and context, migratory movements thus can very well challenge fundamental assumptions about the establishment of political communities. Furthermore, it is in particular the lesser-developed regions of the world, for example on the African continent, which have to deal with a disproportionally large share of the global migratory movements[4] – an issue likely to be missed in Eurocentric discourses,[5] which is unfortunate considering Europe's colonial past.[6]

Dealing with conflicts arising from migration becomes more complex when realising that, despite all approaches to categorise migratory movements by type, migration can often not be explained in a monocausal way. It is difficult, or sometimes impossible, to draw a clear line between different forms of migration, such as forced migration, labour migration, and lifestyle migration.[7] Who can say where exactly the extrinsically forced pursuit of survival ends, and where the intrinsically motivated pursuit of happiness starts?

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3 *M. H. Fisher*, Migration: A World History, 2014.

4 In 2018, Bangladesh, Chad, Tanzania, Uganda and Yemen were hosting 33 per cent of all refugees worldwide, while accounting for only 13 per cent of the global population and 1.25 per cent of the global gross domestic product, see UNHCR, Global Trends – Forced Displacement in 2018, 20 June 2019, pp. 17f., https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html.

5 *T. Straubhaar*, Towards a European Refugee Policy, Intereconomics 50 (2015), 238, 238.

6 On colonialism and migration see *E. Gutiérrez Rodríguez*, Conceptualizing the Coloniality of Migration: On European Settler Colonialism-Migration, Racism, and Migration Policies, in: D. Bachmann-Medick/J. Kugele (eds.), Migration. Changing Concepts, Critical Approaches, 2018, pp. 193 ff.; *M. Harper/S. Constantine*, Migration and Empire, 2010; *P. M. Amakasu Raposo de Medeiros Carvalho*, Migration and Global Politics in Africa and Asia, in: P. M. Amakasu Raposo de Medeiros Carvalho/D. Arase/S. Cornelissen (eds.), Routledge Handbook of Africa-Asia Relations, 2018, 424 ff.; A. L. Smith (ed.), Europe's Invisible Migrants. Consequences of the Colonists' Return, 2002.

7 On these forms of migration from a sociological perspective see *K. O'Reilly*, International migration and Social Theory, 2012. *P. Boeles/M. den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2nd edition, 2014, 5 argue for a wide understanding of migration.

The whole complexity of migratory phenomena is illustrated by the inner conflicts of the individual. On the one side, there is the cosmopolitan desire of the individual, articulated in *Seneca's* well-known phrase, "*patria mea totus hic mundus est*" (Epistulae morales – Epistula 28). In an interconnected and globalised world, this cosmopolitan ideal seems ever more seizable. At the same time, the insecurities of the age of globalisation provoke a desire for protection provided by the nation state as a space of security. This apparent paradox of the individual's desires is reflected in human rights law: The *universalism of human rights*[8] strives for a concept of global citizenship, and thereby opens up the nation state. In contrast, the right of peoples to *self-determination*, understood as the democratic sovereignty of the people and based in human rights,[9] allows for the formation of consciously distinct political communities on the basis of exclusion and inclusion.

II. Migration management by the means of human rights?

Acknowledging that human rights do not only function as a limitation for measures aiming at the prevention of migratory movements leads to the assumption that human rights can also serve as a means of managing migration. Due to the conflictual nature of migration, the question of how to deal with the movement of persons should not be subjected to the free play of political forces. There is a need for *normative* management to prevent conflicts before they occur, and to deal with conflicts once they arise. It is needless to say that human rights law is by far not the only possible management resource for the conflicts arising in the context of migration. Yet, as the apparent contradiction between the universalism of human rights and the right to self-determination is inherent in human rights law,

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8 *R. Arnold*, Reflections on the Universality of Human Rights, in: R. Arnold (ed.), The Universalism of Human Rights, 2013, 1 ff. *M. Mutua*, The Complexity of Universalism in Human Rights, in: A. Sajó (ed.), Human Rights with Modesty: The Problem of Universalism, 2004, 51 ff. suggests a cautious approach to universality. On the struggle between universalism and cultural relativism see *A. Dundes Renteln*, International Human Rights. Universalism versus Relativism, 1990.

9 *J. Fisch*, The Right of Self-Determination of Peoples. The Domestication of an Illusion, 2015, 61 f.: "Popular sovereignty thereby becomes a preliminary stage of the right of self-determination in the sense of being a necessary but not sufficient condition. Where there is no popular sovereignty, there can, but need not, be a right of self-determination." On provisions on self-determination in human rights conventions see *C. Griffioen*, Self-Determination as a Human Right, 2010, 50 ff.

it is worth critically examining the potential of human rights guarantees for the management of migration.

1. Legal management and international human rights law

While the need for migration management is evident, the idea of human rights as a means of management implies that migration can actually be managed, and that international human rights law offers adequate and effective courses of action. This might seem questionable, as international law has often been criticised for lacking effective enforcement mechanisms.[10] This might be true for many other areas of international law, but especially in the field of human rights law, with its differentiated mechanisms of monitoring and control, it has proven useful. The jurisdiction of regional human rights courts[11] serves as an example, as well as the impacts of the discussion about a human rights-based "responsibility to protect".[12] And, as already mentioned, human rights do not only serve as a limit for states' attempts to impede migration, which is their *status negativus.* More than functioning as a limit to and defence of state power, human rights also oblige states to act, which is their *status positivus*, *status activus* or *status processualis*. They serve as an orientation point, allowing migration and limiting migration at the same time, but always from the perspective of human freedoms. In this way, human rights activate courses of action, as they oblige the responsible actors both within and beyond the state to take creative action.

Law can be used as a means of management in two ways: reactively and proactively. Reactive legal management can be used to design a framework that is necessary to process social and political changes. Law can also serve as an instrument to bring about, to proactively shape processes of change. In the first case, law follows reality, while in the second case, reality fol-

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10 For example by *J. L. Goldsmith/E. A. Posner*, The Limits of International Law, 2005; critically *A. van Aaken*, To Do Away with International Law? Some Limits to "The Limits of International Law", EJIL 17 (2006), 289 ff. On the effectiveness of international law, American Society of International Law (ed.), Proceedings of the 108th Annual Meeting, 2015.

11 For instance the European Court of Human Rights, *Y. Shani*, Assessing the Effectiveness of International Courts, 2014, 253 ff.

12 Report of the International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, 2001; UN Doc. GA/Res. 60/1 (2005 World Summit and Outcome); *C. Stahn*, Responsibility to Protect. Political Rhetoric or Emerging Legal Norm?, AJIL 101 (2007), 99 ff.

lows law. In any case, law cannot (and should not) dictate social developments. Regarding migration, this means that law can build a framework and, serve as an orientation point in response to migration. This is of course only possible if the *rule of law* is comprehensively secured in all matters of migration. Hasty retreats into states of emergency which are beyond the law make the required normative management of migratory conflicts impossible.

Legal management by the means of international law is management in a broader sense than in national law. But unlike national parliamentary legislation, norms of international law can *horizontally* bind state and non-state actors alike, and *vertically* use the mechanisms of multilevel governance[13]. These mechanisms include the establishment of "international benchmark norms"[14] that serve as orientation for national lawmaking and national law enforcement. Even if international law lacks the high degree of effectiveness and precision of management through national law, it has the advantage of being able to address transnational phenomena like migration much better than national law and can have an integrating effect. Due to these dynamics, national sovereignty does not constitute an impermeable shield against international legal management impulses anymore. This applies particularly to the international human rights system with its differentiated possibilities of individual complaints. The individual's right to directly make a claim under various human rights regimes helps to activate international human rights law as a resource for the management of migration. Lastly, human rights are suitable for migration management as they do not take the simple perspective of protection against dangers emanating from migration, but the perspective of migration as an issue of individual freedoms and liberties. In this way, they can capture the problems and conflicts in the context of migration much better than solely defensive approaches. Such a human rights-based approach to migration management may be structured into the three conceptual dimensions of the "re-

13 H. Enderlein/S. Wälti/M. Zürn (eds.), Handbook on Multi-level Governance, 2010; *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, Common Market Law Review 36 (1999), 703 ff.; on the multilevel governance structures in the context of European migration law *P. Boeles/M. den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2nd edition, 2014, 21 ff. For the Australian context see K. A. Daniell/A. Kay (eds.), Multi-Level Governance. Conceptual Challenges and Case Studies from Australia, 2017.

14 *C. Calliess*, Auswärtige Gewalt, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts, vol. IV, 3rd edition, 2006, § 83 MN 6: „Maßstabsnormen".

sponsibility to protect": the responsibility to prevent, the responsibility to react and the responsibility to rebuild.[15]

2. *Migration management and human rights-based belonging*

Sovereignty and individual freedoms mark the starting points of migration management based on human rights. The classical sovereign nation state has the authority to freely decide at its own discretion who may enter its territory, be it for temporary or for permanent stay.[16] This leaves only a little room for migration management through human rights, as long as the state has not bound itself to relevant human rights treaties. But once this happens, the protective armour of sovereignty starts to open, and a humanisation of sovereignty can be witnessed. There are good reasons to believe that the principle of sovereignty (Art. 2 para. 1 UN Charter) can no longer be understood as a value solely serving itself, but that the modern, human rights-rooted nation state is at the service of *humanity*.[17]

It would therefore be wrong to assume that sovereignty and humanity must be antagonisms. It might be true that the construct of sovereignty rather implies the territoriality of the state and the sedentariness of its people, so that international migratory movements conceptually challenge it more than they do challenge universal human rights guarantees. But this does not necessarily lead to the conclusion that sovereignty automatically closes borders, and that human rights automatically open them. Both are social constructs, and as such they are susceptible to absolutist argumentations. Still, painting an irreconcilable contrast between self-determined territorial sovereignty on the one hand – as the only guarantor of freedom in security – and self-determined individual freedom on the other hand – which must not be completely subordinated to security and break at the borders of territorial sovereignty – does not do justice to the complex relation between the two. Sovereignty has been losing its claim to exclusivity.

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15 *A. Hurwitz*, The Collective Responsibility to Protect Refugees, 2009; *S. Martin*, Forced Migration, the Refugee Regime and the Responsibility to Protect, Global Responsibility to Protect 2 (2010), 38 ff.

16 *R. Jennings/A. Watts*, Oppenheim's International Law, vol. I, 9th edition, 2008, § 400.

17 *A. Peters*, Humanity as the A and Ω of Sovereignty, EJIL 20 (2009), 513 ff.

Discussions about a humanitarian intervention[18], the "responsibility to protect", the concept of "human security"[19], or about human rights-based relativisations of state immunity[20] illustrate this development, even if the legalisation of these approaches may in part be doubtful. Then again, human rights can also establish state obligations towards its own nationals, which can be invoked against non-nationals, together with the human rights-based right to self-determination. As an example, Art. 32 para. 2 of the 1951 Refugee Convention[21] can be read as acknowledging this ambiguous nature of human rights when it stipulates that refugee protection does not always prevail over fundamental security interests of the community.[22] But to formulate such fundamental interests of the community on a human rights basis helps to reveal where the real conflicts lie, and where, in contrast, the reference to sovereignty is only a pretext for arbitrary exclusion. In this way, more concrete standards for the balancing of the different interests involved can be obtained.

However, the awareness that human rights do not exclusively convey free movement of persons should not lead to the reinterpretation of the individual right to asylum as a solely objective guarantee. With an individualised understanding of asylum as a subjective and actionable right, the individual is empowered to step on the scene as an actor in the migration game, and – with the help of courts – to enforce the rule of law, which is a prerequisite for normative migration management. Here, the development

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18 See *J.-P. L. Fonteyne*, The Customary International Law Doctrine of Humanitarian Intervention, California Western International Law Journal 4 (1974), 203 ff.; *W. D. Verwey*, Humanitarian Intervention, in: A. Cassese (ed.), The Current Legal Regulation of the Use of Force, 1986, 57 ff.; *F. R. Tesón*, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, 2005; recently *A. J. Bellamy/S. McLoughlin*, Rethinking Humanitarian Intervention, 2018.

19 *C. Tomuschat*, Human Rights. Between Idealism and Realism, 3rd edition, 2014, 159 ff.

20 *K. Parlett*, Immunity in Civil Proceedings for Torture: The Emerging Exception, European Human Rights Law Review 2006, 49 ff.; *H. Fox*, State Immunity and the International Crime of Torture, European Human Rights Law Review 2006, 142 ff.; *P. De Sena/F. De Vittor*, State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case, EJIL 16 (2005), 89 ff.

21 Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, UNTS 189 (1954), 150 ff.

22 *E. Lauterpacht/D. Bethlehem*, The Scope and Content of the Principle of Non-Refoulement: Opinion, in: E. Feller/V. Türk/F. Nicholson (eds.), Refugee Protection in International Law, 2003, 87, 128 ff.; *J. C. Hathaway*, The Rights of Refugees under International Law, 2006, 342 ff.; *G. S. Goodwin-Gill/J. McAdam*, The Refugee in International Law, 3rd edition, 2007, 234 ff.

of the EU Dublin system can serve as an example: while initially the Dublin regulation was interpreted as a purely objective interstate law for the organisation of the EU asylum system between the member states,[23] the reform of the Dublin III regulation in 2013 created individual rights of asylum seekers to challenge states' transfer decisions based on the regulation,[24] and thus, enabled them to insist on the observation of the rule of law in times of crisis.

But when a binary codification of international migration law between sovereignty on the one side and human rights and freedom of movement on the other is too simplistic, what other categories are there to approach migration legally? In the end, sovereignty and human rights imply an idea of different forms and levels of *belonging*[25] to political communities. The idea of belonging is the core question of migration management: It is about balancing wishes to belong with abilities and possibilities of belonging. Human rights offer a differentiated system of belonging, which starts with the basic right to survival, emanating from the mere fact of belonging to the human family. Human rights-based belonging is organised in statuses, from the defensive *status negativus*, to rights of participation (*status positivus*, *status activus*) and procedural rights (*status processualis*). This interpretation of human rights as a system of belonging is where their potential for migration management lies.

But belonging on the grounds of human rights does not end with the basic right to survival. A "bare life" alone would be nothing more than an empty shell, if there was not at least a *right to have rights*,[26] to secure the right to life and to allow for a development of the personality in dignity. It

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23 See the opinion of the Advocate General *N. Jääskinen*, delivered on 18 April 2013, C-4/11, ECLI:EU:C:2013:244, para. 58 – Bundesrepublik Deutschland v. Kaveh Puid, which was confirmed by the European Court of Justice, C-4/11, ECLI:EU:C:2013:740, judgement, 14 November 2013, paras. 24 ff. – Bundesrepublik Deutschland v. Kaveh Puid; also European Court of Justice, C-394/12, ECLI:EU:C:2013:813, judgement, 10 December 2013, paras. 47 ff – Shamso Abdullahi v. Bundesasylamt.

24 European Court of Justice, C-63/15, ECLI:EU:C:2016:409, judgement, 7 June 2016, paras. 34, 51 – Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie; European Court of Justice, C-670/16, ECLI:EU:C:2017:587, judgement, 26 July 2017, paras. 55 ff. – Tsegezab Mengesteab v. Bundesrepublik Deutschland.

25 This can also be named "allegiance" or "identity". On these categories F. Jenkins/M. Nolan/K. Rubenstein (eds.), Allegiance and Identity in a Globalised World, 2014.

26 *P. Owens*, Beyond 'Bare Life': Refugees and the 'Right to Have Rights', in: A. Betts/G. Loescher (eds.), Refugees in International Relations, 2010, 133 ff.

is the minimum condition for seeking opportunities in life, be they related to education, work or personal freedoms. The right to survival applies long before the formation of political communities, and therefore it must be fundamental for all attempts to manage migration. Once political communities constitute, and the more specific they become, the more specific become the rights of the individuals, as the addressee of the corresponding obligation – the community – assumes a more specific form. The spectrum of rights and players ranges from the most fundamental human rights to the right to self-determination, from the elusive international community to the nation state, also encompassing other intermediate, regional entities such as the European Union. Faced with migratory movements, international law has the task of designing a normative framework based on human rights, in which political communities can form their own regimes of belonging, according to the principle of subsidiarity and – most importantly – under the observance of the fundamental belonging of the human to the human family.[27]

III. International migration law as the tool for the management of migration

1. International migration law: some terminological remarks

International law addresses migration phenomena in a number of legal fields, classically in the international law of aliens[28], furthermore in inter-

27 For different constructions of belonging in mobile societies, see *D. Kostakopoulou*, Thick, Thin and Thinner Patriotism: Is This All There Is?, Oxford Journal of Legal Studies 26 (2006), 73, 84. On the idea of "global citizenship", UNESCO, Global Citizenship Education Topics and Learning Objectives, 2015.

28 On the international minimum standard concerning the treatment of aliens, *A. Verdross*, Les règles internationales concernant le traitement des étrangers, Recueil des Cours 37 (1931-III), 323 ff.; *A. H. Roth*, The Minimum Standard of International Law Applied to Aliens, 1949; *K. Hailbronner/J. Gogolin*, "Aliens", in: MPEPIL (2013); *J. Crawford*, Brownlie's Principles of Public International Law, 9th edition, 2019, 591 ff. On the roots of universal human rights protection in the international law concerning the treatment of aliens, *M. Kotzur*, "Fremd bin ich eingezogen" – Überlegungen zu den Wurzeln universellen Menschenrechtsschutzes im völkerrechtlichen Fremdenrecht, in: G. Jochum/W. Fritzemeyer/M. Kau (eds.), Grenzüberschreitendes Recht – Crossing Frontiers. Festschrift für Kay Hailbronner, 2013, 585 ff.

national refugee law, in the law of migrant workers,[29] or in universal human rights catalogues. Still, the term of migration is not a clearly defined legal term in international law. When talking about migration, this should thus be done with semantic sensitivity. The term migration, as used in everyday language, is connoted with problems, linked to all the potential conflicts that have already been described. This is why it has been suggested to speak preferably of "mobility"[30] or "movement of persons"[31] rather than of "migration". This notional differentiation makes sense not least because "migration" implies sedentariness as the norm and mobility as the exception, while "movement" is the rule and the reality of the globalised 21st century with its mobile societies.[32] Furthermore, "movement" and "mobility" are better able to express that the concepts of belonging and the respective attributions of identity have become more variable and have started to move themselves.

Nevertheless, migration is the well-established term in jurisprudence and literature, which is why we want to stick to this nomenclature – however, always having in mind the semantic nuances and the normality of mobility. Therefore, we want to suggest a wide understanding of migration, leaving out domestic migration, and defining migrants as "persons who leave their country of origin or the country of habitual residence, to remain either permanently or temporarily in another country with the possible consequence of establishment".[33] International migration law can therefore be understood as the entirety of all norms of international law dealing with migration in the aforementioned sense.

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29 According to Art. 2 para. 1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, "the term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national", UNTS 2220, 3 ff. On the law of migrant workers see *R. Cholewinski*, Migrant Workers in International Human Rights Law, 1997.

30 *J. H. Cohen/I. Sirkeci*, Cultures of Migration. The Global Nature of Contemporary Mobility, 2011, 7.

31 *P. Boeles/M. den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2nd edition, 2014, 5.

32 *S. Sassen*, Globalization and its Discontents, 1998, XXI; *A. McGrew*, A Global Society, 1992. Globalisation changes realities in a way "that state, civil society and market are inextricably intertwined", as *P. Boeles/M. Den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2014, 6 state, referring to J. A. Camilleri/A. P. Jarvis/A. J. Paolini (eds.), The State in Transition. Remaining Political Space, 1995, 223.

33 *D. Kugelmann*, "Migration", in: MPEPIL (2009), MN 4.

2. *The fragmented nature of international migration law: institutions, substantive law and cooperative responsibility*

Certainly, this definition of international migration law does not establish an independent field of public international law, nor does it lay claim to intradisciplinary status. International migration law is in fact highly fragmented. This is true for the substantive law as well as for the institutional framework. For some specific parts of international migration law, there is a certain level of institutionalisation. The United Nations High Commissioner for Refugees (UNHCR) in the area of refugee protection, or the EU and its institutions, such as the European Court of Justice, with regard to the EU regime of free movement of persons, serve as examples. Beside these two actors, also the UN Security Council can step on the scene as a player in international migration law, when it activates its powers according to Chapter VII of the UN Charter by defining migratory pressure due to armed conflicts as a threat to international peace and security.[34] The pluralism of institutions and the diversity of their respective areas and subareas of international migration law reveal the lack of a coherent governance structure.[35] This becomes evident in the light of mass migration scenarios, when cooperative structures between the players would be most needed. Even the 1951 Refugee Convention does not entail an international obligation of states to cooperate, and includes only a vague appeal for international cooperation in its preamble.[36] The absolute absence of a specific legal framework for people fleeing from natural disasters and other consequences of climate change[37] completes the fragmented picture of international migration law.

At the same time, cooperation is of fundamental importance for the effectiveness of all attempts to manage international migration. Internation-

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34 For examples see *N. Krisch*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations. A Commentary, vol. II, 3rd edition, 2012, Art. 39 MN 23.

35 *S. Benz/A. Hasenclever*, "Global" Governance of Forced Migration, in: A. Betts/G. Loescher (eds.), Refugees in International Relations, 2010, 185 ff. In general K. Blome/H. Franzki/N. Markard/A. Fischer-Lescano/S. Oeter (eds.), Contested Regime Collisions: Norm Fragmentation in World Society, 2016.

36 Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, UNTS 189 (1954), 150, 150.

37 *J. McAdam*, Climate Change, Forced Migration, and International Law, 2012, 187 ff.; *E. Ferris*, Governance and Climate Change-Induced Mobility: International and Regional Frameworks, in: D. Manou/A. Baldwin/D. Cubie/A. Mihr/T. Thorp (eds.), Climate Change, Migration and Human Rights, 2017, 11 ff.

al migration law is indeed international law of cooperation par excellence. The fact that the legal framework is in practice often dominated by the strategic considerations of power politics,[38] thus retaining a certain anarchic character,[39] does not change the necessity of cooperation. Regardless of whether duties of cooperation can arise from an international law principle of solidarity,[40] the question here shall be what potential human rights have for the governance of cooperation. In the first place, human rights create subjective rights for individuals. What might prima facie seem as a factor limiting their potential for cooperation management, can become a genuine duty to cooperate, when the least protection of the individual becomes impossible without a certain degree of cooperation, as for example in cases of mass migration.[41] In the globalised world with transnational migratory movements, the *status processualis* expands to a cooperative *status infrastructuralis.* Those bound by human rights guarantees are obliged to provide at least the minimum of procedural infrastructures, without which the individual rights would in their substance be empty. In this context, it is important to note that "procedure" should not be understood in a narrow and formal sense, only meaning judicial remedies. This logic is illustrated by the idea of the "responsibility to protect", where a single state is unwilling or unable to guarantee the most fundamental human rights of its population, so that the responsibility to protect shifts to the international community as a whole. The realisation of this shared subsidiary responsibility goes along with a responsibility to cooperate. The

38 *A. Betts*, International Cooperation in the Refugee Regime, in: A. Betts/G. Loescher (eds.), Refugees in International Relations, 2010, 53 ff.

39 *A. Hurrell*, Refugees, International Society, and Global Order, in: A. Betts/G. Loescher (eds.), Refugees in International Relations, 2010, 85, 86.

40 See *M. Kotzur/K. Schmalenbach*, Solidarity among Nations, AVR 52 (2014), 68 ff.

41 The preamble of the 1951 Refugee Convention stresses the necessity of burden-sharing: "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". On burden-sharing *P. Hilpold*, Quotas as an Instrument of Burden-Sharing in International Refugee Law – The Many Facets of an Instrument Still in the Making, ICON 15 (2017), 1188 ff.; *J.-P. L. Fonteyn*, Burden-Sharing: An Analysis of the Nature and Function of the International Solidarity in Cases of Mass Influx of Refugees, Australian Year Book of International Law 8 (1978–1980), 162 ff. Whether fixed refugee quotas are helpful for such burden-sharing is however a different question, see *P. Hilpold*, Unilateralism in Refugee Law – Austria's Quota Approach Under Scrutiny, Human Rights Review 18 (2017), 305 ff.

UN Security Council with its extensive Chapter VII policy[42] could in terms of competences well take this responsibility, also in the context of migration.

3. Human rights law as the normative resource beyond all fragmentations

Migratory movements have, from a human rights perspective, two dimensions concerning the freedom of movement. Firstly, there is the freedom to leave a country. This dimension of freedom is normatively recognised and protected in a number of human rights texts. Art. 13 para. 2 of the Universal Declaration of Human Rights[43] stipulates the right to leave any country, including one's own, and so do Art. 12 para. 2 of the International Covenant on Civil and Political Rights (ICCPR)[44] as well as Art. 2 para. 2 of Protocol No. 4 to the European Convention on Human Rights. In contrast, the counterpart, the freedom to enter a country, is hardly accepted in international law. It is generally in the discretion of all nation states to decide, whom to let into their territory and whom not. Already in 1892, the U.S. Supreme Court stated:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[45]

Even Art. 14 para. 1 of the Universal Declaration of Human Rights, which grants everyone the right to seek and enjoy asylum from persecution, was in its genesis not intended to establish a right of the individual to be granted asylum, and is thus commonly read in a sovereignty-centred way: It is "the right of every state to offer refuge and to resist all demands for extradition", as the British delegate phrased it during the drafting of

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42 For an overview see *N. Krisch*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations. A Commentary, vol. II, 3rd edition, 2012, Art. 39 MN 23 ff.

43 General Assembly resolution 271 (III) A.

44 UNTS 999 (1976), 171 ff.

45 U.S. Supreme Court, *Nishimura Ekiu v. United States et al.*, 142 U.S. 651, 142. See also ECtHR, *Abdulaziz, Cabales and Balkandali*, Appl. Nos. 9214/80, 9473/81, 9474/81, 28 May 1985, para. 67; on this see *P. Boeles/M. Den Heijer/G. Lodder/K. Wouters*, European Migration Law, 2014, 15.

the declaration.[46] The declaration does not accord the individual a "right to be granted asylum", only a "right to enjoy asylum", establishing no obligation for the state.[47]

However, state practice has evolved since 1948. In 1951, the Convention relating to the Status of Refugees was signed in Geneva and has, together with its 1967 Protocol, become the core document or "Magna Carta"[48], for international refugee law.[49] The Convention, which in its preamble classifies itself as a human rights treaty, provides for a limited individual right to asylum in its Art. 33. The prohibition of expulsion or return (so-called *refoulement*) of a refugee to territories where his or her life or freedom would be in danger, contained in this provision, is generally interpreted as applying at the frontiers,[50] and in this way establishing a right to enter the territory of the state in which he or she seeks protection.

In universal human rights treaties, no express right to asylum can be found. Neither the international Covenant on Civil and Political Rights (ICCPR), nor the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain a parallel provision to Art. 14 of the Universal Declaration of Human Rights. Nevertheless, general human rights provisions have a reinforcing effect on the principle of *non-refoulement*. While Art. 3 para. 1 of the Convention against Torture[51] expressly prohibits *refoulement*, similar obligations not to expel a person can originate from certain rights of the Convention on the Rights of the Child[52] (for example Art. 9 and 10), or from general human rights obligations, such as the right

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46 *H. Lauterpacht*, The Universal Declaration of Human Rights, British Yearbook of International Law 25 (1948), 354, 373.

47 For more on this aspect of the drafting history *R. Boed*, The State of the Right of Asylum in International Law, Duke Journal of Comparative & International Law 5 (1994), 1, 9 f.

48 *J. M. Read*, Magna Carta for Refugees, 1953.

49 On the historical development see *C. Skran*, Historical Development of International Refugee Law, in: A. Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary, 2011, 3 ff.; *T. Einarsen*, Drafting History of the 1951 Convention and the 1967 Protocol, in: A. Zimmermann (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary, 2011, 37 ff.

50 *G. S. Goodwin-Gill/J. McAdam*, The Refugee in International Law, 3rd edition, 2007, 306 ff.

51 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, UNTS 1465 (1987), 85 ff.

52 Convention on the Rights of the Child, adopted on 20 November 1989, UNTS 1577 (1990), 3 ff.

to life[53] and the prohibition of torture[54]. In the case of general human rights treaties, the establishment of a right to enter a country faces the problem of the very limited extraterritorial applicability[55] of the respective treaties. As a consequence, human rights convey "complementary protection"[56] to the prohibition of *refoulement*, reinforcing it once the person has reached the territory of a state bound by the human rights treaty. Some regional human rights treaties such as the European Convention on Human Rights (ECHR) go even further[57] and contain additional protection, for example from collective expulsion in Art. 4 of Protocol No. 4,[58] or residence rights (Art. 8 ECHR).

And yet, genuine freedom of movement, complementing the freedom to leave a country with a corresponding freedom of entry, only seems to have a chance when, on the basis of international treaty law, more comprehensive processes of integration take place, as for example in the case of

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53 Contained for example in Art. 6 para. 1 ICCPR, Art. 2 para. 1 ECHR.

54 Art. 7 ICCPR, Art. 3 ECHR. See ECtHR, *Soering*, Appl. No. 14038/88, 7 July 1989, para. 91; ECtHR, *Chahal*, Appl. No. 22414/93, 15 November 1996, para. 74; ECtHR, *Saadi*, Appl. No. 37201/06, 28 February 2008, para. 125 ff. The ECtHR has also considered that "an issue might exceptionally arise under Article 6 [ECHR] by an extradition decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial in the requesting country", ECtHR, *Aborugeze*, Appl. No. 37075/09, 27 October 2011, para. 113.

55 The ECtHR has assumed a relatively wide extraterritorial responsibility of the parties to the ECHR, see ECtHR, *Medvedjev*, Appl. No. 3394/04, 29 March 2010; ECtHR, *Al-Skeini*, Appl. No. 55721/07, 7 July 2011; ECtHR, *Hirsi Jamaa*, Appl. No. 27765/09, 23 December 2012; see also ECtHR, *Khlaifia*, Appl. No. 16483/12, 1 September 2015. With regard to maritime borders *A. Fischer-Lescano/T. Loehr/T. Tohodipur*, Border Controls at Sea: Requirements under International Human Rights and Refugee Law, International Journal of Refugee Law 21 (2009), 256 ff.

56 *G. S. Goodwin-Gill/J. McAdam*, The Refugee in International Law, 3rd edition, 2007, 285.

57 On Europe *A. Klug*, Regional Developments: Europe, in: A. Zimmermann (ed.) (fn. 49), 117 ff.; on Asia *S. Blay*, Regional Developments: Asia, in: A. Zimmermann (ed.) (fn. 49), 145 ff.; in Africa, the relevant treaty is the 1969 Refugee Convention of the OAU, see *J. van Garderen/J. Ebstein*, Regional Developments: Africa, in: A. Zimmermann (ed.) (fn. 49), 185 ff.; for the Americas it is the 1984 Cartagena Declaration, see *F. Piovesan/L. L. Jubilut*, Regional Developments: Americas, in: A. Zimmermann (ed.) (fn. 49), 205 ff.

58 But see the recent decision of the ECtHR, *N.D. and N.T.*, Appl. Nos. 8675/15 and 8697/15, 13 February 2020, establishing an exception from the prohibition of collective expulsion which has been strongly criticised, see *M. Pichl/D. Schmalz*, "Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgement in case N.D. and N.T., Verfassungsblog, 14 February 2020, https://verfassungsblog.de/unlawful-may-not-mean-rightless/.

the EU. The EU has established a legal space with an advanced regime of free movement of persons for the citizens of the Union.[59] This shows that it is often more effective to seek regional or even bilateral answers to global challenges, using regional instruments and institutions of international law and unfolding the potential of the close relations of the respective players. It might by all means be fruitful to think global, but to act and react local.

IV. Conclusions for migration management based on human rights

1. Management in advance of migratory movements

To act locally when faced with the global issue of migration starts before migration occurs. In this stage, migration management – from the perspective of human rights – is preventive. In a narrow sense of the word, it is about the prevention of unwanted causes of migration. Preventive migration management in a wider sense also encompasses the dismantling of existing infrastructural barriers to freedom of movement. What can be framed as a "responsibility to prevent", can address migration in all its facets: from precarious economic situations to the lack of opportunities for young people,[60] from environmental disasters as a reason for displacement[61] to human rights violations in civil wars and other armed conflicts. Of course, deep-rooted ethical, religious, political or cultural conflicts cannot be solved by legal management alone. But conflict resolution, being first and foremost a political process, can and should be normatively accompanied and safeguarded by law. This implies the usage of the common instruments of good governance, protection against forced displacement as part of the freedom of movement,[62] as well as the usage of international criminal law instruments against gross violations of human rights. Other

59 See for example Art. 20, 21 and 45 TFEU and Art. 45 of the EU Charter of Fundamental Rights.

60 On factors for migration, see *E. Lee*, A Theory of Migration, in: J. A. Jackson (ed.), Migration, 1969, 282, 285 ff.

61 *R. Cohen/M. Bradley*, Disasters and Displacement: Gaps in Protection, Journal of International Humanitarian Legal Studies 1 (2010), 95 ff.; *D. Farber*, International Law and the Disaster Cycle, in: D. Caron/M. Kelly/A. Telesetsky (eds.), The International Law of Disaster Relief, 2014, 7 ff.

62 Art. 12 para. 1 ICCPR stipulates, "Everyone lawfully within the territory of a State shall, within that territory, have the […] freedom to choose his residence".

issues to be envisaged are the strengthening of international institutions such as the United Nations High Commissioner for Refugees,[63] and a focus on international environmental law and development policies. The EU Agenda on Migration, for example, defines "the development of the countries of origin" as one goal of the EU's legal migration policy.[64] Human rights-based migration management is thus a cross-sectional task of international cooperation, involving various fields of international law.

2. Management of migratory movements

Once migration occurs, there is a need for reactive management. Compliance with this "responsibility to react" is difficult, due to the many deficiencies of international migration law. It starts with the assumption of the 1951 Refugee Convention that refugees will only stay temporarily in the host countries. In reality, permanent resettlement is the rule. This can challenge societies and their ability to integrate migrants whom they might consider a threat to their wish for a self-determined decision about questions of permanent belonging. On the other side, permanent emigration can potentially cause problems for the countries of origin, when they experience "brain drain" and thus might even lose their capacity to rebuild after conflict resolution. Furthermore, the problem of mass exodus scenarios remains inadequately solved in international refugee law. While the 1951 Refugee Convention remains silent with regard to mass influxes of refugees, Art. 3 of the UN General Assembly resolution of 1967 establishes an exemption for mass influx scenarios:

> "1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."[65]

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63 *R. Cohen/M. Bradley*, Disasters and Displacement: Gaps in Protection, Journal of International Humanitarian Legal Studies 1 (2010), 95, 138.

64 COM (2015) 240 final, 16.

65 UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, Res. 2312 (XXII).

This is, however, not a satisfying solution because particularly in such occasions of mass displacement, when the protection of human rights is at stake on a massive scale, refugees are vulnerable. At the same time, a single state cannot handle the need for protection alone.[66]

Migration management by the means of the Refugee Convention becomes even harder with its restrictive refugee definition in Art. 1, limiting the Convention's applicability to individual persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and excluding other important factors for forced migration, such as armed conflicts or environmental disasters. But the crucial point from a human rights perspective is that the Convention requires successful flight. The core principle of refugee protection, the prohibition of *refoulement* in Art. 33, only applies once the refugee has – be it legally or illegally – entered the territory of the state, or at least reached the border.[67] Yet some of the greatest threats for life and physical integrity of refugees lie on the route to the countries of destination. The lack of legal entry possibilities in the countries of destination results in illegality becoming the only way to make use of guaranteed human rights, and it incentivises the taking up of dangerous journeys in the hands of criminal traffickers. The issue of humanitarian visa, as proposed by the Advocate General *P. Mengozzi* in a case before the European Court of Justice with regard to situations where there is a genuine risk of infringement of certain human rights,[68] would be difficult to put into practice, considering the potential run on the diplo-

66 In 2001, the Council of the EU adopted the Council Directive 2001/55/EC of 20 July 2001 on "minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof". The directive has, however, never been activated, see *J. Koo*, Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem, European Journal of Migration and Law 20 (2018), 157 ff., who argues that the concept of temporary protection has failed; but also *M. Ineli-Ciger*, Time to Activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe, European Journal of Migration and Law, 18 (2016), 1 ff.

67 *E. Lauterpacht/D. Bethlehem*, The Scope and Content of the Principle of Non-Refoulement: Opinion, in: E. Feller/V. Türk/F. Nicholson (eds.), Refugee Protection in International Law, 2003, 87, 113 ff.; *Hathaway*, The Rights of Refugees under International Law, 2006, 315 ff.; *G. S. Goodwin-Gill/J. McAdam*, The Refugee in International Law, 3rd edition, 2007, 246; *W. Kälin/M. Caroni/L. Heim*, in: A. Zimmermann (ed.) (fn. 49), Art. 33 para. 1 MN 105 ff.

68 Opinion of the Advocate General *P. Mengozzi*, delivered on 7 February 2017, C-638/16 PPU, ECLI:EU:C:2017:93, para. 109-175 – X and X v. État Belge.