Ius Gentium: Comparative Perspectives on Law and Justice 81

Neža Kogovšek Šalamon *Editor*

Causes and Consequences of Migrant Criminalization

Springer

Ius Gentium: Comparative Perspectives on Law and Justice

Volume 81

More information about this series at http://www.springer.com/series/7888

Neža Kogovšek Šalamon
Editor

Causes and Consequences of Migrant Criminalization

Springer

Editor
Neža Kogovšek Šalamon
Peace Institute
Ljubljana, Slovenia

ISSN 1534-6781 ISSN 2214-9902 (electronic)
Ius Gentium: Comparative Perspectives on Law and Justice
ISBN 978-3-030-43731-2 ISBN 978-3-030-43732-9 (eBook)
https://doi.org/10.1007/978-3-030-43732-9

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Contents

Contributors

Maddalena Avon Center for Peace Studies, Zagreb, Croatia

Veronika Bajt Peace Institute, Ljubljana, Slovenia

Peter Billings School of Law, The University of Queensland, Brisbane, QLD, Australia

Emina Bužinkić Centre for Peace Studies and Welcome Initiative, Zagreb, Croatia;
University of Minnesota, Twin Cities, Minnesota, USA

Didem Doğar Faculty of Law, McGill University, Montreal, Canada

Barry Frett University of Chicago Law School, Chicago, IL, USA

César Cuauhtémoc García Hernández University of Denver, Denver, CO, USA

Tomaž Gregorc Trieste, Italy

Yewa S. Holiday Queen Mary University of London, London, UK

Vlasta Jalušič Peace Institute, Ljubljana, Slovenia

Elizabeth Stark Ketchum University of Chicago Law School, Chicago, IL, USA

Neža Kogovšek Šalamon Peace Institute, Ljubljana, Slovenia

Christelle Macq Interdisciplinary Research Centre on Deviance and Penalty (CRID&P), European Rights and Migration Team (EDEM), Catholic University of Louvain (UCLouvain), Louvain-la-Neuve, Belgium

Izabella Majcher European Council on Refugees and Exiles (ECRE), Brussels, Belgium

Davide Pittioni Trieste, Italy

Rok Smrdelj Department of Sociology, Faculty of Arts, University of Ljubljana, Ljubljana, Slovenia

Tjaša Učakar Faculty of Arts, University of Ljubljana, Ljubljana, Slovenia

Jože Vogrinc Department of Sociology, Faculty of Arts, University of Ljubljana, Ljubljana, Slovenia

Crimmigration Across the Globe

Global Crimmigration Trends

Neža Kogovšek Šalamon, Barry Frett, and Elizabeth Stark Ketchum

Abstract Crimmigration, generally defined, is the increased entanglement of criminal and immigration procedures. Scholars have been observing this trend in the United States, Australia, and various European countries, as well as on other continents. Historically, states handled immigration infractions through civil or administrative systems separate from criminal law. However, in response to increases in migration and mobility, the politicisation of this topic, and a cultural shift in how receiving countries perceive immigrants, immigration and criminal law have become more intertwined. This has increased the number of people processed in immigration systems, detained, and deported. These changes have led to alarming consequences that are incidents of migrant criminalisation—inequality, xenophobia, and a widespread assault on the rights and dignity of migrants.

1 Introduction: A Definition

Based on the contributions in this volume, this introductory chapter first defines crimmigration as a concept, presents the phenomenology of crimmigration practices,

[1]The volume is one of the results of a research programme of the Peace Institute "Equality and human rights in times of global governance," no. 6037-24/2016/87 (2020–2023) and of a basic research project "Crimmigration between Human Rights and Surveillance" no. J5-7121 (2016–2018), both financed by the Slovenian Research Agency. The project hosted a conference on causes and consequences of the criminalisation of migration where a number of experts, researchers, and analysts gathered to debate contemporary crimmigration phenomena.

N. Kogovšek Šalamon (✉)
Peace Institute, Ljubljana, Slovenia
e-mail: neza.kogovsek@mirovni-institut.si

B. Frett · E. S. Ketchum
University of Chicago Law School, Chicago, IL, USA
e-mail: bfrett@uchicago.edu

E. S. Ketchum
e-mail: estarkketchum@uchicago.edu

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_1

and examines its causes and consequences. In the second part, it outlines the main crimmigration trends on a global scale.[1]

Crimmigration, generally defined, is the increased entanglement of criminal and immigration procedures.[2] Scholars have recently observed crimmigration trends in the United States, Australia, various European countries, as well as in other continents. Historically, states handled immigration infractions through civil or administrative systems separated from the criminal law. However, in response to increases in migration and mobility, the politicisation of this topic, and a cultural shift in how receiving countries perceive immigrants, immigration and criminal law have become more intertwined. This has increased the number of people processed in immigration systems, detained and deported. These changes have led to alarming consequences of migrant criminalisation—border violence, exclusion, punishment, inequality, xenophobia, and a widespread assault on the rights and dignity of migrants. As Jalušič notes in this book, crimmigration is a result of the adoption of criminal law characteristics in immigration enforcement on the one hand and adoption of immigration consequences for criminal law infractions on the other hand. Majcher in her chapter defines the use of criminal sanctions for violations of administrative immigration law as "formal" criminalisation of migration. Another form of crimmigration that she exposes refers to adding criminal offences to the lists of grounds justifying expulsion within immigration legislation, which reflect criminal law priorities being incorporated into the immigration law. As Holiday puts it in this volume, crimmigration is the example of Spena's *Täterstrafrecht* approach to criminal law, meaning that one is guilty for who he or she is and not for what he or she has done. Crimmigration law imposes punishment for wrongbeing, not for wrongdoing. Since Western societies have a liberal criminal law model oriented to punish crimes, it is evident that in modern contemporary societies and legal systems *Täterstrafrecht* approach can and does, in fact, co-exist with *Tätstrafrecht* approach. Jalušič further expands this idea by finding that the crimmigration law needs no specific crime; it creates a parallel system of an "alleged" crime, without the guarantees of criminal law. She sees crimmigration law as very discretionary and arbitrary type of law: namely, migrants are treated worse than criminals even when they are innocent.

2 Phenomenology of Crimmigration Law

Migrant criminalisation is perceived, therefore, as an interplay between immigration and criminal law. This interplay is visible in various mechanisms, such as immigration detention, forced expulsion and punishment for migration-related infractions, used by states for crime control and risk management, as Hernández and Billings point out in this book. As Jalušič highlights, special border regimes are being established for undesirable migrants, which is a process led by "Western" or Global north governments and transnational formations, such as the EU. Particularly problematic

[2]E.g. Rosenbloom (2016).

is the fact that migration law is increasingly taking on punitive elements of criminal law, while simultaneously it is not also taking on criminal law's procedural guarantees.

Juliet Stumpf noted two types of crimmigration trends: first, increased criminalisation of border crossing infractions (Hernández calls them *immigration crimes*), and second, expansion of criminal deportability grounds for non-citizens already present in society (also lawfully). Hernández further specifies the various aspects of increased crimmigration: (1) immigration law is used to raise the severity of criminal infractions; (2) migration-related activity is criminalised (penalty increases for helping people or assisting them for commercial gain); (3) unique (or uniquely harsh) law enforcement measures are adopted, affecting migrants or migration: in the U.S. crossing of the border is punishable with up to six months imprisonment. The same act after previous deportation is punishable with up to two years imprisonment. If the offender crossing the border has a prior conviction, the breach is punishable with up to twenty (!) years of imprisonment. Hernández reminds us that in some countries, such as the U.S., laws criminalising migration have existed for almost hundred years but have been mostly irrelevant for people who wanted to enter. In the U.S. this drastically changed in the 1980s, and immigration-related charges outnumber the drug-related federal offences significantly, he stresses. As Billings notes in the context of Australia, the situation has reached the point of a complete lack of tolerance for criminal or fraudulent behaviour of immigrants, asylum seekers and refugees and aims at their total exclusion.

Criminalisation of migration law is manifested on many levels: in the strengthening of border control institutions (border police, European Border and Coast Guard Agency—Frontex, the U.S. Immigration and Customs Enforcement (ICE), etc.); increased confinement of irregular migrants to detention centres; mandatory immigration detention; indefinite detention; lack of alternatives to detention; prolonged immigration detention also for minor charges or "anti-social" or "disruptive" behaviour; policing of non-citizens before and after entry to prevent entry; annulment of visas and residency permits based on broad list of cancellation grounds and expansion of these grounds; mandatory visa cancellations, allowing no discretion; visa cancellations following criminal charges even if they do not result in convictions; expulsions in cases of convictions for crimes; penalisation for irregular border crossing offences; drafting of anti-terrorism laws aimed at racial profiling of individuals from the Middle East; and in the disproportionate incarceration of migrants. Some measures are no longer considered to be aimed at crime control and punishment for committing a crime but are seen and used as crime prevention measures. Further, a specific deterring element is the processing of asylum seekers' claims in third countries based on regional processing agreements, a phenomenon also known as extraterritorial processing of asylum claims (as, e.g. in the case of Manus and Nauru islands, northeast of Australia, as Billings points out).

Billings also writes about maritime interceptions as specific tools of crimmigration. Such interceptions are not sea rescue operations but are intended to deter and criminalise in the forms of turnbacks, takebacks and assisted return. In this context, turnbacks are equivalent to pushbacks that prevent people from accessing asylum

procedure. There is also a mechanism of offshore processing resulting in chain *refoulement*: it first requires deporting a person to a third country for processing the asylum application, but these third countries have their own immigration laws also regulating these situations, and might render people subject to further removal. Učakar highlights that involvement of third countries into migration control schemes through "help and support" programmes results in removing the Western societies from responsibility. Furthermore, these third countries are also subjected to conditionality, being pushed towards taking over the responsibility in exchange of becoming partners or members of the "developed" world, as for instance in the case of candidate countries for the EU membership.

One of the most widespread crimmigration state practices affecting the rights of migrants is detention, in particular if it has a punitive purpose, as Majcher reminds. She invokes utilitarian criminal law theory to show that detention aimed at deterrence, retribution and incapacitation constitutes *criminal punishment*. Detention, she emphasises, is not punitive if it is short and aimed at ensuring presence for the purpose of removal. However, frequently this is not the case. Often detention as a tool of deterrence is accompanied by pushbacks, i.e. informal returns preventing people from accessing protection mechanisms. In this volume, such practices are discussed in the context of the EU enlargement in two chapters, one written by myself and the other by Bužinkić and Avon. As they point out, pushbacks are often accompanied by physical police violence (beatings resulting in injuries and bruises); threats, mockery and humiliation; other crimes committed against migrants, such as thefts of money and mobile phones, all resulting in treatment so detrimental that the authors describe it as *living hell*.

On the contrary, Pittioni and Gregorc in this volume remind that crimmigration does not need to be physically violent to be brutal. They refer to criminalisation of migration as a *total situation*, invoking a concept similar to *total institution*. The *total* situation is a situation of bureaucratic suspension and uncertainty that affects all aspects of human existence and abolishes all differences between individuals.

Interestingly, in this volume, Doğar identifies yet another specific type of crimmigration—the exclusion clause in the 1951 Geneva Convention Relating to the Status of Refugees, according to which the refugee status is not granted if serious reasons exist to believe the person has committed war crimes. Within this context, Doğar emphasises the right not to incriminate oneself. This right is central to fair criminal procedure, but not always respected when individuals present their claim within the asylum procedure. There are cases when these claims were used against the asylum seekers in criminal proceedings that were instigated based on facts people shared as asylum seekers. Doğar points out that while the legal systems, national and international ones, provide for protection against self-incriminating, they fail to recognise this right to asylum seekers who are suspected of committing war crimes.

Crimmigration is also noticeable on the level of discourse. On the one hand, as Hernández reminds, refugees and migrants are subject to demonisation as the politicians and some media accuse them of threatening public order and undermining the democracy. They are charged with disrespect of the rule of law, breaking the law, and jeopardising safety. The term "asylum seeker" was transformed into "illegal

asylum seeker", and applying for asylum is considered as asylum system abuse. Further, asylum is no longer understood as a tool of protection but as a tool of migration management.

On the other hand, on the international level, there is an increased use of humanitarian and human rights language in migration management systems.[3] The examples of softening of the language given by Učakar in this volume are that "migration control" has become "migration management", while "fight against irregular migration and international crime" has been replaced by "migration profiles" and "risk assessments". Učakar notes a shift from "migration as a threat" to "migration as an opportunity" because of its ability to address the problem of the labour shortage, maintain sustainability of the welfare systems and meet the demographic needs of the Western societies. Hence, opportunities are not understood as opportunities for migrants, but for the host societies. These are linked to regular migration only, which means further threat to irregular migration.

These changes, however, should not conceal the real crimmigration's goals of deterring, surveillance and penalisation of migrants and protection of external borders. As Učakar also notes in this volume, less securitarian language used recently by the EU does not lead to a changed understanding of migration but broadens the logic of securitisation. Humanitarianism and militarisation have become two sides of the same coin: saving lives has moved away from rights-based approach towards compassion. There is a definite shift from "protection" to "rescue", as Učakar points out, reducing migrants to *bare lives*. The discourse of "saving lives as a top priority" is not reflected in actual policies.

3 Causes of Crimmigration

A leitmotif of all the authors of this book was a search for causes—and consequences—for the criminalisation of migration. What are the reasons for the flourishing of such policies, its diversification and popularity? How is it done? Why are politicians, policymakers and legislators resorting to it so massively? Why are they on the rise despite sharp criticism by civil society and academia? Are they really so effective, necessary and hence—inevitable? Why are all three branches of power—legislative, executive and judicial—involved in this process and why such few cases exist where the system of checks and balances played a role in slowing this process down?

The authors who contributed to this volume identify a wide variety of causes, reasons and justifications for the spread of crimmigration. What is common to all geographies where crimmigration is on the rise, there generally seems to be a problem with the lack of ability and/or lack of interest to understand, acknowledge and deal with the root causes for migration itself. Crimmigration is a type of response that completely disregards this issue. It negatively affects people who either have already

[3] Franko Aas and Gundhus (2014).

suffered in their countries of origin or while on the move. As Učakar notes, the EU's understanding of migration is limited to mostly seeing it as a problem that must and can be fought. When designing new crimmigrant policy approaches, states believe that this is the only effective way of responding to the developments in the crisis regions that force large numbers of people to leave. As Hernández points out, it is a popular way to respond to caravans of several hundreds of people at the time who are trying to make it to the country of destination. Hence, mass criminal prosecution and other crimmigration tools can be seen as an attempt of the state authorities to respond to mass arrivals, and their desire to signal the population that they are trying to protect them from danger. At the same time, Doğar reminds that migration flows are mixed, involving not only asylum seekers but also some foreign fighters who all have a common feature: they both cross international borders, however, for the opposite reasons. In these circumstances, Doğar concludes, host states have a difficult task to determine who is a refugee and who is, in fact, a criminal, putting everyone in the same basket.

Hence, the politicians think, everyone in the host countries will be better off if migration is suppressed. Billings who analysed the political justifications for increased crimmigration in Australia pointed at the authorities' message that the previously liberal reception system—due to changed circumstances and ineffectiveness and inappropriateness of the old system—supposedly requires a more rigorous approach now. Using a technical language the latter is being justified by the needs of *population control*, *crime control*, *risk management*, *protection of public safety or national security* and *protection of public health*, suggesting that migrants may spread contagious diseases, but not backing up such statements with evidence or data. The reasons stated for a more stringent use of detention are the need for removal from territory as quickly as possible, facilitation of removal and ensuring that the person does not flee and hide, and prevention of absconding (which always means the loss of state control over an individual). When tightening the legislation, as Billings notes, the politicians often refer to the alleged community expectations and to what the government believes or assumes the public wants and expects, purposefully ignoring the voices opposing the harsh attitudes towards the newcomers.

In addition to justifications related to deterring migration in general, specific justifications can be heard concerning specific crimmigration measures targeting non-citizens with criminal records. For example, as Billings explains, in Australia the government was concerned that people were released from prison before immigration procedures were finalised. Mandatory visa cancellation resolved this problem, as a two-step procedure (punishment for crime first, followed by revoking of a visa) was omitted. Sometimes the causes for the spread of crimmigration are extremely practical, even banal. For instance, as Billings illustrates, using migrant deportation is more discretionary and requires a lower threshold to be met, enables the governments to circumvent the criminal deportations that are more limited, demand a higher threshold and are subject to various conditions. In other words, migrant deportation allows the governments to avoid the guarantees embedded in criminal legal systems.

The need to address the so-called *pull factors* has also been identified by the authors among the reasons for the proliferation of crimmmigration measures. Billings

notes that reducing the attractiveness of countries of destination has been one of the main goals of harsher migration policies. At the same time, as Billings and Učakar find, humanitarian or sea rescue operations are being considered as one of the primary pull factors. The fact that they respond to the duty of the states to protect the right to life disturbingly does not seem to be of much significance anymore.

Discouragement of new arrivals seems to be the overarching motive for the states introducing yet another restrictive crimmigration policy, as noted by Učakar, Billings, Pittioni and Gregorc in their respective chapters. In addition, the latter two authors also highlight the importance of the role the police plays in the asylum process, leading to relations towards people being of securitarian nature, but also other banal reasons such as just a very poorly organised asylum system resulting in people wholly neglected and forgotten by the system to the extent that they feel like less than criminals. On the other hand, Pittioni and Gregorc emphasise that this same system hugely benefits from such invisible and humiliated people, namely by using migrant workforce within the capitalist production system as means of *control* and *segregation* of individuals from the rest of the population.

Crimmigration attitudes developed by the Western countries of destination have spillover effects on transit countries that are not attractive for migrants (yet), such as the EU candidate countries. The reasons for increased migrant criminalisation in those regions are not the same, but are specific to those regions and reflect their own particular needs. As I write further in this volume, the cause for crimminalisation in this region is the EU membership conditionality: as the EU aims at creating the buffer zone in the Western Balkans region, trying to close its external borders and keep the migrants out, the candidate countries are eager to meet the EU's expectations, hoping they will be awarded EU membership for their efforts. Consequently, they construct new structures of control and detention centres using donor money. In these countries, crimmigration is, paradoxically, the sign of *development*, as understood and defined by the West.

On the general level, some authors observe in this volume that the division of powers system does not seem to be working in this field. The checks and balances enshrined in the division of powers principle are ineffective. As Hernández notes observing the situation in the U.S., the judicial framework is not able to resist the pressure of politics. Billings agrees that the judicial oversight of the completely new paradigm is insufficient and ineffective. Specifically, the judicial oversight is restricted due to extensive legal grounds for crimmigration measures, for instance for detention: the judge can only compare detention to the legal provisions, and when the measures were imposed consistent with the provisions not much can be done by the judiciary. In such cases, the legislative branch is the problem, as Billings observes. In this context, Jalušič asks how it is possible that, under the rule of law, such changes in law happen. She refers the readers to historical experience of humankind with taking advantage of the state of emergency to introduce changes that would otherwise not be possible. She invokes the past to show how the state of emergency is prolonged to the extent that the division of powers ceases to exist. In this *crimmigration era* she points at the signs signalling that the abolition of the division of powers is taking place, an

era in which administration begins living its own life without judicial control—at least when it comes to migrant criminalisation approach to law.

Jalušič further defines the method of how it is being done. Criminalisation of migration becoming a prevalent system is made possible by constant revision of norms and laws, not to award more importance to post WWII refugee protection structures, but to undermine it. She identifies four steps through which this is accomplished. The first step is a discursive creation of *prima facie* criminal suspects and erasure of the term *refugee*. This is followed by creation of the legal category of *illegals* who are consequently subject to criminalisation. Third, migrants as a whole are criminalised, and criminal alien is constructed; and ultimate control over entire population is introduced, criminalising both migrants *and* local population (not only smugglers but also those who exercise solidarity). Finally, when it becomes evident that criminalisation works in some areas, other behaviours tend to be criminalised as well, to control them, regardless if they are justifiable or not. Jalušič labels this process *a pragmatic use of law*.

The process can also be observed from the otherness perspective. Bajt reminds that the origins of crimmigration policies are also related to the negative perception of the *Other* and that nationalism, together with the fear from weakening welfare state and *collective paranoia* may be some of the causes of crimmigration. She clarifies that the elites are investing in the construction of the enemy by crimmigration and rhetoric of *Othering* that instils fear. Here, political leaders and policymakers play an important role bearing the primary responsibility for increase of crimmigration structures. As a result, the so-called *dangerous others* are construed as scapegoats who can efficiently mobilise people for the idea of protecting their own nation against arbitrarily defined outsiders. Such populist discourse, as Učakar adds, creates a continuous crisis comprised of alleged threats, resulting in a widespread populism. Hence, it is the populism, and not migration, that, in fact, poses a threat to the rule of law.

4 Consequences of Crimmigration

The consequences of crimmigration, including those elaborated by the authors of this volume, are vast. First, crimmigration changes the way migration unfolds. As Hernández demonstrates, due to crimmigration, the prevalent way in which individuals who flee enter the country is clandestine. Fear from criminalisation and negative consequences of detection of irregular stay, deportations and inability to enter legally are pushing people to enter in such an undesirable way.

Consequently, this trend has a significant impact on the structure of the crime statistics. Hernández notes that in the US, immigration crime has become the most commonly charged federal offence nationwide. Conviction of a migrant for any offence increases chances of deportation. As entry is a felony, everyone is prosecuted, and almost everyone is convicted, meaning that a substantial part of the US federal law enforcement resources is being used for migrants and refugees. At the same time, the visa cancellations rate increases, and so does the extent of deportations and

detentions, as Billings and Učakar find. As Jalušič notes in this volume, invoking a statement by Hannah Arendt, it is a system in which the victims are turned into criminals.

Further, crimmigration provokes changes in the very nature of the law. Invoking Ernst Fraenkel's Dual State theory, Jalušič shows that crimmigration creates two parallel legal regimes, for two sets of populations, *them and us*. In the system set up for the *other*, illegal existence of a human being becomes the norm. Entire groups of people are controlled and declared "unlawful", Jalušič notes. Rules that were once an exception become normalised, while solidarity (protest, support and assistance to migrants) becomes an exception. Adding a set of crimes to migrants' identity is represented as their inclusion into the law and starts to be regarded as justified within the general legal framework, she points out. However, in fact, while crimmigration law takes over the punitive elements of criminal law, it is a breach of fundamental guarantees of criminal law; large groups of people who are subject to crimmigration measures are excluded from criminal law protections. This, Jalušič concludes, undermines the law itself. Therefore, the law changes its very character. It becomes a source of harassment and distress. It becomes a denial of justice. As a result, crimmigration harms rule of law and equality.

With this, crimmigration causes fundamental changes in the human rights paradigm. Hernández finds that crimmigration undermines the foundational human rights aspiration of protecting persecuted persons from reprisals, the very idea upon which the 1951 Geneva Convention Relating to the Status of Refugees is founded. At the same time, the 1951 Geneva Convention's protections from persecution are still in force, equally legally valid as before. However, criminalisation terminates the ability of people to seek protection as the right to ask for asylum ceases to exist, Hernández finds. This is not just implicit, it is also explicit, as for instance in the U.S., the prosecutors have required people to waive their rights to ask for protection as part of their plea-bargaining agreements. Majcher recognises this phenomenon as blocking access to protection.

Furthermore, as Billings states, crimmigration leads to a situation where a non-citizen claiming asylum no longer has a legal right to enter the state territory; namely, in Australia, all irregularly entering persons are subject to mandatory detention regardless of asylum claims. Holiday points at the wrongfulness of such treatment as asylum seekers should not be penalised according to international refugee law. The trends are exacerbated by turnback operations, such as those conducted by Australia, as Billings points out, where the state relies on political assurance of humane treatment of returnees. Since there are reports on inhuman and degrading treatment of failed asylum seekers, such treatment imperils the customary norm of *non-refoulment*.

This has further human rights implications. For instance, confinement means worse access to any claims, including protection claims, and separates individuals from family and other support services. As Hernández stresses, in such situation one is unable to work, hence lacks financial resources. They either depend on the pro bono services or defend themselves from criminal charges. Very few migrants receive any legal assistance, which further decreases their chances of successfully

defending themselves from removal or asking for protection. Criminalisation also severely affects families. Separation of children from their parents is based on a wicked logic, according to which a person (parent who is smuggling (his or her own) child) is prosecuted while a child is taken away. This is another example in which the law that is supposed to protect people from the arbitrariness of the state turns into the opposite—a tool of oppression, harm and suffering.

Hence, as Hernández finds, crimmigration represents a factual re-writing of asylum law. By law, physical presence in the territory is sufficient to ask for asylum. The trends go the other way as criminal law is prevailing over the idea of asylum and the concept of human rights protection established after World War II, Jalušič reminds. The notion of asylum is turned into an empty shell.

These negative legal implications of crimmigration also have a high societal and human cost. Jalušič identifies consequences such as rights violations, harmful social exclusion, racial profiling, border violence, and massive dying of migrants on the move. As Billings finds, criminalisation with indefinite detention increases vulnerability of migrants resulting in alarming levels of mental illness, self-harm, abuse and neglect. Detention decreases job opportunities as people have a prior immigration-related conviction. Further, if one has a conviction, they are unable to travel or benefit from family reunification, Holiday emphasises. Crimmigration increases the numbers of undesirable but unreturnable refugees, usually of minority status, male, with lack of family ties in the host countries. Deportations result in people who are sent "home" but are unprepared for culture or language and might have low employment possibilities and minimal government, charitable or familial support; people may even end up stateless, Billings notes.

Crimmigration causes, what Gregorc and Pittoni call, criminalisation of legality—an alternate state of living condition and uncertainty and existential insecurity. Migrants and refugees experience lengthy waiting times for obtaining the required documents, awaiting hearing and decisions. Delays in processes of extending residence permits cause delays in accessing all other rights. In the desire to control, sort and stop, they observe aggressiveness of state apparatuses. The asylum machinery has a depersonalising power that causes a high level of alienation. It causes feelings of constant precariousness. Asylum seekers are exposed to controls—in the street, any time of the day asked to resent their documents that are usually expired, which forces them into exhaustive control procedures conducted by the state apparatus needed for the renewal procedures. The latter come with long waiting times, chaotic queues of people and constant procedural complications. Gregorc and Pittioni observe the distance between asylum machinery and the asylum seekers, the difficulty to understand the procedure, why they last so long and all its requirements. Consequently, migrants have a lack of trust in the asylum system. Continuous exposure to these procedures causes a general feeling of living in a constant "state of illegality". Such conditions lead to a variety of psychosomatic disorders, Pittioni and Gregorc note.

Finally, crimmigration changes politics. As Bužinkić and Avon remind, crimmigration causes a hyper-militarization of borders with chorography of pushbacks and removal of undesirable subjects. The human security regime constructed around migration management is police-centred. They call for the need for a sharp and more

critical discussion on violent border regimes on a global scale. Majcher describes similar processes, such as empowering the border agencies, setting up the border fences, and employment of armies at the borders. Bajt notes that agencies that have traditionally not dealt with immigration are becoming involved, for example the Navy and Customs control. The result of such securitised and militarized borders is, as Billings sees it, overwhelming state-inflicted violence that derives from unchecked exercise of power. This has consequences for the state itself: it results in the lack of transparency, lack of public scrutiny and lack of accountability regarding the legality of treatment.

Smrdelj and Vogrinc examine the role of the media in these processes and show their obsession with presenting migration-related developments as a crisis. Simultaneously, migrants are entirely objectivised, as if allowing migrants to speak on TV would present the threat to national security by itself, Smrdelj and Vogrinc observe. As Učakar finds, media over-representation and exposure leads to general acceptance and justification of authoritarian and repressive surveillance policies against the dangerous other. In this context, Bajt rightfully reminds that crimmigration itself is already a consequence of the nation state's attempt to exert its power inwardly onto its nationals and outwardly against non-members.

5 Global Crimmigration Trends

5.1 Crimmigration in the United States

Data shows that crimmigration has become a prevalent approach to migration control on the global level. In the United States, crimmigration laws have led to an explosion of the number of deportations and immigration detainees/prisoners. Whereas drug violations used to account for the majority of prisoners, there are now more federal prisoners for immigration violations.[4] Regarding deportations, in 1988, there were 6000 criminal-law related removals. However, in 2014, there were over 300,000.[5] This sharp increase has added significant cost to the immigration system (without any apparent benefit, given that immigrants generally do not make society more unsafe or financially worse off). Further, although there are more deportations, the average waiting time for deportation has increased.[6] This has occurred because the system has struggled to accommodate the higher number of removals. Overall, this vast expansion in the reach and punitiveness of immigration law has helped perpetuate a vast underclass of minorities.

A recent crimmigration development in the United States concerned President Donald Trump's travel ban soon after his 2017 inauguration. Initially promulgated

[4] Stumpf (2013).

[5] Vasquez (2017).

[6] Svirnovskiy (2017).

as a "total and complete shutdown" of all Muslim immigration,[7] the contours of the travel ban slightly changed as the U.S. federal courts struck down the original ban, as well as subsequent iterations, on constitutional and statutory grounds.[8] However, the final version of the ban, which added a few African countries, as well as Venezuela and North Korea, was upheld by the Supreme Court.[9] The Supreme Court's travel ban decision, however, was contested. In dissent, Justice Sotomayor wrote the following:

> By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying Korematsu[10] and merely replaces one "gravely wrong" decision with another.[11]

Finally, another recent crimmigration development—the separation of children and families at the Mexico-U.S. border in 2018—has been particularly tragic. Parents caught illegally crossing the border were imprisoned, while any young children who accompanied them were sent to government custody or foster care.[12] Between 1 October 2017 and 31 May 2018, at least 2700 children were forcibly separated from their families for seeking asylum.[13] Likely, in response to a massive public outcry, the state rescinded the family-separation policy on 20 June 2018.[14]

Crimmigration in the United States has posed unique problems for Latinos. While the laws are facially race-neutral, Latinos have been substantially affected by crimmigration's deleterious effects. This partly results from the discretion of street-level officers who have wide latitude in determining whom to stop for immigration inquiries.[15] Once an officer makes an immigration inquiry, the subsequent immigration proceedings can be hard to curtail. This is because while street-level officers have broad discretion, there is less ability for people to use discretion to halt immigration proceedings once they begin.[16] Because street-level officers often use their discretion to target minority groups, especially people who appear to be Latino, it is these people who interact most with immigration authorities. The situation parallels how drug laws and criminal mass incarceration disproportionately harm African Americans.[17] While drug laws are race-neutral, officers have discretion in whom to target, and this has led to the disproportionate targeting and imprisonment of African Americans.

---

[7] Johnson (2015).

[8] Bier (2017).

[9] *Trump v. Hawaii*, 585 U.S. ___ (2018b).

[10] *Korematsu v. United States.*, 323 U.S. 214 (1944), was a Supreme Court case from World War II that upheld the internment of Japanese Americans. The court of history has largely viewed this decision as deeply misguided.

[11] *Trump v. Hawaii*, 585 U.S. ___ (2018a) at *28 (Sotomayor dissenting).

[12] Lind (2018).

[13] Ibid.

[14] Edelman (2018).

[15] Provine (2016).

[16] Rosenbloom (2016).

[17] Vasquez (2017).

5.2 Crimmigration in the European Union

Similar to the U.S., immigration law in various EU Member States often lacks the protections that apply to criminal proceedings.[18] The functioning of the EU, even though it was established with the aim of lasting peace on the European continent, importantly influences the increase in migrant criminalisation. Migration and asylum law has been a core competence of the EU and the legislative activity in these fields on the EU level has been incredibly intensive. Each year new policies, instruments, and pieces of legislation are introduced to regulate migration. Institutions have been set up on the EU level to enhance external border controls (Frontex) and the application of asylum law (European Asylum Support Office—EASO). As the EU Member States harmonise their internal legislation with EU law in this field, this often has a levelling-down effect, despite the fact that in the EU migration law instruments, there are no provisions preventing the Member States from keeping the provisions that were more beneficial to migrants and asylum seekers than those introduced by the new EU instruments. Consequently, states lower their standards to abide by the minimum standards of the Union. In the field of migrant criminalisation, this constitutes more crimmigration.

In practice, this primarily means that the law in all but three EU Member States punishes irregular entry with sanctions (fines or imprisonment), and these penalties are issued in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state.[19] The exceptions are Malta, Portugal, and Spain, which do not punish irregular entry with a fine or imprisonment. However, even in these countries, return procedures are carried out as elsewhere.[20] In addition, across the EU and because of EU law, new definitions of migration-related offences (crimes and misdemeanours) are being added to the national legislation, and penalties for existing migration-related offences are being increased.

Next, detention and return are measures that are at the heart of the EU migration policies. In 2017, there were 150 detention centres in Europe, out of which 90 were in the EU.[21] Tens of thousands of migrants are being detained at each at any given time, and in recent years, the numbers have risen dramatically in some countries. For instance, in the first half of 2015 Austria detained 857 irregular migrants, while in the same period of 2016 the number of detainees was 14,661.[22] In Belgium, 6229 persons were placed in immigration detention in 2015, an 11% increase compared to 2014. In Denmark, 2180 asylum seekers were detained in 2016 compared to 1926 in 2015.[23]

The return had already been widely used by individual Member States before any legislation was adopted at the EU level. Since Europe is full of small countries with

[18] Zender (2013).

[19] European Union Fundamental Rights Agency (2014).

[20] Ibid.

[21] Global Detention Project (2017).

[22] Global Detention Project, Austria country profile (2017).

[23] Global Detention Project (2017).

low numbers of migrants, and organising charter flights to countries of origin was never an economically viable option, joint flights were introduced as an option with Council Decision 2004/573/EC, already more than a decade old. Further, with the adoption of Return Directive 2008/115/EC, deportations have become a substantial and central part of the official EU-level migration policy. The Directive encourages the creation of bilateral readmission agreements with third countries to facilitate the return processes and understands international cooperation with countries of origin as a prerequisite to achieving "sustainable return".[24] Such ideas penetrated even those jurisdictions that have been relatively tolerant towards people who irregularly stay in their territories, such as Portugal and the Netherlands. Further, according to the transposition of the Directive, some countries established new individual entry bans for those who have been previously subject to deportation,[25] leading to double punishment for behaviour, which may be nothing more than moving and is far from criminal.

The Return Directive 2008/115/EC also has many positive sides that increase protection of migrants, especially those in irregular situations, and hence minimise their vulnerability to criminalisation. For instance, it requires the states to address the situation of those irregularly staying who cannot be deported and take care of their subsistence.[26] Further, it subjects detention to the principle of proportionality and encourages the use of alternatives to detention. According to the Return Directive, detention is allowed only if it serves the purpose of return.[27] Hence, this means that if there is no prospect of a return for an individual, he or she should not be detained at all. It also protects migrants detained for immigration-related offences from being held in prisons intended for convicts of crimes.[28] In general, the Return Directive allows detention only if there are no other less coercive measures available to make deportation possible,[29] which is known as alternatives to detention. For unaccompanied minors and families with minors, detention should only be a measure of last resort and imposed for the shortest appropriate period.[30] These are some of the standards that somewhat alleviate the situation of detained migrants. However, there have recently been setbacks concerning these standards. Namely, with its 2017 Recommendation, the European Commission, apparently not satisfied with the state of play in the field of return, advised the Member States to take deportations more seriously. It recommended them, *inter alia*, to locate more irregular migrants in their territories, speed up procedures, engage more staff, and issue return decisions with unlimited duration. Specific guarantees for minors and families with minor children are set aside. Instead, in recommendation No. 14, the Member States are advised not to exclude minors from detention policies.

[24] Return Directive 2008/115/EC, recital 7.

[25] Return Directive 2008/115/EC, recital 13.

[26] Ibid., recital 12.

[27] Ibid., recital 16.

[28] Ibid., recital 17.

[29] Article 15(1) of the Return Directive.

[30] Article 17(1) of the Return Directive.

After the transposition of the Return Directive to the Member States' legal systems, the EU Fundamental Rights Agency (FRA) found that several EU Member States have resorted to criminal law measures aimed at deterring migrants from entering or staying in their territory in an irregular way.[31] FRA also found that the EU legislation obliges the EU Member States to punish persons who help irregular migrants enter and stay in the EU.[32]

In addition to these legislative setbacks increasing migrant criminalisation within the EU, new types of measures were adopted to prevent people from accessing the EU territory in the first place. The inability of the EU to confront the increased numbers of arrivals from the Middle East and North Africa resulted in an agreement with Turkey. The agreement of 18 March 2016 stipulated that from 20 March onward, irregular migrants arriving in Greece would be sent back to Turkey if they did not apply for asylum or if their claim was rejected. According to the deal, one Syrian refugee would be resettled in the EU for each Syrian sent back to Turkey.[33] The problematic legal nature and content of the deal have already been analysed by many authors who found that the deal is not a binding source of EU law, as it was not adopted by the European Parliament, but rather an international treaty masked as a European Council press release. As such, it contravenes other binding norms of international law.[34]

5.3 Beyond Europe and the U.S.

The criminalisation of migration is a phenomenon unfolding on a global scale. States other than Europe and the United States are also increasingly implementing practices of immigrant detention, expulsion, and mechanisms of deterrence. For example, Australia currently implements a particularly harsh policy based on boat interception, the externalisation of refugee status determination procedures, the provision of extraterritorial camps for recognised refugees on Manus Island and Nauru, and innovative (at best) reasons for expulsion for what it deems the "boat people" problem.[35] Additionally, a strengthening of deterrence practices swept the African continent[36] and similar reports were made for Asian countries such as India and Pakistan. In India, public rituals of migrant deportation and expulsion have further bolstered a public discourse that increasingly views undocumented Muslim immigrants from Bangladesh as a severe threat to the security and integrity of the Hindu nation.[37]

---

[31] FRA (2014).

[32] Ibid.

[33] European Council (2016).

[34] Gatti (2016), Danisi (2017), Mătușescu (2016), Den Heijer and Spijkerboer (2016).

[35] McKenzie and Hazmath (2013).

[36] Badalič (2018).

[37] Ramachandran (1999).

Similarly, Pakistan uses many incentives to encourage Afghani refugees to return, contesting the notion of the so-called voluntary return.[38]

5.3.1 Southeast Asia

While the majority of crimmigration literature focuses on the United States, Europe, and Australia, the increased intertwinement of criminal law and immigration law is a trend that transcends these geographic regions. Indonesia, a common transit country for those seeking to migrate to Australia, has historically ignored the movements of immigrants across its borders.[39] However, researchers have noted a change in the Indonesian government's policy regarding irregular migration. With the enactment of the 1992 Immigration Law,[40] Indonesia introduced criminal sanctions for immigration-related offences: for example, imposing imprisonment for such actions as failing to pass through the Immigration Office, misusing or overstaying a visa, or assisting an irregular migrant in their movement.[41] These measures were further reinforced by the more recent Law No. 6 in 2011, which also applied criminal sanctions to immigration-related offences (e.g., smuggling).[42] These changes have been heavily supported by Australia, which provided AU $7.9 million in 2008 to develop Indonesia's "border movement alert system" and AU $86.8 million in 2014–2017 to "manage asylum seekers" as part of a "regional cooperation agreement."[43] Researcher Antje Missbach, in a recent book in which she interviewed 180 irregular immigrants throughout Indonesia including at various detention centres, details the crimmigration process through first-person narratives. The accounts highlight the recasting of the irregular migrant as a "criminal".[44] For many irregular migrants within Indonesia, the increasing intertwinement of criminal law with immigration policy has had profound consequences.

The rise of crimmigration policy is also evident in India, dating back to the 1990s. Sujata Ramachandran documents the Indian Government's first official statement regarding the influx of "clandestine migration" into India. In the statement, then Union House Prime Minister Indrajit Gupta declared the existence of nearly ten million undocumented immigrants within the country, and what she highlights as a rise of the "Hindu Right" in reaction to this perceived threat.[45] Ramachandran describes how these undocumented immigrants, mostly Bangladeshi Muslim, were

[38] Ibid.
[39] Akbari (2015).
[40] Law No. 9/1992.
[41] Ibid.
[42] Ibid.
[43] Missbach (2015).
[44] Ibid.
[45] Ramachandran (1999).

recast as "infiltrators," "unwanted guests," and "problem people," whose very existence threatened national security.[46] Additionally, she documents the rise of "numerous public rituals," such as protest marches, campaigns, and publications, in which these Bangladeshi Muslim immigrants were further criminalised, going so far as to declare their mere existence a "growing menace".[47] As in many other parts of the world, the enactment of crimmigration policy within India assisted in fuelling the rise of nationalistic political discourses and movements.[48]

5.3.2 The Middle East

Turkey is a major host country for asylum-seekers and refugees, hosting 3.5 million people in 2017 (almost twice as much as its neighbour—Lebanon), which places it as the country hosting the most significant number of refugees in the world for the fourth year in a row.[49] Additionally, it was the fourth largest recipient of individual applications for asylum seekers in 2017, receiving 7.4% of all applications (only outnumbered by the U.S., Germany, and Italy).[50] In line with global crimmigration trends, there are reports that Turkey has engaged in mass refugee deportations and pushbacks of asylum seekers at the border, violating the principle of *non-refoulement*.[51]

The rise of crimmigration policy in Turkey is also evident in Turkey's role as a country of transit. The strategy of externalisation is one in which a government outsources migration controls to states outside of their borders, thereby shifting the responsibility of upholding human rights and "evad[ing] their legal obligation to give asylum seekers an individual hearing for protection".[52] Examples of the externalisation of migration control include the United States' maritime interception and pushback of boats containing Haitian asylum-seekers in 1991, and more recently, Australia's practice of intercepting boats of asylum seekers, who are then housed at offshore detention centres.[53] Similarly, the EU has partnered with Turkey to "manag[e] the migratory flows" of asylum seekers moving from Turkey to Greece.[54] Beginning in 2015, deterrence measures adopted by Turkey in partnership with the EU include an agreement for Turkey to increase the interception capacity of the Turkish Coast Guard with the aim of, ultimately, "end[ing] the irregular migration from Turkey to the EU" completely.[55]

---

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] UNHCR (2018).
[50] Ibid.
[51] Human Rights Watch (2018).
[52] Sager (2018).
[53] Ibid.
[54] Ruhrmann and FitzGerald (2016).
[55] Ibid.

As with the treatment of Bangladeshi Muslim immigrants within India, some asylum seekers within Israel receive a special annotation. Stemming back to the 1950s and the 1954 Law for the Prevention of Infiltration, those asylum seekers who crossed the Israeli-Egyptian border without authorisation and not at an official border crossing are legally deemed "infiltrators".[56] Primarily composed of Sudanese and Eritrean nationals, "infiltrators" experience the effects of crimmigration through a precarious existence composed of hostile treatment, detention, and sanctions, in which they are prohibited from legally working.[57] While the Israeli Government does not actively enforce this prohibition against gainful employment, they have simultaneously enacted policies in which employers must withhold 16% of an "infiltrator's" salary, only to be returned after the "infiltrator" "departs".[58] Until 2013, the Ministry of Interior did not adjudicate individual asylum claims by Sudanese or Eritrean asylum seekers, closing any route out of precarity for these individuals. Since 2013, once the Ministry began to adjudicate these claims, only four Eritreans and no Sudanese have been granted refugee status. This equates to an acceptance rate of less than 0.5%—a rate that pales in comparison to the average recognition rate of 82% for Eritreans in developed countries and 68% for Sudanese.[59]

Until recently, the Israeli state policy was one of "temporary non-renewal" in which asylum seekers were typically afforded protection from deportation but excluded from all societal benefits and services.[60] The lack of access to societal benefits and services created a policy of deterrence to incentivise asylum seekers to leave on their own accord due to hostile conditions.[61] However, more recently, Israeli immigration policy has moved more towards a policy of deportation. For example, the government is currently discussing the policy of "voluntary" deportation in which "infiltrators" must choose between returning to their countries of origin or being deported to a "third country." Either way, neither Sudanese nor Eritrean asylum seekers would be able to stay within Israel.[62]

5.3.3 Africa

In North Africa, the rise of crimmigration is visible in Tunisian policy—both in Tunisia's role within the broader EU strategy of externalising migration controls and within domestic Tunisian legislation that criminalises irregular migration. As in the cases of Indonesia and Turkey, Tunisia is the leading transit country for asylum seekers wishing to reach the EU. In migration agreements between Tunisia and the EU in which migration management controls were outsourced to Tunisia in exchange

[56] Ziegler (2015).
[57] Ibid.
[58] Ibid.
[59] (ARDC) (2016).
[60] Ibid.
[61] Ibid.
[62] Amnesty International (2018).

for financial assistance, Tunisia agreed to prevent irregular migration flows to Italy by intercepting "boat people" attempting to land on Italian shores.[63] In addition to intercepting these irregular migrants, Tunisia is expected to process their asylum claims in Tunisian territory.[64]

Crimmigration policy is also evident in Tunisia's internal legislation. Tunisia recently enacted legislation criminalising migration-related activities, such as smuggling. This was partly due to its relationship with the EU, which incentivised Tunisia to enact such legislation in efforts to deter those assisting irregular migrants.[65] However, as some scholars highlight, the rise of crimmigration policy within Tunisia is only in part due to its role within the broader EU strategy of externalising crimmigration controls. As Badalič notes, "in Tunisia, both pre-revolutionary and post-revolutionary governments used laws criminalising irregular migration and migration-related activities as one of the key tools for enhancing migration controls".[66] As in many Western countries, and as previously discussed in the case of India, the criminalisation of irregular migrants and the depiction of them as threats to national security were and are political tools used by the state to increase political power. As a destination or host country for many migrants, mostly Libyans, Tunisia has adopted crimmigration practices such as pushing back irregular migrants at its borders, detaining migrants and preventing them from making asylum claims, refusing access to lawyers or interpreters, and denying refugees the ability to obtain residency permits. All of these practices are violations of the right to asylum, the right to due process, and the refugee's right to work.[67]

The trend toward crimmigration is not limited to Tunisia. In other parts of North Africa, such as Morocco[68] and Libya,[69] we are seeing the criminalisation of the irregular migrant, pushbacks and detainment violating the right to asylum, and increased border security. These actions are all primarily funded through the EU's strategy of externalisation. While several countries in West Africa have a long-standing history of expelling immigrants (e.g. Kenya, the Ivory Coast, and the Democratic Republic of Congo), it is only since the 1990s that we are witnessing mass deportations in other West African countries that were previously hospitable to irregular migrants, such as Tanzania, Namibia, and Mali.[70]

[63] Badalič (2018).
[64] Ibid.
[65] Cassarino (2014).
[66] Badalič (2018).
[67] Ibid.
[68] Sager (2018).
[69] The Guardian (2017).
[70] Adida (2014).

5.3.4 Crimmigration in South America—An Exception?

South America is a continent that, to some extent, appears to be an exception to the global rise of crimmigration policy. Out of more than 1200 immigration detention centres globally, the entire continent hosts fewer than twenty.[71] Additionally, multiple South American countries have legally recognised migration as a human right: Argentina stipulated the existence of a "human right to migrate" within their 2004 Migration Law, as did Ecuador, within their 2008 Constitution.[72] Ecuador also implemented universal visa freedom for a limited period in 2008, temporarily opening its borders to migrants.[73] Furthermore, Brazil and Argentina implemented specific regularisation programs for the largest groups of irregular extra-regional immigrants: Senegalese, Dominicans, and Haitians. These recent counter-crimmigration trends suggest that South America may present an alternative model for addressing increasing migration flows.

On the other hand, the actions of several South American governments suggest that painting South America as an exception may be premature. Despite publicly welcoming migrants regardless of national origin, the governments of Argentina, Brazil, and Ecuador have in practice tended to be hostile towards extra-regional south-south migrants.[74] This gap in discursive policy and actual practice is perhaps most evident in Ecuador, where the government abandoned its policy of visa-free access in response to increasing irregular south-south migration from outside the region.[75] In sum, it may be too early to conclude that South America exists as an exception, untouched by the global trend of criminalisation of irregular migrants visible in Europe, North America, and the rest of the world.

6 Conclusion

Across most of the globe, crimmigration constitutes an increased entanglement between criminal and immigration law. While some scholars dispute the usefulness of the term and the novelty of the merger between the two branches of law, researchers agree that immigration detentions, deportations, and criminalisation have been on the rise. Europe and the United States have unique circumstances that their border fortifications seek to address, but the fundamental goal of crimmigration—preventing certain people from integrating into society—is the same everywhere.

One universal motivation behind crimmigration is a fear that immigrants are dangerous and perhaps a source of economic unrest. Even if these motivations are sincere, they are unfounded, because research indicates that immigrants do not increase crime

[71] Global Detention Project.

[72] Freier and Arcarazo (2015).

[73] Ibid.

[74] Ibid.

[75] Ibid.

rates. This disconnect between motivations and reality is troubling because it has led to the pervasive, inequitable treatment of minority groups for little benefit in return. One possible explanation for this occurrence is scapegoating by vested interests to prevent the public from demanding changes that would require wealth redistribution. However, this explanation is yet to be tested by researchers. Along these lines, though, Ben Bowling suggests that crimmigration law perpetuates a system of global apartheid.[76] This system ensures that wealthy (and for the most part, white) receiving countries maintain their position of economic predominance. Perhaps, though, this characterisation overlooks how economic stratifications within countries have also helped precipitate modern crimmigration.

References

Adida CL (2014) Immigrant exclusion and insecurity in Africa: coethnic strangers. Cambridge University Press, Cambridge

African Refugee Development Center (ARDC) (2016) Untold stories of success. https://docs.wixstatic.com/ugd/aba652_6d423e0d5ab543ae891f288b84e5efe6.pdf

Akbari AR (2015) Explaining crimmigration in Indonesia: a discourse of the fight against people smuggling, irregular migration control, and symbolic criminalization. Indonesia Law Rev 3:276–290

Amnesty International (2018, June 18) Israel: African asylum-seeker deportations and 'voluntary' transfers are forced and illegal. https://www.amnesty.org/en/latest/news/2018/06/israel-african-asylum-seeker-deportations

Badalič V (2018) Tunisia's role in the EU external migration policy: crimmigration law, illegal practices, and their impact on human rights. J Int Migr Integr 1–16. https://doi.org/10.1007/s12134-018-0596-7. Accessed 13 Nov 2018

Bier D (2017, August 14) A dozen times Trump equated his travel ban with a Muslim ban. Cato Institute. https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban

Bowling B (2013) Epilogue: the borders of punishment: towards a criminology of mobility. In: Franko Aas K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford

Cassarino J-P (2014) Channelled policy transfers: EU-Tunisia interactions on migration matters. Eur J Migr Law 16(1):97–123

Danisi C (2017) Taking the 'Union' out of 'EU': the EU-Turkey statement on the Syrian refugee crisis as an agreement between states under international law. EJIL Talk. https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/

Den Heijer M, Spijkerboer T (2016) Is the EU-Turkey refugee and migration deal a treaty? European Area of Freedom Security & Justice, FREE Group. https://free-group.eu/2016/04/07/is-the-eu-turkey-refugee-and-migration-deal-a-treaty/

Edelman A (2018, June 20) Trump signs order stopping his policy of separating families at the border, NBC. https://www.nbcnews.com/politics/immigration/trump-says-he-ll-sign-order-stopping-separation-families-border-n885061

European Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C (2017) 1600 final. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/

[76] Bowling (2013).

european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf
European Council Conclusions, 17–18 March 2016. http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/
European Union Fundamental Rights Agency (2014) Criminalisation of migrants in an irregular situation and of persons engaging with them. http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them
Freier LF, Arcarazo DA (2015, June 17) South America's moves to liberalize irregular migration are in stark contrast to the punitive and fatal policies of the U.S. and Europe. LSE USCentre. http://bit.ly/1JVf2jw
Franko Aas K, Gundhus HOI (2014) Policing humanitarian borderlands: Frontex, human rights and the precariousness of life. Br J Criminol 55(1):1–18. https://doi.org/10.1093/bjc/azu086
Gatti M (2016) The EU-Turkey statement: a treaty that violates democracy (Part 1 of 2). EJIL Talk. https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/
Global Detention Project, Austria country profile. https://www.globaldetentionproject.org/countries/europe/Austria. Accessed 14 Sep 2018
Global Detention Project. https://www.globaldetentionproject.org/
Human Rights Watch (2018, March 26) Turkey: mass deportations of Syrians. https://www.hrw.org/news/2018/03/22/turkey-mass-deportations-syrians
Johnson J (2015) Trump calls for total and complete shutdown of Muslims entering the United States, Washington Post, 7 December 2015. https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on&utm_term=.3bd378b93e4e
Lind D (2018, June 15) The Trump administration's separation of families at the border, explained. Vox. https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents
Mătușescu C (2016) Considerations on the legal nature and validity of the EU-Turkey refugee deal. Int J Law Jurisprud Online Semiannually Publ VI(special issue):91–101
McKenzie J, Hazmath R (2013) Deterring the 'boat people': explaining the Australian government's people swap response to asylum seekers. Aust J Polit Sci 48(4):417–430. https://doi.org/10.1080/10361146.2013.841124
Missbach A (2015) Troubled transit: asylum seekers stuck in Indonesia. ISEAS-Yusof Ishak Institute
Provine DM et al (2016) Policing immigrants: local law enforcement on the front lines. University of Chicago Press, Chicago
Ramachandran S (1999) Of boundaries and border crossings: undocumented Bangladeshi 'infiltrators' and the hegemony of Hindu nationalism in India. Int J Postcolonial Stud 1(2):235–253
Rosenbloom RE (2016) Policing sex, policing immigrants: what crimmigration's past can tell us about its present and its future. Calif Law Rev 104:149–200
Ruhrmann H, Fitzgerald D (2016, Sept) The externalization of Europe's borders in the refugee crisis, 2015–2016. Center for Comparative Immigration Studies. https://ccis.ucsd.edu/_files/wp194.pdf. Accessed 13 Nov 2018
Sager A (2018, June 12) The perversity of external immigration enforcement. http://crimmigration.com/2018/06/12/the-perversity-of-external-immigration-enforcement
Stumpf JP (2013) The Crimmigration crisis: immigrants, crime, and sovereign power. In: Dowling JA, Inda JX (eds) Governing immigration through crime. stanford social sciences. Stanford University Press, Stanford, California, pp 59–76
Svirnovskiy SY (2017) Finding a right to remain: immigration, deportation, and due process. New J Law Soc Policy 12:32–77
The Guardian (2017, Nov 14) EU's policy of helping Libya intercept migrants is 'inhuman,' says UN. https://www.theguardian.com/world/2017/nov/14/eu-libya-coastguard-detention-centres-migration-mediterranean-un-zeid-raad-al-hussein
UNHCR (2018, June 25) Global trends: forced displacement in 2017
US Supreme Court, Trump v. Hawaii, 585 U.S. ___ (2018a) at *28 (Sotomayor dissenting). https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf

US Supreme Court, Trump v. Hawaii, 585 U.S. ___ (2018b). https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf

Vasquez Y (2015) Constructing crimmigration: Latino subordination in a "post-racial" world. Faculty Articles and Other Publications. Paper 254. http://scholarship.law.uc.edu/fac_pubs/254

Vasquez Y (2017) Crimmigration: the missing piece of criminal justice reform. Univ Rich Law Rev 51:1093–1147

Zender L (2013) Is the criminal law only for citizens? In: Franko Aas K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford

Ziegler R (2015) No asylum for 'infiltrators': the legal predicament of Eritrean and Sudanese nationals in Israel. Immigr Asylum Natl Law 29(2):172–191

Criminalizing Migration, Ending Rights: The Case of United States Crimmigration Law

César Cuauhtémoc García Hernández

Abstract The United States has been criminalizing migration since the 1980s. In addition to its deportation practices, immigration crime prosecutions are the most commonly prosecuted offense in the nation's federal courts. Illustrating a newly pernicious edge to the country's embrace of crimmigration laws and policies, federal officials have expressed a willingness to criminally prosecute migrants who enter the United States without authorization even if they intend to request asylum despite the existence of a statutory right to request asylum if present in the United States. This chapter takes this development as an example of the limits of human rights norms. Framed as emanating from a post-war recognition of the primacy of law, the criminalization of asylum seekers displays the fragility of the human rights tradition's illusory imperative that states respect as fundamentally inviolable the right of all people, as people, to seek legal protection from persecution.

1 Introduction

An official complaint that prosecutors filed in a California federal court tells a familiar story. Olvin Jovani Herrera-Romero, a citizen of Honduras, allegedly entered the United States without the federal government's permission. He crossed a fence west of San Ysidro, California near San Diego along with six others and walked north through a dusty stretch of arid landscape known as "Goat Canyon." By the time a Border Patrol agent reached Herrera-Romero and his companions, they were no more than fifty yards north of the boundary line.[1] There is nothing unusual about these circumstances. If true, Herrera-Romero was simply in the company of literally countless others who have trekked through this stretch of desert. Many go undetected, while many others do not. The nearby port-of-entry is the busiest authorized

[1] *United States of America v. Herrera-Romero* (2018).

C. C. García Hernández (✉)
University of Denver, Denver, CO, USA
e-mail: ccgarciahernandez@gmail.com

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_2

land crossing between the United States and Mexico, and the surrounding area has historically been among the most common sites of clandestine entry.

For all its similarities with typical migratory patterns, Herrera-Romero's experience illustrates a still relatively new penchant of United States prosecutors to tap the criminal justice system to regulate migration. Officials with the United States Department of Justice, the federal government's principal prosecutorial agency, claim that Herrera-Romero clandestinely entered the United States after having previously been deported. For this, he has committed a crime punishable by up to two years imprisonment in a federal penitentiary. Herrera-Romero and the six others who were apprehended with him now face criminal prosecution in federal court.

Here still, there is nothing unique about Herrera-Romero's situation. For the last decade, immigration crime has occupied the time and attention of federal prosecutors, criminal defense attorneys, and judges. As a single category, immigration crime is the most commonly charged type of federal offense nationwide. Along with more prosecutions comes more imprisonment. Immigration crime defendants make up the largest category of individuals detained pending criminal prosecution in the federal courts. After conviction, they comprise a substantial, though smaller, percentage of the population of federal prisoners locked up as punishment for their conduct. As Herrera-Romero and his co-arrestees have learned all too well, the power of federal law enforcement resources and criminal prosecutions have been turned on migrants. This marks one important component of the increasingly entrenched crimmigration law regime in the United States.

Despite its embeddedness in twenty-first century policing and prosecuting, this decades-long trend continues evolving. In recent years, prosecutors have tapped the power of federal criminal law to punish people arriving in the United States expressly in search of safe harbor. Asylum-seekers have been turned into criminal defendants and, almost inevitably, convicted criminals. In the days that followed Herrera-Romero's arrest, federal officials claimed that he was part of a larger contingent of migrants making its way to the United States from Mexico's southern border. These individuals, the government's official press statement announced, are "suspected members of the so-called 'caravan'" of migrants that convened in Mexico's southernmost state, Chiapas, and headed north. As in years past, the organizers' goal was to provide safe passage for some of the many migrants traversing the whole of Mexico on their way to the United States. At one point, the caravan numbered approximately 1000 migrants, mostly from the tumultuous and violent regions of Central America. The number of participants dropped by the time the group reached the border with the United States. Dubbing itself the *Víacrucis de los migrantes* (the Migrants' Stations of the Cross), the collective expressly invokes the Catholic tradition of mimicking Jesus Christ's final walk to his death and resurrection. To the organizers and participants, migration is bestowed with a saintly quality, but to government authorities, it represents danger. When Justice Department officials announced Herrera-Romero's criminal accusations, they also announced that the federal government had committed itself to prosecuting all migrants who enter the United States without permission.

What the caravan had lost in participants it more than gained in publicity. Officials at the United States Department of Justice and Department of Homeland Security, the federal government's border-policing entity, had devoted considerable energy to tracking the group's progress. The Justice Department announced that it had reshuffled prosecutors and administrative immigration judges to await the group. For a time, President Donald Trump tweeted about the caravan on a daily basis. In a strange twist, the president used the caravan's existence to tout Mexican migration laws while simultaneously criticizing the United States' analogous regulatory regime. His top law-enforcement officer, Attorney General Jefferson B. Sessions, accused Herrera-Romero and others allegedly like him of endangering the public and subverting United States democracy. In a press release accompanying the filing of criminal charges, Sessions said, "When respect for the rule of law diminishes, so too does our ability to protect our great nation, its borders, and its citizens. The United States will not stand by as our immigration laws are ignored and our nation's safety is jeopardized".[2] The prosecutor who signed the criminal complaints claimed, "the foundation for […] what allows our democracy to flourish […] is commitment to the rule of law. These eleven defendants face charges now because they believed themselves to be above the law."

The example of Herrera-Romero and the ten other migrants indicted on charges of committing federal immigration crimes in early May 2018 illustrates the thorough criminalization of migration in the United States and its subversion of the foundational human-rights aspiration of protecting persecuted persons from reprisals. Criminalizing migration does nothing to alter the formal protections for persecuted individuals, codified in United States law as it is across the globe. Statutory protections—narrow though they are—remain in force. Nonetheless, criminalization ends the ability of people seeking protection under this foundational feature of the post-war human rights tradition to effectively lay claim to the law's protection. If a migrant who seeks safe harbor from violence cannot adequately ask for a state's protection, this chapter argues, then that right effectively ceases to exist. Furthermore, when legal rights that are considered inviolable, fundamental features of a legal system grounded in human rights are rendered unenforceable, the precarity of legality is revealed. To reach this conclusion, the chapter proceeds in two parts. Part I explains the causes of criminalization of migration in the United States. Part II follows by addressing the consequences of criminalization on protection-based claims and the role of human rights in United States law more generally, giving special attention to the role of federal criminal proceedings and their impact on potential asylum claims. The chapter concludes with reflections on the implications of this trend and its significance for the development and further entrenchment of crimmigration law in the United States.

[2]U.S. Department of Justice (2018).

2 Causes of Criminalization

Beginning with the last decades of the twentieth century, there has been a significant shift in the regulation of migration to the United States. Historically, migration was regulated administratively, if at all. While the national legislature adopted the substantive criteria governing migration, regulators housed in various units of the federal government's executive branch—at varying times the Labor, Justice, and, now, Homeland Security Departments—identified who ought to be excluded, admitted, or deported from the United States. Mostly, government officials regulated through wilful ignorance. For most of the nation's history, there were vastly insufficient numbers of law enforcement officials dedicated to migration control to meaningfully have any substantial impact. On the contrary, most people who wanted to enter the United States and had the resources to reach the nation's borders could do so with what is now properly characterized as relative ease. The criminal justice system played even less of a role. From 1970 to 1979, for example, there were never more than 800 ongoing immigration crime prosecutions in the federal courts.[3]

Today, the criminal justice system is fully involved in United States migration control. Starting in the mid-1980s, successive presidential administrations representing both major political parties, working with Congresses under the control of both Republicans and Democrats, have crafted what Stumpf first described as "crimmigration" law.[4] Three decades into crimmigration's development, it consists of three major branches: the use of immigration law to raise the severity of criminal infractions, the criminalization of migration-related activity, and the adoption of unique (or uniquely harsh) law enforcement measures affecting migrants or migration.[5]

Contemporary reliance on criminal prosecution of clandestine entrants illustrates crimmigration law's second component: subjection to crime control tactics. Federal law punishes multiple activities related to migration. Helping people who are not United States citizens enter the country without the federal government's authorization is punishable by imprisonment for up to five years. Do this for commercial gain, and the penalty increases to ten years. Truck driver James Matthew Bradley, Jr. recently learned that if someone dies along the way, the ultimate sanction of life imprisonment or even death is possible.[6] Convicted of transporting a tractor-trailer full of unauthorized migrants across Texas in July 2017 in which ten people died, a judge sentenced Bradley to life imprisonment. This outcome, the local prosecutor declared afterwards, sends a tough message to "ruthless human smugglers indifferent to the well-being of their fragile cargo".[7]

---

[3] García Hernández (2018b).

[4] Stumpf (2006).

[5] García Hernández (2015).

[6] Immigration and Nationality Act § 274(a)(1).

[7] Ingber (2018).

Far less sensational than the crime of human smuggling, entering the United States without authorization is also a federal immigration crime.[8] Doing so once is punishable by up to six months' imprisonment. Doing so after having previously been deported, as Herrera-Romero is accused of doing, can lead to two years' imprisonment. Had he previously been convicted of a crime categorized as an "aggravated felony," a term with a twenty-one-part definition that includes white-collar offenses and shoplifting as well as more serious crimes, the maximum term of imprisonment rises to twenty years.[9] Illegal entry and illegal re-entry, as these offenses are called, have been part of federal immigration law since 1929. Despite nine decades of criminalizing migration, they were largely irrelevant to migrants for most of that period, since prosecutors rarely relied on either to target migration activity. When federal officials wanted a migrant to suffer consequences for entering the country without the government's permission, they turned to administrative immigration law and its provision of forcible removal from the United States, whether through exclusion or deportation.

Historical disinterest in the power of criminal law to regulate illicit migration activity has altered radically. In 1977, for example, there were far more vehicular traffic crime prosecutions than there were immigration crime cases in the federal courts.[10] More recently, immigration cases have outpaced every other category of offense. In 1997, for example, the 20,484 immigration cases filed before federal district or magistrate judges surpassed drug cases by almost 6000 prosecutions.[11] That trend continued through 2017, the last year for which data are available. Almost all people accused of committing a federal immigration crime were eventually convicted, mostly through plea agreements in which they admitted guilt in exchange for a reduction of charges. In 2017, for example, 20,902 defendants were charged with an immigration crime before a federal district court judge, and 20,411 were convicted. Of those convicted, 20,337 pleaded guilty. A mere seventy-four convicted individuals (and another fourteen who were acquitted) received a trial.[12] Unusual in much of the world, pleas are so common in the United States that the United States Supreme Court recently described the process of negotiating pleas as "not some adjunct to the criminal justice system; it *is* the criminal justice system".[13]

[8] Immigration and Nationality Act § 275(a).

[9] Ibid., § 276(a).

[10] Administrative Office of the U.S. Courts (1979).

[11] Administrative Office of the U.S. Courts (1997), tbls. M-1A and D2.

[12] Administrative Office of the U.S. Courts (2017), tbl. D-4.

[13] *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

3 Consequences of Criminalization

Relying so heavily on the criminal justice system to regulate migration results in prudential and normative consequences for migrants' ability to exercise protection-based claims codified in United States law and international human rights norms. By extension, it also threatens the central role that asylum has occupied in the human rights-based legal tradition of much of the last century.

3.1 Prudential Concerns

For all its flaws and inefficiencies, the United States criminal justice system is exceptionally capable of stigmatizing individuals marked as criminals. In four important ways, the elaborate patchwork of crimmigration laws that has developed in the United States uses the marker of criminality as a means of increasing the precarity of life in the United States as a migrant. First, a conviction for almost any offense identifies a migrant as a high priority for removal proceedings. President Obama famously described his administration's immigration policing practices as focused on "felons, not families".[14] President Trump has taken a harder rhetorical line and expanded immigration officials' view of criminality well beyond felons (indeed, to include people who have not even been charged with a criminal offense), but like his predecessor, his administration also claims to be targeting criminals.[15] Under both administrations, people like Herrera-Romero represent a threat in need of attention from the criminal justice system and immigration law enforcement officials. Entering the United States clandestinely, as Herrera-Romero allegedly did, is worthy of criminal prosecution and of top-level priority for government efforts to remove the offender from the United States. In the past, people raising credible asylum claims were usually allowed to do so without criminal prosecution, but some were subjected to criminal charges.[16] In response to the migrant caravan that Herrera-Romero was supposedly part of, in May 2018 the Trump administration signalled an important policy shift. "[W]e are not going to let this country be overwhelmed. People are not going to caravan or otherwise stampede our border," Attorney General Jeff Sessions announced. "We need legality and integrity in the system." As a result, the Justice Department would partner with the Department of Homeland Security to prosecute "100 percent of illegal Southwest Border crossings." Describing the administration's position more succinctly, Sessions added, "If you cross this border unlawfully, then we will prosecute you. It's that simple".[17] The exception is now the rule.

Second, the stain of criminality surely operates as a disincentive to raising a protection-based claim. If the federal government's official policy is to begin by

[14] Obama (2014).

[15] Trump (2017).

[16] DHS Inspector General, 2.

[17] Sessions (2018).

prosecuting criminally, then using the resources of the nation's administrative immigration law adjudicative processes to forcibly remove unauthorized entrants from the United States, the message is unmistakable: do not bother asking for asylum. It would be eminently reasonable to conclude that chances of successfully requesting asylum are slim when the officials from the very government whose protection is sought have made a migrant's unwanted presence known not once, but twice. Augmenting the fear of claiming asylum, Sessions promised to separate families who reach the United States without the federal government's authorization. "If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law," he said. Under this policy, criminalization is the justification for attacking families. Put another way, the cost of seeking asylum may entail losing one's children.

Third, there is reason to be concerned that the Trump administration's "zero tolerance" policy toward unauthorized entrants will come with an expectation that migrants will cede their legal right to request asylum. At times, federal prosecutors have explicitly required migrants to waive their right to pursue a protection-based claim to obtain the benefits of a plea bargain. A sample plea agreement used by prosecutors in some Virginia federal courts, for example, includes the following provision: "the defendant agrees to waive the defendant's rights to apply for any and all forms of relief or protection from removal, deportation, or exclusion under the Immigration and Nationality Act […]. These rights include, but are not limited to, the ability to apply for […] (a) voluntary departure, (b) asylum, (c) withholding of deportation or removal, […] and (g) protection under Article 3 of the Convention Against Torture".[18] Another plea agreement—this one from a New York federal court—required a defendant to "waive[] any right she may have to apply for relief or protection from removal."[19] Defense attorneys report that prosecutors frequently resist efforts to remove such provisions from plea agreements by threatening to recommend that the judge issue a more severe punishment.[20]

Fourth, confinement is an integral part of the criminalization process that carries remarkable significance for raising protection-based claims. Every year since 2004, people suspected of having committed a federal immigration crime make up the single largest type of defendant jailed pending prosecution. In fiscal year 2013, the most recent year for which data are available, the United States Marshals Service, the agency responsible for all pretrial detention of federal criminal suspects, took into its custody 97,982 people charged with an immigration crime. That surpassed the next highest category of jailed defendants—alleged illicit drug crime offenders—by almost 70,000.[21] Alone among major categories of crime leading to pretrial detention, suspected immigration criminality has been a growing reason for confinement pending prosecution. Since 1994, most other pretrial detention has plateaued. Immigration

[18] MacBride (2012, p. 9).

[19] Lynch (2012, p. 144).

[20] Arnpriester and Byrne (2018, p. 20).

[21] García Hernández (2016b).

crime, in contrast, grew by almost 900% in the twenty years that followed.[22] Like all other federal offenders sentenced to a term of imprisonment, immigration crime defendants are handed over to the Bureau of Prisons (BOP) upon conviction. In some years, the BOP has held as many as 21,500 convicted immigration offenders daily. More recently, it held roughly 13,000 people convicted of an immigration crime, approximately eight percent of the federal government's total convicted offender population.[23] Once they have served their prison sentences, these individuals will be transferred into the custody of ICE for more confinement, pending removal from the United States.

No matter the form of custody, confinement always imposes obstacles to raising legal claims. In the words of a former immigration judge, "When you're locked up, you're in a much worse position than if you're on the outside".[24] For one, it necessarily results in a migrant's separation from family or other support services. Many jails and prisons are located in rural parts of the United States where there are few social support services that can help migrants carry the weight of imprisonment long enough to pursue legal claims.[25] In addition, the inability to work while confined means that migrants' financial resources are limited, making accessing legal counsel nearly impossible. In the United States immigration court system, there is a right to hire counsel. Migrants who are unable to afford an attorney, however, are left hoping to find someone willing to work pro bono or, more often, are forced to fend for themselves in an adversarial legal proceeding that will determine whether they are allowed to remain in the United States. Indeed, the most thorough study of access to counsel in the nation's immigration court system found that eighty-six percent of detained migrants did not receive the assistance of a lawyer. In the Tucson, Arizona immigration court, a mere 0.002% of detained migrants were represented.[26] Representation would not matter if it did not affect outcomes, but numerous studies using various methodologies indicate that it does.[27] The most methodologically robust analysis of the effect of representation on outcomes in immigration proceedings focuses on the New York Immigrant Family Unity Project, the first initiative in the United States to guarantee legal representation to every detained migrant facing the prospect of removal through the Manhattan immigration court. Compared to individuals lacking representation prior to the Project's existence, lawyers reached a successful outcome for their clients 1100% more often.[28] In slightly less than half of cases, Project attorneys sought relief from removal. In seventy-six percent of those cases, Project attorneys submitted a request for one of three protection-based claims: asylum, withholding of removal, or protection under the Convention Against Torture. Including non-protection claims of relief (e.g., discretionary statutory relief known

[22] García Hernández (2016a).
[23] García Hernández (2018a).
[24] Stave (2017).
[25] García Hernández (2011).
[26] Eagly and Shafer (2015, p. 8).
[27] Ibid., p. 52.
[28] Stave (2017, 27–28).

as cancellation of removal), just over half (fifty-two percent) of clients had at least one claim granted, allowing them to remain in the United States.[29]

3.2 Normative Concerns

The prudential problems of criminalizing migration are compounded by the more fundamental normative concerns that this practice raises. Using imprisonment and punishment as means of condemning unauthorized entry pits criminalization against the post-war human rights tradition of guaranteeing access to protection-based claims such as asylum. Prosecuting migrants criminally privileges criminal law over the very concept of juridical asylum. In his announcement, Sessions said, "Citizens of other countries don't get to violate our laws or rewrite them for us. People around the world have no right to demand entry in violation of our sovereignty." He could not be more incorrect. People from around the world do, theoretically it turns out, have a right to demand entry if they are seeking protection from harm. They do not have a right to win protection permanently, but international human rights norms codified into United States statutory law guarantee the ability to raise an asylum claim. Unlike refugee protections, one prerequisite for requesting asylum is physical presence in a country's territory.[30] Whatever his motive, the Attorney General's pronouncement subverts a core feature of post-war human rights norms. People are supposed to have access to the security of well-ordered democracies with functioning legal systems to raise demands for protection. Illustrating the centrality of the ability to make a claim for asylum, the Department of Homeland Security contends that criminal prosecution does not meaningfully dissuade legitimate claimants. The Border Patrol contends that the criminal process is wholly separate from the administrative removal process, thus "[n]either process affects the outcome of the other".[31]

All asylum-seekers have to do, Secretary of Homeland Security Kristjen Nielsen suggested, is enter through an official port of entry.[32] This claim contradicts the plain terms of United States asylum law. "Any alien who is physically present in the United States (whether or not at a designated port of arrival…)," the statutory text reads, "may apply for asylum".[33] Nowhere does the statute require presentation at an official port of entry. Attestations to the contrary, even government officials occasionally reveal the juridical subterfuge of criminalizing migration. In 2015, the independent oversight body of the department that Nielsen now heads warned that the "practice of referring such aliens [who have expressed a fear of persecution] to prosecution…may violate U.S. treaty obligations." Indeed, it appears that DHS had not previously given much thought to this possibility since, as of that year, the

[29] Ibid., p. 33.

[30] Immigration and Nationality Act § 208.

[31] DHS Inspector General, 17.

[32] Planas, "Nielsen"

[33] Immigration and Nationality Act § 208.

approximately 20,000 agents of the federal Border Patrol lacked guidance as to how or if to criminally prosecute migrants who feared for their lives if removed.[34]

More fundamentally, the clash between human rights claims such as asylum and the criminalization of migration points to the limits of human rights approaches to migration. Juridical rights are invaluable. With the right to lay claim to a legal obligation, humans are converted into citizens, not in the formal sense of citizenship law, but in the sense of having agency to affect the path of their lives. Without the ability to effectuate what is ostensibly a legal entitlement, juridical rights are meaningless. The existence of juridical rights is relegated to the cold formality of legal text—statutes and constitutions, for example. As a unit, legal text that cannot be realized has effectively died. Breath has ceased to course through that body of words. What entitlement the juridical right once secured has calcified into a mere promise and nothing more. Threatening to imprison, convict, deport, and remove from their children and the country those who have dared to enter the United States in search of safe harbor strips the textual promise of asylum into something worse than a shell of its former self. Instead, adding a punitive, criminalized bent to asylum converts it into a weaponized mirage. Like the vision of an oasis in the desert, prosecuting hopeful asylum-seekers because they entered unlawfully (yet as law requires) turns the United States' asylum statute into an imaginary promise of life-saving assistance. Worse, it does so intentionally. This is no uncontrollable by-product of physics. Instead of the sun's rays interacting with the heat of the desert's sandy floor, there are policymakers who view asylum as just another threat in the nation's armor.

Nevertheless, to say that the promise of seeking asylum or another protection-based legal right has died is not to say it does not exist or does not matter. Surely, the promise continues to exist. There is no denying that it remains embedded in federal statutes and judicial decisions. Similarly, the promise continues to matter. Instead of being important because it represents an affirmative route toward legal recognition and, for those who successfully navigate its strict contours, flesh-and-bones refuge, it matters precisely because it signals the deprivation of those possibilities. By criminalizing migration and deploying criminal law's authority to stigmatize and punish, including through the use of imprisonment and harsh imposition on family life, the United States government's policy reveals that this is a right that is not meant to be exercised. What once was, no longer is. More harmful than empty, the right to request asylum resembles a lure for the naïve.

> "[I]t turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them," writes Hannah Arendt about the newly stateless peoples of twentieth-century Europe.[35] Law can bestow juridical life, just as law can deny it. Rights are created, not born, precisely because they emanate from "defined territorial entities".[36] Once people lose the power to demand recognition as citizens of a state, they lose their status as people protected by law. They are no longer cloaked in "inalienable human rights",[37] rather,

[34] DHS Inspector General, 2.

[35] Arendt (1973, p. 292).

[36] Ibid., p. ix.

[37] Ibid., p. 291.

> they are pushed toward the position "not that they are not equal before the law, but that no law exists for them".[38]

Arendt's analysis of twentieth century Europe is gripping and insightful. It is also limited by its very subject. The context of her study is not identical to the United States of the early twenty-first century. It would be imprudent to compare the violence of war with the violence of border policing, or confinement in Nazi concentration camps to that in ICE prisons. But difference does not mean irrelevance. Arendt's retrospective analysis of her generation's experiences—and her personal plight as someone who obtained safety in the United States only because a compassionate official was willing to violate federal immigration law—rings of remarkable prescience. Hers is but one example—the most brutal, to be sure—of the precarity of juridical existence that depends heavily on the willingness of sovereign states to acknowledge the citizenship prerogatives of other territorially bounded entities. Neither her subject nor ours is, as she wrote, the first "migration[] of individuals or whole groups of people for political or economic reasons".[39]

Despite a generation gap and a multitude of differences in context, both examples illustrate the subversion of one of Arendt's most significant contributions to the theory of legality. The collapse of citizenship tied to a state subverts the "right to have rights".[40] Once pushed into a position of "rightlessness," the right to life itself becomes susceptible.[41] Juridical recognition as a citizen, then, is inextricably tied to acknowledgment as a person. The former is a perquisite for the latter. If legality does not define humanity, it does at least measure humanity's worth. The "'abstract' human" invoked by calls for recognition of "inalienable human rights" was revealed to be non-existent.[42] Instead, there are merely citizens of particular states.

The United States' criminalization of migration illustrates that just as the nations in Arendt's retrospective analysis collapsed, the citizenship-based juridical framework that she described is vulnerable. Human rights norms grounded in claims to inherent human dignity appear incapable of steering the course of legality. Human dignity, as both examples show, is malleable. It is as robust as the law allows and politics demands. This fluidity is both its greatest promise and its weakest feature. Arendt focuses on the most gruesome product of its weakness; the manifestation of its promise is more difficult to pinpoint. More important is that between the two ends lays a vast spectrum of human experience, legal evolution, and political contestation. "The life of the law has not been logic," the United States jurist Oliver Wendell Holmes wrote, "it has been experience".[43] Tapping the power of substantive and procedural criminal law to frustrate last-ditch efforts to protect human life through the law of asylum augurs the more unfortunate end of the spectrum of human experience, surely without quite yet reaching its terminus.

---

[38] Ibid., pp. 295–296.

[39] Ibid., p. 293.

[40] Ibid., p. 296.

[41] Ibid.

[42] Ibid., p. 291.

[43] Holmes (1882, p. 1).

The Trump administration's fervent embrace of a policy of criminalization of asylum-seekers, equipped with imprisonment and family separation, is a reminder of the fragility of human rights jurisprudence. In the name of securing the nation, government officials have declared themselves willing to deny people the ability to request modern law's foundational safe harbor. As Arendt might say, these migrants are being denied the possibility of finding a new home.[44] The "supposedly inalienable" right to request asylum has "proved to be unenforceable".[45] However, it is not happening this time because nations have collapsed, but rather because the juridical framework has proven incapable of resisting the push of politics. Law has become a symptom of the politics of migrant criminality. Through crimmigration law, state violence in the form of criminalization, imprisonment, and family separation is being deployed for the sake of power. In the process, features of law that post-war generations imagined as inalienable in the self-styled "[c]ivilized countries" are being pushed to the margins of relevance.[46]

Violence wielded in the pursuit of power is alarming. Arendt feared that "violence administered for power's (and not for law's) sake turns into a destructive principle that will not stop until there is nothing left to violate".[47] Her point was quite simple: law legitimately sets the boundaries of the state's permissible use of violence. Without law to guide its use, what constraints, other than material, are there on a state's exercise of its coercive strength? Applied to the United States, a country with a remarkable willingness to dedicate substantial material resources to tools of military, civilian, and private violence, what limits exist on the government's treatment of migrants once it accustoms itself to disregarding even foundational features of the legal tradition that it has taken an integral part in crafting for most of a century?

Writing when that post-war legal tradition was a hopeful aspiration rather than examinable history, the towering figure of twentieth-century legal practice in the United States, Robert Jackson, described his fears of unbounded state violence. A justice on the United States Supreme Court, Jackson famously took a leave of absence from the nation's highest judicial tribunal to accept President Franklin Roosevelt's request that he lead the United States' prosecutions of high-level Nazi prisoners at Nuremberg. Fully aware of the victors' ability to haul the thoroughly stigmatized prisoners to the gallows, Jackson instead supported privileging law over power. The outcome might very well be the same, conviction followed by death, but to Jackson the legitimacy of state-inflicted violence did not emanate from the brute power to kill, but from the process by which that outcome was reached.[48]

Upon his return to the Supreme Court, Jackson retained his commitment to law's essential role in legitimatizing violence and the inherent risk of unchecked exercise of power. Disagreeing with the majority of his colleagues in a case authorizing the federal government's detention of a migrant on an island facility from which he could

[44] Arendt (1973, p. 293).
[45] Ibid.
[46] Ibid., p. 294.
[47] Ibid., p. 137.
[48] Jackson (1945, pp. ix–x).

not leave on the basis of secret evidence that he could not challenge because he was denied a hearing, an exasperated Jackson exclaimed, "Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?"[49] More than six decades later, Jackson's question remains unanswered, but no less pressing. In a 2018 decision involving over 7500 detained asylum seekers, Supreme Court Justice Stephen Breyer asked, "would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries?"[50]

When law ceases to restrict the state's use of violence, it does so, Arendt teaches, through an apparent exception. "[T]he fate of the Jewish people was considered a 'special case' whose history follows exceptional laws, and whose destiny was therefore of no general relevance," she writes.[51] It is precisely the stigma of extraordinariness that merits concern regardless the context. Just as the Jews of nineteenth- and early twentieth-century Europe were unusual, so too, suggests the political rhetoric animating official policy, are the migrants now arriving at the United States border. In the repeated mantra that launched President Trump to victory, migrants are exceptionally dangerous. "They're bringing drugs. They're bringing crime. They're rapists," he claimed in 2015. Well into his presidency, he repurposed that accusation in 2018, focusing specifically on asylum-seekers. Migrants participating in the asylum caravan, he said at a political rally, "are raped at levels that have never been seen before".[52] In the repeated warnings of Attorney General Sessions, they are unusually liable to risk their children's safety and unusually likely to derail democracy. Migrants arriving without authorization, he said, pose "a threat to our very system of self-government".[53] As aberrations and outsized threats, they merit departures from previously accepted principles of legality.

4 Conclusion

Having fully embraced the logic of migrant criminality, the United States ineluctably follows a juridical path toward criminalizing migrants. If they are inclined to flout community norms, the logic goes, the state has no choice but to respond forcefully and decisively. Unsurprisingly, substantive criminal law and procedure, embodied most

[49] *Shaughnessy v. Mezei*, 345 U.S. 206, 226–27 (1953).

[50] *Jennings v. Rodriguez*, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting).

[51] Arendt (1973, p. 22).

[52] Jacobs (2018).

[53] Sessions (2018).

vividly in the prison's barbed wire, are the policy tactics of choice. Like Herrera-Romero, migrants who dare arrive in the United States without the federal government's authorization are captured, jailed, prosecuted, and convicted. They are imbrued with the stain of criminality, and it is that mark of undesirability that is wielded as a political tactic by politicians on the right and left in the United States. The stigma of criminality dominates all else. Parents are prosecuted and families are separated. Turning their gaze toward migrants turned criminals turned inmates, politicians speak of public safety and the integrity of legality.

While migrants surely experience this treatment harshly—as it is indeed intended—their criminalization has a second life as a harbinger of the law's limits. The post-war codification of human rights laws based on respect for the inherent dignity of people as people wavers as the winds of anti-migrant rhetoric reveal the law's inability to contain the excesses of brute power. Even the promise of safety from persecution, codified into asylum law in the United States as in much of the rest of the world, gives way. The era of inalienable rights, as the criminalization of migrants seeking asylum illustrates, remains illusory. Where law was thought to constrain, power reigns supreme. These are not the concentration camps of Nazi Europe, but like those exemplars of brutality, they point to the grave risk present when power unbounded by law becomes dominant.

References

1979 Annual Report of the Director of the Administrative Office of the United States Courts. Administrative Office of the United States Courts, Washington, DC

Arendt H (1973) The origins of totalitarianism. Harcourt, Brace & Company, San Diego

Arnpriester N, Byrne O (2018) Punishing refugees and migrants: the Trump administration's misuse of criminal prosecutions. Human Rights First, New York

Eagly IV, Shafer S (2015) A national study of access to counsel in immigration court. Univ PA Law Rev 165(1):1–91

García Hernández CC (2011) Due process and immigrant detainee prison transfers: moving LPRs to isolated prisons violates their right to counsel. Berkeley La Raza Law J 21:17–60

García Hernández CC (2015) Crimmigration law. American Bar Association, Chicago

García Hernández CC (2016a, Sept 15) Pretrial immigration prisoner trends, Part 1. crimmigration.com. http://crimmigration.com/2016/09/15/pretrial-immigration-prisoner-trends-1994-2012/

García Hernández CC (2016b, Sept 20) Pretrial immigration prisoner trends, Part 2. http://crimmigration.com/2016/09/20/pretrial-immigration-prisoner-trends-part-2/

García Hernández CC (2018a, Jan 12) US prison population drops a bit in 2016, Including for immigration crimes. http://crimmigration.com/2018/01/12/us-prison-population-drops-a-bit-in-2016-including-for-immigration-crimes/

García Hernández CC (2018b, Feb 26) Immigration crime cases in the 1970s. http://crimmigration.com/2018/02/26/immigration-crime-cases-in-the-1970s/

Holmes OW Jr (1882) The common law. MacMillan & Co., London

Ingber S (2018, April 20) Trucker in human smuggling case sentenced to life in prison. National Public Radio. https://www.npr.org/sections/thetwo-way/2018/04/20/604411510/trucker-in-human-smuggling-case-sentenced-to-life-in-prison

Jackson RH (1945) Report of Robert H. Jackson, United States Representative, to the International Conference on Military Trials. United States Department of State, London
Jacobs B (2018, Apr 5) Trump defends Mexican rapists claim during conspiracy-Laden speech. The Guardian. https://www.theguardian.com/us-news/2018/apr/05/trump-mexico-caravan-voter-claims-speech-west-virginia
Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting)
Judicial Business of the Courts (1997) Administrative Office of the United States Courts, Washington, DC
Judicial Business of the Courts (2017) Administrative Office of the United States Courts. Judicial Business of the Courts, Washington, D.C.
Lynch LE (2012) United States Attorney, "Plea Agreement". https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/fast-track-plea-agreements.pdf
MacBride NH (2012) United States Attorney, "Plea Agreement". https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/fast-track-plea-agreements.pdf
Missouri v. Frye, 566 U.S. 134, 144 (2012)
Obama B (2014, Nov 20) Remarks by the President in address to the nation on immigration. The White House. https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration
Office of Inspector General (2015, May 15) Streamline: measuring its effect on illegal border crossing. OIG-15-95. United States Department of Homeland Security, Washington, DC
Planas R (@RoqPlanas) (2018, May 8) Nielsen says pregnant women. Twitter, https://twitter.com/RoqPlanas/status/993957981812379650
Sessions JB (2018, May 7) Attorney general sessions delivers remarks discussing the immigration enforcement actions of the Trump administration. https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions
Shaughnessy v. Mezei, 345 U.S. 206, 226-27 (1953)
Stave J (2017) Evaluation of the New York immigrant family unity project: assessing the impact of legal representation on family and community unity. vol 23. https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf
Stumpf J (2006) The crimmigration crisis. Am Univ Law Rev 56(2):367–419
Trump DJ (2017, January 25) President of the United States of America, executive order: enhancing public safety in the interior of the United States. https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/
United States Department of Justice (2018, May 1) Press release, justice department announces first criminal illegal entry prosecutions for suspected caravan members. https://www.justice.gov/opa/pr/justice-department-announces-first-criminal-illegal-entry-prosecutions-suspected-caravan
United States of America v. Herrera-Romero, No. 18-MJ-2073 (United States District Court for the Southern District of California 2018)

Governing Felonious Foreigners Through Crimmigration Controls in Australia: Administering Additional Punishments?

Peter Billings

Abstract Australian politicians have been categorical about their commitment to protecting the Australian community from the risk of harm that may result from criminal activity by non-citizens, proclaiming that there "is no place in Australia for foreign criminals". This policy has been pursued through administrative, regulatory, means. Specifically, via the administration of the 'character test' under section 501 *Migration Act 1958* (Cth), and through general visa cancellation powers governing 'risky' non-citizens. This chapter critically examines recent reforms to the 'character test',—reforms that introduced an unprecedented regime of mandatory visa cancellation for non-citizens considered to be of bad character—and the administration of those new powers. Non-citizens subject to mandatory visa cancellation include, notably, those possessing a 'substantial criminal record'. These individuals are subject to administrative detention upon the expiration of their prison sentence, and are vulnerable to removal from Australia as unlawful non-citizens. Justified by politicians as a measure of effective crime control, visa cancellations on the grounds of bad character have increased by over 1, 400 per cent, as a consequence of the introduction of mandatory visa cancellation powers in December 2014. This chapter analyses and critiques the introduction, justification and administration of mandatory visa cancellation in Australia. The chapter argues that visa cancellation, consequential detention ('immcarceration'), attendant legal processes, and the sanction of removal, are akin to double punishment, largely because non-citizens experience these measures as punitive.

1 Introduction

The Australian Government exhibits a very low tolerance for criminal, non-compliant, or fraudulent behaviour by non-citizens, including those seeking asylum

P. Billings (✉)
School of Law, The University of Queensland, Brisbane, QLD, Australia
e-mail: p.billings@law.uq.edu.au

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_3

and those with refugee status. Increasingly, exclusion from Australia is the national government's response to criminal or 'risky' behaviour by non-citizens. Under the *Migration Act 1958* (Cth) (*Migration Act*) exclusion and expulsion is largely achieved via s 501 (the 'character test'), and s 116 ('general visa cancellation' powers). These provisions are at the heart of the interplay between criminal law and immigration law in Australia.

The character test is concerned with the policing of non-citizens before and after entry to Australia and serves to prevent entry and facilitate removal of non-citizens from the community, by reason of their past activities, reputation, or known criminal record. Administration of the character test can lead to immigration detention (or, 'immcarceration')[1] for lengthy periods of time, pending 'removal' from Australia or restoration of lawful resident status. Generally speaking, the character test requires a more serious level of offence and a higher level of certainty about a person's riskiness compared with s 116. Section 116 provides extensive discretionary powers of cancellation, enabling ministers or their delegates to cancel a temporary visa upon satisfaction of one of several grounds.[2] Use of this provision can also lead to prolonged immigration detention for non-citizens on the basis of minor charges or (in the case of asylum seekers) because of alleged 'anti-social' or 'disruptive' behaviour.

The *Migration Amendment (Character and General Visa Cancellation) Act* 2014 (Cth) extensively recast s 501 and amended s 116. These reforms showed the political will to crack down on non-citizens who offend or who might offend while living in Australia. The reforms toughened the character test by redefining and broadening existing cancellation grounds and by adding new substantive grounds on which a person may not pass the character test. Importantly, s 501 introduced the mandatory cancellation of a visa for particular non-citizens who have exhibited certain offending behaviours. Politicians championed mandatory visa cancellation as a crime preventive measure, thereby revealing its "penal traits".[3] In addition to the increasing use of s 501 for those non-citizens with criminal convictions, there has also been a recent trend towards using cancellation powers under s 501 and s 116 in 'pre-crime' cases with respect to individuals who have not been convicted of offences. This has captured individuals reckoned to be 'risky' because of their current or past associations or memberships, and has netted individuals who have been charged with an offence, but who have been neither prosecuted nor convicted at the time of visa cancellation. The increased use of s 501 and s 116 and the related use of immigration detention as tools of crime control and risk management are critical features of contemporary 'crimmigration' in Australia.

The focus of this chapter is not on the overcriminalisation of migrants and forms of mobility per se, important though these features of crimmigration are. Here, the emphasis is on the regulatory response to and immigration-related consequences of a person's perceived riskiness or offending. Section 2 provides a brief overview of crimmigration law and practice in Australia with reference to selected examples. It

[1] Kahlan (2010, p. 43).

[2] A permanent visa cannot be cancelled under s 116(1) *Migration Act*: s. 117(2).

[3] Franko Aas (2014, p. 527).

explains and analyses why Australia is regarded as being in the 'vanguard' of crimmigration law and practice globally.[4] Then, Sect. 3 examines the political motives for the new exclusionary regime in Australia with a critical eye on the official justifications for enhanced visa cancellation powers. Section 4 describes and explains the terms and application of mandatory visa cancellation, teasing out its connection to broader crimmigration trends and practices globally, specifically linking visa cancellation with wider escalating practices of deporting or removing non-citizens who breach immigration or criminal law as a means of population control in Europe and North America. Section 5 identifies and critically evaluates the adverse consequences of mandatory visa cancellation with particular reference to the punishing aspects of the scheme. In the final section, attention will turn to s 116, a provision that the Australian government has increasingly relied upon to supplant criminal justice processes and facilitate the detention and exclusion of non-citizens perceived to be risky.

2 Australia: At the Vanguard of Crimmigration

2.1 Mandatory Immigration Detention

Seeking refugee protection in Australia by 'irregular' means is not a criminal offence. However, irregular migration is effectively criminalised. A non-citizen with no lawful right to enter Australia (because they lack a valid visa to enter or because they are not exempted from visa requirements) is subject to mandatory detention, pending administrative decisions about their entry or removal from Australia. A non-citizen seeking refugee protection has no legal right to enter Australia[5] and is subject to mandatory detention regardless of their asylum claim.

The *Migration Act* authorises the detention of unlawful non-citizens[6] by the executive without judicial order or warrant.[7] Non-citizens liable to be detained for prolonged and indeterminate periods include protection visa claimants pending decisions about their refugee status and visa eligibility, and also 'declared' refugees (within the definition of the 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees*—together, 'Refugees Convention'),[8] whose visa claims are refused or cancelled on security or adverse character grounds but who cannot be removed or deported on the basis of the international law, *non-refoulement*, principle (i.e., they are undesirable but unreturnable refugees).

---

[4] Vogl and Methven (2017).

[5] *Migration Act 1958* (Cth) s 228B.

[6] Generally, any person who is not a 'lawful non-citizen' (i.e., holds a valid visa) is an 'unlawful non-citizen': *Migration Act 1958* (Cth) ss 13(1), 14(1).

[7] *Migration Act 1958* (Cth) ss 189, 196, 198.

[8] Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

Immigration detention is justified on protective grounds. Public health and safety are said to be secured by incapacitating protection seekers who upon arrival may carry a contagious disease, or who officials consider to pose an unacceptable risk to public safety or national security. Detention also serves to manage those non-citizens who officials believe are a flight risk to prevent them absconding, and it serves ancillary administrative purposes related to visa processing/adjudication and facilitating removal/deportation. General deterrence of irregular maritime migration is not a lawful basis on which a non-citizen can be detained in Australia.[9]

Immigration detention risks executive overreach and may breach an individual's human rights. Effective checks and balances are absent in Australia, notwithstanding the availability of judicial oversight. The High Court of Australia (HCA) has entertained several challenges to the legality of prolonged and indefinite immigration detention. Notoriously, in the case of *Al-Kateb v. Godwin*,[10] the HCA accepted the possibility that detention might endure for the term of a non-citizen's natural life under the terms of the *Migration Act*. Subsequently, the effect of *Al-Kateb* has been tempered somewhat, as the HCA has identified purposive and temporal constraints on immigration detention. The Court has stated that detention serves three statutory purposes: (i) facilitating removal from Australia, (ii) receiving, investigating and determining a visa application, or (iii) determining whether to permit a valid visa application.[11] Moreover, in *Plaintiff M76*, three members of the HCA identified temporal limitations on detention that connect with the identified statutory purposes underpinning detention.[12] Accordingly, detention is only legally necessary if it is for a reasonable period to effect statutory purposes. Absent temporal constraints, there is a strong case for arguing that detention provisions are punitive and, therefore, unconstitutional.

Mandatory detention is flawed for several reasons. Among the main problems are: First, executive officials administer and apply the law and policy relating to deprivation of liberty, absent effective oversight. Independent and impartial adjudicative bodies are not routinely required to check detention decision-making (for example, through periodic appeals, statutory reviews or bail proceedings). Second, substantive unfairness arises because the proportionality of a person's detention is not rigorously scrutinised by public officials on an individual basis, as required under international law, but rather stems reflexively from the state's characterisation of a person as unauthorised and unlawful. Third, the judiciary's capacity to promote the rule of law by policing legal limits on detention through judicial review is restricted. This is due to (i) the broad purposes officially underpinning and informing the statutory mandate governing detention, and (ii) the uncertainty afflicting 'reasonableness' as a normative constraint on the duration of detention.

---

[9] Billings (2015).

[10] (2004) 219 CLR 562, 575 (Gleeson CJ), 651 (Hayne J).

[11] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; and *Plaintiff M96A/2016 v Commonwealth of Australia* (2017) 261 CLR 582.

[12] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322.

The executive detention (and *de facto* criminalisation) of non-citizens seeking entry to Australia has happened routinely in a maritime environment. Moreover, it has also occurred in designated third countries co-operating with Australia pursuant to 'regional processing' agreements. These policies and practices are (or were) integral components of Operation Sovereign Borders (OSB), which comprises a suite of deterrence measures aimed at deflecting and deterring the arrival of 'irregular' migrants (asylum-seekers). Space constraints permit consideration of two key measures, namely: (i) the covert maritime interception of vessels carrying migrants, and (ii) regional processing of refugee claimants under conditions of restraint in third countries.

2.2 Maritime Interdiction

Interdiction is not characterised as a sea rescue operation. Indeed, genuine and proactive rescue at sea operations are represented by politicians as an additional 'pull factor', encouraging and delivering refugees to Australia.[13] However, the interdiction policy is constrained by the imperative of securing safety of life at sea, and assistance is provided where vessels cannot safely function at sea. There are several modalities of interdiction: turn-backs, take-backs and assisted returns.

A 'turn-back' involves the unilateral return of asylum seekers and crew to the departure point, either in the vessel intercepted by Australian authorities or in an alternative vessel. Turn-backs entail the covert interception and removal of vessels, where it is safe to do so, from within Australia's territorial sea or the contiguous zone. The Australian Government procured disposable lifeboats and fishing vessels to complete turn-backs to Indonesia in 2013–14. 'Take-backs' entail maritime and aerial returns to a person's home country or another country with which Australia co-operates pursuant to a consensual agreement. A take-back is an overt activity initiated in Australia's territorial waters or the contiguous zone. Finally, an 'assisted return' by sea occurs where Australian authorities come across a vessel in distress, and there is a perceived safety of life at sea situation. This practice can entail repairing a vessel and turning it back, or taking into custody the passengers and crew on board Australian border protection vessels and then taking them back to another country.

The Australian Government claims that it does not directly return refugees to face persecution or significant harm. There is an on-water assessment, termed 'enhanced screening', that purports to ensure Australia's compliance with international law. Following this process, government officials have returned asylum seekers directly to Sri Lanka and Vietnam, on the basis they do not engage Australia's *non-refoulement* obligations. The apparent injustices arising from enhanced screening processes at sea have elicited criticism from the UN Special Rapporteur on the Human Rights of

[13] Vasek (2012).

Migrants. Specifically, that asylum claims are not being thoroughly and fairly examined and the process lacks independent oversight.[14] It is striking that in the period between December 2013 and May 2017, of the 765 people reportedly interdicted at sea, only a single Sri Lankan asylum seeker was screened in and then transferred to a third country under regional processing arrangements. The balance of those interdicted seemingly did not overcome the threshold of potentially 'engaging' Australia's international protection obligations.[15]

There is an emerging body of evidence that speaks to the adverse consequences for interdictees returned directly to Sri Lanka and Vietnam via take-backs. When asylum seekers are screened out at sea and are returned to their country of origin Australia expresses confidence in political assurances from the authorities of that state regarding the humane treatment of returnees, but there are no mechanisms in place to ensure that such political gestures are honoured. This is insufficient to discharge international obligations, as the UN Special Rapporteur on Torture has stated.[16] Indeed, there are media reports detailing prosecutions and other forms of harm—detention, imprisonment, and physical assaults—experienced by 'failed' asylum seekers at the hands of Vietnamese state authorities.[17] Additionally, there is evidence that asylum seekers returned to Sri Lanka are vulnerable to harm such as imprisonment, interrogation, and prolonged torture.[18]

In sum, the international law principle of *non-refoulement* is imperilled because asylum seekers are put at risk by the coercive modalities of interdiction at sea, a circumstance aggravated by the secrecy attending maritime operations. The lack of transparency surrounding interdiction has diminished political and public scrutiny and, therefore, democratic accountability regarding the legality and adverse consequences of interdiction at sea. Moreover, given the broad and arguably exorbitant nature of crimmigration powers authorising interdiction and detention at sea,[19] coupled with the practical challenges associated with accessing legal representation at sea, judicial oversight cannot be relied upon to effectively safeguard the fundamental rights of non-citizens.

[14] Crépeau (2017).

[15] Billings (2018). As at March 2020, there had been 873 people turned back since Operation Sovereign Borders commenced in December 2013 (Galloway 2020).

[16] Méndez (2016, p. 10) [26].

[17] Cochrane (2017).

[18] Sweeney (2015).

[19] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 579 [193]. The HCA determined that the *Maritime Powers Act 2013* (Cth) authorised the interception, prolonged detention at sea and (attempted) transfer to India—the place of departure.

2.3 Regional Processing and Detention

In 2012, the Australian Government announced it would resuscitate the practice of extraterritorial processing of refugee protection claims. This was intended to deter irregular maritime migration by reducing the attractiveness of remote Australian territories as an intended destination for asylum seekers. Following legislative reforms—the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth)—those persons arriving at an 'excised' place without a valid visa were, effectively, criminalised. They became vulnerable to removal to a 'designated' offshore processing country and subject to detention that, by design, was for an indefinite period. Moreover, they were further punished for their irregular mobility with denial of access to family reunification pending the outcome of the refugee status determination process.

Regional processing arrangements survived two separate legal challenges before the HCA. The first legal challenge focused on the potential indefinite detention in a third country and the risk of chain *refoulement*, contrary to Australia's international obligations. These arguments were rejected by the HCA because the laws founding offshore processing operated simply to effect the removal of asylum seekers to a designated country, without more than an implication that refugee status determination was to be carried out in that country.[20] The *Migration Act* was deliberately silent on what was to occur offshore, since the laws of designated third countries governed such matters. Second, the HCA later ruled that the government's offshore regional processing arrangements with Nauru were legally valid, supported by both legislation and the *Constitution*.[21]

After an unsuccessful judicial review of detention in Nauru,[22] the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers was unconstitutional. In a momentous judgment, the Court ruled that restricting the asylum seekers' freedom of movement was unconstitutional because it did not fall within the limited exceptions to the right to liberty.[23] Additionally, Kandakasi J observed that asylum seekers' treatment also breached international human rights law.[24] The closure of "Australia's Guantanamo" followed over a year later, and the Australian government and its private contractors agreed to pay compensation to 1905 asylum seekers who sued for damages over false imprisonment and alleged physical and psychological injuries.[25]

International and civil society organisations have uniformly condemned regional processing for human rights violations. For example, the UN Special Rapporteur

---

[20] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28.

[21] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[22] *AG and Ors v Secretary of Justice* [2013] NRSC 10. In October 2015 arrangements on Nauru changed, the processing centre became an 'open centre' with greater freedom of movement for asylum seekers.

[23] *Namah v Pato* [2016] PNG SC [39], [58]; [80], [117]–[118].

[24] Ibid. [69].

[25] Doherty and Wahlquist (2017).

on the Human Rights of Migrants referred to the punishing experience of protracted periods of closed detention in regional processing centres and Australia's legal responsibility for its practices:

> Considering that this situation is purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorized maritime arrivals ("we stopped the boats"), considering the incredible hardship that most of these asylum seekers and refugees have already endured in their countries of origin and in transit countries on their way to Australia, and considering that Australian authorities have been alerted to such serious issues by numerous reports from international organizations such as the United Nations and civil society organizations, Australia's responsibility for the physical and psychological damage suffered by these asylum seekers and refugees is clear and undeniable.[26]

Offshore detention and refugee processing illustrates the propensity of states to criminalise (in effect) irregular migration. The regime increased the vulnerability of migrants to human rights violations, with arbitrary detention in a punitive environment with inadequate independent oversight. The legacy of offshore processing is alarming levels of mental illness, self-harm, abuse and neglect.[27]

In conclusion, this section has outlined and briefly appraised several key aspects of contemporary crimmigration law and practice in Australia, and identified some of the adverse consequences for non-citizens. Also important, though perhaps less obvious to outside observers, are the punishing aspects of visa cancellation laws and their administration and enforcement. The balance of this chapter identifies and critically examines the regulation of crimmigrants and its consequences.

3 Community Expectations and the Containment of Crimmigrants

The Australian Government espouses a zero-tolerance approach towards non-citizens committing criminal offences. Politicians have been categorical, proclaiming "[T]hey should be removed from our shores as quickly as possible".[28] Therefore, the Government has prioritised the taking of precautionary and preventive steps by expelling certain offenders and excluding 'risky' non-citizens. Indeed, 'war' was declared on Outlaw Motorcycle Gang members, with the perceived problem of non-citizen 'Bikie' gang members singled out for special attention.[29] In short, the enforcement of enhanced crimmigration laws has assumed greater prominence in the management of perceived threats and risks posed by certain non-citizens present within the Australian community.

---

[26] Crépeau (2017, p. 15).

[27] United Nations High Commissioner for Refugees (2016).

[28] Gribbin (2015).

[29] Dutton (2016).

The reforms to the character test were justified on the basis that the increased facilitation of entry to Australia and higher numbers of temporary resident visa holders over the preceding fifteen years warranted stronger visa cancellation grounds and processes. Additionally, the reforms were said to reflect the "government's and the Australian community's low tolerance for criminal, non-compliant or fraudulent behaviour by those who are given the privilege of holding a visa to enter and stay in Australia".[30] More particularly, mandatory visa cancellation for prescribed cohorts of crimmigrants was justified in terms of risk management. Incapacitation was identified as the key benefit of the mandatory visa cancellation process as an "opportunity to ensure non-citizens who pose a risk to the community […] remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved".[31] Arguably, the justifications for reforming the character test do not withstand close inspection.

Precisely how the environment relating to Australian migration patterns relating to entry and stay, had changed so fundamentally as to justify the extensive reforms to the visa cancellation regime was not explained logically. Also, whether the Government's and community's views generally align with regard to visa refusal and cancellation on character grounds cannot be objectively ascertained. Assertions about 'community expectations', expressed in government policy, amount to an articulation of the Government's assumptions (or views) about 'community attitudes' regarding how non-citizen criminals in Australia ought to have their visas cancelled or visa applications refused in most cases.[32] But 'community expectations' do not necessarily weigh against a non-citizen having regard to the person's particular circumstances. Arguably, the community would be fair-minded and not vengeful, and the community would not want to see visa cancellation misused to inflict further punishment.[33] A further problem with the second justification for the 2014 legislative reforms relates to the reference to a "privilege" in order to describe a non-citizen's entitlement to remain in Australia.[34] This policy statement suggests a paucity of rights for non-citizens, and is misleading because it is inconsistent with the statutory rights and interests held by non-citizens.[35]

A particular justification for the introduction of mandatory visa cancellation powers for prescribed cohorts of crimmigrants stemmed from the Government's concern that non-citizen criminals were being released from prison before immigration processes could be finalised (see Sect. 4). This was said to present a significant potential risk to community safety because felonious non-citizens could be residing

[30] Commonwealth, House of Representatives (2013, p. 10327).

[31] Ibid.

[32] *YNQY v Minister for Immigration and Border Control* (2017) FCA 1466 para. 76 and see *FYBR v Minister for Home Affairs* [2019] FCAFC 185 paras 66–79, 87–93.

[33] *Do and Minister for Immigration and Border Protection* (2016) AATA 390, para. 23; and, McCabe (2013, p. 103).

[34] Commonwealth, House of Representatives (2013, p. 10327).

[35] E.g. *Nigam v. Minister for Immigration and Border Protection* (2017) FCA 106, para. 67; and, *Minister for Immigration and Border Protection v. Stretton* (2016) 237 FCR 1, p. 10, para. 26 and pp. 24–25, para. 70d.

in the community pending the finalisation of the administrative, visa cancellation or refusal, process. Accordingly, the introduction of mandatory visa cancellation, promoting public safety through the efficient management of future risks to society, serves a legitimate aim. However, arguably the reforms were an unreasonable means of achieving a legitimate aim because the preventive measures went beyond what was necessary and proportionate to achieve the Government's objectives. Therefore, the Government failed to satisfactorily demonstrate that the restrictions imposed on non-citizens' human rights were justified.[36]

4 Crimmigration, The Character Test, and Mandatory Visa Cancellation

4.1 Crimmigration

Crimmigration "represents the distinct laws and legal processes that states employ as a means of exerting control over a sector of our global society".[37] The doyen of crimmigration law, Juliet Stumpf, has observed that crimmigration law is "an umbrella term for two loosely connected and overlapping legal trends".[38] The first transnational trend Stumpf identified relates to those seeking entry, or the increasing criminalisation of border crossing infractions (including unlawful entry and re-entry), and of conduct facilitating irregular migration (including human smuggling and trafficking). The second transnational trend she identified is the expansion of criminal deportability grounds for non-citizens already present in society.[39] The criminal justice system has become a direct pathway to removal/deportation, and this has directly impacted lawful (and often long-term) residents. Both trends are evident in contemporary Australian law and practice, with border crossing infractions effectively criminalized through interdiction, detention, and offshore processing arrangements, and with enhanced visa cancellation provisions and stringent enforcement for felonious non-citizens.

[36] Australian Human Rights Commission (2014, pp. 4–7). The Commission pointed to the potential for arbitrary detention and arbitrary interference with family life, contrary to the *International Covenant on Civil and Political Rights* ('ICCPR'). The Commission is an independent statutory body with non-coercive powers, tasked with keeping government accountable to human rights standards.

[37] Bowling and Westenra (2015). On the historical antecedents to crimmigration, see Aiken et al. (2014).

[38] Stumpf (2013a, p. 61).

[39] See Stumpf (2006, 2013b), Aliverti (2012, pp. 417–434), and Chacon (2012, p. 613).

4.2 The Character Test s 501 Migration Act

The centrality of the character test for migration control stems from its broad and flexible operation. Relying on s 501 to facilitate the removal of non-citizens has enabled successive national governments to circumvent the criminal deportation power,[40] the application of which is limited by the 'ten-year rule'. This restriction generally operates to prevent the removal of non-citizens if they have at least ten years of lawful residency in Australia.[41] For over twenty years, national governments have increasingly utilised the broader power in s 501 to cancel the visas of long-term residents because the power is not as restricted as that of s 201.[42]

Under s 501(1)-(3) there are discretionary powers enabling the Australian Government to refuse or cancel a visa on adverse character grounds. Subsection 501(6) stipulates the circumstances in which a person does not pass the character test. Some of these grounds are expressed in objective terms; for example, s 501(6)(a) provides that a person will not pass the character test if they have a 'substantial criminal record'.[43] This statutory criterion correlates to the existence of certain objective circumstances, such as where a person has received a death sentence, a sentence of life imprisonment, a minimum twelve-month prison sentence, or two terms of imprisonment for a total of 12 months or more. Other aspects of the character test rest on subjective criteria. For instance, s 501(6)(b) requires the formation of a 'reasonable suspicion' that certain legislative criteria are met that relate to a person's association with or membership in a criminal group or organisation. Additionally, certain character test provisions require the decision-maker to make an evaluative judgment about whether certain objective circumstances may eventuate. For example, s 501(6)(d) requires the decision-maker to engage in a predictive exercise and to evaluate whether there is a risk a non-citizen would, *inter alia*, engage in criminal conduct or pose a danger to the community.

4.3 Mandatory Visa Cancellation

The 2014 migration reforms effected major changes to the existing character test. The most critical reform was the introduction of mandatory visa cancellation powers via s 501(3A). This provision applies to a class of non-citizens who are deemed to have a serious criminal history and who are serving a full-time prison sentence. The underlying purpose is that risky noncitizens will remain contained in either

[40] Migration Act 1958 (Cth) s 200.

[41] *Migration Act 1958* (Cth) s 201: except in very limited circumstances relating to specified offences (such as, treason, sedition and conspiracy), see s 203 *Migration Act 1958* (Cth).

[42] Commonwealth Ombudsman (2006, p. 12).

[43] *Migration Act 1958* (Cth) s 501(7) defines 'substantial criminal record'.

criminal or immigration detention until they are removed or their immigration status is otherwise resolved.[44]

Mandatory visa cancellation affects a person who is serving a prison sentence with either a 'substantial criminal record' or a conviction for sexually based offences against a child. For the purposes of mandatory visa cancellation, a 'substantial criminal record' encompasses non-citizens who have been sentenced to death, sentenced to life imprisonment, or sentenced to a term of imprisonment of 12 months or more. The legislative designation of a 'substantial criminal record' sets a relatively low threshold, embracing the circumstance where the person has been sentenced to a term of imprisonment of twelve months or more, whether its operation is suspended or not.[45] Some offences that lead to minimum twelve-month sentences may not be very serious, as the Federal Court in *Eden* acknowledged. Justice Logan observed: "That the descriptor "substantial criminal record" is used does not mean that any sentence for offending conduct falling within that descriptor is automatically and objectively serious."[46]

Mandatory visa cancellation decision-making processes are procedurally suspect. Indeed, "abnormal justice" is a notable characteristic of crimmigration procedures more broadly.[47] The subjects of mandatory visa cancellation processes do not enjoy the same rule of law-based protections that are conventionally applicable to administrative decision-making. Specifically, fundamental principles of procedural justice/fairness do not apply to mandatory visa cancellation determinations. There is no prior notice of the relevant issues and material on which immigration officials might rely as a reason for coming to an unfavourable decision. Additionally, there is no prior opportunity to be heard (to make representations to officials) before the adverse administrative action is taken.

The right to seek, what is effectively, an internal administrative review accompanies the mandatory cancellation of a person's visa. This ameliorative if unconventional mechanism provides for a measure of post-decisional procedural fairness: a right to make representations in writing about whether the visa cancellation should be revoked. The onus is on the non-citizen to persuade officials to revoke a cancellation decision on the basis that the person actually passes the character test or because "there is another reason why the original decision should be revoked".[48] Government data reveals that 77% of non-citizens subject to mandatory visa cancellation since December 2014 sought revocation, with relatively high rates of success. Of 2, 644 revocation requests lodged, 834 decisions were made to revoke visa cancellation.[49]

---

[44] Commonwealth, *Parliamentary Debates, House of Representatives*, 24 September 2014, p. 10328.

[45] *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, pp. 173–174, paras 69–75.

[46] *Eden v. Minister for Immigration and Border Protection* (2015) FCA 780, pp. 7–8, para. 25.

[47] Franko Aas (2014).

[48] Migration Act 1958 (Cth) s 501(CA)(4)(b).

[49] Commonwealth, Joint Standing Committee on Migration (2019, p. 18) and Department of Home Affairs (2018, p. 8).

Where government delegates exercise statutory revocation powers, there is a right to appeal an adverse decision on substantive merits. By contrast, when the Immigration Minister elects to consider a non-citizen's revocation request personally, there is no opportunity to have an independent and impartial administrative review of that particular decision. The absence of merits review over ministerial decision-making is a striking omission. It is a serious procedural shortcoming given the importance of the revocation power and its consequences for non-citizens and their families. It contributes to a troubling lack of effective oversight and accountability on the substantive fairness of visa cancellation decisions founded on s 501. There are related concerns about the administration and oversight of general visa cancellation powers under s 116 (Sect. 6, below).

5 The Impact and Consequences of Mandatory Visa Cancellation

5.1 Spike in Visa Cancellations

The 'net-widening' impact of the legislative changes has been dramatic, with the number of visa cancellations on character grounds increasing 1400% since 2014.[50] This increase stems primarily from the introduction of mandatory visa cancellation provisions.[51] The nationals most affected by s 501 visa cancellations (including but not limited to mandatory visa cancellation) are New Zealanders, the British, and Vietnamese residents. New Zealanders have been disproportionately affected by the Australian Government's escalation of crimmigration law and practice. Moreover, and in keeping with past trends, the application of visa cancellation powers affects long-term residents (see below) and impacts ethnic minority populations disproportionately, especially Maori and Pasifika populations.[52]

What accounts for the disparate impact on New Zealanders, who constitute approximately 50% of those captured by character cancellation powers? The answer lies in part in their unique access to Australia through a special class of temporary visa,[53] which has been subject to progressively stringent visa conditions introduced since 2001. This has served to make the status of around 280,000 New Zealanders precarious, that of "indefinite temporary residents" who are often without access to social assistance.[54] The visa restrictions limit eligibility for certain social welfare

[50] Department of Immigration and Border Protection (2017b).

[51] DIBP, *FOI Disclosure Logs*, 22 July 2016.

[52] Stanley (2017, pp. 5–7).

[53] Uniquely, New Zealanders do not require a visa before travelling to Australia; they automatically receive a special category visa (SCV) on arrival in the absence of another valid visa, providing they meet public interest criteria.

[54] Birrell (2013), Walsh (2015) and Stanley (2017).

benefits (including unemployment and sickness benefits) and direct access to citizenship. Without the protection citizenship provides many New Zealanders who are long-term residents are vulnerable to the character test and removal from Australia. Accordingly, the disproportionate impact of mandatory visa cancellation decisions on New Zealanders may be linked to the visa conditions that permit their long term residency but not access to citizenship.

5.2 *New Zealanders Constitute the Highest Number of Detainees*

New Zealanders have become the largest cohort by nationality of immigration detainees. New Zealanders (overwhelmingly males) have constituted the highest proportion of detainees at around 12–13% since July 2016 to date.[55] This demographic change has occurred at a time when the composition of the overall population in immigration detention has changed. Since 2014, the number of non-citizens detained due to their 'irregular' (unauthorised) mode of maritime arrival has diminished as a consequence of harsh (and arguably unlawful) deterrence policies aimed at asylum seekers, as discussed in Sect. 2. Conversely, the number of people detained after 'failing' the character test has increased markedly. Between 1 July 2015 and 30 June 2016, the cohort of s 501 immigration detainees increased as a percentage of the entire detainee population from 15 to 30%,[56] later increasing to 32%.[57] The balance of the detainee cohort comprises those who breach their visa conditions, along with a diminishing number of irregular maritime and air arrivals.

5.3 *Crimmigration Captures Virtual Nationals*

Visa cancellation decisions warrant a thorough and nuanced balancing of the public interest (including community safety)[58] with private rights and interests. There are people adversely and sometimes tragically affected by non-citizens' crimes. Alternatively, for non-citizens and their families and associates, there are human rights, immunities, and interests at stake. Hardships may arise for individuals who have deep roots and enduring ties in Australia, and for their family members who are Australian citizens. Deporting people 'home' to their birthplace can function as an additional punitive consequence of offending; they may be unprepared for the culture and language and/or have low employment prospects with minimal governmental,

[55] DIBP (2017a).

[56] Commonwealth Ombudsman (2016a, b, p. 18).

[57] DIBP (2017a).

[58] In addition to benefitting public safety, there are estimated savings to the taxpayer by removing organised crime offenders. See Australian Institute of Criminology (2018).

charitable, or familial support. Indeed, the removal of New Zealanders and British residents to their country of nationality can certainly occasion considerable suffering for individuals who are effectively Australian, notwithstanding the shared language and sociocultural similarities between those Commonwealth countries. The courts have recognized this circumstance. For example, in the case of *Stretton*, Allsopp CJ reflected on the effect of removing a long-term British resident:

> The decision to remove Mr Stretton from Australia will cause hardship to him, and his family, in particular the breaking of family relationships of many years; further, the removal of someone from Australia who has spent much of his life here (arriving as a child of six years) itself has *a quality of harshness that might, in other statutory contexts, together with the effect on him and his family, bespeak unjustness, arbitrariness or disproportion of response. […] His human frailties are of someone who has lived his life here, as part of the Australian community* (emphasis supplied).[59]

Moreover, adverse visa decisions can affect permanent residents whose lives have been afflicted by tragedy and abuse, including refugees and stateless persons. In the case of *YNQY*, Mortimer J identified the difficulties encountered by a Sudanese refugee who was the subject of visa cancellation:

> The circumstances and background of the applicant, and the way in which he comes to find himself in the place he does, are testament to the difficulties which may be encountered by people arriving in Australia from war-torn and crisis-laden regions as very young people, then having to adjust to a very different way of life in Australia. […] it is important to remember that sitting behind a proceeding such as this are human beings whose lives have become full of tragedy. That applies not only to the applicant and his family, but to those people affected by the applicant's crimes in Australia.[60]

Both *Stretton* and *YNQY* illustrate judicial recognition of the burden and adverse consequences stemming from visa cancellation, and this is supported by the available empirical material that speaks to the lived experiences of those subject to exclusion. Although there is limited data available,[61] understanding of the operation and impacts of mandatory visa cancellation can be gleaned from media and official reporting. These contemporary accounts draw attention to how certain long-term residents (or, 'virtual nationals') are subject to visa cancellation, and offer first-hand insights into its affective nature.

Evidently, the mandatory visa cancellation regime is capturing individuals who are non-citizens "by the barest of threads".[62] For example, Joanne Gordon-Stables received notice of mandatory visa cancellation while in prison. She was subject to removal to New Zealand, where she had not lived for nearly forty years, following

---

[59] *Minister for Immigration and Border Protection v. Stretton* (2016) 237 FCR 1, p. 6, para. 15.

[60] *YNQY v Minister for Immigration and Border Protection* (2017) FCA 1466, para 1.

[61] See Bosworth and Turnbull (2014, p. 100), and Pickering et al. (2014, pp. 389–391), on the importance of the production of interdisciplinary studies into the empirical realities of criminal non-citizens. Also, see Powell and Seagrave (2018) exploring the issues arising when researching non-citizen offenders awaiting deportation.

[62] *Nystrom v. Minister for Immigration and Multicultural Affairs* (2005), 143 FCR 420, p. 422. Nystrom had lived in Australia since infancy for over thirty years at the time of visa cancellation.

a twelve-month sentence for drug offences, of which she served six months.[63] Likewise, Mirjana ('Maryanne') Caric arrived from the Republic of Yugoslavia (as it then was) as a two-year-old, and after fifty years as an Australian resident, was subject to mandatory visa cancellation due to several convictions and prison sentences for drug possession and supply. Caric's request for revocation of the cancellation decision was refused by the Assistant Minister in February 2017.[64] Caric was confined to mandatory immigration detention throughout 2017 pending her legal team's efforts to challenge her visa cancellation. Subsequently, in *Caric v Minister for Immigration and Border Protection* a judge remitted her matter for further consideration by the government because the prospect of indeterminate detention arising from unresolved concerns about her potential statelessness had not been actively considered during the revocation process—specifically, whether Croatia, her birthplace, would recognize her for citizenship purposes and permit her entry.

The application of mandatory visa cancellation powers demonstrates how brittle the legal status and community membership of non-citizens can be, including for those who have lived most of their lives, often since early childhood, within Australia. Indeed, a common feature of reported cases in the media is that non-citizens subject to visa cancellation and exclusion identified as Australian and believed they were Australian.[65] However, by virtue of the automatic operation of the mandatory visa cancellation process, non-citizens' experience of belonging is not taken into account at the outset of the process. The scheme's operation means there is no nuanced risk assessment or fine-grained evaluation of mitigating factors specific to the non-citizen prior to notification of visa cancellation. Individual risk assessments and the person's personal circumstances—including the presence of family ties in Australia, degree of familial/welfare support and hardships associated with their removal overseas—and designated human rights matters are only considered retrospectively, and only upon application for revocation of the mandatory cancellation decision. As noted in Sect. 4.3, a significant proportion of cancellation decisions are later revoked or are judged to be unmerited. However, it is important to appreciate the uncertainties and anxieties affecting individuals requesting revocation decisions while in prison and detention. Additionally, a lack of timeliness in preparing and finalising revocation decisions and reviews has resulted in lengthy periods of immigration detention after the expiration of the penal sentence. The punitive aspects of mandatory visa cancellation (and related detention) are explored below.

5.4 Expulsion: A Form of Double Punishment?

Formally, mandatory visa cancellation is not administered as a form of punishment; it is designed to exclude certain non-citizens from the Australian community. In

[63] Gribbin (2015).

[64] Arnold (2017).

[65] Tlozek (2015), Arnold (2017) and Atfield (2016).

the recent case of *Falzon*, it was argued that s 501(3A) was constitutionally invalid because it breached the separation of powers. The applicants claimed s 501(3A) was concerned with punishment for and by reference to offending in addition to the punishment imposed by the sentencing court. The HCA unanimously rejected this claim, deciding that the exercise of mandatory visa cancellation powers did not involve the imposition of punishment for an offence. Rather, the cancellation powers were administrative in character and served protective purposes. The joint judgment stated that:

> The power to cancel a visa by reference to a person's character, informed by their prior offending, is not inherently judicial in character. It operates on the status of the person deriving from their conviction. By selecting the objective facts of conviction and imprisonment, Parliament does not seek to impose an additional punishment.[66]

Concurring with the plurality, Justice Nettle stated that the mandatory visa cancellation provision did not impose punishment, although it may be burdensome and severe for a virtual national.[67] He continued:

> Given that the plaintiff came to this country as a three-year-old child more than 60 years ago, it might be thought that whatever risk he now poses to the safety and welfare of the nation is one that the nation should bear. In general, however, it is for Parliament to select the "trigger" for legislative consequences and especially so in the case of deportation. *It is not the role of this Court to say that the criteria of deportation are overly harsh or unduly burdensome or otherwise disproportionate to the risk to the safety and welfare of the nation posed by the subject non-citizen remaining in this country* (emphasis supplied).[68]

This passage reveals the limited supervisory role of the courts when engaging in judicial review. The Australian courts are constitutionally precluded from engaging with the substantive merits of administrative decisions when supervising government action. Therefore, the courts cannot conduct an assessment of whether administrative decision-making outcomes are substantively just, overly harsh, or disproportionate to the risks posed by the non-citizen to community safety. Nor can the Court assess conformity with human rights and enforce those rights against the State. Consequently, pleading that removal from Australia breaches the *International Covenant on Civil and Political Rights* (ICCPR) is futile because the treaty is not incorporated into domestic law.[69] Instead, selected human rights are translated into government policy. This form of 'soft law' serves to guide but not strictly constrain administrative action.[70]

---

[66] *Falzon v Minister for Immigration and Border Protection* (2018) 92 ALJR 201, 211 [48].

[67] Ibid., 217 [93].

[68] Ibid., 217 [95].

[69] *Stojanovski v. Assistant Minister for Immigration and Border Protection* (2017) FCA 609, para. [66]-[67].

[70] Ministerial Direction No. 65—Migration Act 1958—*Direction under section 499—Visa refusal and cancellation under s 501 and revocation of mandatory cancellation of visa under s 501CA*.

5.5 *Experiencing Mandatory Visa Cancellation—Additional Punishments?*

Legal formalities aside, there is ample evidence that non-citizens experience mandatory visa cancellation processes and practices as a form of additional punishment. Mandatory visa cancellation, detention, and removal have punitive qualities; the measures are experienced as painful, coercive, repressive and exclusionary—all characteristics of punishment—by non-citizens. Removal from Australia is, arguably, a penal intervention. As Franko Aas has claimed, its purpose is to prevent crime and "and it is … in many cases experienced as painful".[71] Indeed, the Australian Ombudsman has revealed that the process of mandatory visa cancellation and exclusion is in fact punitive. An inquiry into the operation of the new regime uncovered several punitive effects of mandatory visa cancellation.[72]

First, the process of mandatory visa cancellation is punitive because of the significant distress caused to prisoners and their families when notification of visa cancellation is provided shortly before their scheduled release from prison. Detainees view this practice as a cruel means of administering visa cancellation.[73] Second, the legal process is also punitive for non-citizens pursuing revocation due to administrative torpor. Considerable delays have arisen, in part because of direct ministerial involvement in the revocation decision-making process.[74] These delays have resulted in prolonging people's incarceration in immigration detention for several months after the expiration of their custodial sentences.[75] Indeed, in one case, the judge described as "undesirable" and "arguably oppressive" a delay of sixteen months, while the Minister personally took a revocation decision.[76] The attendant and painful uncertainty about the future (when the detention period will end and where they will reside) is potentially damaging to non-citizens' health and well-being.[77] Third, effective access to justice is complicated by the rules governing access to immigration detention centres and the increased security of detention facilities (due to the increased numbers of s 501 detainees). Additionally, there are practical barriers associated with visiting or contacting detainees who are often held in very remote locations away from family and from lawyers who can provide the necessary legal advice. Relatedly, there are barriers to procedural fairness when detainees exercise their administrative review rights because they may be unfairly required to participate and give evidence in hearings via video from remote locations.[78] Fourth, the lack of timely decision-making

[71] Franko Aas (2014, p. 528).

[72] Commonwealth Ombudsman (2016a).

[73] Ibid., pp. 10, 19.

[74] Ibid., p. 11.

[75] Ibid., p. 3. In the period 1 January 2014 to 1 March 2016, the average processing time for revocation decisions was 153 days, and 21 cases took more than 12 months.

[76] *Martin v. Minister for Immigration and Border Protection* (2017) FCA 1, para. 11.

[77] See Commonwealth Ombudsman (2013, p. 2), noting the negative impacts on a detainee's mental health of immigration detention, in a closed environment, for a period of longer than six months.

[78] *Tuimaseve v. Minister for Immigration and Border Protection* (2016) AATA 924, para. 16.

has adversely affected families, especially children, which is contrary to human rights principles related to the best interests of minors.[79] Indeed, the Ombudsman noted that family separation was a major concern for detainees, which is aggravated when prisoners are moved to remote detention facilities.[80]

In short, additional containment for prolonged and uncertain periods beyond the expiration of custodial sentence, the affective nature of the initial cancellation notification and subsequent legal processes, and geographical separation and disruption to family life are chief among the deprivations associated with mandatory visa cancellation for individuals and their families. Therefore, it can be readily appreciated why offending non-citizens experience and view their immigration detention and potential removal upon completion of their sentences as a form of "double punishment".[81]

5.6 Nonconformity with International Human Rights Law?

The case studies briefly discussed above are, arguably, instances of Australia abnegating its responsibilities to persons who, though not nationals formally, are effectively absorbed members of the community. This may put Australia in breach of certain human rights obligations arising under the ICCPR, as noted earlier. Indeed, this conclusion is supported by the findings of the UN Human Rights Committee in several cases, including *Nystrom v Australia*.[82] Nystrom had lived in Australia since he was 27 days old and had no connection with Sweden, his birthplace. He had strong personal and familial ties to Australia and misapprehended that he was an Australian citizen. A majority of the UN Committee adopted a broad reading of ICCPR Article 12(4)—the 'right to enter a person's own country'. They interpreted Article 12(4) as extending protection to those without formal nationality who could establish sufficiently close and enduring ties to a country. Accordingly, in Nystrom's case, the Committee found that Australia violated (*inter alia*) Article 12(4) by removing him to Sweden years after his serious criminal offence. Australia took no action to comply with the Committee's determination, leaving Nystrom destitute and vulnerable to ill health and recidivism in Sweden.[83]

In summary, the effect of mandatory detention provisions in conjunction with laws and government policy that promotes exclusion over human rights protection, under conditions of decisive ministerial control over decision-making in many cases, means fundamental rights are forfeited and non-citizens endure additional punishments.

---

[79] *UN Convention on the Rights of the Child*, Art 37(b).

[80] Commonwealth Ombudsman (2016a, b, p. 18).

[81] Ibid., pp. 18–19.

[82] UN Doc CCPR/C/102/D/1557/2007 (18 July 2011).

[83] Park (2013).

6 General Visa Cancellation Powers and Their Consequences

The second legislative scheme that the Australian Government habitually employs to cancel a person's visa when there has been alleged or proven criminal misconduct is s 116. This provision provides broad powers of cancellation, enabling the Immigration Minister or their delegate to cancel a temporary visa upon satisfaction of one of several grounds.[84] Most relevant for present purposes are s 116(1) paras (e) and (g).

Section 116(1)(e) provides for cancellation of a person's temporary visa on the speculative basis of a future risk to public order. In particular, that their ongoing presence in Australia might present a risk to either the health, safety, or good order of the Australian community or a segment of the community, or to the health or safety of an individual or individuals. Section 116(1)(e) can be administered on the basis of unproven criminal charges, or by reference to criminal offence that does not reach a level of severity that would warrant automatic cancellation under the character test.[85] This sets a very low threshold for visa cancellation; it is activated where there is the mere possibility of risk to the community.[86]

Additionally, s 116(1)(g) stipulates that a visa may be cancelled when a prescribed ground for cancelling a visa applies to the visa holder.[87] Merely being charged with a criminal offence, without prosecution or conviction, activates one of the prescribed grounds for a cancelling a visa. A person's visa may be cancelled in advance of their guilt or innocence being judicially determined, and they are liable to be detained for lengthy periods of time. Indeed, there is evidence of non-citizens remaining in detention for many months after the criminal charges that had triggered their temporary visa cancellation had been dropped or withdrawn.[88]

Cheryala's case demonstrates how the application of s 116(1)(g) can have unfair and adverse consequences for a non-citizen when criminal charges are later dropped. Cheryala was put on notice that the Government was considering cancelling his bridging visa while reporting to a police station as a condition of bail. His visa was subsequently cancelled on the basis of the criminal charges, and he was taken into immigration detention and advised that he could appeal (albeit within two days, as he was a detainee). He failed to pursue his appeal rights within the truncated period and, critically, was prohibited from *validly* applying for another bridging visa. The restriction stemmed from rules in delegated legislation that specified that a visa applicant must not previously have held a visa that was cancelled on specified grounds.[89] Cheryala's judicial review application was unsuccessful; however, the

[84] A permanent visa cannot be cancelled under s 116(1) *Migration Act 1958* (Cth): s. 117(2).

[85] See, *Kapene Te Amo* [2018] AATA 2214.

[86] 1702551 (Migration) [2017] AATA 1415, para 97.

[87] Grounds are prescribed in the *Migration Regulations 1994* (Cth).

[88] Commonwealth Ombudsman (2016a, pp. 16–18).

[89] *Cheryala v Immigration and Border Protection* [2018] FCAFC 43, para 58.

Federal Court made three telling observations about the broad scope of the general visa cancellation regime.

First, the Court acknowledged the breadth of the potential conduct that could fall within the relevant regulations, stating: "A charge may be entirely misconceived and cases may arise where (for example) a claimant has been charged in relation to conduct pursued by another but which is mistakenly attributed to the claimant."[90] Secondly, the Court found that the term "offence" was unconstrained "either within Australia or overseas to an offence of any particular character" and "would be wide enough to embrace conduct of a kind which would be no offence at all if engaged in within Australia".[91] Third, the Court pointed to the lack of any operative temporal constraint, observing: "As drafted, the regulation applies to any 'charge' in respect to an 'offence' at any period of time."[92] Accordingly, the 'charge' could relate to conduct either in Australia or overseas and be of considerable antiquity. In short, Cheryala's case reveals how potentially minor offences, or unproven and even misconceived charges, can trigger visa cancellation.

Another prescribed ground for visa cancellation that warrants brief consideration is when a temporary visa holder has breached the Code of Behaviour. The Code governs the conduct of asylum seekers on bridging visas. All bridging visa holders over 18 must sign the Code, which prohibits asylum seekers from engaging in "antisocial" or "disruptive" activities, including; spitting, swearing, being "disrespectful" or "inconsiderate". As a consequence of breaching the Code, asylum seekers awaiting finalisation of their substantive protection visa application have had their temporary visas cancelled and been detained.[93] Effectively, they are left in legal limbo while deprived of their liberty.

In summary, the increasing use of s 116 by the Government over the past two years (particularly with respect to New Zealanders) demonstrates how immigration law is being employed to augment or supplant regulation through criminal law and criminal justice processes. Substantively, s 116(1) supplies very expansive powers encompassing a wide range of behaviour including minor misdemeanours (public order offences) or acting contrary to the Asylum Seeker's Code. Furthermore, non-citizens can be excluded on the basis of unproven charges. Moreover, accountability for the exercise of s 116(1) powers may be lacking. The Immigration Minister may administer s 116 personally and without the need for procedural fairness. In that circumstance, there is no independent and impartial oversight on the merits of the decision by the Administrative Appeals Tribunal. Conversely, when delegates take action under s 116, appeal rights are available but are subject to stringent timeframes. As Cheryala's case reveals, a failure to exercise those appeal rights within the settled timeframe can mean there are no further opportunities to regularize a person's legal status in circumstances where there is no proven charge or conviction recorded.

[90] Ibid., para 39.

[91] Ibid., para 40.

[92] Ibid., para 41.

[93] Vogl and Methven (2015).

7 Conclusions

Crimmigration—the intermingling and interplay of criminal law and immigration law—is well illustrated by the study of mandatory and general visa cancellation powers and their administration in Australia. The policy and practice of mandatory visa cancellation, containment, and removal, is part of a transnational trend of escalating crimmigration, and it has served to aggravate troubled relationships between certain criminal non-citizens and the Australian community. Mandatory visa cancellation is used as a tool for crime control, operating within what is formally a system of immigration control. On its face, it is a strict regime in form and substance. This exclusionary regime has facilitated the confinement and removal of non-citizens in increasing numbers, in large part due to the overly broad legislative designation of 'substantial criminal record'. Arguably, this provision is capturing more non-citizens than those who can objectively be labelled as serious offenders, and it encompasses both short-term and long-term permanent residents alike.

Non-citizens must rely upon an unorthodox 'revocation' process as a safeguard to vindicate their rights and interests. However, that scheme offers the prospect of substantive injustice. It departs from traditional administrative justice standards and safeguards in two key respects. There is an attenuated form of procedural fairness and, often, there is no independent and impartial check on the merits of decisions because revocation decisions are not eligible for appeal when the minister personally exercises statutory powers. Without the security of an objective and impartial decision-maker, checking the substantive fairness of visa cancellation decisions, non-citizens are left exposed to decision-making at the hands of politicians who have expressed strident views on crimmigrants.

Increasing government reliance upon s 116 exposes non-citizens to exclusion on the basis of a broad range of offences, including those that would not ordinarily result in a conviction or jail time. The administration of s 116 is characterised by strict time limits for appealing decisions, and these limits can have a significant impact on an individual's capacity to access justice.

Consequently, procedural injustice begets harsh, unjust, and disproportionate outcomes. Mandatory and general visa cancellation powers may not be formally imposed as punishment but the pains of crimmigration control are nonetheless comparable. Especially for virtual nationals (including refugees) and also asylum seekers, crimmigration control is typically experienced as punitive. It is important that the collateral damage occasioned by the Government's recent purge of criminal or, seemingly, risky non-citizens is understood by and made visible to the Australian community in whose name the Government purports to act.

Acknowledgements I thank Dr Neža Kogovšek Šalamon and the anonymous reviewers for their comments on an earlier version of this chapter. This chapter was completed in August 2018 and slightly modified in March 2020 prior to publication.

References

Books, Chapters, Articles and Conference Papers

Aiken S, Lyon D, Thorburn M (2012) Introduction to crimmigration, surveillance and 'security threats': a multidisciplinary dialogue. Queens Law J 40(1) (Special issue)
Aliverti A (2012) Making people criminal: the role of criminal law in immigration enforcement. Theor Criminol 16(4):417–434
Billings P (2015) Indefinite immigration detention in Australia? Rethinking the legal constraints on the detention of non-citizens. Univ NSW Law J 38(4):1386–1420
Billings P (2016) Operation sovereign borders and interdiction at sea: CPCF v Minister for immigration and border protection. Aust J Adm Law 23(2):76–101
Billings P (2018, May 24–25) Operation sovereign borders—The Australian experience of maritime border policing. In: Interdisciplinary conference on migration: vulnerability, protection, and agency, Faculty of Law, University of Oslo
Bosworth M, Turnbull S (2014) Immigration detention, punishment and the criminalization of migration. In: Pickering S, Ham J (eds) The Routledge handbook on crime and international migration. Taylor & Francis Ltd., London, pp 91–106
Bowling B (2013) Epilogue: the borders of punishment—towards a criminology of mobility. In: Franko Aas K, Bosworth M (eds) The borders of punishment. Oxford University Press, Oxford, pp 291–306
Chacon J (2012) Overcriminalizing immigration. J Crim Law Criminol 102(3):613–652
Franko Aas K (2014) Bordered penality: precarious membership and abnormal justice. Punishment Soc 16(5):520–541
McCabe B (2013) Community values and correct and preferable decision in administrative tribunals. Univ Queensland Law Rev 32(1):103–122
Pickering S, Bosworth M, Franko Aas K (2014) The criminology of mobility. In: Pickering S, Ham J (eds) The Routledge handbook on crime and international migration. Taylor & Francis Ltd., London, pp 382–395
Stanley E (2017) Expanding crimmigration: the detention and deportation of New Zealanders from Australia. Aust N Z J Criminol 51(4):1–18
Stumpf J (2006) The crimmigration crisis: immigrants, crime and sovereign power. Am Univ Law Rev 56(2):367–419
Stumpf J (2013a) The process is the punishment in crimmigration law. In: Franko Aas K, Bosworth M (eds) The borders of punishment. University of Oxford Press, Oxford, pp 58–75
Stumpf J (2013b) Two profiles of crimmigration law. In: Pakes F (ed) Globalisation and the challenge to criminology. Routledge, London (Chap. 7)
Stumpf J (2014) Crimmigration: encountering the leviathan. In: Pickering S, Ham J (eds) The Routledge handbook on crime and international migration. Routledge, London, pp 237–250
Sweeney J (2015, May 5) Sri Lanka: Australia continues to deport people to danger. Edmund Rice Centre
Vogl A, Methven E (2015) We will decide who comes to this country, and how they behave: a critical reading of the asylum seeker code of behavior. Altern Law J 40(3):175

News and Media

Arnold A (2017, Mar 15) Immigration department set to deport grandmother who arrived in Australia as a two year old. ABC: the law report. http://www.abc.net.au/news/2017-03-15/grandmothers-visa-cancelled-faces-deportation-to-croatia/8355302

Atfield C (2015, Sept 23) Brisbane man, in Australia since the age of one, faces deportation to Chile. Sydney Morning Herald. http://www.smh.com.au/federal-politics/political-news/brisbane-man-in-australia-since-the-age-of-one-faces-deportation-to-chile-20150922-gjskd9.html

Atfield C (2016, June 28) Brisbane man deported to Chile determined to make most of second chance. The Brisbane Times. https://www.brisbanetimes.com.au/national/queensland/brisbane-man-deported-to-chile-determined-to-make-the-most-of-second-chance-20160628-gptuzy.html

Birrell R (2013) Tougher policy needed for New Zealanders wanting to work in Australia. The Conversation. http://theconversation.com/tougher-policy-needed-for-new-zealanders-wanting-to-work-in-australia-12007

Brennan B (2015, Oct 26) Lebanese-born Sydney father Fouad Arja facing deportation for unlicensed driving, held in Villawood Detention Centre. ABC News. http://www.abc.net.au/news/2015-10-26/lebanese-born-sydney-dad-faces-deportation-unlicensed-driving/6886366

Cochrane L (2017, Feb 23) Vietnamese asylum seeker returned by Australia says "a bullet would be better". Australian Broadcasting Association (online). http://www.abc.net.au/news/2017-02-21/vietnam-asylum-seeker-returned-by-australia-speaks-of-beatings/8288226

Day L (2015, Nov 6) WA man Ian Wightman facing deportation after jail term despite living in Australia since infancy. ABC News. http://www.abc.net.au/news/2015-11-06/man-faces-deportation-after-jail-despite-living-in-wa-50-years/6919574

Doherty B, Wahlquist C (2017, June 14) Government to pay $70 m damages to 1,905 Manus detainees in class action. The Guardian (online). https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action

Dutton P (2016) Disrupting the threat of outlaw motorcycle gangs. Media release

Gribbin C (2015, Feb 25) Hundreds of convicted criminals have visas revoked under the Migration Act amendment. ABC News. http://www.abc.net.au/news/2015-02-24/convicted-criminals-have-visas-cancelled/6254120

Park A (2013, Aug 26) Stefan Nystrom's deportation 'led to criminal relapse'. SBS. www.sbs.com.au/news/stefan-nystrom-s-deportation-led-to-criminal-relapse

Tlozek E (2015, Aug 14) Lawyers criticise mandatory deportation from Australia of foreign citizens who have served jail time. ABC News. http://www.abc.net.au/news/2015-08-14/lawyers-criticise-mandatory-deportation-foreign-citizens-jail/6697854

Vasek L (2012, July 12) Navy ships 'Used as Water Taxis' for people smugglers. The Australian

Vogl A, Methven E (2017, Jan 31) In a global trend towards crimmigration, Australia has led the world. The Guardian. https://www.theguardian.com/commentisfree/2017/jan/31/in-a-global-trend-towards-crimmigration-australia-has-led-the-world

White A (2017, Apr 4) Geelong mum stays in Australia, fails federal government's immigration character test. Herald Sun. http://www.heraldsun.com.au/news/victoria/geelong-mum-stays-in-australia-fails-federal-governments-immigration-character-test/news-story/20f24ad7deed86681a7d2446c45e6a07

Official Publications

Australian Human Rights Commission [Submission] (2014, October 28) Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014

Australian Institute of Criminology (2018) What are the taxpayer savings from cancelling the visas of organised crime offenders? (Statistical Report 08)

Commonwealth House of Representatives Parliamentary Debates (2014, September 24)

Commonwealth, Migration Amendment (2014) (Character and General Visa Cancellation) Bill (Explanatory Memorandum) Attachment A (Statement of Compatibility with Human Rights) (Cth)

Commonwealth Ombudsman (2006) Administration of S 501 of the Migration Act 1958 as it applies to long-term residents (Report)
Commonwealth Ombudsman (2013) Suicide and self-harm in the immigration detention network (Report)
Commonwealth Ombudsman (2016a) The administration of section 501 of the Migration Act 1958 (Report)
Commonwealth Ombudsman (2016b) Department of Immigration and Border Protection: the administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention (Report)
Crépeau F (2017, April 24) Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru, UN Doc A/HRC/35/25/Add.3
Department of Home Affairs (2018, May 11) Inquiry into review processes associated with visa cancellations made on criminal grounds. Joint Standing Committee on Migration [submission]
Department of Immigration and Border Protection (2017a) Immigration detention and community statistics summary. https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia
Department of Immigration and Border Protection (2017b) Key cancellation statistics. https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics
Department of Immigration and Border Protection (2016) FOI disclosure logs. www.border.gov.au/about/access-accountability/freedom-of-information-foi/log/2016
Méndez J (2016, February 24) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc. A/HRC/31/57/Add.1, 10
United Nations High Commissioner for Refugees (2016, November 16) Submission No 43 to Senate Legal and Constitutional Affairs Committee. Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre

Case Law

Do and Minister for Immigration and Border Protection (2016) AATA 390
Eden v. Minister for Immigration and Border Protection (2015) FCA 780
Falzon v Minister for Immigration and Border Protection (2018) 92 ALJR 201
Fraser v. Minister for Immigration and Border Protection (2014) FCA 1333
Martin v. Minister for Immigration and Border Protection (2017) FCA 1
Minister for Immigration and Border Protection v Eden (2016) 240 FCR 158
Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1
Nigam v Minister for Immigration and Border Protection (2017) FCA 106
Nystrom v. Minister for Immigration and Multicultural Affairs (2005) 143 FCR 420
Nystrom v Australia (2011, July 18) UN Doc CCPR/C/102/D/1557/2007
Stojanovski v. Assistant Minister for Immigration and Border Protection (2017) FCA 609
Tuimaseve v. Minister for Immigration and Border Protection (2016) AATA 924
YNQY v Minister for Immigration and Border Protection (2017) FCA 1466

Statutes & Policy

Caric v Minister for Immigration and Border Protection (2017) FCA 1391

Commonwealth, Joint Standing Committee on Migration (2019) The report of the inquiry into review processes associated with visa cancellations made on criminal grounds

Galloway A (2020, March 2) People-smuggling boat off Australia stopped and turned back. The Sydney Morning Herald. http://smh.com.au/politics/federal/people-smuggling-boat-off-australia-stopped-and-turned-back-20200302-p545xt.html

Migration Act 1958 (Cth)

Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)

Ministerial Direction No. 65—Migration Act 1958—Direction under section 499—Visa refusal and cancellation under s 501 and revocation of mandatory cancellation of visa under s 501CA

Powell R, Seagrave M (2018) In the absence of sympathy: serious criminal offenders and the impact of border control measures. In: Fili A, Jahnsen S and Powell R (eds) Criminal Justice in an Era of Mass Mobility. Chapter 11

Walsh T (2015) New Zealanders in crisis in Australia: the absence of a social safety net. New Zealand Universities L R 26(3):673

Less Than Criminals: Crimmigration "Law" and the Creation of the Dual State

Vlasta Jalušič

Abstract This chapter lays out a broader framework for understanding the process of crimmigration—the merging of immigration and criminal law. It discusses alternative concepts and approaches to understanding what crimmigration law is or "serves for" and how it functions, such as Täterstrafrecht, Feindstrafrecht, inversion of law, counter-law, double state. Drawing on Hannah Arendt's analysis of the functioning of law concerning refugees, and on Ernst Fraenkel's theorem of the "double state" the chapter shows how crimmigration "law"—with its increasing "regulation" and "over-legislation" of migration—creates two parallel legal regimes for two different kinds of populations. All this leads, the article proposes, to a more general transformation of the state, the practice of law, and equality principle. They radically change their characters, not solely in the context of migration.

There is a story told by Hannah Arendt, in one of the rare recorded interviews with her, where she speaks about her personal experience with the Nazi authorities before leaving Germany in 1933. She was working for a Zionist organisation with Kurt Blumenfeld, and while documenting anti-Semitic statements and activities of the Nazis in Germany, she was arrested but released after eight days. To her interviewer Günther Gaus she told the following:

> I was arrested, and I had to leave the country illegally […], and that was instant gratification for me. I thought at least I had done something! At least I am not 'innocent'. No one could say that of me![1]

This sarcastic statement points our attention to one of the most essential plights of the modern victims of terror, which also lies at the heart of the crimmigration problem. It underlines that victims (who later became refugees in order to escape extermination) are considered and treated as criminals, although they have not committed any crime and there is no lawful justification for their persecution, expulsion

V. Jalušič (✉)
Peace Institute, Ljubljana, Slovenia
e-mail: jalusic.vlasta@gmail.com

[1] Arendt (1994a, p. 5).

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_4

or similar. Moreover, they are "absolutely innocent" in terms of any wrongful action or deeds, which, in Arendt's words, appears to be almost "inhuman".[2]

Arendt ascribed the emerging refugee problem of the twentieth century to the fact that modern refugees have lost the legal and political framework to practice their rights and are considered superfluous both by the states they flee from as well as the states in which they are seeking refuge. The problem of those whom "the enemies put into concentration and friends into detention camps" was not that they were "not equal before the law", but that "no law" existed "for them"[3] and they could only rely on eventual human goodness and charity.[4]

This critical absence of law, which would guarantee (international) protection to refugees has been partially filled by the Geneva Convention of 1951, which was formulated in the framework of the International Code of Human Rights. It was adopted in the post-World-War-II climate of a feeling of great shame and responsibility for the Holocaust and the problems of refugees who fled from the Nazism's threat of extinction.[5] Not only they were often not accepted and given asylum by the states to which they looked for safety, but they were also sent back to Germany, and many ended up in the extermination camps they were desperate to avoid.

In contrast to the situation described by Arendt, the problems of the protection and the rights of refugees today are not marked by the sheer absence of rules and laws "for them". On the contrary, some hyper-production of rules, directives and legal acts which are dealing with migration and refugee problem in the context of global migration can be noticed: the US, Canadian, Australian, and EU authorities and states are constantly revising legislative and adding rules.[6] These, however, are not meant to give more importance to the post-World-War-II tradition of guaranteeing access to international protection, i.e., asylum. On the contrary, they are not only tightening the conditions under which foreigners can enter and remain in the states, but are also undermining the already-achieved international standards of refugee protection and human rights norms.[7] Containment, rather than protection of refugees has become the primary goal of these policies, while the language of threat and security has been normalised.[8] Policing, detention and deportation of more and more migrants turned out to be at the centre of these changing measures, policies, and new laws

[2] Arendt (1986, pp. 8 and 295).

[3] Ibid., pp. 295–296.

[4] Ibid., pp. 281 and 296. I have dealt with this issue elsewhere (Jalušič 2017) while trying to show how today's "migration management" has to maintain the picture of a passive and "innocent" refugee in order to pursue depoliticized solutions.

[5] See Malkki (1995, p. 4).

[6] Researchers are describing an enormous increase of both criminal and immigration legislation, a development also connected with anti-drug and anti-terrorist legislative. Cf. Hussain (2007), Roach (2011), García Hernández (2015) and Arnold (2018). The term "hyper-legality" was used to describe the strategy of increasing ad hoc production of administrative and other rules that were used to justify the securitization and over-policing of migration, and above all, expulsion and detention. See Hussain (2007, p. 740ff); and Arnold (2018).

[7] See García Hernández in this volume.

[8] Chimni (2000, p. 10), Aas and Gundhus (2015).

that are nowadays mainly described by the term criminalisation of migration or "crimmigration".[9]

This chapter addresses the "nature" of crimmigration "law" and its impact on the rule of law, rights, and equality while discussing several possible approaches to understanding what the crimmigration law is or "serves for" and how it functions (*Täterstrafrect*, *Feindstrafrecht*, inversion of law, counter-law, double state). It aims at unfolding some additional layers for understanding the crimmigration processes. With the help of some of Hannah Arendt's insights regarding the functioning of law in the case of refugees and of Ernst Fraenkel's theorem of the "double state", it attempts to show how crimmigration "law", with the increasing "regulation" and "over-legislation" of migration, creates two parallel legal regimes, for two different kinds of populations. These processes are part of the more general transformation of the notion and practice of the rule of law and equality principle, which both radically change their character, not solely in the context of migration.

1 Pragmatics and Symbolic of Crimmigration

Although there is no standard definition of it, crimmigration is most generally understood as the linking of criminal and immigration procedures and the corresponding policies, and creating special border regimes and legal systems for groups of undesirable migrants.[10] It consists of a broad range of actions taken by several states and other actors around the world, led by the "Western" or "Global North" governments and trans-national formations, for example the EU, which are increasingly conflating the area of criminal law with that of migration control or management to the point where they became "indistinct".[11] Criminalisation of migration, as defined by Provera[12] includes "detention, discourse and criminal law measures directed towards irregular migrants as well as identifying penalties which may be grounded in civil law. Criminalisation of migration means the adoption of criminal law characteristics in immigration enforcement and the adoption of immigration consequences for criminal law infractions."

Four main steps in the process of criminalisation of migration can be identified from the crimmigration scholarly literature. The first step is usually made with discursive creation of migrants as *prima facie* criminal suspects[13] and with the discursive erasure of the term "refugee".[14] The second is the legal definition of those who entered the state without special permission (such as visas or other documents) as

[9] See Stumpf (2006).

[10] See Stumpf (2006) and Provera (2015).

[11] Stumpf (2006).

[12] Provera (2015, p. i).

[13] Parkin (2013) and Guild (2010).

[14] Côté-Boucher (2015, p. 82).

"non-persons" or "illegals" ("legislating them away"),[15] who are then subject to consequences of such "criminalisation" in secondary law. This happens even if there is no legal basis for the criminalisation of persons who arrive in the territory without permission in the first place.[16] In spite of the lack of nexus between the rise of crime and intensification of migration, in the third step, migrants as a whole are criminalised due to this *prima facie* predisposition, and the so-called criminal migrant[17] or "criminal alien" is constructed.[18] Data shows that even when the number of migrants' crimes decreases, the number of arrested migrants increases.[19] Finally, these policies gradually introduce control over the entire population while at the same time criminalising and penalising not only acts of human smuggling, which is in fact always already a consequence of the definition of "crimes of arrival",[20] but also acts of solidarity, such as basic assistance to migrants (e.g., housing, job placement, etc.).[21] Criminalisation of migration therefore first clearly separates "foreigners from citizens through an elision of administrative and criminal law language", and it subjects "the foreigner to measures which cannot be applied to citizens, such as detention without charge, trial or conviction". Additionally, "the criminalisation of persons […] who engage with foreigners" takes place. As a result, the sole human contact with foreigners "can be risky as it may result in criminal charges".[22]

Beside severe human rights violations and phenomena of harmful social exclusion, the criminalization of persons who are seeking international protection, racial profiling, border violence, massive dying of migrants on their move,[23] there are also other grim consequences of these "trends". While state authorities sometimes act contrary to the law—namely, contrary to the international human rights law and, for example, contrary to EU's secondary legislation, like the European Charter on Human Rights[24]—additional consequences concern both the public discourse as well as public policies and (criminal) law, while the law itself, as it has been observed by

[15] Ibid.

[16] Provera (2015).

[17] Parkin (2013, p. 6).

[18] Vazquez (2016, p. 1097).

[19] Parkin (2013). The United States, up until now the leading country in detention of immigrants, incarcerates up to 34,000 immigrants per day. Diaz and Keen (2015). The EU Member States also started to use broadly the detention for the enforcement of the new immigration rules. Parkin (2013, p. 12ff).

[20] Webber (1996, 2008).

[21] Provera (2015, p. 3), maintains that compared to the US, "criminalization in a European context embraces a much broader understanding which has included 'repressive action of police forces, and then of judicial proceedings' because a person has 'contravened to [*sic*] one or more norms of the administrative, civil or criminal code', as well as discourse, the use of immigration detention and, importantly, is inclusive of the criminalization of those persons acting in solidarity with irregular migrants".

[22] Guild (2010, p. 39). I analysed the criminalisation of "pro immigrant activities" elsewhere. See Jalušič (2019).

[23] See Guild (2010) and European Union Agency for Fundamental Rights (2014).

[24] Provera (2015, p. 29).

several authors, changes its very character.[25] In spite of numerous concerns expressed by scholars, national and international human rights and advocacy organizations, important civil-society actors, and institutions like European Parliament regarding the upsetting developments in the criminalization of (undesired) migration,[26] and despite proof of the transformed character of law, no change in action and therefore of "trends" is taking place on the side of responsible authorities.

If, at the beginning of the crimmigration law's developments, these rules could have been seen as a state of exception, they now became normalised[27] and, by the majority of nation-state's population, increasingly acceptable "rules". Exceptions became rather numerous solidarity activities—support, protests against crimmigration, and assistance to migrants based on the principle of solidarity which have managed to mobilise people, established coalitions, and even succeeded with some demands.[28] Soon, however, they started becoming contentious and increasingly criminalised.[29]

While some types of migration and specific categories of migrants seem to be more and more controlled,[30] sanctioned for their movement and even banned, studies in fact found of no real proof of "efficiency" of these measures and maintain that "public policies with regard to security and immigration have become effectively symbolic".[31] In other words, "unless the political regime changes" they "cannot keep up with the rhetoric of systematic control"[32] and fail to achieve the goals their creators themselves claim to pursue.[33] Even with the Berlin Wall, one had to establish "total" control with weapons. Such (symbolic) politics of crimmigration should, therefore, serve other goals and not really combat irregular migration or "alien crime": for example to demonstrate that the state controls the flow of migration, whereby new legislation can also affect residents and citizens who are supposed to be protected

[25] Duff (2010a, b), Spena (2014), Zedner (2013), Provera (2015), García Hernández (2015); and his chapter in this volume.

[26] Guild (2010), Parkin (2013), Fekete (2017, 2018), Carrera, Guild, Aliverti et al. (2016), European Union Agency for Fundamental Rights (2014).

[27] See Hussain (2007, p. 749).

[28] Voss and Bloemraad (2011), Provera (2015), Cantat (2015).

[29] Fekete (2009), Provera (2015), Fekete (2017), Carrera et al. (2018a, b).

[30] Vasquez (2016).

[31] Parkin (2013, p. 6).

[32] Bigo (2004, p. 85).

[33] As already mentioned, there is no relationship between an increase in crime rates and migration, so the use of administrative detention to help identify, control and return undesirable migrants faster is not efficient, since the time of detention is prolonged for good (Broeders 2010). Strict border control and punitive attitudes, which are intended to discourage undesired migrants to risk the journey, only diverts their routes (Sampson 2015), and the crimmigration measures that should generate "security" of the "autochtonous" populations in general do not give such results (Carling and Hernández-Carretero 2011). Instead, they enable profit to newly-established corporations and prison systems, which are dealing with surveillance and surveillance techniques (Flynn 2016).

from crime and violence by these measures. The criminal law is used for migration management in an "ad hoc instrumental" way,[34] hence pragmatically. While it "works" in some areas, institutions tend to criminalise certain other behaviours in order to control them, regardless if they are justifiable or not. Such pragmatic use of law disconnects criminal law from normative and ethical considerations.[35]

I want to make use of the thesis of "symbolic politics" and instrumentalisation of criminal law to begin a short journey of thinking of what use such "symbolic" politics and instrumentalism would be; or in other words, why the actors in question are in need of such politics, and what are its consequences in terms of the function and the meaning of (criminal) law. I will not, therefore, specifically or in detail tackle the issues that are widely discussed in other chapters of this book, such as the concrete consequences for individuals or groups of people such as discursive criminalization, surveillance, or detention and expulsion, but will discuss this particular aspect, namely the character of crimmigration "law". What kind of "law" is it, for whom, and why is it needed as a "law"?

2 The Crimmigration Law Needs No Specific Crime

A closer look reveals that crimmigration law, in its most ambiguous feature, creates a parallel system of alleged "crime" and punishment by inverting the (criminal) law itself. As put by Zedner, the "insertion of immigration 'crimes' within criminal law results in the creation of offences that breach fundamental principles of criminal law".[36] Criminal law has some basic requirements, like a fair warning, a reasonable concern for serious harm or prospective of harm that is caused by someone, and most importantly, the requirement of culpability, which must be proven within the judicial system.[37] Crimmigration law does not satisfy these principles of criminalisation, but it expands the number of crimes for which very harsh punishments are levied. Moreover, criminal law's sense is to punish people for what they did (*das Tatstrafrecht*, act-centred criminal law) and not for what they are (*das Täterstrafrecht*, actor-centred criminal law). As thoroughly analysed by Alessandro Spena, in the case of "criminalisation" of illegal migrants, one is not punished for what one *did* (and thus because of one's criminal deeds/actions) but because of what one *is* and therefore because of one's identity—namely for being an ("illegal") immigrant. This "identity" was pre-defined by exactly those governments that are punishing migrants for being illegal after creating a legal situation in which the majority of immigrants can only enter the state/s if they enter it "illegally".

Täterstrafrecht—similar to *Feindstrafrecht* (criminal law for the enemy), in the case of Nazi criminal legislation—functions as a type criminal law according to which

[34] Sklansky (2012).

[35] See also Provera (2015).

[36] Zedner (2013, p. 11).

[37] Ibid.

criminalisation needs types of offenders and not types of offences. Punishment by such law is inflicted on people for "wrongbeing" or for what they fit into (like a type of perpetrator, a reflection of a certain type of person) and not for their "wrongdoing". Even if an actor did do something wrong, the wrongs are not attributed to the actor's agency but her pre-defined "criminality".[38] The increased accusations of migrants that they cause criminality, which resulted in the discursive framing of the "criminal alien" in both political and also legal jargon is, in fact, representing such "definition" of the problem. As Arendt makes clear, a completely innocent individual can be considered a criminal if she/he fits into the pre-defined deviancy: actions or non-actions do not count; such "types" are entirely dehumanised and rendered akin to natural events.[39] It seems that their alleged predisposition for crime is more like the predisposition for "sin", or "vice". In such context, "criminality" and crime—in fact, the very concept of crime, is entirely changed.[40] Crime is attributed to the type and character and therefore related to the mere existence of a "category" of person who is criminalized. As such, crime can neither be prevented nor punished; it can only be erased, uprooted, in the final consequence with the person itself.[41]

The incredibly discretionary and arbitrary nature and application of criminal law in "immigration offences," where sanctions used against migrants are taking place in a very contested area, often still as "administrative measures" while they are only mimicking criminal procedure,[42] can therefore not even be considered as "punishment" in terms of law, although they function practically as a punishment for individuals and are experienced as such. In reflecting about these issues, we might still have the same problem as Arendt when writing about stateless people who were "not guilty" of any criminal offences but were nevertheless considered and treated worse than any extreme criminal offender. Therefore, her, at first surprising claim, that stateless people at that time might have legally benefited from committing a crime because it seemed "to be easier to deprive a completely innocent person of legality than someone who has committed an offense" makes sense.[43] While she could not imagine the enormous development of crimmigration law, Arendt was thinking about rights, and argued that, for the "illegal" individual who would be pulled into the process of criminal prosecution, a necessary consequence would be recognition as a legal person in the process of persecution and trial (on the basis of what she or he did). If convicted, she argued, the person should have been afforded basic rights, even if found guilty and excluded (imprisoned) as a person. With this, Arendt has paid attention to the entirely different nature of the "alien", the refugee's exclusion from the exclusion of the convicted criminal. Importantly, she remarked that the "jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than the layman to recognize that

[38] Spena (2014).

[39] Ibid.

[40] Arendt (1986, p. 433).

[41] Ibid., p. 87.

[42] See García Hernández in this volume.

[43] Arendt (1986, p. 295).

the deprivation of legality, i.e. of all rights, no longer has a connection with specific crimes".[44] Whereas some authors question this assumption,[45] other researchers of crimmigration law still maintain that the protections that criminal law offers to the convict would, in fact, improve their situation,[46] and therefore, as suggested by Zedner and Bosworth "the bigger problem is not so much that detention centres look like prisons but that they do not".[47]

3 Less Than Criminals: Inversion of Law

Through crimmigration legislation, a hybrid system is created, through which a series of quasi-specific "crimes" is defined, which are "added on" to the migrant's identity and "illegality". Such system of criminal offences represents a window of seeming "inclusion" into the lawful procedure. As a result, the crimmigration law starts to be regarded as justified and therefore the adequate norm within the common institutional legal framework. Supported by a discursive dimension of crimmigration these regulations start to function "as if" they were law, while people who become subject to it have no prospect of either be fairly processed in the framework of (criminal) law or really become "legal".

It is true that, as thoroughly analysed by Stumpf, this kind of hybridization was only possible due to the fact that there exist essential parallelisms between criminal law and migration law, in the sense of inclusion in or exclusion from membership in a community as an element of punishment: the criminal is incarcerated, and the migrant (a temporary or sometimes, as recent cases in Australia and US show, even permanent resident)[48] is expelled.[49] Consequently, Stumpf concludes that the fact that both laws are conflating can be explained by the application of a theory of membership—and exclusion from it.[50] This claim is made based on analogy, and it compares two entirely different situations by means of looking at penalization as a basis of criminal law.

---

[44] Ibid., p. 297.

[45] Arnold (2016, p. 12), and (2018) proceeds from paraphrasing Arendt's (and also subsequent Agamben's) thesis that it is better to be a criminal than the stateless person and discusses this while also observing that not absence of law is the characteristic of the status of migrant but "fullness" of rules—hyperlegality. She however argues that that Arendt, as well as Agamben, is "idealizing the criminal justice system and prison conditions" and that they do not take into account the "diminished personhood rights that inevitably occur to citizen-criminals before and after sentencing (or, before and during imprisonment)".

[46] Duff (2010a, b).

[47] Bosworth (2012) and Zedner (2013, p. 54).

[48] See Billings in this volume.

[49] Stumpf (2006).

[50] "A decision to exclude in criminal law results in segregation within our society through incarceration, while exclusion in immigration law results in separation from our society through expulsion from the national territory." Stumpf (2006, p. 168). "Yet at bottom, both criminal and immigration law embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community". Ibid., p. 297.

The criminal offender—even if extremely excluded—still preserves (most or at least some of) her citizenship rights, and she thus still holds the right to *have* rights, even if those rights are (as in a state of exception) reduced to the minimum, therefore her membership is not suspended.[51] The immigrant, on the contrary, either does not have or—in the most cases of punishment with deportations—entirely loses the membership and even any possibility to achieve it. This brings about her non-status, the fact that she is factually "outside" the law, and therefore her complete existence is "illegal".[52] When looking at the problem from this perspective, it is not really that the migrants, stateless and refugees are considered "criminals" but that they are in principle considered and treated as less than criminal offenders (legal person). That there exists a clear gap between both "statuses", or status and non-status is also evident from the extreme case, namely from the organizational structure of the concentration and extermination camps, where people were detained under complete lawlessness on a similar "legal" basis as migrants today. In these places, under conditions of the extreme situation of inverted "law" of the Nazi regime, those who were "implementing" rules and order and "organizing" the concentration camp life were the criminals. Both Arendt and Primo Levi wrote about this kind of inversion, where every law or commandment that was functioning as "normal" outside such totalitarian situation was overturned in the camp, so that the camp "law", instead of commanding not killing or not stealing, demanded that "thou shalt […] steal and kill".[53]

Some authors, therefore, consider crimmigration "law" to be breaching the fundamental principles of criminal law.[54] Moreover, Anthony Duff wrote about "perversion of criminal law" in which case criminal legislation is (unjustifiably) used as means to attain aims other than those the criminal law is supposed to pursue (and about "subversion" when other methods replace procedures which should be used in the criminal procedure). While the convicted criminal might be seen as one who has excluded herself in principle from society by committing a crime, she is still entitled to the presumption of innocence and due process.[55] This proves that criminal law can nonetheless be considered re-including the criminal through use of the criminal procedure of prosecution, trial and punishment. Alternatively, as Hegel put it long

[51] Maybe the analogy between two exclusions holds more for some countries than for others. In the US, the exclusion of a criminal offender from civic rights is much more radical than in other places, such as Europe. Felons lose the right to vote and other political rights in all but two states (see Felon voting rights 2017), which is rarely the case in Europe. In 22 of the Council of Europe member states, prisoners retain their right to vote, while the rest have varying restrictions. In accordance with several sentences of the European Court of Human Rights, some of these restrictions are about to be removed (except for the UK after Brexit). See Horne and White (2015).

[52] Agamben (1998, p. 126ff) concludes based on the theory of the state of exception that the refugee/stateless is paradoxically both excluded (as a citizen, resident) and included into law, at the same time (as a bare human being, *homo sacer*). Yet such law of inclusion can be considered "law" only if it is defined as "force" or violence, and law and violence in fact coincide. Such total separation from justice (*Recht*) would be in my opinion the characteristic of totalitarian "law".

[53] Arendt (1994b, p. 150). See also Levi (2003, pp. 83–92).

[54] Zedner (2013).

[55] Duff (2010a, b, p. 148).

ago in his *Philosophy of Right*, the punishment is the criminal's own right on the basis of what she did.[56]

The crimmigration "law" in the first place "only" excludes from the law (and its protection) and therefore arbitrarily "punishes" through the complete exclusion (the rest of arbitrariness and additional punitive measures are the results of this very act). Consequently, most of the crimmigratory procedures cannot be considered as (judicial) punishments within the framework of the law.[57] According to Hegel, on whose notion of law/right/justice (*Recht*) I am leaning here, the annulment of crime has also the task to restore and confirm the existence of justice/law (*Recht*) and is therefore needed not because crime is something producing evil but because it is the violation of right. Hence, the annulment of crime does not just serve subjective punishment of a wrongdoer or even retribution.[58]

4 Counter Law and the End of (Criminal) Law

This brings me to the next point. In accordance with what was said above, one could claim that crimmigration "law" functions in practice as a "counter law", as Ericson put it: as a "law" against the law.[59] While describing these processes in the wider context of criminalisation trends, Ericson speaks of two types or stages of counter-law creation. The first step is the formation of a "law against the law" and the second is the introduction of complex surveillance systems. The main feature of the "law against the law" is that it evolves as a "creative" establishment of rules/laws that conflict with traditional principles, standards and procedures of the criminal law. These new forms of law, as well as new ways of using administrative and civil law, try to reduce or even eliminate the protection that exists in investigative and criminal proceedings. They increase discretionary rights and allow arbitrary decisions so that those in power can take preventive measures, which are not accompanied by similar protection of rights as in criminal law.

When addressing two types of counter-law, Ericson emphasizes that the surveillance counter-law implies all possible forms of physical and other control, in order to enable institutions and also individuals to act in a "preventive" manner; so that those who have been declared "suitable enemies",[60] or alleged potential "criminals", would be expelled elsewhere, thereby making the legal process against criminal offences redundant. The preventive counter-law makes it possible that any group—via the

[56] Hegel (1972, p. 96), § 100.

[57] And as Garcia Hernandez (2015: 4) describes for the US case, in spite of the "immigration law's early reliance on criminal law to decide upon whom to allow to enter into or remain in the United States, the Supreme Court made clear that deportation was not to be considered a form of punishment".

[58] Ibid., § 99.

[59] Ericson (2007a, p. 207ff).

[60] Fekete (2009).

systems of (private) surveillance and punishment—decides who is undesirable and trigger a preventive action against him. While counter-law, in principle, promises to the inhabitants of certain countries security and certainty, time and again, it causes crises and catastrophes from which it then repeatedly draws self-justification.[61]

However, the emergence and increasing importance of counter-law do not materialise as a single and manifest act of establishing an authoritarian state in which everything is under some sovereign control or as a collapse of law and justice. On the contrary, it takes place as everyday practices of changing rules in the bureaucratic apparatus of liberal-democratic societies that promise their populations safety and predictability. It is ironic, remarks Ericson, that the neoliberal state is, in fact, a regulatory state that implies more regulation and control on the side of not only the state but also more regulation and surveillance in the field of corporate organisation, while the majority of the employed population are entirely controlled at their working places. In a neoliberal state, the whole society is increasingly regarded from various risks, unpredictability and dangers, and therefore a potential crime. Entire groups of people are controlled and declared "unlawful" (from "unlawful enemy combatants" and "illegal migrants" to "unlawful enemy minorities"). Ericson argues that counter-law effectively eliminates justice from criminal procedure and undermines the law itself as a democratic institution of liberal social imaginary, which in reality means not only the end of rights for migrants and asylum seekers but also the end of (criminal) law and law as such.[62]

5 Creation of Dual State

Last but not least, while trying to think how is it possible that, under the rule of law and in the situation of *Recthstaat* such changes of law happen, I want to turn to the theorem of the "dual state". In his book *The Dual State*, published in the US in 1941, Ernst Fraenkel, a lawyer and immigrant from Nazi Germany, analysed the rise of the so-called "prerogatory state" (*Massnahmenstaat*) to explain how Germany "slid" into a Nazi dictatorship after 1933.[63] For the transition to the state of permanent emergency, in which there existed no more restrictions of laws for the actions of the authorities, the introduction of rapid temporary measures to protect against an alleged enemy threatening public security was decisive. The book can be read as a phenomenology of the abolition of the rule of law, of constitutional restraints and other legal checks, of abolition of restraints on the police power, judicial review (administrative courts, civil and penal procedure), how party and politics became the instrument and the goal of prerogative state, and how, finally, this caused the "negation of formal rationality" and all sorts of persecutions: not only of communists and Jews but also to other members of both civic and religious associations.

[61] Ericson (2007a, p. 219).

[62] Ibid.

[63] Fraenkel (2010).

The "pretext" of this was the ill-famed "Decree of the President of the Reich for the Protection of the People and the State" (*Reichstagsbrandverordnung*) of 28 February 1933, introduced one day after the Reichstag fire, for which the Communists were blamed. Fraenkel lucidly describes the way prerogative state comes to exist: through the practices of court decisions that gradually gave up to political pressure and allowed the *Reichstagsbrandverordnung* to be maintained and, moreover, to be interpreted in a way that enabled the whole legal framework to become arbitrary. With this, any idea of natural rational law ceased to be binding on the police and government officials and was ultimately abolished so the Nazis could take advantage of the state of emergency. The first sentence of the Dual State therefore reads: "Martial law provides the Constitution of the Third Reich. The constitutional charter of the Third Reich is the Emergency Decree […]".[64] The ensuing dictatorship, justified by many with the Carl Schmitt's idea of "authoritarian democracy", did not mean a transitional constitutional dictatorship (with the aim of restoring the disturbed order), but an unconstitutional permanent dictatorship that sought to create a national-socialist state with unlimited powers.

With the view that control and judgements of the judicial branch of power must be decisive for the declaration of a martial law (state of emergency) and that also monarchical rule, not only modern states, has been limited by such control of the courts, Fraenkel expressly opposed the theory of (absolute) sovereignty, as developed by Carl Schmitt in his theory of the state, notably in *Political Theology*. Namely, Schmitt argued that sovereignty, which gives the prerogative to declare a state of emergency (in Article 48 of the Weimar Constitution), excludes any instances of further control. Fraenkel contrasted with this the view that a "sovereign" power in itself is neither "absolute" nor omnipotent but becomes so only at the moment when the division and balance of power are de facto abolished, i.e. when the executive branch is no longer controlled by the judicial branch.[65]

While tracing the way how the Nazi state came into existence and how the National Socialists were endowed with all the powers by a state of siege, Frankel holds that Hitler's coup d'état in 1933 was "at least technically, facilitated by the executive and judicial practices of the Weimar Republic" and that "long before Hitler's dictatorship, the courts had held that questions as to the necessity and expediency of martial law were not subject to review by the courts. The German law has just taken over

[64] Ibid., p. 3.

[65] Schmitt's position—Giorgio Agamben (1998: 15ff) took it over when he launched the thesis about *homo sacer* (which, with a sovereign decision, was excluded from law)—is dominating in recent reflections on the theory of sovereignty. They are located within Schmitt's theory of decisionism, which greatly hampers the understanding of how the state of emergency is established. That does not necessarily happen on the edge, as an exceptional, "special case", but can take place "within the usual legal procedures" carried out by individual officials, authorities, etc. In short, in order to understand these processes, one needs, as Austin Sarat argues, to move "beyond the drama of a sovereign suspension of legality" into a less abstract debate on sovereignty, emergency state and legality. Cf. Sarat (2010, p. 2).

the monarchic tradition when the declaration of martial was the privilege of the government and was independent of the jurisdiction of the court".[66]

This is how the division of powers was abolished and two parallel "states" came to exist: on the one side the Nazi governance system with unlimited arbitrariness was introduced, unchecked by legal guarantees; on the other, an administrative body (the "normative state") which in the first period maintained economic life, and legal institutions crucial to capitalism and functioning of capitalistic system.

Fraenkel maintained that, with the emergence of the prerogative state, the law did not simply cease to exist. The main thought behind the idea about the dual state was that, after 1933, a prerogative state (*Massnahmenstaat*) appeared, beside which a normative state still existed, but its scope was constantly shrinking. It was this doubling of the legal system, the parallel existence of two "regimes", which allowed those in power in state and party to arbitrary abolish the rights of individual persons and gradually of the whole groups of the population.

The dual state theorem is therefore not about the doubling (and merging) of the structures of party and state (which is how totalitarian regime is often understood) or the merging between certain institutions or forms of decision-making.[67] It is also not about the doubling between the part of the state that gives more general legal norms and the part of the state that creates individual pieces of legal acts like administrative acts, judgements and so on (therefore not the division between normative and administrative). The "trick" of the prerogative state is that it can take on the form of normative law as well (and, as we see in the case of crimmigration, mimic law). The "dual state" is therefore the simultaneous existence and selective disintegration of certain basic principles of law, which are in one case respected and in other simply put aside, without being formally abolished or restricted. It does not involve a complete elimination of the rule of law (*Rechtstaat*) while certain modes of its replacement emerge. A system is established with the residuals and areas where the rule of law and some of the formal and material legal principles are still respected but are under the constant threat of being violated.

The prerogatory state represents a method of ruling/domination (*Herrschaftsystem*) with unlimited arbitrariness and violence, namely not limited by any law guarantees. The legal protections of the Normative State in Nazi Germany were reserved only for the "constructive forces of the nation"[68] and "inasmuch as the Jews (were) not considered a part of the German nation but rather (were) regarded as enemies, all questions in which Jews (were) involved (fell) within the jurisdiction of the Prerogative state". One important evidence of the existence of a dual state in Fraenkel's analysis is the fact that despite the almost complete elimination of Jews' individual rights by the Nuremberg laws of 1935, they remained under legal protection until they were active in a limited sphere of economy or capitalist system: "The completion of the subjugation of the Jews to the Prerogative State was realised at the

[66] Fraenkel (2010, p. 5).

[67] Dreier (2012).

[68] Fraenkel (2010, p. 89).

moment it was resolved to extirpate Jews from economic life".[69] The regime used the *Feindstrafrecht* based on the Schmittian differentiation in the sphere of politics as the relationship between friend and foe. Fraenkel describes this as following:

> "In the early years of Hitler regime, a theoretical treatise on the legal status of the Jews would have had to investigate whether the Jews were being more or less justly treated. Such a question would not be relevant today [in 1939]. It must be remembered that *the dichotomy of justice and injustice in dictatorial countries has been supplanted by one of legality and lawlessness*. Finally, the *Reichstagsgericht* itself has refused to recognize Jews living in Germany as "persons" in the legal sense. In a decision of June 27, 1936 the highest German court condemned German Jews living in Germany to 'civil death'".[70]

The theorem of the "dual" state describing the gradual expansion of the prerogative side that is becoming more and more important additionally highlights the dynamic of contemporary processes of criminalisation of migration and the "nature" of crimmigration "law". The expanding of the prerogative side from encompassing migrants to including virtual nationals as we have seen in several places should be seen in this light, for example. Fraenkel claims that once a temporary state of emergency is introduced and is treated as if being "lawful" (i.e. legal), it can be constantly prolonged and extended whereby the division and balance of powers can cease to exist. This mostly starts with compliance of the judicial system with the government and party decisions, instead of proclaiming them unlawful and non-constitutional. While Fraenkel considered Western democracies—due to their division of powers and constitutional guarantees—as being less at risk of introducing prerogatory measures, the recent counterterrorism legislation, various forms of "war against" and crimmigration law witness the successful affirmation of the argument that the freedom of "sovereign" political action of executive should triumph over the inviolability of the law (and equal rights). In the US, such measures were justified by an increasingly pronounced "plenary power doctrine", originating in the late nineteenth century, which abolished the obligation to judicial review of the decisions of the executive power. Plenary power, initially used in cases of immigration and indigenous populations, represents a form of "sovereign decision" that "writes exceptionality into law in a paradoxical way: the judiciary allows government action by exempting such action from judicial review. As a legal doctrine, plenary power is thus authorised by courts through the suspension of their own authority".[71] Fraenkel did not know this doctrine or did not deal with it when he thought of the American political system as being inclined much less to give into totalitarian temptations. There is, however,

---

[69] Ibid.

[70] Ibid., p. 95 (emphasised by VJ). In this case, the court decided that the fact that the motion-picture stage manager was a Jew was equivalent to "sickness, death and similar causes rendering the stage manager's work impossible" and that the company could therefore terminate the contract with an employee of Jewish origin. The court then also dismissed the complaint of the stage manager with the argument that "the former (liberal) theory of the legal status of the person made no distinction between races". Ibid.

[71] Bibler Coutin et al. (2014, p. 99).

a significant similarity between the growing role of this doctrine in the US and the way the German courts operated in the 1930s.[72]

When the parliament in Weimar Germany was no longer able to constitute a majority government and, on the basis of Article 48 of the Constitution, began to form a kind of "parallel track" of legislative action with a fatal consequence that one no longer distinguished between the state measures of the president or the commissioner dictator and "real" laws, Fraenkel wrote the following sentence: "When the judiciary is no longer able to recognize what is a law, it is at risk that it will only be brought into the field of illegality."

Therefore, the unlawfulness of a dual state is not marked by the complete absence of a law, but by increasing number of prerogative acts mimicking law. With the establishment of the dual state, the central principle of a modern state, that is equality, is destroyed. In Germany, the Nazi party started to play the role of the unlimited "administrator" of the alleged will of the German people, so that this new framework established a racial state in which the law applied only to the constructive forces of the nation. As expressed by the main jurist of the Reich, Hans Frank, law and justice (*Recht*) was understood as that which was "good for the German people".

The red thread of Ernest Fraenkel's efforts to counter the development of the dual state, while leaning on the described analysis, is therefore a constant linkage of the principle of the rule of law with the preservation of the equal validity of law as a general principle of equality for all people, so that arbitrary quasi-legal powers cannot be introduced. In exercising the rule of law, the independence of the courts is decisive, and they must not give way to the introduction of individual orders, decrees or pressures from other branches of power. The rule of law is not "*Regelwerk*", that is, a sort of rulebook of arbitrarily established procedures that only ensure the predictability of the behaviour of individual subjects. It is an institution that enables the realisation of fundamental principles, such as the idea of equality and justice for all.

6 Conclusion

This chapter attempted to show how crimmigration "law", with the increasing regulation and over-legislation of migration, creates two parallel legal regimes for two different populations, whereby one of them, migrants, are treated as "less than criminals" while being "absolutely innocent". The characteristic of today's migrant and refugee populations is not the absence of rules and laws "for them", but an over-abundance, a hyper-legality. As put by Ericson, ironically, "when law and other democratic institutions are most threatened by seemingly intractable problems, the response is to devise new forms of counter-law that further threaten those institutions. Law is transformed into an institution of suspicion, discriminatory practices, invasion of privacy, denial of rights, and exclusion […] law itself becomes a source

[72]Cf. Saito (2007).

of 'harassment, alarm and distress'. Security trumps justice, and insecurity proves itself".[73]

These processes are not the result of the state's exclusive, punitive, and repressive power but of the "new forms of policing strategies that rest on public-private partnerships and alignments".[74] In the area of migration, new actors and dispersed, decentralised techniques are implemented. With this, the state power is both "more visible and encroaching and more fragmented and diffusive",[75] and the violations of rights are more difficult to identify, while they seem to be increasingly "normal".

These developments are part of the more general transformation of the notion and practice of the rule of law and equality principle, which both radically change their character, not solely in the context of migration. One can hardly find cases when courts (e.g. the Inter-American court) concerning undocumented migrants took equality as a fundamental value and human rights principle as a basis for their deliberation. Equality as an underlying ethical and legal principle of modern political communities, and citizens' and non-citizens' human rights, is destroyed if criminal law is instrumentalised in the ways described above. The state and some supranational institutions use both human rights law and criminal law to protect individuals. The essence of the law, however, is broader and deeper, since its function is not only to protect individuals against violations but also to preserve the principles of justice and rights themselves. Sanctions should in this sense affirm and not deny law/justice. The problem of the (mis)use of criminal law in cases of migration, which is creating "superfluous people," indicates that in this case the law is used against its fundamental purpose, which leads to denial of law (justice/rights) or to its inversion, an element pertaining to setting up of totalitarian regimes.[76]

Acknowledgements This chapter is the result of two research projects – J5-7121 "Crimmigration between human rights and surveillance" and J5-1749 "The break in tradition: Hannah Arendt and conceptual change", and the research programme P5-0413 "Equality and human rights in times of global governance", all funded by the Slovenian Research Agency.

References

Aas KF, Gundhus H (2015) Policing humanitarian borderlands: frontex, human rights and the precariousness of life. Br J Criminol 55:1–18

Arendt H (1986) The origins of totalitarianism. André Deutsch, London

Arendt H (1994a) 'What remains? The language remains': a conversation with Günther Gaus. In: Kohn J (ed) Essays in understanding: 1930–1954. Harcourt Brace & Company, New York, Sand Diego, London, pp 1–23

Arendt H (1994b) Eichmann in Jerusalem. Penguin Books, New York

[73] Ericson (2007b, p. 7).

[74] Walsh (2014, pp. 252–253).

[75] Ibid.

[76] Arendt (2007).

Arendt H (2007) We refugees. In: Kohn J, Feldman RH (eds) The Jewish writings. Schocken Books, New York, pp 264–274
Arnold KR (2018) Arendt, Agamben and the issue of hyper-legality: between the prisoner-stateless Nexus. Routledge, London, New York
Arnold KR (2016) Is it better to be a criminal than a stateless person? Revisiting Arendt's famous comparison. https://www.academia.edu/35941822/_Is_it_Better_to_be_a_Criminal_Than_a_Stateless_Person_Revisiting_Arendt_s_Famous_Comparison_
Bibler Coutin S, Richland J, Fortin V (2014) Routine exceptionality: the plenary power doctrine, immigrants, and the indigenous under U.S. law. UCIrvine Law Rev 4/97:97–120
Bigo D (2004) Criminalization of 'Migrants': the side effects of the will to control the frontiers and the sovereign illusion. In: Bogusz B, Cholewinski R, Cygan A, Szyszczak E (eds) Irregular migration and human rights: theoretical, European and international perspectives. Martinus Nijhoff Publishers, Leiden, pp 61–92
Broeders D (2010) Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands. Punishment Soc 12(2):169–186
Carling J, Hernández-Carretero M (2011) Protecting Europe and protecting migrants? Strategies for managing unauthorised migration from Africa. Br J Polit Int Relat 13:42–58
Carrera S, Allsopp J, Vosyliute L (2018a) Main research findings of ESRC project on the effects of EU's anti-smuggling policies on civil society actors. http://www.picum.org/Documents/Publi/2018/Main-Findings-of-the-Report-2018.pdf
Carrera S, Allsopp J, Vosyliute L (2018b) The effects of anti-migrant smuggling policies on humanitarian assistance in the EU. Int J Migr Border Stud (IJBMS) (Special Issue). https://gtr.ukri.org/publication/overview?outcomeid=5aa85eece3ddc5.75737244&projectref=ES/P001335/1
Chimni BS (2000) Globalisation, humanitarianism, and the erosion of refugee protection, Refugee Studies Centre. Queen Elisabeth House, University of Oxford. Working paper No. 3. https://www.rsc.ox.ac.uk/files/files-1/wp3-globalisation-humanitarianism-erosion-refugee-protection-2000.pdf
Côté-Boucher K (2015) The criminalization of migration in Canada. In: Pickering S, Ham J (eds) The Routledge handbook on crime and international migration. Routledge, London, New York, pp 75–90
Dreier H (2012) Nachwort. Was ist doppel am Doppelstaat. Zu Rezeption und Bedeutung der klassischen Studie von Ernst Fraenkel. In: Der Doppelstaat, Ernst Fraenkel, 3rd edn. Europäische Verlaganstalt, Hamburg, pp 274–300
Duff AR (2010a) Perversions and subversions of criminal law. In: Duff RA, Farmer L, Marshall SE, Renzo M, Tadros V (eds) The boundaries of the criminal law. Oxford University Press, Oxford, pp 88–110
Duff AR (2010b) A criminal law for citizens. Theor Criminol 14:293–309
Ericson R (2007a) Crime in an insecure world. Polity, Cambridge
Ericson R (2007b) Security, surveillance and counter-law. Centre for Crime and Justice Studies. CJM no. 68/Summer. https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627250708553271.pdf
European Union Agency for Fundamental Rights (2014) Criminalization of migrants in an irregular situation and of persons engaging with them. http://fra.europa.eu/en/publication/2014/criminalization-migrants-irregular-situation-and-persons-engaging-them
Fassin D (2011) Humanitarian reason. A moral history of the present. University of California Press, Berkely
Fekete L (2009) A suitable enemy: racism, migration and Islamophobia in Europe. Pluto Press, London
Fekete L (2017) Introduction. In: Fekete L, Webber F, Pettitt-Edmond A (eds) Humanitarianism: the unacceptable face of solidarity. Institute for Race Relations, London, pp 1–6
Fekete L (2018) Migrants, borders, and the criminalization of solidarity in the EU. Race Class 59(4):65–83

Fellon Voting Rights (2017) National conference of state legislatures, 3 April 2017. http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx
Flynn MB (2016) From bare life to bureaucratic capitalism: analyzing the growth of the immigration detention industry as a complex organization. Contemp Readings Law Soc Justice 8(1):70–97
Fraenkel E (2010) The dual state. A contribution to the theory of dictatorship. The Lawbook Exchange, Clark, NJ
García Hernández CC (2015) Naturalizing immigration imprisonment. Cal L Rev (103)1449
Guild E (2010) Criminalization of migration in Europe: human rights implications. Council of Europe: Commissioner for Human Rights, February 2010. http://www.refworld.org/docid/4b6a9fef2.html
Hegel GWF (1972) Grundlinien der Philosophie des Rechts (Outline of the philosophy of rights). Ullstein Buch, Frankfurt am Main, Berlin, Vienna
Horne A, White I (2015) Prisoners' voting rights (2005 to May 2015). House of Commons Library, UK. http://researchbriefings.files.parliament.uk/documents/SN01764/SN01764.pdf
Hussain N (2007) Beyond norm and exception: Guantánamo. Crit Inquiry 33(4):734–753
Jalušič V (2017) Refugees today: superflousness and humanitarianism. Estudos Ibero Americanos 43(3):524–534. http://revistaseletronicas.pucrs.br/ojs/index.php/iberoamericana/article/view/26139
Jalušič (2019) Criminalizing "pro-immigrant" initiatives: reducing the space of human action. Two Homel 49:109–122. http://twohomelands.zrc-sazu.si/en/articles/show/589/criminalizing-pro-immigrant-initiatives-reducing-the-space-of-humanaction
Levi P (2003) If this is a man. The truce. Abacus, London
Malkki L (1995) Refugees and exile: from 'Refugee Studies' to the national order of things. Ann Rev Anthropol 24:495–523
Parkin J (2013) The criminalization of migration in Europe. A state-of-the-art of the academic literature and research. CEPS Paper in Liberty and Security in Europe, No. 61. https://www.reuters.com/article/us-europe-migrants-hungary-strasbourg-idUSKBN16L1YO
Provera M (2015) The criminalization of irregular migration in the European Union. CEPS Paper on Liberty and Security in Europe, No. 80/February. https://www.ceps.eu/publications/criminalization-irregular-migration-european-union
Roach K (2011) The 9/11 effect: comparative counter-terrorism. Cambridge University Press, Cambridge
Saito NT (2007) From Chinese exclusion to Guantánamo Bay: plenary power and the prerogative state. University Press of Colorado, Boulder (Colorado)
Sampson R (2015) Briefing paper: does detention deter? International detention coalition. www.idcoalition.org. Accessed 1 Nov 2018
Sarat A (2010) Sovereignty, emergency, legality. Cambridge University Press, Cambridge, New York
Sklansky DA (2012) Crime, immigration, and ad hoc instrumentalism. New Crim Law Rev 15(2):157–223
Spena A (2014) Iniuria Migrandi: criminalization of immigrants and the basic principles of the criminal law. Crim Law Philos 8(3):635–665
Stumpf J (2006) The crimmigration crisis: immigrants, crime and sovereign power. Am Univ Law Rev 56(2):367–419
Vazquez Y (2016) Crimmigration: the missing piece of criminal justice reform. Univ Richmond Law Rev 51:1093–1147
Walsh JP (2014) Watchful citizens: immigration control, surveillance and societal participaton. Soc Legal Stud 23(2):237–259
Webber F (1996) Crimes of arrival: immigrants and asylum-seekers in the new Europe. Statwatch, London. http://www.statewatch.org/analyses/crimes-of-arrival.pdf
Webber F (2008) Border wars and asylum crimes. Statewatch, London

Zedner L (2013) Is the criminal law only for citizens? A problem at the borders of punishment. In: Aas KF, Bosworth M (eds) Migration, citizenship, and social exclusion. Oxford University Press, Oxford, pp 41–54

European Union and Its Neighbourhood Policies

The Rhetoric of European Migration Policy and Its Role in Criminalization of Migration

Tjaša Učakar

Abstract European migration policy frames migration predominantly as a securitarian issue and thus paints migrants as a threat to the established order of the EU. Even though the most recent documents use more liberal and humane rhetoric, the underlying assumptions about migration have not changed, and, furthermore, are getting even more difficult to recognise. This chapter demonstrates how the European migration policy has undergone some discursive changes since the pre-Maastricht period until today. Whereas the softening of discourse could, on the one hand, lead to less restrictive measures within migration policy, it, on the other hand, establishes a new field where foreignness is produced, and membership and belonging of migrants in the EU are delineated. These discursive shifts, despite exhibiting a widening of themes and terminology, including integration of new sensitivities, and ostensibly suggesting a picture of greater liberalism and humanitarianism, do not ultimately change the hierarchy of fundamental values, as all newly introduced themes remain subordinate to the current securitarian priorities. Furthermore, it is becoming even more challenging to detect the criminalisation of migrants within this changed field of political discourse, which is characterised not only by repressive aspects of power but also by affirmative discourses of fundamental European values, such as the protection of human lives and other humanitarian ideals.

1 Migration as a Problem

Migration is one of the main challenges for the European Union. Even though migration is a heterogeneous and complex social phenomenon, the EU's understanding of it is very narrow. Namely, migration is understood exclusively as a problem, a problem we must fight and a problem it is possible to fight against. Bigo calls this

T. Učakar (✉)
Faculty of Arts, University of Ljubljana, Ljubljana, Slovenia
e-mail: tjasa.ucakar@ff.uni-lj.si

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_5

discourse "anti-immigrant" since it is intended to control and preferably stop immigration.[1] The negative framing of migration is strengthened by various discursive and non-discursive elements that construct immigration in the EU as an unusual and threatening state, while the immigrants are constructed as the 'Others of Europe' through a complex set of exclusion mechanisms that prevent them from acquiring full membership in the European political community.[2] The majority of discourses and actions in the field of migration policy is based on mechanisms of securitisation and criminalisation of immigrants.[3] Even though in recent years the discourse of development cooperation with third countries was added to the prevailing discourse of security, this cooperation is still tightly tied to security concerns of preventing illegal immigration and applies to only selective needs of the labour market.[4] Even the newest humanitarian discourses are just a disguise for repressive control mechanisms,[5] and the shift of official language into "saving lives" has not resulted in practice. As Moreno-Lax writes in her analysis on the securitization of human rights, "neither policy goals, nor their underpinning rationale or the means to achieve them have been revised".[6] This leads to policies predominantly motivated by securitarian concerns aimed at discouraging migration, and characterised by repressive measures of border controls, externalisation of migration management and multiplication of practices that exclude unwanted immigrants through various practices of criminalization and marginalization,[7] and selectively allow entry to just those that meet the labour market's needs and contribute to its economic growth.[8] On the level of naming, the term "illegal migration" is still in use, establishing an implicit link between migration and law violation, inscribing illegality into the mere bodies of migrants, even though they are put into "illegal" positions by restrictive border regimes and not by their mere being.[9] Through setting up of borders and the restrictive discourse on these borders, migrants are presented as those who ultimately belong outside of the borders and who, by entering the bordered space, present a danger for the established order inside of the borders.[10] Illegalization, criminalization, and dehumanization of migrants further add up to their marginalization in European societies.

In this chapter, I will argue that criminalisation of migration is a phenomenon that is rooted already in the discourses about migration in the EU and that the seemingly less securitarian language used in recent years does not lead to a changed understanding of migration but even broadens the logic of securitisation and criminalisation. I will discuss how European policies allow this situation of continuous crises and

[1] Bigo (2005, p. 63).
[2] Guild (2009), Cuttitta (2015).
[3] Bigo (2005), Düvell (2006).
[4] Babayan (2011).
[5] Albahari (2015).
[6] Moreno-Lax (2018, p. 120).
[7] Calavita (2005).
[8] Ibid.; Brown (2010), Mezzadra and Neilson (2013).
[9] Bigo and Guild (2005b), Pallitto and Heyman (2008).
[10] Balibar (2007), Jones (2017), Guild (2009).

threats, and the political discourse used to, on the one hand, establish the normative framework of the EU, and, on the other hand, produce actions that are opposed to these same fundamental values, by criminalizing and marginalizing migrants in new ways. This will enable a broader understanding of European migration policy, which continues to be predominantly restrictive, repressive and anti-European.[11] The repressive aspects of power are increasingly accompanied by the productive articulations of fundamental European values and their declarative humanistic directions, which actualises the notion of European apartheid[12] in the twenty-first century. I borrow the notion of European apartheid from Balibar (2007), who argued that an essential part of the formation of the EU identity was based on the exclusion of the "other", the foreigner, the outsider, as someone, who is supposed to be fundamentally not compatible with the essence of the EU. With the term "European apartheid," Balibar names the centrality of the dividing line between "us" and "them", which he sees as one of the main characteristics of the formation of European identity.

In the following pages, I will present the discursive shifts that I identify using a historical comparative textual analysis of the fundamental documents of the European migration policy. Eleven main European documents[13] will be analysed that frame the basic structure of the EU migration policy since the pre-Maastricht era[14] to the recent Agendas on migration and security from 2015, which were a response to the increased migration movements of 2015, commonly known as the "2015 migration crisis".[15] In the first part of the chapter, I will show how the identified discursive shifts point to the emergence of new themes, priorities, and discourses, and how

[11] Anti-European in a sense that it is in contradiction with the humanistic values of respect for human dignity and human rights, freedom, democracy, equality, and the rule of law, which are supposed to be the building blocks of the European Union.

[12] Balibar (2007).

[13] The analysis included: The Palma Document (1989), Treaty on European Union (1992), Treaty of Amsterdam (1997), Convention implementing the Schengen Agreement (1985), Tampere European Council (1999), The Hague Program (2004), The Stockholm Program (2011), European Council Conclusions (2014), The Global Approach to Migration and Mobility—GAMM (2011), the European Agenda on Migration (2015), and the European Agenda on Security (2015).

[14] The common European migration policy was designed long before the signing of the Treaty on European Union or the Maastricht Treaty in 1992, which is one of the two treaties forming the constitutional basis of the European Union. Various working groups were preparing reports on questions of free movement of people in the EU after 1992, and these efforts culminated in the preparation of 1989 The Palma Document (Huysmans 2000), which is the first document of my analysis.

[15] The empirical analysis was part of my Ph.D. research study at the Faculty of Arts, University of Ljubljana. I used thematic analysis as defined by Philo and Berry (2004) to analyse the documents according to the main "explanatory themes" (Philo 2007), which define how migration is understood in the EU. The relations between these themes allow us to understand the hierarchy of values of migration policy, which then dictates the use of concrete measures on the ground. In the documents, I follow the occurrence and order of certain themes, the importance of different perspectives, the values that mirror through the exposed themes and the hierarchy of values that is established through conflicting interpretative frameworks. An additional analytical perspective is added by the analysis of key discursive elements, as defined by critical discursive analysis, such as new or changed terms and semantic relations between words, a priori assumptions and colocations, implicit common truths, typical semantic structures, syntax, and lexical elements (Fairclough 2003; van Dijk 2002),

these changes contribute to further criminalisation and marginalisation of migrants within the EU. In the second part of the chapter, I will focus on the consequences of these discursive shifts. I will show that these discursive changes do not change the underlying assumptions and antagonisms of the European migration policy, nor do they solve the basic conflict framing the field of migration policy; that is, the conflict between the normative frame of the EU as a community of values and the counter-value practices that establish the EU as a fortress. I will demonstrate how the documents themselves, through thematic framing, the terminology used, and the establishing of a value system, already create the basis for the securitisation and criminalisation practices that exclude migrants and strengthens the "fortress Europe".[16] The emergence of the humanitarian discourse did partly obstruct the repressive rhetoric,[17] but through a thorough reading and chronological comparative analysis of changes in dictions, I point out to those points in the discourse that leave room for repressive measures, enhance criminalisation and marginalisation and present points of deviation from the declarative values of the EU.

2 Shifts in the EU Discourses as Causes of Criminalisation

Direct linking of immigration issues to crime dates back to the 1990s when the countries of Southern Europe became recipients of an influx of immigrants from other continents, who came mainly for family reunification reasons and as a continuation of the influx of the needed workforce in Europe after the World War II.[18] While their presence in European societies was cherished as a workforce in the 1960s, the recession of 1970s changed this picture. The prevailing public sentiment was one of urgency to protect jobs and welfare of the domestic population and stop the influx of immigrants.[19] There was a general fear of the criminal behaviour of immigrants based on prevailing stereotypes about their criminal nature.[20] Their illegal status has been established as an unambiguous indicator of the belief in their tendency to commit acts of crime.[21] However, public discourses overlooked the fact that it is the procedures of illegalisation that place immigrants in situations where they are more visible to the authorities and more exposed to criminal activities. Since the legalisation of their status is often permanently disabled, they are forced to use unregulated services of employment, so that they can survive within the country of immigration.[22]

---

and, also, who is defined as an actor of the social event and to whom the responsibility is attributed for solving a particular challenge (Philo 2007).

[16] Balibar (2007).

[17] Albahari (2015), Cuttitta (2015), Moreno-Lax (2018).

[18] Calavita (2005).

[19] Huysmans (2000).

[20] De Giorgi (2010).

[21] Aliverti (2012).

[22] Calavita (2005), De Giorgi (2010), Melossi (2003).

The link between immigration and crime promotes the representation of immigrants as enemies. Media over-representation and the political exposure of immigrant criminals led to the general acceptance and justification of authoritarian and repressive surveillance policies against "dangerous others",[23] which allows for the ignoring of human rights protections when they should be provided to migrants.[24] Migration and crime have become so intertwined not only within public and political discourses but also in law with an increasing overlap between immigration and criminal law.[25] The use of criminal law practices and vocabulary to condone violations of immigration legislation leads to the equation of immigrants with criminals, thereby further justifying the strengthening of control and the use of repressive methods.[26]

While the European migration policy has undergone some discursive changes since the pre-Maastricht period until today, the discursive shifts have not opened up a space for alternative understandings of migrants and migration beyond their determinacy with crime, threat, and danger from the outside, and the securitarian framework motivating migration policy persists.

The development of the discourse surrounding European migration policy paints a dual picture. On the one hand, we are witnessing the development of migration policy that can be characterised as broadening of the thematic field, meaning that the primary theme of internal security, which was characteristic of the first common European policies, was broadened to encompass other themes. Two new vital themes are utility and humanitarianism. *Utility* refers to the rise of recent discourses highlighting the potential economic benefits of migration for the EU. However, as I will argue later on, this does not change the position of migrants, as they are still dehumanised, only now by emphasising their utility within European labour markets.

Regarding *humanitarianism*, the repressive measures, measures of protection and control, and measures of selective work mobility and selective asylum systems are being framed as humanitarian help to people in need. This humanitarian shift is getting more attention in scientific literature in recent years since it is an important shift in terms of framing migration questions, which influences the way migration is perceived. Scholars have highlighted the adoption of a humanitarian discourse by the authorities as a tool to legitimise enhanced border control, such as in the case of Mare Nostrum.[27] They have also argued that humanitarianism and militarisation have become two sides of the same coin of border controls[28] and have shown that the rights of migrants, including the right to life, are moving from the sphere of politics to the sphere of humanitarianism and compassion,[29] which means that migrants are not regarded as political subjects of the rule of law and human rights but as objects of benevolent, compassionate help. Also, the change in rhetoric into more human

[23] Tsoukala (2005).

[24] Balibar (2007).

[25] Stumpf (2006), Aliverti (2012).

[26] Aliverti (2012), Tsoukala (2005), De Giorgi (2010).

[27] Cuttitta (2015).

[28] Albahari (2015).

[29] Fassin (2005).

rights oriented discourse has not changed the general goals of the European migration policy, which remain focused on border controls and migration prevention.[30]

In the following pages, I will show which discursive mechanisms are used to enable these shifts, which will help to understand how the new terminology and new thematic frames enhance, not soften, the securitarian understanding of migration, which gives room to criminalisation and marginalisation of migrants in European societies. It is essential that the new thematic frames that are emerging give an impression that the repressive discourse is giving room to a utilitarian and a humanitarian one. However, both remain subordinate to the hierarchy of values in which security is still placed on the top of the agenda.

2.1 Transformations of Securitarian Discourse

The broadest characteristic of the changes of the European migration policy discourses is its softening, which is encompassed in the substitution of the term "control" with the term "management".[31] This seemingly softens the repressiveness of migration policy, but the actual measures of management still include predominantly measures to prevent access to the EU. The usage of the term "management" broadens the whole terminological spectre of words used in relation to migration. While the term "control" was accompanied by notions of fighting against migration, e.g. "fight against irregular migration", "fight against international crime", which was used in the older documents,[32] the term "management" is supplemented in recent documents with terms such as "route analyses", "migration profiles", and "risk assessments",[33] which picture migration questions as issues of technical management. Even if this shift abolishes the direct link between migration and crime, the understanding of migration as an impersonal phenomenon, which can be managed with technical measures, helps in the dehumanisation of migrants and allows for even stricter measures of control that can be implemented on the ground. As Pallitto and Heyman warn, this does not abolish control, but merely shifts it from security domain to the domain of community life management, while differentiating according to different degrees and categories of suspicion, attributed to individuals in advance, depending on their origin and other socio-economic characteristics.[34]

The managerial logic of dealing with migration does not include any reference to the historical or social circumstances related to the phenomenon. The analysed policy

[30] Moreno-Lax (2018).

[31] Stockholm Program (2011), GAMM (2011).

[32] The Palma Document (1989).

[33] Stockholm Program (2011), GAMM (2011).

[34] Pallitto and Heyman (2008) even write about "mobility classes" that characterise groups of people, depending on their mobility capability, in analogy with Marx's classes, which differ according to their relation to production means. "Classification into different categories of control means the distribution of benefits and burdens, opportunities and risks, in view of the already existing differences that at the same time generate and deepen social inequalities". Ibid., 327.

documents acknowledge migration as a social reality that is not about to change, and a phenomenon that is part of modern societies, and therefore needs a comprehensive managerial approach.[35] However, the policy documents do not mention the broader social contexts and systemic causes of migration, nor the historical or economic relations between states, which, as Sassen notes, dictate precisely defined patterns of migration movements. In contradiction with the claim of Sassen, that "migration doesn't happen but is produced",[36] the European policies do not acknowledge this historical and social production of migration, but understand it as an ahistorical social phenomenon that is threatening the EU and should, therefore, be managed.

This managerial logic is also linked to the emergence of a broader discourse of utility of migration and of possible benefits that migrants would bring to European societies, which further dehumanises migrants and opens up new ways of their criminalisation. This development is hidden in the discursive shift from migration as a threat to migration as an opportunity. It is important to note that opportunities in this context stand solely for economic opportunities for the labour markets in the EU. Migration is supposed to replace the labour shortage in some sectors of the European economies and help to maintain the sustainability of social welfare systems facing demographic decline and the risk of economic unsustainability in the long run.[37] The opportunities are not understood in terms of opportunities for migrants or opportunities for a multicultural development and flourishment of European societies.[38] Such an understanding brings a new layer of threat to irregular migration since the opportunities are namely related only to regular migration.

On the other hand, irregular migration is thought to prevent the establishment of an inclusive and open immigration system, as they undermine confidence in the system and strengthen the stigmatisation of the overall phenomenon of migration, as noted in the 2015 European Agenda on Migration. This in turn further deepens the distinction between regular and irregular migration, thus between migration that is occurring within an established legal mechanism and migration that is bypassing the legislation. Now irregular migration threatens not only the security and social order of European societies but also the economic prosperity of European countries and third countries alike. Since the opportunities of regularised migration are put to the fore as something that could benefit the economies of European and third countries, the

[35] Hague Program (2004), Stockholm program (2011).

[36] Sassen (2000, p. 155).

[37] Parker (2013).

[38] The opportunities of migration are framed exclusively in terms of economic opportunities for labour markets and entrepreneurial development of European countries. The term "benefits" is used with other economic terms, such as "economy stimulation", "migrant work force", "labour market needs", "competitiveness", and others, which reveal the implementation of economistic market logic into the field of migration policies. Market logic, therefore, dictates the contexts of usefulness of migration in the EU. What is particularly important in this regard is that economic subjects are becoming the main moderators of migration policies, through their market needs. The main moderators of regularised migration are therefore employers, and not state strategies and directives. More about this topic of marketisation of migration and the rise of utilitarian market discourse in Parker (2013).

threat of irregular migration gains a new dimension. The documents analysed state that regular migration cannot be successfully facilitated when irregular migration is undermining the regularised systems.[39] Thus, irregular migration is now perceived as an additional threat to the economic development of the EU and third countries, which are endangered by it. In this setting, the repressive measures for preventing irregular migration gain a new grounding and rationale.

The usage of different terminology in naming migrants is also important for the way they are understood and perceived. As Tsoukala notes in her analysis, the highly contested term "illegal migrant" succeeded the former term "undocumented migrant" in the 1990s, and established a direct and firm link between migration and crime.[40] I found in my analysis that the term "illegal migrant" is used less since the analysed policy documents of the European Commission (GAMM and Agendas on migration and security) do not use the term "illegal migration" anymore. However, its substitution this time is particularly interesting. The whole word pair legal/illegal migration is namely substituted with the word pair mobility/migration. With the introduction of the word "mobility" and its usage with the word "migration", the latter is becoming a synonym for irregularity. The word "mobility" takes the positive meanings of the broader phenomenon of migration, while the word "migration" becomes defined only by its negative aspects since, in comparison with mobility, migration stands for unwanted mobility. Therefore, the political documents on migration policy do not need to use the highly contested word pair illegal or irregular migration any longer, since all the positive aspects of migration were transferred to the term mobility and when used together, the term migration itself stands only for its negative aspects, describing the irregularity of migrants in the EU.

The introduction of the term mobility also enables the documents to place more attention to facilitation of mobility, in addition to prevention of migration, which gives an impression that the first is becoming more important than the latter. However, it is essential to understand that the facilitation measures remain in the domain of individual states and are based solely in the field of mobility facilitation, related to measures of a particular Member State and mainly their labour market needs.[41] While on the other hand, the measures to prevent migration remain a common domain of the EU, they are getting more and more automatized and systemized through common border controls, common security agencies, information systems, etc.[42] Such logic follows the prevailing logic of the developmental economy, where current neoliberal management is based on micro-economic measures of individual development projects, rather than on a macro-economic approach, which would address the systemic causes of the global distribution of wealth and power.[43] The mobility facilitating projects are thus introduced only as small project solutions between individual Member States

[39] Stockholm Program (2011), European Council Conclusions (2014), GAMM (2011).

[40] Tsoukala (2005).

[41] Babayan (2011).

[42] Broeders (2007), Walters (2006).

[43] Fine (2009) in Chouliaraki (2012, p. 8).

and third states, and not directed towards systemic solutions, which would enable potential migrants to enter the EU in an easier, more transparent and safer manner.

2.2 Emergence of Humanitarian Discourse

The essential discursive shift in the analysed documents is the emergence of humanitarian discourse, a shift from protection to rescue, which includes the shift in focus from protection of the territory of the EU and its internal security to rescuing the lives of migrants. However, this shift does not lead to a reduction of repressiveness of migration policy measures, since the humanitarian discourse is used solely as a novel means of legitimation of border controls and prevention of irregular migration into the EU. "What has changed is the way in which 'interdiction' has been configured and portrayed, from the prime border/migration control mechanism into a 'necessary' life-saving device".[44]

The shift into humanitarianism started with the phenomenon known as the externalisation of migration policy, which means that the EU started to treat migration issues as external, not only internal questions.[45] When the measures to manage migration were transferred to third countries, these countries were portrayed as those, who suffer from migration-related issues, while the EU is solitarily helping them to tackle those questions. The EU's interventions have a veneer of a humanitarian discourse of help and rescue, while the logic behind its measures is based on either utilitarian principles of labour market needs or a securitarian logic of exporting security standards into third countries.

One of the most critical aspects of externalisation of migration policy is the transfer of responsibilities to the third countries. Migration is progressively understood as a problem of third countries, where the EU is ready to offer solidarity, help and support, but the critical responsibility for managing migration lies with the third countries. For example, the Stockholm Program (2011, 37) states that the EU will help third countries with their "efforts to form a migration policy", implying that these countries have problems with migration, and not that the EU is helping these countries with the aim to keep the potential migrants as far away from its external borders as possible. Although the external policy, through externalisation processes,

[44] Pallister-Wilkins (2017) in Moreno-Lax (2018, p. 120).

[45] Bigo and Guild (2005b). The mechanism of externalisation was primarily introduced with the aim to prevent illegal immigration into the EU. Triandafyllidou (2010). It gained a central role in 2005, when the European Commission adopted the program "The Global Approach to Migration" Hayes and Vermeulen (2012). Externalisation is performed on the basis of bilateral and multilateral EU agreements with third countries. Largely, these are trade and development agreements that are supposed to contribute to the eradication of the root causes of legal and illegal migration, by addressing those circumstances that force people into migration. At the same time, development and trade objectives are linked to cooperation with the European Commission in the management of illegal migration flows—through visa regimes and through the re-acceptance of returned irregular immigrants and rejected asylum seekers. See Guild (2009).

is becoming the primary tool for achieving internal policy objectives, these objectives are hidden in development aid, partnerships with third countries and strengthening of their capacities.[46] Taking responsibilities for migration management is becoming a condition for third countries for their partnerships with the EU, as only efficient measures of the third countries are supposed to enable the creation of EU as a space of freedom, security, and justice, as is it written in the European Council Conclusions (2014). The third countries, therefore, have a responsibility to control their borders and potential irregular migration to the EU, which would enable their citizens better chances of regularised migration to the EU. It is in these conditions that the EU would be able to open up its borders for migrants and set up a frame for successful regular migration, as it is stated in GAMM (2011) and the 2015 European Agenda on Migration. This would also help economies and societies of the third countries in their development. The consequence of this shift of responsibility is that the EU measures in tackling migration become understood as a well-intentioned help, while the problems in dealing with migration are supposed to be the responsibility of the third countries, because of their improper handling of border management or inappropriate cooperation with the EU.

Another critical field where humanitarian discourse is emerging is the field of asylum and international protection. Anna Triandafyllidou in her analysis of the European migration policy measures already detected a trend of expansion of irregularity presumption to other forms of arrival to the EU, especially to the field of asylum policy, which leads to a strengthened correlation between asylum and irregular migration.[47] The emphasis of asylum policy is shifting from ensuring the rights of asylum seekers to issues of ensuring security, preventing the abuse of asylum status and the effective expulsion of failed asylum seekers. Wodak even writes about the fusion of terms "asylum seeker" and "immigrant" into a new concept of "illegal asylum-seeker".[48] I notice the same trend in my analysis. The shift from responsibility to providing international protection to preventing abuse represents a shift from the discourse of international legal obligations to the discourse of humanitarian aid, which justifies the increased restrictiveness of asylum procedures with the need to prevent abuse, which should provide better protection for those who are entitled to it. Until the 2004 Hague Program, the right to asylum was treated as one of the fundamental values of the EU, as part of the respect for international obligations to provide protection. Within the 2004 Hague Program, asylum is no longer primarily understood as a system based on the protection of human rights, but only as one of the systems of migration management, where the collection of quality data and the prevention of abuse of asylum procedure is more important than human rights. The danger of abuse is underlined by some new terms, such as "mixed flows"[49] and

[46] Babayan (2011), Guild (2009).

[47] Triandafyllidou (2010).

[48] Wodak (2006, p. 186).

[49] GAMM (2011), EU Council Conclusions (2014).

"persons who undoubtedly need international protection".[50] The terms mixed or heterogeneous flows are used concerning those measures, which are supposed to protect migrants, who are entitled to it by international standards and agreements. The term implies that along with these migrants there also come other people, who are not in need of protection and therefore not entitled to the same measures, which implies the danger of potential exploitation of protection systems. The same goes for addressing the persons who undoubtedly need international protection, which implies that there are also persons, who do not need this protection undoubtedly, thus everyone needs to be carefully examined in order to decide, who needs protection and who does not. This creates suspicion about the sincere intentions and needs of all migrants and creates a picture that the majority of those who wish to enter the EU do so with mal intentions and unjustifiably. Furthermore, the 2015 European Agenda on Migration lists specific figures about the percentage of rejected asylum applications, which are presented as a confirmation of the risk of abuse of the system, and not, for example, as evidence of the excessive restrictiveness of asylum procedures. The inability to provide adequate and rapid protection to those who need it does not call into question European humanity but blames all those who are trying to exploit the systems of protection.

Such understanding is opening a space for measures of ever greater control, which are being implemented, e.g. fingerprinting, electronic recording of all asylum applications and facilitating the prompt treatment of unfounded asylum applications,[51] which are introduced precisely in order to provide protection to those who supposedly really need it. In such a context, all applications for asylum are implicitly labelled as unfounded in advance, but the demonstration process can show otherwise. By doing so, responsibility is transferred to refugees themselves, who must overcome the pre-emptive doubts accompanying their request for international assistance and prove that they are entitled to the protection accorded to them under international standards and commitments. Repressive measures of stricter control are introduced with a humanitarian discourse to ensure more just and faster protection for those who are supposed to need it.

Another visible theme that is characteristic of the humanitarian shift has become rescuing the lives at sea and in third countries, which is supposed to highlight the EU's humanitarian focus in times of enhanced border controls. However, as also Moreno-Lax notes in her study on securitisation of human rights, the changes in official language that gave rise to "saving lives" as a top priority have not resulted in an equal transformation of practices on the ground. "Neither policy goals, nor their underpinning rationale or the means to achieve them have been revised".[52] Apart from recognising a large number of casualties among offshore migrants and the EU's responsibility to save lives, concrete measures are then not directed towards greater humanity for people in need. Humanitarian measures are understood only as rescuing human lives, while all other measures are securitarian. In addition to rescuing human

[50] European Agenda on Migration (2015).

[51] Ibid.

[52] Moreno-Lax (2018, p. 120).

lives, the Frontex operations are intended to serve the identification and precise census of migrants, assist in return procedures in the context of "hotspot" approach, prosecute smugglers' networks and prevent the possibility of sailing vessels towards the EU coasts through "vessel destruction".[53] GAMM presents the prevention of illegal migration as a framework, which should provide mobility opportunities for third countries.[54] The 2015 Agenda on Migration presents an undoubtedly repressive measure of fingerprinting in the context of the "hotspot approach" as a measure of humanitarian aid, which is supposed to enable migrants a faster consideration of their asylum application where justified. Another aid measure that the Agenda mentions is "prevention of dangerous travels". Potential migrants should be rescued even before they decide to migrate to the EU beyond the existing legal frameworks. By rescuing, the Agenda proposes information campaigns that would convince third country citizens not to try to enter the EU illegally, without addressing their motives for migration nor the root causes of migration. In fact, "through a narrative of 'rescue' interdiction is laundered into an ethically sustainable strategy of border governance".[55]

3 Consequences of Discursive Shifts

The discursive shift from internal security and border enforcement into rescuing the lives of migrants does not change the predominant securitarian rationale of the concrete measures of the European migration policy nor does it provide a different way of perceiving migrants. On the one hand, the "increasingly human rights-friendly narrative" depicts migrants as victims of smugglers at sea,[56] while on the other hand, they are still perceived as "near-criminals",[57] who are exploiting the legal possibilities of entering the EU.

3.1 Migrants as Victims

The main consequence of the shift to humanitarian discourse is the portraying of migrants as victims of criminal activity. They are increasingly portrayed as victims of trafficking in human beings and smuggling networks, which is presented because of ignorance of the real situation and possibilities of legitimate entry into the EU, as well as of irresponsibility of third countries to solve security issues and thus contribute to safe migration for their citizens. As victims, migrants become subjects of compassion and solidary help. At the same time, they are reduced to passive

[53] European Agenda on Migration (2015).
[54] GAMM (2011).
[55] Moreno-Lax (2018, p. 119).
[56] Moreno-Lax (2018).
[57] Guild (2009).

subjects that need help, instead of being understood as active actors that demand their rights and search for a better life.

When understanding migrants as victims, considerable attention is placed on the measures taken to combat smuggling networks, which are supposed to be intended to help the victims of exploitation, but the main measure in this field is the destruction of smugglers' vessels, which is supposed to contribute to reducing the exploitation of vulnerable migrants. The EU would this way show that it is serious about the fight against organised crime. The main attention of these policy measures is shifted from migrants to smugglers that facilitate their transit.[58] This establishes an understanding that the operation of criminal organisations is the cause and not the consequence of the people's need to migrate in the absence of legitimate and orderly routes to enter the EU. The term "destruction of vessels" underlines the militarisation of migration management in the Mediterranean, even though the measure is again presented as a measure of humanitarian aid to save the lives of vulnerable migrants. Moreno-Lax points to the equivalence that is being introduced discursively between interdiction/prevention-of-departure and rescue/saving-of-lives, which are understood in the European migration policy as synonymous. The actions against smugglers are becoming the main measure of migration policy, and the actions are getting more offensive, "proactively seeking to destroy the (only) means of mobility left to unauthorized crossers—even at the expense of the human rights (and life) of 'boat migrants'".[59]

The necessity to enforce securitarian measures is justified by exposing the fact that the dangerous crossings of the Mediterranean are in fact attempts to enter the EU illegally and "lives at sea" are understood as migrants who want to enter the EU irregularly, which enhances the link between migration and crime. This way, the humanity of European states, which is trying to save lives at risk, is confronted with the exploitative and criminal Other, who is trying to take advantage of humanitarian help and employ illegal ways to enter the EU. Rescuing lives at sea is presented as a humanitarian focus of the EU, even though it is an obligation that follows from international laws and conventions. At the same time, the themes of humanitarian catastrophes and offshore tragedies are part of the chapters on cooperation with third countries, which implies that such tragedies are a consequence of inadequate cooperation of third countries that the EU is helping through capacity building and development aid partnerships, with the aim of preventing further loss of life. Again, the EU is presented as an actor of solidarity and humanity, while third countries are presented as indifferent and irresponsible.

[58] Moreno-Lax (2018).

[59] Ibid., p. 127.

3.2 Novel Aspects of Production of Migrants' Foreignness

Whereas the softening of the discourse does not lead to less restrictive measures of the migration policy, it does establish a new field for the production of foreignness and the discursive (and ensuing legal and political) delineation of membership and belonging of migrants in the EU. The discursive shifts, mainly through the widening of themes and terminology, and through the integration of new sensitivities show a picture of greater liberalism and humanitarianism, but do not change the hierarchy of fundamental values, since all new themes remain subordinate to the securitarian aspects. The underlying assumptions and antagonisms of European migration policy, which frame migration as a security issue and then require the use of repressive measures, therefore do not change. Not even the shift to humanitarian discourse, which only portrays the restrictive and securitarian measures as humanitarian aid. Therefore, although humanitarian discourse is becoming more exposed, it is merely the other side of the coin of the discourse on security. Also, humanitarian discourse itself is intertwined with a post-humanitarian ethos of governance, which places itself at the centre of charity, understanding each effort as a significant gesture of hospitality, while ignoring the historical and social circumstances, which make humanitarian aid needed at all. This way it only maintains the status quo of global social relations. The ultimate goal of EU actions in the field of migration, which are presented as humanitarian, is neither help out of pity, neither an attempt to change the root causes of global inequality, which were, according to Chouliaraki characteristics of modern solidarity, but security and economic prosperity of the EU.[60] Development aid to third countries and externalisation of migration management serves both objectives, the securitarian one through the export of safety standards to third countries, and the economic one through facilitating mobility for the useful workforce. In the framework of asylum systems, help is subordinated to fraud prevention, which means that humanitarian aims are subordinated to security ones. In the framework of legal migration, the facilitation of mobility is conditioned by labour market needs. Therefore, humanitarian aims are subordinated to economic ones. Although the shift to humanitarian discourse gives an impression that "the human life of [the Vulnerable Others] means more", as Cuttitta writes in his analysis of the Mare Nostrum operation, this discourse does not change the repressive nature of migration policy.[61] The discourse about the fight against smugglers' networks, which is presented as a humanitarian measure to help migrants avoid deadly travels to the EU, is again strengthening the link between migration and crime, even organised crime. The discursive line that links migration with the worst forms of international crime could be defined as follows: migration—irregular migration— smuggling—human trafficking—international crime—terrorism. In such a discursive composition, criminality appears to be an inherent phenomenon of migration. As Moreno-Lax concludes,

[60] Chouliaraki (2012).

[61] Cuttitta (2015, p. 131).

"smugglers/traffickers have been reconfigured into the immediate causes of unauthorised migration and exploitation, with migrants victimised and 'protected' from abuse through their neutralisation—regardless of other consequences on their legal agency and rights".[62]

Such position preserves the fundamental dichotomy of European migration policy, which is the dichotomy inside/outside,[63] where the field inside is labelled by values such as freedom, security, justice, humanity, while the field outside is an area of origin of all the dangers and threats, characterized by violations, abuse, and crime. The demarcation in geographical terms follows the EU external borders,[64] in policy terms it extends to the countries of origin and transit where the EU exports its safety standards through its foreign policy,[65] and in terms of culture it follows the line of values of humanity against attempts to exploit the systems of protection and mobility.[66] The EU is represented as an actor of humanity and a guardian of values, in opposition to the Other, which is seen to exploit such humanity and threaten the fundamental values. This, again, leads to the legitimation of control practices that are considered necessary to maintain security within the European area. Therefore, as Bigo and Guild pointed out that the earlier migration policy of the EU was characterized by "control in the name of freedom", the current policy on migration is characterised by humanitarianism in the name of security, which does not eliminate the primacy of the securitarian aspect of the European migration policy.[67] This keeps the underlying assumptions of migration policy that immigration is primarily a threat to internal order, stability, and security, while migrants are equipped with a negative image even before they reach the EU territory, which leads to racism and xenophobia,[68] or a priori marginalisation.[69]

4 Migrants Remain the *Other*

The security framework of the migration policy is related to the perception of immigrants as foreigners who are "marginalised because they come from outside, outside of our community",[70] and this idea did not change with the analysed discursive shifts. Migrants are still excluded from the European social tissue, not just as foreigners, but also as foreigners who are dangerous to the reproduction of the social tissue alone.[71]

[62] Moreno-Lax (2018, p. 130).
[63] Balibar (2007).
[64] Walters (2004).
[65] Guild (2009).
[66] Triandafyllidou (2010).
[67] Bigo and Guild (2005a).
[68] Huysmans (2000).
[69] Calavita (2005).
[70] Ibid., p. 13.
[71] Huysmans (2000).

Calavita points out that immigrants are not only criminalised and marginalised but that their difference is stigmatised as a personal characteristic, which makes them unsuitable for social inclusion.[72] Balibar recognises such a policy of separating those who are not compatible with the nation's essence as a contribution to the European apartheid, which he treats as the second stage in the development of the EU and its search for identity,[73] while Bauman identifies such a distinction as one of the main characteristics of racism.[74]

The identified discursive shifts that change the way European migration policy is articulated seemingly broaden the perspectives of immigration in the EU, but through the intertwining of different discursive elements keep the underlying assumptions about migration as a threat, which leads to their further criminalisation and marginalisation. Even the shift to humanitarian discourse means that also the measures which are aimed at securitisation of the EU are presented as humanitarian and solidary help to people in need, including border control measures, migration management in third countries, mechanisms of preventing access and also return and readmission measures.

Migrants remain dehumanised, either as a threat, either as victims or as labour, while no discursive change contributes to their empowerment into actors of their destinies, who would be entitled to the demands for membership and belonging in the societies of immigration. They remain the Others, those who do not belong, those outside, who we otherwise want to help, but only as long as they remain spatially separated, and do not change the status quo of our comfort, habits, statuses. When they cross the boundaries of our territory and become beneficiaries of our benefits, fear emerges. The shifts in discourse do not change the fundamental assumptions about the threatened EU and the otherness of migrants, and thus maintain the boundaries of (not)belonging of migrants and open a space for the repressive measures of preventing access. Therefore, one of the main challenges in the future will be how to open up the space for other discourses, such as the discourse of freedom, autonomy, emancipation, rights, and for alternative approaches to defining membership and belonging, which would encompass new possibilities of transnational residence that migrants, refugees, asylum seekers represent. Another challenge will be how to detect and recognise exclusion and even criminalisation of migrants in these changed narratives of migration policy, which are characterised by affirmative discourses of fundamental European values, protection of human lives, humanity and humanitarianism; thus by discourses that used to be considered as related to the fundamental European values.

[72] Calavita (2005).

[73] Balibar (2007).

[74] Bauman (1999).

References

Albahari M (2015) Crimes of peace: Mediterranean migrations at the world's deadliest border. University of Pennsylvania Press, Philadelphia
Aliverti A (2012) Making people criminal: the role of the criminal law in immigration enforcement. Theor Criminol 16(4):417–434
Babayan D (2011) Balancing security and development in migration policy: EU mobility partnerships. Natolin best Master thesis. College of Europe Natolin Campus
Balibar É (2007) Mi, državljani Evrope? Meje, država, ljudstvo. Sophia, Ljubljana
Bauman Z (1999) Modernity and the holocaust. Polity Press, Cambridge
Bigo D (2005) Frontier controls in the European Union: who is in control? In: Bigo D, Guild E (eds) Controlling frontiers: free movement into and within Europe. Ashgate, Aldershot, pp 49–99
Bigo D, Guild E (2005a) Policing at a distance: Schengen visa policies. In: Bigo D, Guild E (eds) Controlling frontiers: free movement into and within Europe. Ashgate, Aldershot, pp 233–263
Bigo D, Guild E (2005b) Introduction—policing in the name of freedom. In: Bigo D, Guild E (eds) Controlling frontiers: free movement into and within Europe. Ashgate, Aldershot, pp 1–13
Broeders D (2007) The new digital borders of Europe: EU databases and the surveillance of irregular migrants. Int Sociol 22(1):71–92
Brown W (2010) Walled states, waning sovereignty. Zone Books, New York
Calavita K (2005) Immigrants at the margins: law, race, and exclusion in Southern Europe. Cambridge University Press, Cambridge
Chouliaraki L (2012) The ironic spectator: solidarity in the age of post-humanitarianism. Polity Press, Cambridge
Convention implementing the Schengen Agreement (1985) Accessed May 11, 2016. http://www.mzz.gov.si/fileadmin/pageuploads/konzulara/Schengenski_izvedbeni_sporazum_-_slo.pdf
Cuttitta P (2015) Humanitarianism and migration in the Mediterranean borderscape: the Italian-North African border between sea patrols and integration measures. In: Brambilla C, Laine J, Bocchi G (eds) Borderscaping: imaginations and practices of border making. Ashgate, London, pp 131–140
De Giorgi A (2010) Immigration control, post-fordism, and less eligibility: a materialist critique of the criminalization of immigration across Europe. Punish Soc 12(2):147–167
Düvell F (2006) Illegal immigration in Europe: beyond control? Palgrave Macmillan, New York
European Agenda on Migration (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_sl.pdf
European Council Conclusions (2014) http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/sl/pdf. Accessed 11 May 2016
Fairclough N (2003) Analysing discourse textual analysis for social research. Routledge, London
Fassin D (2005) Compassion and repression: the moral economy of immigration policies in France. Cult Anthropol 20(3):362–387
Fine B (2009) Development as zombieconomics in the age of neo-liberalism. Third World Q 30(5):885–904
GAMM (2011) http://ec.europa.eu/dgs/home-affairs/news/intro/docs/1_en_act_part1_v9.pdf
Guild E (2009) Security and migration in the 21st Century. Polity, London
Hague Program (2004) http://eur-lex.europa.eu/legal-content/SL/TXT/PDF/?uri=CELEX:52005XG0303(01)&qid=1460478171190&from=EN
Hayes B, Vermeulen M (2012) Borderline—the EU's new border surveillance initiatives. Heinrich Böll Foundation, Study. http://www.statewatch.org/news/2012/jun/borderline.pdf
Huysmans J (2000) The European Union and the securitization of migration. J Common Market Stud 38(5):751–777
Jones R (2017) Violent borders: refugees and the right to move. Verso, London
Melossi D (2003) 'In a peaceful life': migration and the crime of modernity in Europe/Italy. Punish Soc 5(4):371–397

Mezzadra S, Neilson B (2013) Border as method, or, the multiplication of labor. Duke University Press, Durham (North Carolina)
Moreno Lax V (2018) The EU humanitarian border and the securitization of human rights: the 'Rescue-through-interdiction/rescue-without-protection' Paradigm. J Common Market Stud 56(1):1–19–140
Pallister-Wilkins P (2017) Humanitarian rescue/sovereign capture and the policing of possible: responses to violent borders. Glob Policy 8(1):19–24
Pallitto R, Heyman J (2008) Theorizing cross-border mobility: surveillance, security and identity. Surveil Soc 5(3):315–333
Parker O (2013) Cosmopolitan government in Europe: citizens and entrepreneurs in postnational politics. Routledge, Abingdon
Philo G (2007) Can discourse analysis successfully explain the content of media and journalistic practice? J Stud 8(2):175–196
Philo G, Berry M (2004) Bad news from Israel. Pluto Press, London
Sassen S (2000) Guests and aliens. The New Press, New York
Stockholm Program (2011). Accessed May 11, 2016. http://eur-lex.europa.eu/legal-content/SL/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN
Stumpf JP (2006) The crimmigration crisis: immigrants, crime, & sovereign power. Bepress legal series (paper 1635). http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=aulr
Tampere European Council (1999, 15 and 16 October) Presidency conclusions 1999. Accessed May 11, 2016. http://www.europarl.europa.eu/summits/tam_en.htm
The European Agenda on Security (2015) COM (2015) 185 final. Accessed May 11, 2016. http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf
The Palma Document (1989) http://www.statewatch.org/semdoc/assets/files/keytexts/ktch1.pdf
Treaty of Amsterdam (1997) Accessed May 11, 2016. http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf
Treaty on European Union (1992) Accessed May 11, 2016. http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf
Triandafyllidou A (2010) Irregular migration in Europe in the early 21st century. In: Triandafyllidou A (ed) Irregular migration in Europe: myths and realities. Ashgate Publishing, Aldershot, pp 1–22
Tsoukala A (2005) Looking at migrants as enemies. In: Bigo D, Guild E (eds) Controlling frontiers: free movement into and within Europe. Ashgate, Aldershot, pp 161–192
van Dijk T (2002) Multidisciplinary CDA: a plea for diversity. In: Wodak R, Meyer M (eds) Methods of critical discourse analysis. Sage, London, pp 95–120
Walters W (2004) The frontiers of the European Union: a geostrategic perspective. Geopolitics 9(3):674–698
Walters W (2006) Rethinking borders beyond the state. Comp Eur Polit 4(2–3):141–159
Wodak R (2006) Mediation between discourse and society: assessing cognitive approaches in CDA. Discourse Stud 8(1):179–190

The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention

Izabella Majcher

Abstract This chapter argues that despite its formal administrative label, pre-removal detention regulated under the European Union (EU) Directive 2008/115/EC (hereafter Returns Directive) is not limited to non-punitive purposes. In the context of the EU's current measures to strengthen the effectiveness of the return policy, the punitive potential of detention-relation provisions of the Directive became flagrant. The underlying rationale behind the current interpretation of the Directive is a policy of deterrence, retribution, and incapacitation. While immigration detention under EU law may be in practice punitive in nature, the protective features that accompany criminal processes are not always assured within immigration procedures, because of their administrative classification. This gap—the *crimmigration* phenomenon—allows states to benefit from the broader discretion typical of administrative proceedings and exacerbates migrants' vulnerability. As the chapter concludes, to tackle the crimmigration phenomenon within the EU pre-removal detention regime, arguments should focus on the prohibition of arbitrary detention and the right to an effective remedy, benefiting every detainee.

1 Introduction: The EU's Obsession with the Effectiveness of "Return"

Rather than prompting a genuine humanitarian and protection-oriented response, the 2015–2016 so-called refugee crisis has triggered a series of restrictive measures adopted both by the European Union (EU) and the Member States, including border fences, employment of armies at the border, empowering the EU border agency,

The views expressed in this chapter are those of the author and do not necessarily reflect the position of ECRE. This chapter had been finalised in August 2018, hence before the European Commission proposed a recast of the Returns Directive which includes issues relevant to the discussion in the chapter.

I. Majcher (✉)
European Council on Refugees and Exiles (ECRE), Brussels, Belgium
e-mail: izabella.majcher@graduateinstitute.ch

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_6

and attempts to outsource refugee protection to non-EU countries (Greenhill 2016; Majcher 2017; Moreno-Lax and Giuffré 2019). At the EU level, these policies focus at either blocking the access to EU's protection systems or increasing the return rate of migrants to their countries of origin or transit countries. In relation to return, the need to more efficiently use the measures of the EU return policy, as laid down in the Directive 2008/115/EC (hereafter Returns Directive),[1] became the European Commission (hereafter Commission)'s mantra (2017d). Oblivious that higher numbers of protection seekers in 2015 reflected total lack of safety in various world regions and that irregular entries and stays frequently result from inadequate legal pathways to the EU and regularisation schemes, the Commission presents the effectiveness of return as a panacea for the "crisis" the EU faces. For the Commission, the effectiveness of the return system is meant to increase the return rate and discourage migrants from coming or staying in an undocumented way. The Commission identified over thirty actions to improve the effectiveness of the EU return system, including via information sharing, enhancing voluntary return, strengthening the EU border agency's role in return, increasing financial assistance, or signing new readmission agreements (2017c). Among these measures, immigration detention has come to the forefront. As the Commission's 2017 *Recommendation on making returns more effective* (hereafter Returns Recommendation) shows, for the Commission, detention is an essential element to enhance the effectiveness of EU's return system (2017d, § 16). The use of detention according to the Commission's guidance is not without punitive features.

Using the return-related measures laid down in the Returns Directive, including pre-removal detention, for punitive purposes raises questions of their adequacy and appropriateness. Traditionally, return and detention are understood as administrative and bureaucratic measures. As the European Court of Human Rights (ECtHR) established in *Maaonia v. France*, decisions on the entry, stay, and deportation of non-citizens do not concern penal sanctions and thus do not warrant the fair trial guarantees laid down in Article 6 of the European Convention on Human Rights (ECHR) (2000a, § 39–41). The same rationale underlies the regulation of detention set forth in the Returns Directive. What justifies this formal administrative classification is an assumption that detention of non-citizens is a preventive and non-punitive measure aimed solely to enforce migration and asylum policy (Bosworth and Turnbull 2015, 4; Leerkes and Broeders 2013, 80). The current phenomenon, whereby pre-removal detention displays some punitive characteristics, is not new, however. For over a decade, legal and social science scholars have discerned that United States' criminal enforcement and immigration control systems have become increasingly intertwined. Broadly called "criminalisation of migration," this trend manifests itself in different ways, all of which are negative for migrants, ranging from rhetoric conflating migration with criminality to harsher migration measures (Chacón 2009; Legomsky 2007; Miller 2003). This convergence between criminal and immigration law was dubbed "crimmigration" (Stumpf 2006; García Hernández 2015) and, more recently, its various aspects have been identified in Australia (Billings 2019), Canada (Derrick 2013), and European countries (Desmond 2013).

[1] OJ 2008 L 348/98, 24 December 2008.

This chapter aims to contribute to the critical discussion on the interaction between penal and (administrative) migration law. It explores punitive elements of the pre-removal detention regime under the Returns Directive, by focusing on the rationale behind and consequences of this phenomenon. The chapter utilises the term "crimmigration" in a narrower sense, referring only to the detention of migrants in particular. Additionally, whereas immigration detention may not always and necessarily constitute the phenomenon of crimmigration *per se*, it can fall under the label of crimmigration where it manifests punitive functions or effects. There are two broad facets of this phenomenon (Stumpf 2013). The first trend, also called "(formal) criminalisation of migration," refers to the use of criminal sanctions for violations of (administrative) immigration law. A recent and blatant example of this trend is the 2015 amendment to the Hungarian Criminal Code which introduced three new crimes related to the crossing of the border from Serbia, including unauthorised entry through the border fence, damaging the fence, and obstructing its construction, which are punishable by up to 3–5 years of imprisonment (Hungarian Helsinki Committee 2015). The most extreme forms of formal criminalisation of migration involve imprisonment for merely an irregular entry or stay itself, which is possible in at least a quarter of countries implementing the Directive.[2] The Court of Justice of the European Union (CJEU)'s rulings in *El Dridi* (2011b) and *Achughbabian* (2011a) reveal that the Directive does limit states' power to punish status-related offences with criminal incarceration (Mitsilegas 2016, 41–43). As the CJEU stressed, domestic penal provisions must not undermine the overarching EU's objectives regarding return. Since imprisonment invariably delays removal and thus impedes the effectiveness of return, imprisonment for the failure to comply voluntarily with the return decision or for the irregular stay itself, imposed during or before expulsion proceedings, may be at odds with the Directive. Rather than imprisoning the non-citizen, states should pursue their efforts to enforce return (2011b, § 53–59; 2011a, § 33–43). While laudable, this interpretation of the Directive has only a limited impact on the criminalisation of migration because states are still free to impose a sentence of imprisonment once removal has failed (CJEU 2011b, § 60; CJEU 2011a, § 48).[3]

The chapter focuses on the second facet of crimmigration, which embraces circumstances where penal features are more latent. The most visible aspect of this trend refers to including criminal offences within the lists of grounds justifying expulsion under immigration legislation. More broadly, this trend refers to the incorporation of criminal law's priorities, functions, and techniques into immigration law. As observed by Legomsky, this incorporation has a "consciously asymmetric form," meaning that "immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication" (2007, 468). In line with this understanding of

[2]These countries include AT, DE, FR, HR, LT, LV, and SE. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019). See also the annex to European Union Agency for Fundamental Rights (2014).

[3]In addition, the Directive does not preclude imposing (non-custodial) pecuniary penal sanctions during return proceedings (CJEU 2012, § 36).

criminalisation, the chapter assesses punitive elements embedded in the regulation of the pre-removal detention under EU law, in particular as currently interpreted by the Commission.[4] Against this background, the chapter first discusses the underlying causes of the current interpretation and use of the detention-related provisions of the Returns Directive. As it argues, the rationale behind the Commission's Returns Recommendation is an attempt to deter, punish, and incapacitate unwanted non-citizens. Formally administrative pre-removal detention incorporates criminal law priorities and functions and manifests thus a crimmigration phenomenon (Sect. 2). Secondly, the chapter looks at the consequences of using immigration detention for these punitive purposes. The dissonance between a formally administrative form of detention and its underlying punitive purposes affords a greater discretion to governments. At the same time it renders immigration detainees more vulnerable (Sect. 3). The final section argues that a proper application of the principle of non-arbitrariness and the right to an effective remedy should close this gap (Sect. 4).

2 The Punitive Rationale Behind the Current Interpretation of the Returns Directive

The fair trial guarantees under Article 6 of the ECHR apply in the determination of criminal charge. The ECtHR recognised that states could easily evade these guarantees by defining an infraction or procedure as administrative rather than criminal in their domestic legislation. It acknowledged that there might be proceedings that are formally administrative but that are criminal in nature. In *Engel v. the Netherlands*, the Court established three non-cumulative criteria to distinguish criminal proceedings from administrative ones: the formal classification of the proceedings under domestic law; the nature of the offence; and the nature, severity, and purpose of the penalty (1976, § 81–82). If the assessment shows that the proceedings are in fact of criminal nature, it does not, however, entail that the state should transfer the proceedings into its penal law processes. All that the ECtHR requires is that such formally non-criminal proceedings do ensure the fair trial guarantees.

The analysis of the provisions of the Directive will rely on the last *Engel* criterion—the nature, severity, and purpose of the sanction. In terms of the nature of the sanction, among pecuniary and custodial sanctions, the deprivation of liberty most easily reveals a criminal character of a penalty. Yet, the key factor in assessing a potential penal character of the sanction is its purpose. According to the Strasbourg Court, "[in] a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental" (1976, § 82). Hence, a punitive purpose of deprivation of liberty creates a

[4]For a discussion on the punitive nature of formally administrative immigration detention in the United States, see García Hernández (2015) and in the Netherlands, see Leerkes and Broeders (2013).

strong presumption of a criminal character of that detention. The Court also explicitly ruled that "the purpose of the penalty, being both deterrent and punitive, [suffices] to show that the offence in question was, in terms of Article 6 […] of the Convention, criminal in nature" (1984a, § 53). This presumption can be rebutted if the effect that detention has on the detainee is not "appreciably detrimental," meaning that the individual is not disproportionally prejudiced.

The purpose of detention is thus the main factor revealing whether it is a purely administrative sanction or contains some punitive elements. The purposes, both explicit and implicit, of immigration detention can be deduced from the justifications states give for detaining non-citizens. The ensuing analysis discusses the grounds for pre-removal detention under the Returns Directive, in particular as currently interpreted and emphasised in the Commission's Returns Recommendation. Arguably, besides non-punitive administrative functions, immigration detention sanctioned under EU law may also pursue the traditional objectives of the criminal justice systems. In particular, the underlying rationale behind the Commission's current interpretation of the detention provisions is a policy to deter (2.1), punish (2.2), and incapacitate (2.3) unwanted non-citizens.

2.1 Deterrence

The Directive allows states to detain non-citizens on account of the risk of non-citizen absconding (Article 15(1)(a)). Some have argued that the risk of fleeing during return proceedings appears to be the sole ground reflecting the truly administrative and preventive character of immigration detention (Cole 2002, 1007; Cornelisse 2012, 223). If an individual represents a risk of absconding during return proceedings, administrative detention aims to prevent his flight and is thus necessary to ensure his presence at the removal. When maintained for the shortest time possible and carried out in appropriate conditions, detention on this account tends to be a genuine administrative measure.

Sometimes detention formally aiming at prevention of absconding also pursues other, hidden, objectives. More often than not, a purpose of detention is also to discourage non-citizens from seeking asylum or staying irregularly. In such circumstances, formally administrative detention operates like a deterrence which typically belongs to the sphere of criminal law. According to the consequentialist or utilitarian theory of punishment, one of the functions of punishment is to curb criminality or, more broadly, undesired behaviour. Based on the specific deterrent rationale, the fear of punishment would deter wrongdoers from reoffending. The general deterrence theory is even better suited to the migration context. It holds that by the threat of punishment, potential offenders are discouraged from committing impugned acts (Dolinko 2011; Tonry 2011).[5] In order for detention formally justified by the risk of

[5]For a discussion on deterrent function of deportation or detention, see Demleitner (2002, 1068–71), Kanstroom (2000, 1893–94), Leerkes and Broeders (2013, 82), and Legomsky (2007, 514–15).

absconding to remain a non-punitive measure, it should comply with a number of human rights requirements. According to the well-established case law of the UN Human Rights Committee (HRC) (1997, § 9(2); 2006, § 7(2)), mirrored in recommendations of the UN Working Group on Arbitrary Detention (WGAD) (2018, § 19-24) and the UN Special Rapporteur on the Human Rights of Migrants (SRHRM) (2012, § 6), immigration detention is subject to the principles of necessity and proportionality. In particular, to be justifiable, detention should be ordered as a last resort when it is necessary to execute removal order, taking into account all circumstances of the particular case. It should also be proportionate to the ends sought by the authorities. Thus, the requirements of necessity and proportionality preclude systematic or quasi-automatic detention. Likewise, since administrative detention is by definition a preventive measure, it may be imposed only where there is something to prevent, i.e. the risk of absconding must be real.

The Directive fails to ensure these safeguards adequately. First of all, a flight risk must truly exist in a given case, to justify detention. The Directive does not unequivocally lay down clear safeguards to preclude authorities from using an alleged risk of absconding as a pretext for systematically detaining people in return proceedings. The term "risk of absconding" is not defined. It is merely described as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe" that a person under return procedures may abscond (Article 3(7)). In particular, the key concept—"objective criteria"—is to be defined only at the domestic level. As a result, some states have long lists of non-cumulative criteria revealing such risk. At least eight countries provide for 9–12 criteria.[6] The more criteria provided in the domestic legislation, the broader the legal basis for detention is, and thus the greater the chance that detention is imposed systematically, in contravention to the principles of necessity and proportionality. Besides, in the Returns Recommendation, the Commission instructs states to provide eight criteria revealing absconding (§ 15) and use three other ones as an indication of the fleeing risk (§ 16). This will extend states' lists of the relevant criteria and consequently lead to more detention. Furthermore, Article 3(7) of the Directive does not require states to enumerate and define these criteria in the domestic legislation exhaustively. This omission is at odds with the explicit recommendations by the WGAD (2018, § 22) and SRHRM (2012, § 69) that grounds should be enumerated exhaustively. More recently, the CJEU ruled in *Al Chodor* that the criteria for finding a risk of absconding should be set forth in the domestic legislation (2017, § 42–45). That notwithstanding, in domestic legislation of at least seven Member States the objective criteria are not enumerated exhaustively.[7] This lack of precision offers a broad discretion to authorities to decide whether a migrant displays a risk of absconding. If the person concerned is not likely

[6]These countries include AT, CY, EE, EL, LT, LV, MT, and NO. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

[7]These countries include AT, DE, EL, FI, NO, SI, and SK. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

to abscond, his detention is not necessary to carry out his removal. As a result, detention in such circumstances can hardly be said to pursue only preventive aims (Cole 2002, 1007; Wilsher 2012, 110).

Immigration detention on account of solely irregular status is a prime example of mandatory and punitive measure. The same holds for detention ordered formally on account of the risk of absconding when it is based solely on the person's irregular status in the country. The Directive does not adequately preclude it. The only relevant safeguard is enshrined in the preamble (§ 6), according to which, "decisions taken under [the] Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of irregular stay." While this provision reflects the necessity test, including the requirement of a case-by-case assessment, it is of a non-binding nature. However, the Luxembourg jurisprudence compensates for the fact that this provision has been placed in the preamble rather than in the operative part of the Directive. In *Sagor* (2012, § 41) and *Mahdi* (2014b, § 70), the CJEU held that the assessment relating to the risk of absconding *must* be based on an individual examination of the person's case. In *Zh. and O.* (2015, § 49), the Court referred more broadly to Recital 6 and reminded states that consideration goes beyond the mere fact of irregular stay. Despite the Luxembourg jurisprudence, currently, at least 27% of the Member States enumerate an irregular stay or entry as criteria to consider in the assessment of the risk of absconding.[8] Such detention conflicts with the principles of necessity and proportionality and non-punitive character of immigration detention. It may amount to a disincentive measure, aimed at deterring non-citizens from staying irregularly.

2.2 Retribution

In line with the retributive or desert-based rationale for punishment, offenders should be punished because they deserve it. Retributive punishment aims at reprimanding and sanctioning the wrongdoer for his acts or omissions (Dolinko 2011; Tonry 2011). Some retributive theorists argue that imprisonment also serves to persuade the wrongdoer to recognise his acts and repent (Duff 2005, 142–43).[9] Arguably, retributive elements can be traced in the pre-removal detention regime under the Directive. The Directive allows states to reprimand the person for his non-cooperative behaviour and to persuade him to rectify it. In the Returns Recommendation, the Commission relies on this option set forth in the Directive to urge states to use detention to punish lack of cooperation with the return process.

[8]These countries include DE, EE, FR, LT, LU, LV, NL, and SI. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

[9]For a discussion on retributive function of deportation, see Kanstroom (2000, 1893–1894) and Legomsky (2007, 514–515).

The Directive allows states to detain a non-citizen who avoids or hampers the preparation of the return (Article 15(1)(b)). The Directive does not, however, elucidate what acts would amount to hampering or avoiding the return. This ground is not supposed to cover cases of the risk of absconding since they are separately addressed in the Directive. Presumably it applies to situations where a non-citizen is patently not willing or able to abscond, but nevertheless, authorities characterise his acts as avoiding or thwarting return, such as self-injury to be hospitalised or refusal to board the removal flight. Detention on account of acts hindering the return sits uneasily with the administrative label. Such detention arguably seeks to reprimand such non-cooperative behaviour and persuade the person to rectify it. These are aims traditionally pursued by criminal sanctions. Such measure goes thus beyond non-punitive and purely administrative immigration detention. As Wilsher observes, "any detention imposed because of deliberate hampering [of return process] looks like a sanction; a punishment without a definite crime" (2012, 153).

From the EU perspective, avoiding or hampering return embodies non-cooperation with the process of removal. Indeed, a few states translated Article 15(1)(b) of the Directive into non-cooperation. In Denmark, non-citizens may be detained for the failure to cooperate with the deportation proceedings; in Norway, for non-cooperation in clarifying their identity; while Estonian legislation does not give any indication of the kind of non-cooperation justifying detention.[10] According to the EU, non-cooperation of the migrants impairs the effectiveness of return and should thus be overcome, by, *inter alia*, detention. In line with the Council of the European Union' Conclusions, to overcome migrants' lack of cooperation, states should use detention for the maximum period necessary for the completion of return procedures (2015, § 5). Likewise, in the Returns Recommendation, the Commission urges states to expand the circumstances justifying determination of absconding to include refusal to cooperate in the identification process or to provide fingerprints (§ 15) and, additionally, consider such criteria as explicit expression of the intention of non-compliance with the return decision or non-compliance with the period for voluntary departure (§ 16).

Finally, as will be discussed below, the Directive allows an extension of the length of detention from six to eighteen months when the return proceedings last longer due to detainee's lack of cooperation (Article 15(6)). A one-year extension because of the lack of cooperation may easily become retributive, in terms of both the effect and purpose of the sanction. Eighteen-month detention appears excessive for an allegedly administrative sanction, suggesting, rather, an underlying punitive nature. The authorities may rely on this ground to reprimand the person concerned for his allegedly non-cooperative behaviour and to compel him to cooperate. Moreover, the Directive does not establish what constitutes non-cooperation, leaving it to the discretion of executive officers to assess it.

[10]For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

2.3 Incapacitation

Finally, consequentialist or utilitarian criminal law theory points to incapacitation as a function of incarceration. An incapacitative objective of punishment refers to the isolation of the offender from the society (Dolinko 2011; Tonry 2011).[11] In the migration-enforcement context, this would refer to placing a migrant in immigration detention because of his criminal activity or broadly understood potential danger to public order. While deprivation of liberty in such circumstances may have sound justification, for instance, to protect the population, it is submitted that it is not the role of (administrative) immigration detention to isolate persons who potentially represent such a threat. Rather, criminal laws should equally apply to everyone, irrespective of migratory status. Under the Returns Directive, detention for public order reasons is not explicitly permitted, which aptly reflects these distinct functions of administrative and criminal detention. Yet, some of the provisions of the Directive may mitigate it.

First of all, Article 15(1) of the Directive does not list the grounds for detention in an exhaustive manner, thus in practice, states are not prevented from imposing pre-removal detention on account of public order. Unclear terms of this provision notwithstanding, the Luxembourg case law outlaws justification of pre-removal detention because of a threat to public order and safety. In *Kadzoev*, the domestic court referred a question to the CJEU whether, upon the expiry of the maximum permissible length of detention, the release of the detainee can be postponed due to his lack of valid documents and means of supporting himself, as well as his aggressive conduct. The Court responded in negative, highlighting that the Directive precludes that the detainee is not released immediately when the maximum period of detention set out in the Directive has expired. In particular, it held that "[the] possibility of detaining a person on the grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive" (2009, § 69–71). The decision in *Kadzoev* should be applauded, as it circumscribes the states' power to place non-citizens in pre-removal detention on public order and security grounds. In contravention to the *Kadzoev* ruling, over one third of the Member States maintain the provisions in their domestic legislation for pre-removal detention on account of the threat to national security or public order[12] or criminal offence (either a past or to prevent a prospective one).[13]

However, the limits of the *Kadzoev* ruling itself warrant highlighting. This judgement prevents states only from claiming public order or security-related reasons as

[11] For a discussion on incapacitative function of deportation or detention, see Demleitner (2002, 1068–1071), Kanstroom (2000, 1893–1894), Leerkes and Broeders (2013, 82), and Legomsky (2007, 514–515).

[12] The countries include CZ, DE, EL, FI, LT, and NL. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

[13] These countries include CH, FI, HR, NO, RO, and SE. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

autonomous justification for pre-removal detention under the Directive. Arguably, it does not explicitly preclude states from relying on these grounds *in combination with* other ones. This lack of clarity is generally used by states and the Commission. The Commission maintains that while states are not allowed to detain solely for public order reasons, they may still use these reasons as criteria for ascertaining the risk of absconding (2017a, 67). In addition, in the Returns Recommendation, it urges states to consider an existing conviction for a serious criminal offence as an indication that the person poses a risk of absconding (§ 16). This is reflected in states' laws. In domestic legislation of at least 40% of states, the criteria for finding a risk of absconding include the threat to national security, public order or safety[14] or (previous) convictions.[15] These criteria may serve states to bypass the implications of the CJEU's ruling in *Kadzoev*. It is difficult to find a direct link between these criteria and the risk that the non-citizens would abscond. It appears that these countries make use of immigration detention for purposes related to criminal law enforcement.

Further, under the Returns Directive, states may extend the initial six-month detention by twelve months where removal proceedings last longer because of a lack of cooperation by the detainee or the authorities of the destination country (Article 15(6)). As argued earlier, detention on this ground resembles retributive punishment, but it may also operate like incapacitation. If deportation cannot be carried out, the allegedly non-punitive goal of pre-removal detention disappears (Cole 2002, 1017–18). In such cases, continued detention may implicitly aim at protecting public order. It would serve to incapacitate persons whom authorities consider inclined to commit infractions due to lack of financial means, regular status or social support. As Wilsher highlights, "keeping aliens within a state by means of detention cannot be viewed as a measure of immigration regulation. Put simply, the control of immigrants does not necessarily amount to immigration control. Only measures that secure the physical expulsion of aliens (as opposed to their seclusion from the community) are truly immigration measures" (2012, 72 and 255). There is a widespread practice across the Member States of detaining the so-called "non-deportable" migrants. They are non-citizens who cannot be expulsed but whom the host state did not grant any legal status. They are left in a limbo situation, often with difficult access to even basic social rights, including health care or accommodation. Being thus perceived by authorities as likely to commit (petty) crimes to sustain themselves, in practice they risk being put in long-term and repeated immigration detention (Flemish Refugee Action et al. 2014, 50–61). Without the possibility to deport them, a hidden purpose of their immigration detention is to seclude them from the society to protect public order. Such detention may also implicitly aim at deterring them from staying irregularly in the host states.

Under Article 5(1)(f) of the ECHR, administrative pre-removal detention is justified only for as long as deportation proceedings are being conducted. In cases

[14]These countries include LT, LV, MT, NO, and RO. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

[15]These countries include CY, EE, EL, HU, LV, NL, NO, PT, and SI. For precise reference to these domestic provisions, see Chap. 8 in Majcher (2019).

where expulsion is not feasible due to the detainee's lack of cooperation or failure to issue travel documents by the destination countries, continued detention cannot be said to be effected with a view to deportation. According to the ECtHR, such situations lack a "realistic prospect of expulsion" and continued detention does not achieve immigration objectives, which makes it unlawful under the ECHR (2009c, § 64–68; 2010, § 67–74). Similarly, the Returns Directive lays down the concept of a "reasonable prospect of removal." It provides that detention is no longer justified if a reasonable prospect of removal no longer exists (Article 15(4)). However, in *Kadzoev*, the CJEU read this concept together with the maximum permissible 18-month length of detention. Accordingly, a reasonable prospect of removal means that removal can be carried out successfully within the 18 months and such a prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country within that period (§ 67). Such blanket permission to continue detention as long as it does not exceed eighteen months tends to be inconsistent with the above-mentioned Strasbourg case law. Above all, however, it allows authorities to use extended detention for incapacitation purposes.

As the foregoing assessment displayed, the Returns Directive provides grounds for detention which can be relied on by immigration authorities for punitive purposes. According to the ECtHR's judgement in the *Engel* case, the punitive purpose of sanction creates a strong presumption of a penal character of that sanction. Yet, this presumption may be rebutted if its severity or effect on the detainee are not "appreciably detrimental." The effect on detainee is usually assessed based on the length and conditions of detention. Does the Directive adequately ensure non-punitive length and conditions of detention to rebut the presumption of punitive character of this measure?

In assessing the impact of the detention on the detainees, the ECtHR looks at the maximum length of detention under the law that may be imposed rather than the duration imposed, even if the practice shows that the maximum is rarely applied (2003, § 120–129). As mentioned earlier, the Directive introduces two upper time limits, namely six months which may be extended by 12 months (Article 15(5)–(6)). Ten UN independent experts (SRHRM 2009, § 90) and the Parliamentary Assembly of the Council of Europe (2010, § 5) explicitly labelled the 18-month detention period under the Directive as excessive. Despite these concerns, currently, 57% of the Member States have an eighteen-month time-limit, and further 17% allow detention for up to twelve months.[16] In the Returns Recommendation, the Commission regretted that the maximum duration of detention currently used in a number of the Member States is shorter than the one set out in the Directive. It held that these short periods of detention precluded effective removals (§ 17) and called upon the Member States to provide in their national legislation for a maximum initial period of detention of six months and the possibility to further extend this period until 18 months (§ 10(b)). Not only does the length of detention fail to rebut a presumption

[16]The 18-month period is set forth in legislation of BG, CH, CY, CZ, DE, DK, EE, EL, HR, LT, LV, MT, NL, NO, PL, RO, and SK; while the 12-month period is applicable in FI, HU, IT, SE, and SI.

of a punitive character of immigration detention under EU law but also it may even strengthen this hypothesis.

In terms of the place and conditions of detention, the Returns Directive prioritises the use of dedicated immigration detention facilities (Article 16(1)). Yet it also allows states to hold migrants in prisons, when they cannot provide for dedicated immigration facilities. In its ruling in *Bero and Bouzalmate*, the CJEU reiterated that the possibility to use prisons is a derogation from the principle that as a rule immigration detention should take place in specialised facilities and, as such, it should be interpreted narrowly (2014a, § 25). While this ruling considerably restricts the use of prisons for confining migrants, in practice police or border guard stations are most frequently used in Europe as a substitute for specialised detention facilities (Majcher 2014). In addition, the Directive does not lay down minimum material conditions to be guaranteed to migrants in detention. In practice, it is common for the EU states to subject immigration detainees to prison-like conditions and a securitised regime of detention. Some of the dedicated centres look like prisons and the detainees are held in their cells most of the time (Majcher, Flynn, and Grange 2020). Arguably, prison-like conditions render detention punitive in practice, even if it would have served truly administrative objectives (Pauw 2000, 323). In the Returns Recommendation, the Commission calls upon states to increase their detention capacity, by, among other, using the Directive's derogation clause for emergencies (§ 10(c)). Under this clause, in situations where an exceptionally large number of non-citizens places an unforeseen heavy burden on the capacity of the detention facility, states may derogate from the rule that non-citizens should be placed in dedicated detention facilities (Article 18(1)).

3 Resulting Inadequate Procedural Guarantees for Immigration Detainees Under the ECHR

As the previous section concluded, there is a dissonance between the administrative form of pre-removal detention and its punitive use in practice. This mismatch—the crimmigration phenomenon—is relevant because of the different level of discretion afforded to authorities depending on the form of deprivation of liberty. Deprivation of liberty occurs most commonly within the ambit of the enforcement of criminal law. Due to the impact that incarceration has on the rights and well-being of detainees, they are entitled to several procedural guarantees under the ECHR. Unlike incarceration, administrative detention, including immigration detention, refers to deprivation of liberty ordered by the executive branch of government—rather than the judiciary—without criminal charges or trial. The WGAD describes it as "arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants." It also highlights that "[the] practice of administrative detention is informed by the belief that by detaining a person, a preventive action has

been carried out thus securing society, community and State" (2010, § 77). While not banned under international law, administrative detention should nevertheless be used as an exceptional measure. Since it involves deprivation of liberty accompanied by lesser judicial guarantees and subject to a broader discretion of the executive, it is often inconsistent with the rule of law. Its widespread use poses a danger beyond the violation of individual rights; it could even displace the normal criminal justice system (Cole 2002, 1004–6; International Commission of Jurists 2012, 11). This section highlights the consequences of the punitive use of formally administrative detention. As noted by Legomsky, the formal legislative label allows states to "explicitly [reject] the procedural ingredients of criminal adjudication" (2007, 468). Although states use detention for punitive purposes, they continue enjoying broader discretion, typical for administrative processes. The discussion outlines a number of procedural differences between criminal and administrative detention under the ECHR, as reflected in the provisions of the Returns Directive, such as the presumption of innocence (3.1), a character of the review (3.2), and fair trial guarantees (3.3).[17]

3.1 Presumption of Innocence

By virtue of Article 5(3) of the ECHR, people charged with a criminal offence are entitled to a trial within a reasonable time or to release pending trial. Under Article 6(2) of the ECHR, they must be presumed innocent until proven guilty according to law. In conjunction, these two provisions favour release and oblige the authorities to consider alternatives to detention on remand. According to the ECtHR, if the risk of absconding can be avoided by bail or other measures, the accused must be released (2006, § 41; 2000b, § 83–84). Without explicit guarantees of Articles 5(3) and 6(2), the Court does not require states to demonstrate that immigration detention is necessary to prevent fleeing and to release a migrant when non-custodial measures could preclude potential absconding (1996, § 112; 2009a, § 164). The Strasbourg jurisprudence stands in stark contrast to the position of the HRC, WGAD, and SRHRM, as discussed earlier. Although these UN bodies subject immigration detention to the necessity test and require the observance of the presumption of innocence and prioritising non-custodial alternatives to detention, the ECtHR's case law presumably influenced the wording and implementation of the Directive's relevant standards. The Directive provides that detention may be imposed unless other sufficient but less coercive measures can be applied effectively in a specific case (Article 15(1)). This provision constitutes one of the rare instances where the Directive's standards are stronger than the Strasbourg ones. However, in order to be meaningful in practice, this provision should be coupled with an explicit presumption in favour of liberty

[17] This sections aims to briefly outline the main differences in procedural protections under the ECHR applicable to criminal detainees, compared to administrative detainees. However, stronger procedural safeguards can be, arguably, implied from Article 5(4) of the ECHR, as supported by a consistent body of recommendations of international human rights bodies, see Chap. 9 in Majcher (2019).

and a requirement to include alternatives to detention in domestic legislation and to consider them in each case. Currently, the majority of the Member States do provide for alternatives to detention in their national legislation. However, their implementation is rare (European Commission 2014, 15), which may be influenced by the lack of obligation to do so under the ECHR.[18]

3.2 Automatic and Judicial Character of the Review of Detention

Pursuant to Article 5(4) of the ECHR, every detainee is entitled to take proceedings by which the lawfulness of his detention is decided by a court. For people detained under penal law, the guarantees of Article 5(4) are broadened by Article 5(3) of the ECHR. By virtue of this provision, a person who is arrested on suspicion of having committed a criminal offence must be brought promptly before a judge or other officer authorised by law to exercise judicial power. Article 5(3) has two main implications.

First, it entails that a review of detention is automatic; the detainee does not need to apply for it (ECtHR 2006, § 34). In contrast, administrative detainees do not benefit from *ex officio* review of their detention within the ambit of the ECHR. The review proceedings of immigration detention can be made dependent on a preceding application by the detained person (ECtHR 1984b, § 57). This is reflected in the provisions of the Directive, which does not require the review of pre-removal detention to be conducted *proprio moto* by the court. Rather, it leaves an option for states. Accordingly, where detention has been ordered by administrative authorities, states should either provide for judicial review or grant the detainee "the right to take proceedings by means of which the lawfulness of detention shall be subject to a […] judicial review" (Article 15(2)). Likewise, the subsequent reviews should be carried out either *ex officio* or on application by the detainee (Article 15(3)).

Secondly, Article 5(3) of the ECHR has a bearing on the authority in charge of the review. People detained under criminal law have the right to review of their detention by a judge or other officer exercising judicial power. In turn, the notion of "court" under Article 5(4) of the ECHR does not necessarily imply classic court of law integrated within the standard judicial system of a country (ECtHR 1981, § 53). However, according to the ECtHR, the reviewing "court" should be independent of the executive and the parties to the case and observe fundamental guarantees of a judicial procedure (2008, § 35). It should not have merely advisory functions but the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful. Consequently, the review procedure must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (1996, § 127–130). Despite this set of requirements stemming from the

[18] See also De Senarclens (2013) who argues that the states' reluctance to use the alternatives to detention relates precisely to hidden criminal law functions that immigration detention fulfils.

Strasbourg jurisprudence, it appears that the lack of an obligation on states under Article 5(4) of the ECHR to involve a classic court of law in the review of non-penal detention influenced the drafters of the Directive. Under the Directive, the initial review of a pre-removal detention, if ordered by administrative authorities, is to be carried out by judicial authorities. On the other hand, the periodic reviews of continued detention are conducted by a judicial authority only in the case of prolonged detention periods (Article 15(2)–(3)).

3.3 Fair Trial Guarantees

Once a charge has been brought, according to Article 6(1) of the ECHR, the person is entitled to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." As noted earlier, in *Maaonia*, the Court explicitly refused to apply the guarantees under Article 6 to immigration detention proceedings. This stance might have influenced corresponding provisions of the Directive.

The right to a fair trial is based on the very principles of the separation of powers and the independence of the judiciary from the executive. This concept encompasses the intertwined requirements of equality of arms and adversarial proceedings. As elaborated by the ECtHR, equality of arms refers to a fair balance between the prosecution and defence, meaning that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (1993b, § 33). Proceedings are adversarial if both prosecution and defence have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (1993a, § 63). According to the Court, it is not always necessary that a procedure under Article 5(4) of the ECHR in relation to immigration detention is accompanied by the same guarantees as those required under Article 6 in relation to civil or criminal law proceedings. It should provide guarantees appropriate to the type of deprivation of liberty in question. For instance, the ECtHR found that in cases of detention pending extradition, an oral hearing was not necessary to ensure that the proceedings are adversarial (1986, § 51). The written procedure will comply with Article 5(4) if the detainee had access to his case file and was able to comment on it (2015, § 82). However, an extension of pre-removal detention without notifying the individual and inviting him to a hearing as established under domestic law renders this detention unlawful under Article 5(1) of the ECHR (2016, § 74–78). Thus, the ECHR does require that administrative detention proceedings ensure equality of arms and are adversarial, but the content of these guarantees tend to be narrower compared to penal proceedings. The Directive is silent about the guarantees applicable in the course of the detention proceedings, but this shortcoming has been remedied by the CJEU. According to *Mahdi,* the authority deciding on pre-removal detention should not only consider matters presented by the administrative authorities calling for the detention of the person but rather assess both the facts stated and the evidence adduced by the authorities and any observations that

may be submitted by the non-citizen. The tribunal should also be able to consider any other element that is relevant for its decision, should it so deem necessary (CJEU 2014b, § 62–64; European Law Institute 2017, 193–95).

Pursuant to Article 6(3) of the ECHR, the notion of fair trial embraces also minimum rights for accused in criminal proceedings, including the right to free legal assistance, when the interests of justice so require, and free linguistic assistance, if the person cannot understand the language used in the court proceedings. In line with the *Maaonia* approach, the ECtHR does not demand states to afford immigration detainees access to free legal and linguistic assistance. In a few cases, the Court however noted that absence of these forms of assistance might impede the accessibility of a remedy, required under Article 5(4) of the ECHR (2002, § 44; 2013, § 61). This ambiguity regarding states' obligations is reflected in the provisions of the Directive. The Directive provides that the Member States should ensure that the necessary legal assistance is granted on request free of charge, subject to several conditions (Article 13(4)). This provision also refers to domestic law and is not placed in Chapter IV, devoted to pre-removal detention, but in Chapter III, which addresses return decisions. The same holds for the linguistic assistance. In addition, the relevant provision of the Directive is not clear whether this assistance is to be provided free of charge (Article 13(3)). This latitude flowing from the lack of precision of the Directive is mirrored at the state level, as the majority of the Member States do not systematically grant the detainees free legal and linguistic assistance (Majcher, Flynn, and Grange 2020). Yet, while generally not breaching the ECHR, as interpreted textually by the ECtHR, such practice falls short of the EU law requirements. The right to legal and linguistic assistance to challenge one's detention can be implied from Article 47 of the Charter of Fundamental Rights of the European Union (Charter). Article 47(1) enshrines the right to an effective remedy for violations of the Charter's rights and thereby codifies the principle of effective judicial protection of EU law rights, which is a general principle of EU law. The right to liberty is enshrined in Article 6 of the Charter, hence, the right to an effective remedy for violation of this right benefit immigration detainees. The principle of effectiveness would be breached if non-citizens were prevented from seeking an effective remedy because of the lack of legal and linguistic support. Further, in contrast to Article 6 of the ECHR, Article 47(2) of the Charter extends the fair trial guarantees to all proceedings within the scope of EU law and Article 47(3) requires states to provide legal aid if it is necessary to ensure effective access to justice.

4 Conclusion: The Need to Re-articulate the Prohibition of Arbitrariness and the Right to an Effective Remedy

This chapter argued that despite its formal administrative label, pre-removal detention regulated by the Returns Directive is not limited to non-punitive purposes. While the Directive does contain a number of relevant safeguards, the broad wording of its

provisions allows punitive practices. Currently, in the context of the Commission's mantra about increasing efficiency of the EU return system, the punitive potential of immigration detention becomes evident. This mismatch between the administrative guise of detention and its actual punitive nature is a manifestation of crimmigration.

As discussed, the detention-related provisions of the Directive allow states to employ detention beyond its formal administrative and preventive purpose. The underlying rationale behind the current interpretation of the Directive by the Commission is a policy to deter non-citizens from seeking asylum or staying in an undocumented way, to reprimand migrants for allegedly non-cooperating with the authorities, and to seclude them from society. While immigration detention under EU law may be punitive in practice, because of the undisputed administrative label, protective features of criminal process are not assured. This gap—the crimmigration phenomenon—allows states to benefit from broader discretion typical for administrative proceedings and avoid, sometimes costly and time-consuming, procedural guarantees that should be ensured to individuals in criminal proceedings. The immigration detention thus selectively incorporates penal functions, which exacerbates migrants' vulnerability. Deprived of their liberty for punitive reasons, for extended periods of time, and often in prison-like conditions, they are not granted adequate procedural protection. As De Giorgi noted, it is "exactly the partial subtraction of immigration from the sphere of penal law that allows the suspension of the traditional guarantees of criminal justice: the fact that the detention, expulsion and deportation of immigrants are not considered as real "punishments", permits a de facto criminalisation which leaves aside the principles of the rule of law" (2006, 133). Likewise, as the SRHRM observed, "[criminal] law has built its guarantees over centuries because it was the field of law that could lead to death, torture and arbitrary detention. Today […] administrative law is more dangerous than criminal law: it is the only field of law that can lead to death, torture and arbitrary detention." Yet, "administrative law has not adopted many of the guarantees developed in criminal law, regarding rules of evidence and rules of procedure in particular. Some State authorities are pleased to use such lower standards, relating to the level of proof (balance of probabilities instead of "beyond a reasonable doubt"), the use of information or intelligence instead of properly admissible evidence, the increased possibilities for secret proceedings" (2013).

How to tackle the crimmigration phenomenon addressed in this chapter? The gap between using administrative measure for punitive purposes, on the one hand, and avoiding the concomitant stronger procedural protections, on the other, can be bridged from both sides. First, arguably, punitive use of administrative detention may render this measure arbitrary. There is no universally accepted definition of arbitrary detention. Yet, it is commonly agreed that in order not to amount to arbitrary deprivation of liberty, detention should adhere to the principles of lawfulness, proportionality and necessity, and good faith and should be maintained for non-excessive length and be carried out in adequate material conditions (ECtHR 2009c, § 60; HRC 2006, § 7(2); WGAD 2011, § 8). Regarding the requirement of lawfulness, Article 5(1)(f) of the ECHR allows states to detain non-citizens to carry out deportation. In circumstances where a return is not feasible, detention pursues

other aims, particularly incapacitation and deterrence. Such detention is not permitted under the ECHR. Under Article 5(1) of the ECHR, detention should be imposed on grounds and according to a procedure established in domestic law. Beyond the conformity with domestic law, the principle of lawfulness demands that domestic legislation satisfies the general principle of legal certainty; hence it must be sufficiently accessible, precise, and foreseeable in its application in order to avoid all risk of arbitrariness (ECtHR 2008, § 23). A legal provision allowing detention which is formally administrative but in practice functions akin to penal sanction is not foreseeable in its application and fails to satisfy the general principle of legal certainty and, consequently, the requirement of lawfulness. Preventive by definition, pre-removal detention should be necessary to prevent absconding during return proceedings. If the person is not prompt to flee, his detention does not comply with the necessity requirement. Furthermore, consciously using administrative detention for clearly punitive purposes will display a lack of good faith. This is particularly acute in case of using public order and security grounds as criteria for finding a risk of absconding to circumvent the *Kadzoev* ruling. Finally, 18-month detention period may turn even purely administrative detention into a punitive measure. The same holds when pre-removal detention is carried out in punitive conditions. On the other hand, the effect of crimmigration can be mitigated by affording stronger procedural guarantees to detainees. Where administrative immigration detention amounts in practice to a punitive sanction, immigration detainees should be granted some level of fair trial guarantees. In such circumstances, broader procedural protection could be implied from the right to an effective remedy under Article 5(4) of the ECHR, which should be both accessible and effective. Hence, to be able to access the remedy, detainees should be afforded the necessary legal and linguistic assistance. They should also have a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage toward the administrative authorities, in line with the principle of equality of arms.

References

Billings P (2019) Crimmigration in Australia: law, Politics, and Society. Springer, Singapore
Bosworth M, Turnbull S (2015) Immigration detention, punishment, and the criminalization of migration. In: Pickering S, Ham J (eds) The Routledge handbook on crime and international migration. Routledge, New York, pp 91–106
Chacón JM (2009) Managing migration through crime. Colum Law Rev Sidebar 109:135–148
CJEU (2009) Kadzoev. C-357/09 PPU
CJEU (2011a) Achughbabian. C-329/11
CJEU (2011b) El Dridi. C.61-11 PPU
CJEU (2012) Md Sagor. C-430/11
CJEU (2014a) Bero and Bouzalmate. C-473/13 and C-514/13
CJEU (2014b) Mahdi. C-146/14 PPU
CJEU (2015) Zh. and O. C.554/13
CJEU (2017) Al Chodor. C-528/15

Cole D (2002) Aid of removal: due process limits on immigration detention. Emory Law J 51:1003–1039
Cornelisse G (2012) Detention of foreigners. In: Guild E, Minderhoud P (eds) The first decade of EU migration and asylum law. Nijhoff, Leiden, pp 207–228
Council of the European Union (2015) Council conclusions on measures to handle the refugee and migration crisis
De Giorgi A (2006) Re-thinking the political economy of punishment: perspectives on post-fordism and penal politics. Ashgate, Aldershot
Demleitner NV (2002) Immigration threats and rewards: effective law enforcement tools in the "War" on terrorism? Emory Law J 51:1059–1094
Derrick T (2013) The foreign-born in the canadian federal correctional population. In: Guia MJ, Van der Woude M, Van der Leun J (eds) Social control and justice: crimmigration in the age of fear. Eleven, The Hague, pp 199–229
De Senarclens C (2013) State reluctance to use alternatives to detention. Forced Migr Rev 44:60–62
Desmond A (2013) Irregular immigrants and their Irish citizen children. In: Guia MJ, Van der Woude M, Van der Leun J (eds) Social control and justice: crimmigration in the age of fear. Eleven, The Hague, pp 303–316
Dolinko D (2011) Punishment. In: Deigh J, Dolinko D (eds) The Oxford handbook of philosophy of criminal law. Oxford University Press, New York, pp 403–440
Duff A (2005) Punishment and the morality of law. In: Claes E, Foqué R, Peters T (eds) Punishment, restorative justice and the morality of law. Intersentia, Antwerp, pp 121–143
ECtHR (1976) Engel and others v. the Netherlands. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72
ECtHR (1981) X v. the United Kingdom. 7215/75
ECtHR (1984a) Öztürk v. Germany. 8544/79
ECtHR (1984b) De Jong, Baljet and Van Den Brink v. the Netherlands. 8805/79, 8806/79, 9242/81
ECtHR (1986) Sanchez-Reisse v. Switzerland. 9862/82
ECtHR (1993a) Ruiz-Mateos v. Spain. 12952/87
ECtHR (1993b) Dombo Beheer B.V. v. the Netherlands. 14448/88
ECtHR (1996) Chahal v. the United Kingdom. 22414/93
ECtHR (2000a) Maaouia v. France. 39652/98
ECtHR (2000b) Jablonski v. Poland. 33493/96
ECtHR (2002) Conka v. Belgium. 51564/99
ECtHR (2003) Ezeh and Connors v. the United Kingdom. 39665/98 and 40086/98. GC
ECtHR (2006) McKay v. the United Kingdom. 543/03. GC
ECtHR (2008) Sadaykov v. Bulgaria. 75157/01
ECtHR (2009a) A. and Others v. the United Kingdom. 3455/05. GC
ECtHR (2009b) Abdolkhani and Karimnia v. Turkey. 30471/08
ECtHR (2009c) Mikolenko v. Estonia. 10664/05
ECtHR (2010) Massoud v. Malta. 24340/08
ECtHR (2013) Musa v. Malta. 42337/12
ECtHR (2015) Allah v. Latvia. 66166/13
ECtHR (2016) Richmond Yaw and Others v. Italy. 3342/11, 3391/11, 3408/11 and 3447/11
European Commission (2014) Communication from the Commission to the Council and the European Parliament on EU Return Policy. COM(2014) 199
European Commission (2017a) Annex to the Commission Recommendation establishing a common 'Return Handbook' to be used by member states' competent authorities when carrying out return related tasks. C(2017) 6505
European Commission (2017b) Commission recommendation on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council. C(2017) 1600
European Commission (2017c) Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union—A renewed action plan. COM(2017) 200

European Commission (2017d) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Delivery of the European Agenda on Migration. COM(2017) 558
European Law Institute (2017) Statement of the European Law Institute: detention of asylum seekers and irregular migrants and the rule of law
European Union Agency for Fundamental Rights (2014) Criminalisation of migrants in an irregular situation and of persons engaging with them
Flemish Refugee Action, Detention Action, Menedék, France terre d'asile, ECRE (2014) Point of no return: the futile detention of unreturnable migrants
García Hernández CC (2015) Crimmigration law. ABA, Chicago
Greenhill KM (2016) Open arms behind barred doors: fear, hypocrisy and policy schizophrenia in the European migration crisis. European Law J 22(3):317–332
HRC (1997) A. v. Australia. 560/1993
HRC (2006) Shafiq v. Australia. 1324/2004
Hungarian Helsinki Committee (2015) Tightening criminal rules targeting refugees. http://helsinki.hu/wp-content/uploads/modification-of-criminal-laws-16092015.pdf
International Commission of Jurists (2012) The definition and scope of arbitrary deprivation of liberty in customary international law: International Commission of Jurists (ICJ) submission to the working group on arbitrary detention
Kanstroom D (2000) Deportation, social control, and punishment: some thoughts about why hard laws make bad cases. Harvard Law Rev 113:1890–1935
Leerkes A, Broeders D (2013) Deportable and not so deportable: formal and informal functions of administrative immigration detention. In: Anderson B, Gibney MJ, Paoletti E (eds) The social, political and historical contours of deportation. Springer, New York, pp 79–104
Legomsky SH (2007) The new path of immigration law: asymmetric incorporation of criminal justice norms. Washington Lee Law Rev 64:469–528
Majcher I (2014) The EU returns directive and the use of prisons for detaining migrants in Europe. EU Law Analysis. http://eulawanalysis.blogspot.ch/2014/07/the-eu-returns-directive-and-use-of.html
Majcher I (2017) Border securitization and containment versus fundamental rights: the European Union's 'Refugee Crisis'. Georgetown J Int Affairs. https://www.georgetownjournalofinternationalaffairs.org/online-edition/border-securitization-and-containment-vs-fundamental-rights-the-european-unions-refugee-crisis
Majcher I (2019) The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal. Brill Nijhoff, Leiden
Majcher I, Flynn M, Grange M (2020) Immigration detention in the European Union: in the shadow of the "Crisis". Springer, Switzerland
Miller TA (2003) Citizenship and severity: recent immigration reforms and the new penology. Georgetown Immigr Law J 17:611–666
Mitsilegas V (2016) Immigration detention, risk and human rights in the law of the European Union. Lessons from the returns directive. In: Guia MJ, Koulish R, Mitsilegas V (eds) Immigration detention, risk and human rights: studies on immigration and crime. Springer, Dordrecht, pp 25–45
Moreno-Lax V, Giuffre M (2019) The Rise of consensual containment: from 'Contactless Control' to 'Contactless Responsibility' for forced migration flows. In: Juss S (ed) Research Handbook on international refugee law. Elgar, Cheltenham. pp 82–108
Parliamentary Assembly of the Council of Europe (2010) Resolution 1707(2010): Detention of asylum seekers and irregular migrants in Europe
Pauw R (2000) A new look at deportation as punishment: why at least some of the constitution's criminal procedure protections apply. Admin Law Rev 52:305–345
SRHRM (2009) Addendum: communications sent to governments and replies received. A/HRC/11/7/Add.1

SRHRM (2012) Report of the Special Rapporteur on the Human rights of migrants, François Crépeau: detention of migrants in an irregular situation. A/HRC/20/24
SRHRM (2013) FRA-ECtHR seminar on European law on asylum. Conclud Rem, Borders and Immigration
Stumpf JP (2006) The crimmigration crisis: immigrants, crime, and sovereign power. Am Univ Law Rev 56:367–419
Stumpf JP (2013) The process in the punishment in crimmigration law. In: Franko Aas K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, New York, pp 58–75
Tonry M (2011) Punishment. In: Tonry M (ed) The Oxford handbook of crime and criminal justice. Oxford University Press, New York, pp 95–125
WGAD (2010) Report of the working group on arbitrary detention: thematic considerations: administrative detention and habeas corpus. A/HRC/13/30
WGAD (2011) Report of the working group on arbitrary detention. Annex. A/HRC/16/47
WGAD (2018) Revised deliberation No. 5 on deprivation of liberty of migrants
Wilsher D (2012) Immigration detention: law, history, politics. Cambridge University Press, Cambridge

EU Conditionality in the Western Balkans: Does It Lead to Criminalisation of Migration?

Neža Kogovšek Šalamon

Abstract The responses of the European Union (EU) to migration challenges transcend the territories of the EU Member States and through externalisation of border control, spill over to the countries of the Western Balkans, through which runs one of the largest migration routes from the Middle East and Africa. While the Western Balkan countries show indifference towards the migrants and consider them a "problem" of the EU, the latter conditions European integration of these countries with the setting-up of institutions and migration policies similar to those in the EU. By transposing EU directives, such regulation necessarily brings criminalisation since the newly established norms are followed by sanctions not previously known to some of these legal systems (e.g. expulsion in case of irregular border crossing or detention). It also brings repression, since the regulation introduces surveillance measures against the individuals who in these jurisdictions previously enjoyed the freedom of movement. These processes point to the problematic role of the EU and national legislators in the Western Balkans region in relation to fundamental rights of migrants.

1 The Role of the EU in Setting Up Migration Management System

Institutional development in the field of asylum and migration management in the Western Balkan (WB) countries was driven in the past by the countries' own internal needs when they received refugees and internally displaced persons fleeing the wars of the 1990s. In the recent decade, however, this development has mostly been driven by external incentives such as a prospective European Union (EU) membership. The international actors that are most intensively involved in the development of asylum

N. Kogovšek Šalamon (✉)
Peace Institute, Ljubljana, Slovenia
e-mail: neza.kogovsek@mirovni-institut.si

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_7

institutions and procedures in the region are the United Nations High Commissioner for Refugees (UNHCR),[1] which played a crucial role in setting up the basic asylum mechanisms at the beginning of the new millennium, and the EU, which is seeking to "promote its model of border management as a first step in the process of integrating these countries into the EU".[2] The EU incentives to create migration management mechanisms have consequently led to the creation of a "buffer zone"[3] in the WB used by the EU to minimise phenomena such as irregular migration and security threats.[4] Besides, as presented below, in certain WB countries, other actors such as the US or foreign foundations have been involved in supporting institution building.

This chapter focuses on the role of one of these actors, namely the EU. More specifically, it is examining whether and how the EU's support for institutional development in the field of asylum and migration management is fuelling attitudes that could be considered to be criminalising migrants. For this purpose, a research analysis was done as part of the basic research project entitled "Crimmigration between Human Rights and Surveillance",[5] funded by the Slovenian Research Agency.[6] The main research question was to what extent does the EU membership conditionality, which leads to the adoption of new laws, building of new institutions and execution of new measures in the field of migration and asylum, lead to increased—or decreased—criminalisation of migrants who arrive to or transit through the region.

2 Methodology

To determine the extent of criminalisation of migration in the WB region, the research focused on several aspects of migration management architectures and practices.[7] The first focus was on the legislation and how it changed in the last decade—have new definitions of minor offences and crimes been added concerning migration and state border crossing? Have the sanctions foreseen for these offences changed? Is the irregular crossing of state borders a crime or a minor offence? The second focus was on detention: how many detention centres are in each of the countries concerned?

[1] Feijen (2008, p. 413).

[2] Celador and Juncos (2012, p. 202).

[3] Wolff (2008).

[4] Celador and Juncos (2012, p. 202), Trauner (2007, 2008) and Luli (2015).

[5] Project number: J5-7121, project duration: 2016–2018. More information about the project is available at http://www.mirovni-institut.si/en/projects/crimmigration-between-human-rights-and-surveillance/. The work on the publication was continued within the research program of the Peace Institute "Equality and human rights in times of global governance", no. 6037-24/2016/87, financed by the Slovenian Research Agency, 2020–2023.

[6] The name of the agency (the funding institution) in Slovenian is *Javna agencija za raziskovalno dejavnost Republike Slovenije*. More information about the agency is available at https://www.arrs.gov.si/en/.

[7] I would like to thank my research assistants Maria Saide Liperi and Erica Mail, who contributed to the outcomes of this research.

Have new incarceration facilities been established? Who funded the construction? What are the capacity of and the conditions in the centres? What is the practice of detaining asylum seekers: are they also detained, for how long, and on what grounds? Have the grounds of detention expanded or shrunk in the last decade? The third focus was on a return: what kind of returns are taking place, on what grounds, and where to? Are there indications of pushbacks (i.e. informal forced returns) and what is their extent? Last, the fourth focus of the research was on the actors involved in migration management and their attitudes towards migration and perceptions of authorities' approach to migration, with a particular view of whether they assess that their systems are criminalising migrants or not.

The analysis focused on five countries of the WB region—FYR Macedonia, Serbia, Bosnia and Herzegovina, Kosovo, and Montenegro. To obtain the required information and analyse them, several different methods were used, including a literature review, seven phone or Skype interviews with representatives of national or international organisations working in these countries, and the engagement of five legal consultants working in the field of migration and asylum law, one for each of the five countries. The consultants were asked to complete two questionnaires: the first one was an Excel chart that they were asked to fill with the information on different crimes and minor offences related to migrants who cross state borders. The second questionnaire consisted of open-ended questions asking for information and assessment of the state of affairs related to different elements of criminalisation of migration, such as sanctioning, detention, return, and institutional attitudes.

3 From *Laisser-faire* Attitudes to Systematic Detention and Pushbacks

The countries of the WB region, already complex and diverse, are responding differently to incentives offered by the EU that aims to increase the capacity of these countries to deal with migration and asylum requests. Changes are not visible much in the political and popular awareness on the importance of asylum as a way of ensuring protection to those who need it, but mostly in relation to the formal building of structures, procedures, and institutions that would ensure the countries to act as a *buffer zone*.[8] Namely, the EU agenda for the new Member States is not so much about shared values as it was, as Grabbe points out, to build the countries' capacities to participate in the Common Market and implement similar policies.[9] The fact that the WB countries indeed became more a buffer zone than a safe haven for migrants and asylum seekers is also seen from the fieldwork results of this particular research project. The data shows that some take a relaxed approach, register relatively low number of people in transit, ignore the fact that they are passing through, and keep low capacities, while others take the political pressure seriously and use relatively

[8] Wolff (2008).

[9] Grabbe (2014).

harsh methods that are questionable from the perspective of fundamental procedural and human rights standards.

However, despite these differences, it is notable that in all of the WB countries analysed in this study, the phenomena of migrant and refugee criminalisation has been strengthened. Besides, new features of criminalisation appeared in attitudes and procedures. In the following section, the most important characteristics of each country's system and situation are presented, highlighting only the critical elements that indicate the level of criminalisation of migration. The analysis, which was done between 2016 and 2018, does not comprehensively cover all aspects of migration and asylum systems in the region, only those that stand out in terms of migrant criminalisation.

3.1 Bosnia and Herzegovina: Systematic Detention

Bosnia and Herzegovina (BiH) is a potential candidate country for the EU membership, as it has not been granted the official status of a candidate by the EU Council yet. BiH was not affected by the so-called refugee crisis of 2015–2016, as the main migration route circumvented its territory. At the time of the mass transit through the Balkan route, which was the busiest to the EU,[10] the number of migrants and refugees entering BiH remained low. Coincidentally, while neighbouring countries dealt with mass arrivals and transit, in November 2015 BiH adopted the Aliens Act and in February 2016, the Asylum Act. With the new legislation, BiH sought further harmonisation with the EU asylum and migration *acquis*, which is a condition for prospective EU membership.[11] Harmonisation of the internal law with the EU *acquis* was one of the priorities of the BiH Government, both on the legislative level and in practice.[12]

The analysis of the BiH asylum and migration law and the legislative history in this field indicate that the number of minor offences for which a person may be charged has increased slightly in the last decade. In 2015, the definitions of new types of minor offences appeared in the law because of the adoption of the 2015 Aliens Act.[13] For instance, the irregular work of migrants has become criminalised for the first time, but also more administrative types of minor offences were added to the list, such as "a failure to apply for an extension of temporary residence permit".[14] In general, on the formal level, we could conclude that the level of crimmigration of migrants in BiH is still rather low. However, other more practical indications bring to a different conclusion.

[10] European Parliament (2016).

[11] Before the adoption of these new laws, BiH already had a Movement and Stay of Aliens and Asylum Act, which was enacted in 2008 and amended in 2012. However, it was in need of a reform.

[12] BiH expert Interview 1, 1 February 2018; BiH expert interview 2, 6 February 2018.

[13] Bosnia and Herzegovina, Aliens Act, BiH Official Gazette, No. 88/2015, 17 November 2015.

[14] Excel sheet for BiH completed by consultant from BiH, April 2018.

Namely, before BiH became a "bottleneck" on the WB migration route in the summer of 2018, something that was specific for the BiH state was systematic detention of all irregularly staying non-nationals. The measure is formally called "placement under surveillance", not deprivation of liberty. The BiH law prescribes the measure of surveillance for people irregularly present at Bosnian territory who do not want to apply for asylum,[15] with the aim of expulsion.[16] In principle, the authorities are only allowed to detain people who are not recognised as asylum seekers. However, in half of all asylum cases, asylum seekers were not identified as such at their first contact with the authorities. They were treated as irregular migrants, placed in detention and could only apply for asylum from the immigration detention centre, as provided by Article 33 of the Asylum Act.[17] Hence, there is a need to improve the capacity of recognising people as asylum seekers at the first contact with state officials. There is a further reason why high numbers of refugees apply for asylum in BiH from the detention facility: most of the irregular migrants staying in BiH territory do not intend to make a claim for international protection and accommodation in BiH. They want to reach the EU.[18]

This means that any irregularly-staying foreigner apprehended by the state is detained in the immigration centre, even if he or she express an intention to claim asylum. Also, if foreigners claim asylum while they are already under detention in the immigration centre, the fact that they are claiming asylum does not mean they would be released and placed in an open-type accommodation centre for asylum seekers. This is even defined in law and is not just a matter of practice.[19] Hence, people remain detained until the expiration of "surveillance measure" irrespective of their asylum procedure.[20] The law provides for immigration detention up to ninety days.[21] While detention could be issued for a shorter period, it is typically imposed for ninety days.[22]

The only way to avoid detention for an irregular migrant is to apply for asylum within 24 h of arrival, as practice shows. The public perceives such detention as

[15] Article 118(1) of the Aliens Act.

[16] "Alien shall be placed under surveillance by his/her detention in the Immigration Centre if: (a) there are reasonable grounds to believe that, after the decision on expulsion is rendered, free and unrestricted movement of an alien may endanger legal order, public order and peace or security or international relations of BiH or pose a threat to public health in BiH, that is if determined that he/she poses a threat to public order and peace or security of BiH; (b) to ensure the execution of the decision on expulsion, or in other cases when he/she received the expulsion measure, if there are reasonable grounds to believe that an alien shall flee or otherwise prevent the execution of the decision; or (c) when there is doubt as to the veracity of the allegations of an alien concerning his/her identity, and he/she is pronounced the expulsion measure." (Article 118(3) of the BiH Aliens Act).

[17] Bosnia and Herzegovina, Asylum Act, BiH Official Gazette No. 11/2016, 19 February 2016.

[18] BiH expert interview 1, 1 February 2018; BiH expert interview 2, 6 February 2018.

[19] Article 118(4) of the Aliens Act: "If an alien who expresses the intention of claiming asylum, or who has claimed asylum had already been placed under surveillance in the Immigration Centre, the fact that he/she is claiming asylum shall not affect the imposing or execution of the surveillance".

[20] Expert questionnaire for BiH, April 2018.

[21] Article 119(3) of the Aliens Act.

[22] Expert questionnaire for BiH, April 2018.

normal and not as a form of punishment.[23] Even though the European Court of Human Rights in *Saadi v UK* of 2008 endorsed administrative detention of asylum seekers explicitly ruling out a requirement of necessity, the detention of asylum seekers, especially if it is systematic, is subject to criticism.[24] Critics of this policy claim that it is in breach of Article 31 of the 1951 Geneva Convention, which prohibits penalisation of refugees who have entered or stayed irregularly.[25] They believe that restrictions on movement shall not be applied to refugees in general, but only in exceptional cases.[26] It is notable that Article 26 of the 1951 Convention also provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory to benefit from this provision.[27]

Until 2017, detention was imposed on most asylum seekers. In my view, a strict policy of detaining all asylum seekers is not possible once the numbers of asylum seekers increase. My previous research from 2014 showed that such restrictive policies aimed to deter new arrivals, while at the same time systematic detention was only possible because the numbers were low and therefore manageable.[28] This theory has recently been confirmed: in 2018, the situation dramatically changed when the migration route through BiH strengthened considerably. After the agreement was concluded between the EU Member States and Turkey on 16 March 2016[29] due to the construction of a border fence between Hungary and Serbia (2015/16) and increasingly restrictive border controls between Croatia and Serbia, the route shifted southwest, via Albania, Montenegro, BiH and Croatia. Consequently, in 2018 BiH saw a considerable increase of the number of migrants and refugees entering the country with an aim to reach the EU. Thousands of irregularly present migrants and refugees who are in transit towards the EU are stranded in the city of Velika Kladuša, without access to asylum procedure and basic care.[30,31] They experience difficulties

[23] BiH expert interview 1, 1 February 2018; BiH expert interview 2, 6 February 2018.

[24] O'Nions (2008). See also European Court of Human Rights, *Saadi v UK*, Application no. 13229/03, judgement of 29 January 2008.

[25] The full text of Article 31 of the 1951 Convention reads: "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[26] BiH expert interview 1, 1 February 2018; BiH expert interview 2, 6 February 2018.

[27] Ibid.

[28] Kogovšek Šalamon (2016).

[29] European Council (2016).

[30] Dnevnik (2018) and Delo (2018).

[31] In August 2018, European Commission released a support of 6 million EUR to Bosnia and Herzegovina, to improve its capacity for identification, registration and referral of third-country nationals crossing the border, provide accommodation and basic services for refugees, asylum seekers and

Table 1 Detention statistics in BiH (2008–2016)[a]

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Detention	198	191	312	218	453	236	218	193	311	860
Surveillance	/	/	42	48	67	38	33	17	2	37

[a]Expert questionnaire for BiH, April 2018

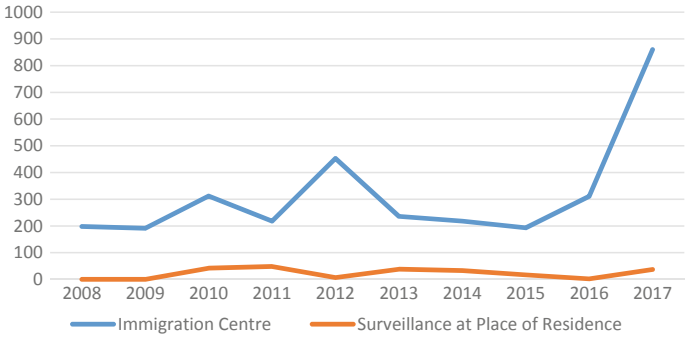

Fig. 1 Number of migrants placed in detention in Bosnia and Herzegovina per year

in moving onwards as first the Slovenian, and then also Croatian authorities are continually pushing them back to Bosnian territory, the latter also with violence.[32] At the same time, they are tolerated by the BiH authorities, who do not impose detention on them. The main reason for this are the limited capacities in detention facilities and immigration staff. BiH has one detention centre. In 2008, its capacity was increased from 40 to its current 120 beds.[33]

The statistics in Table 1 show the number of detained non-nationals in the detention centre per year and reflect the increase in the number of those apprehended and stranded at the BiH territory.

During 2017, 860 non-nationals were placed under surveillance in the detention centre, which represents an increase of 166.53%[34] and constitutes the highest number of detentions per year in the last decade. In addition to the numbers of detained individuals, BiH authorities also keep statistics on the number of people placed under surveillance outside the detention centre, in other premises[35] or at their place of residence (Fig. 1).

migrants and strengthen the capacity for border control and surveillance, hence also contributing to the prevention of and fight against the trafficking of human beings (European Commission 2018b).

[32]Amnesty International (2018).

[33]BiH (2018).

[34]Ibid., p. 41.

[35]Some people belonging to vulnerable groups are housed separately in safe houses operated by NGOs (European Commission 2018a).

Under these new conditions, BiH's aim to use systematic detention as deterrence has been put to the test. The current situation shows that in the presence of alternatives, migrants—and certainly smugglers—are using routes where there are fewer restrictions. This serves the aims of the former to reach a country of destination where either protection will be more effective or economic opportunities will be more accessible, as well as the latter to keep their "business model" running. However, when alternatives cease to exist, the level of restrictiveness of the system loses its importance. Even transiting territories with extremely restrictive regimes becomes an acceptable option for both groups. If detention is one of the features of crimmigration, and BiH has been using it extensively for deterrence, the case of BiH shows that migrant criminalisation does not produce the desired effects.

Another issue that should be highlighted in the context of the EU enlargement conditionality is the provision of funding for the construction of the detention centres. The BiH detention centre began its operations on 30 June 2008, when the then law on foreigners, which allowed for placing aliens under surveillance, came into effect.[36] Its construction was funded by the EU fund titled "Instrument for Pre-accession Assistance" (IPA fund).[37] While on the one hand the provision of funding may improve the living conditions and procedures within the existing centres, it may also provide for an incentive to build a detention centre in the first place, especially in less developed countries such as Bosnia and Herzegovina.[38] Hence, it needs to be taken into account that by funding the construction of detention centres, the EU is contributing to the criminalisation of migration. If detention practices in a country are problematic from a fundamental rights point of view, which systematic detention is, the fact that the EU (which is founded on fundamental rights principles) is providing such funding should be of specific concern.

3.2 Kosovo: American Influence

Kosovo, a small country of 1.8 million people, is the country that has most recently gained its independence in the WB region (in 2008) but is not yet universally recognised as an independent country. It also does not yet have an official EU candidate status. Among the analysed WB countries, Kosovo stands out in the sense that it is not only the EU that has a strong influence on how migration and asylum policy is developing. Instead, Kosovo is relying heavily on the United States for funding and support. In our field, this is particularly visible in the introduction of a crime of "irregular border crossing". While this conduct is not considered a crime but "only" a minor offence in the rest of the region, for which only a fine is foreseen, Kosovo

[36] Bosnia and Herzegovina (2009).

[37] Expert questionnaire for BiH, April 2018.

[38] Bosnia and Herzegovina is ranked 81 among 188 countries at the Human Development Index. http://hdr.undp.org/en/countries/profiles/BIH.

penal legislation foresees a fine *or* imprisonment of up to six months for unauthorised border crossing.[39]

Moreover, when the perpetrator of the crime of unauthorised border crossing is accompanied by someone, the imprisonment could last for up to a year. A closer look at the US system reveals that Kosovo legislation is a copy of the American one. This is unique. While other WB countries are copying the EU *acquis*, Kosovo has strongly relied on the US system, which also has stronger and more explicit crimmigration elements. To compare, only four EU Member States out of 28 defined irregular border crossing as a crime.

Further, the Kosovo law also foreseen other aggravated forms of the commission of this "crime" for which a stricter punishment is also prescribed, for instance:

- a perpetrator was previously convicted of a criminal offence provided for in this Article;
- in the course of apprehension, the perpetrator flees, attempts to flee, or otherwise resists apprehension by the police or KFOR[40];
- the crossing is undertaken between the hours of 8:00 in the evening to 6:00 in the morning during the period from 1 April to 30 September, or between the hours of 6:00 in the evening to 6:00 in the morning during the period from 1 October to 31 March; or
- the perpetrator is in possession of a weapon, ammunition or military clothing, supplies or equipment (Article 146).[41]

While it only makes sense for the last aggravated form of this crime—crossing while possessing a weapon—to be defined as a crime, the criminalisation of the other acts is exaggerated. In addition to these new definitions of crimes, which have been in force since 2012, several new minor offences have been added to the legislation related to foreigners. Out of 34 crimes and minor offences identified, 24 are very recent, all originating in the law of 2012.[42] Further, in 2013 additional minor offences were introduced, such as those for irregular stay and entry as well as for overstayers.[43] Due to intertwinement of criminal and minor offences definitions, there is a clear need for *ne bis in idem* rules and limitations as to when a minor offence procedure and when a criminal procedure should be used.

This harsh legislative picture, which might indicate that Kosovo is acting tough on migrants and refugees, is not reflected in practice. For instance, detaining asylum seekers is not at all a practice in Kosovo. Until the end of the research period, only one asylum seeker was detained in the Centre for Foreigners during the entire asylum

[39] Kosovo, Criminal Code of the Republic of Kosovo, Code No. 04/L-082, 2 April 2012.

[40] KFOR stands for Kosovo Force. Under the authority of the United Nations (UN Security Council Resolution 1244) NATO has been leading a peace support operation in Kosovo since 12 June 1999 in support of wider international efforts to build peace and stability in the area.

[41] Kosovo, Criminal Code of the Republic of Kosovo, Code No. 04/L-082, 2 April 2012.

[42] Excel sheet for Kosovo completed by consultant from Kosovo, April 2018.

[43] Expert questionnaire for Kosovo, April 2018. See also Law No. 04/L-219 on Foreigners, Official Gazette of The Republic of Kosova, No. 35, 5 September 2013.

Table 2 Detention of irregular migrants in Kosovo per year

Year	2013	2014	2015[a]	2016	2017	2018[b]
Detention	0	0	47	78	42	26

[a]From June 2015 when the Detention centre for foreigners was operational until the end of the year the number of irregular migrants detained was 47
[b]Until 12 June 2018

procedure, including filing the asylum request.[44] Moreover, even this person was transferred to a detention centre for foreigners from prison after the court sentenced him with six months of imprisonment, after committing a crime in Kosovo.[45]

The only detention centre for foreigners in the country has started functioning in June 2015. It is not used for asylum seekers, but for irregular migrants for carrying out the deportation procedure. The detention centre is placed in a former military facility. Similarly, as in the case of BiH, re-engineering and reconstruction were made with the donations received from the EU.[46]

As evident from Table 2, the number of detentions remains relatively low. Kosovo is not on migration route and as it does not have extensive resources and capacity to deal with irregular migration.

However, despite low numbers of detainees, the issue of detention and the fact that the detention facility was renovated with EU funds are of particular importance. Specifically, there are very few returns from Kosovo taking place. The country has signed very few useful readmission agreements that would enable the return. E.g., there is no readmission agreement signed with North Macedonia and, for political reasons, there is no such agreement with the Republic of Serbia.[47] Why is this relevant? The only allowed purpose of detention under the EU Returns Directive[48] is the prospect of return. If there is no prospect for return—and Kosovo in not carrying out the return and is legally incapacitated to do so due to the lack of readmission agreements with the key neighbouring countries—detention is not legally justifiable. I argue that for the same reason the use of EU funds for detention, which is serving no legally acceptable purpose, is highly questionable.

While conducting this research study opinions of NGOs that are familiar with asylum and migration policies and are equipped with human rights knowledge were gathered, on how much or to what extent the authorities in their countries are criminalising migration. One of the civil society groups shared their opinion, as follows:

> Kosovo, as a new state, started to build its migration system just recently and, having a short period, it nevertheless achieved significant steps in this regards. Also, being under the strong observation and pressure by EU, it is adopting the best EU practices whether in legislation

[44]Expert questionnaire for Kosovo, April 2018.

[45]Ibid.

[46]Ibid.

[47]Returns to the countries with which Kosovo has no readmission agreements have been facilitated by UNMIK office in Kosovo. Citation: questionnaire on Kosovo.

[48]Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98.

> as well as in implementation. There is no evidence that the system is criminalising migration disproportionately.[49]

At first glance, it seems that such conclusion is inappropriate considering the 2012 legislative changes that introduced irregular border crossing as a crime punishable with up to one year's imprisonment, a practice copied from the US legislation that is considered one of the harshest in the world. This assessment (that Kosovo is not criminalising migrants) also does not seem to be justified if there is a practice of detention in the absence of return. However, it is likely that the group came to this conclusion on other grounds. First, the entire Kosovan society, including professionals, authorities and CSOs, are under the immense pressure of state-building and conditionality imposed on them from various international actors and foreign states. In these circumstances, critical thinking and distance towards "solutions" imposed on them by these actors are often lacking. Second, the analysis shows that while the legislative framework is harsh, it is not implemented in practice. If the statement is read from this point of view, keeping in mind that the Kosovo authorities are not focusing on migrant criminalisation (instead, they focus on how to prevent Kosovo nationals from seeking asylum in the EU), the system is not disproportionally sanctioning third-country nationals.

3.3 Macedonia: The European Gatekeeper and Its "Pushback" Technology

FYR Macedonia, a candidate country for EU membership since 2005, has been at the heart of the main Balkan transit route for the last five years. The approach of the Macedonian government to migration challenges was a mixture of harsh securitisation on the one hand and more lenient de-securitisation measures on the other. The type of measures undertaken by the government depended on the purposes they were serving. When harmonising its migration and asylum law with the EU *acquis,* the government opted for further restrictions in the law. When the authorities of the Republic of Serbia and other countries on the Balkan transit route decided not to stop migrants and refugees[50] who were on their way to Germany and other western EU Member States, the Macedonian government followed the Serbian example and

[49] Statement of a civil society group working in human rights protection in Kosovo, obtained by e-mail sent to the author in April 2018.

[50] This refers to a period 2015/16 when Germany decided not to impose the so-called Dublin rules for Syrian refugees, which means that even though Syrian refugees crossed a number of the EU Member States before reaching Germany and hence should have applied to asylum there, Germany decided not to return them, even though it had the right to do that. Consequently, all countries on the route simply opted for a waving-through approach, meaning that they allowed the people to continue their route (and even assisted them by providing transport and basic subsistence) even though they legally did not have the right to enter and transit. These phenomena, which continued until the conclusion of the EU-Turkey agreement in March 2016, became known as a "humanitarian corridor". For more on this phenomenon see Kogovšek 2017.

provided for a short-term legalization of migrants' presence in the territory not to feel pressured to return them. On the other hand, when the EU started exercising additional pressure towards the WB countries, the Macedonian government resorted to different kind of measures, including pushbacks. Each of these examples is described in the continuation of this chapter.

As in the case of previously analysed countries, Macedonia also enacted stricter immigration legislation targeting irregular migrants. In the immigration and criminal law, 30 crimes and minor offences were identified that are related to migration. Of these, 23 are new and were added to the legislation in 2006.[51] While irregular border crossing is not a crime but remains a minor offence, assistance to cross is already a crime, even if the perpetrator only assists one person. This is stressed because there are examples in the region when assisting one person is not a crime, while assisting two or more persons is, even if it is done for free.[52] Also, even under the previous Macedonian law (Movement and Stay of Aliens Act, which was in force until 2007) the assistance of a foreigner in unauthorized entry and transit and the assistance of a foreigner in illegal stay were minor offences with fines ranging between EUR 700 to EUR 1000, but under the current Aliens Act,[53] these offences are criminal offences penalized with imprisonment. Hence, in Macedonia, mere assistance in crossing is now criminalised.

There is a unique feature in Macedonian law in the field of migrant criminalisation. Namely, the Aliens Act contains both minor offences and criminal offences, which is unprecedented in the WB region. In the legal tradition of the WB region, crimes were always grouped into a single act—the Penal Code. Crimes, unlike minor offences, were never introduced in other pieces of legislation. In its migration law, Macedonia departed from this tradition. This example highlights a situation where criminal and administrative sanctions related to migration are grouped in one document, which is—by itself—an explicit manifestation of crimmigration.

In 2015, when the numbers of arrivals of people in transit towards the west started to rise, the usual migration policy of the Macedonian authorities towards migration, i.e., systematic detention, became unsustainable. The Gazi Baba detention centre located in the Macedonian capital of Skopje was overcrowded. Return was not possible due to the lack of readmission protocols and cooperation with Greece, with whom Macedonia is in dispute over the name of the state.[54] At the same time, the

[51] Excel sheet for Macedonia completed by consultant from Macedonia, April 2018.

[52] Such example is the Republic of Slovenia where Macedonia always copied its migration legislation from. The two states used to belong to the same federal state, SFR Yugoslavia.

[53] FYR Macedonia, Aliens Act, Official Gazette of the Republic of Macedonia, Nos. 35/2006, 66/2007, 117/2008, 92/2009, 156/2010, 158/2011, 84/2012, 13/2013, 147/2013, 148/2015 and 217/2015.

[54] Greece did not allow Macedonia to use the name "Republic of Macedonia" because the northern Greek region is also named Macedonia. Hence Macedonia the state has been forced to use the acronym FYROM (Former Yugoslav Republic of Macedonia) since the declaration of independence in 1991. Recently the two countries reached an agreement on the name Northern Macedonia for the former Yugoslav Republic.

Table 3 Detention of irregular migrants in Macedonia per year

Year	2014	2015	2016	2017
No. of detainees	896	1346	389	100[a]

[a]The official statistics for 2017 were not available at the time of information-gathering. According to expert estimations, there were approximately 100 detainees in 2017

only interest of the people on the move was to transit the country as soon as possible and continue on their way west. As data shows, more than one million people arrived irregularly from the Middle East and North Africa to the EU in 2015–2016.[55] A vast majority of them travelled through Macedonia. Looking at its neighbour, the Republic of Serbia, Macedonia decided to copy one of its seemingly most useful legal provisions that allowed for short-term legalisation of stay of people whose only intention was to transit.

For this purpose, amendments to the Asylum and Temporary Protection Act went into effect in June 2015 that allowed asylum-seekers to declare their intention to claim asylum to any police officer.[56] These amendments provided for more flexibility in claiming international protection by removing the previous restrictive requirement according to which the asylum application had to be made at the border when entering the country, or at the nearest police station. Instead of being held in police custody in order to be transferred to Reception Centre for Asylum Seekers by the police, the migrants' and refugees' stay in Macedonia was regularized for the period of 72 h, with full freedom of movement, and allowed them to formally submit their asylum application at the Reception Centre for Asylum Seekers within these 72 h.

However, most people who received this document allowing them to apply formally simply decided to move on and left the state in this time. The consequence of this policy was also that people were allowed to travel via public transport without using smugglers and without being punished for illegal entry or stay. Out of one million people that transited Macedonia during the "refugee crisis" this way, only 100 applied for asylum.[57] Table 3 shows the drop in the number of people held in detention centre due to changes in policies (Fig. 2).

Even though it is less crowded than it used to be, the detention facility in Gazi Baba is still in operation. One of the issues that were underlined as clearly problematic from the perspective of migrant criminalisation is that the law does not define the maximum length of detention period for irregular migrants.[58] In 2015 due to overcrowding, many international and domestic human rights watchdogs placed pressure on the Macedonian Government to close it down[59] and, as a result, all of the detained were released and allowed to seek asylum.[60]

[55]http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/.

[56]Interviews with Macedonian experts, 6 February 2018 and 20 March 2018.

[57]Expert questionnaire for Macedonia, April 2018.

[58]Ibid.

[59]Amnesty International (2015a, b).

[60]Expert questionnaire for Macedonia, April 2018.

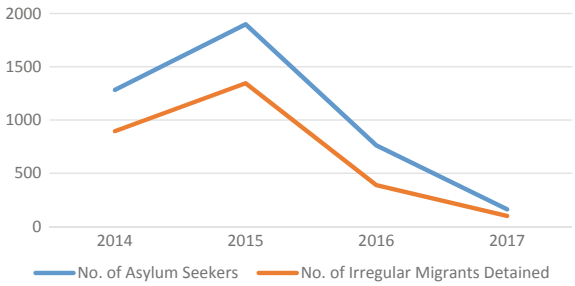

Fig. 2 Number of irregular migrants compared to the number of asylum seekers in Macedonia per year

This de-securitisation development, which was a direct result of broader but particular circumstances at the time (i.e. Germany's open-door policy, the Serbian example of a 72-h pass, lack of cooperation with Greece etc.), soon shifted into the opposite direction. The majority of irregular migrants are now again being detained and are not given access to asylum procedure before release. The majority of them (56% in 2016 and 58% in 2017) became asylum seekers after release.[61] Currently, the process of enacting a new International and Temporary Protection Act is ongoing, and it foresees the expansion of detention grounds for asylum seekers. The act was supposed to be adopted in 2018.[62]

In the last few years, these policies are being accompanied by pushbacks of migrants and refugees. Pushbacks may take many different forms, and there is no universally accepted definition of this phenomenon. In general, they are defined as informal collective forced returns of people who irregularly enter the country back to the country they entered from, via procedures that take place outside legally defined rules in protocols or agreements signed by the neighbouring countries. In pushbacks, access to seek asylum is usually restricted, and often police violence is used to enforce return. Often pushbacks are informal to the extent that even the authorities of the neighbouring ("receiving") country are not informed about the procedure. Pushbacks are problematic for a variety of reasons, such as that there is no democratic or judicial control over these processes (as there is no decision to appeal against); that there is no differentiation between people who are in need of protection and those who are not; that they enable returns to jurisdictions with the risk of torture, inhuman and degrading treatment and punishment; and that there is a lack of documentation of the procedures. If pushbacks are accompanied by police violence, the lack of documentation and evidence that pushbacks took place and that individuals were in contact with the police, render the recourse to legal remedies and redress for people affected difficult, if not impossible.

[61] Ibid.

[62] Ibid.

Even though they are highly problematic from the human rights and constitutional guarantees point of view, pushbacks are becoming more and more frequent in South-eastern Europe.[63] Macedonia is no exception. From 19 November 2015 until 31 May 2017, according to monitoring organisations, Macedonian authorities have pushed back 10,377 refugees and migrants to Greece. Following the final closure of the Balkan route on 18 March 2016, the pushbacks of refugees and migrants significantly increased and continued throughout 2017.[64] The pushback practices have also been confirmed by the Macedonian authorities.[65]

Two main types of pushback practices were identified. The first type affects refugees and migrants who were fingerprinted. Under this practice, refugees and migrants intercepted by the authorities on Macedonian territory were apprehended and taken to the Transit Centre Vinojug located at the border between Macedonia and Greece. People were fingerprinted and in less than two hours, taken by the Macedonian authorities to the Greek border outside any of the established and official border crossing points where no Greek authorities are stationed. At the borderline, they were forced by the Macedonian authorities to walk across the line into Greek territory. The numbers of deported persons stated above refer to those pushed back under this practice. The second type of pushback practice excludes the fingerprinting step. All of the pushbacks are carried out without any assessment of each person's situation, as they take place outside of any legal framework prescribed by national legislation. The refugees and migrants who were pushed back were not issued expulsion decisions by the Ministry of Interior, as required by Article 103 of the Macedonian Aliens Act.[66]

As of September 2016, a complaint has been pending before the European Court of Human Rights related to large-scale collective expulsions of refugees from Macedonia to the border camp Idomeni in Greece in March 2016. In this case, the European Court communicated the complaints of eight applicants from Syria, Iraq and Afghanistan to the Macedonian government. The complaints claim that Macedonia's practice of unlawful expulsions is violating the European Convention on Human Rights.

As in the case of Kosovo, when obtaining the information about the individual contexts in each country during the research process, civil society groups were asked to examine the information they have provided in the context of migrant criminalisation. The statement one of them provided was:

> The Macedonian legal framework is not criminalising migration in a disproportionate way. However, further efforts are needed regarding decreasing the pushbacks and prolonged detention that happen in practice. The legislative framework concerning the maximum length of detention is an issue *per se* as there is no maximum length of detention on the grounds of establishing identity.

[63] Human Rights Watch (2016) and European Council on Refugees and Exiles (2018a). See also Bužinkić, Avon and Horvat in this volume.

[64] Expert questionnaire for Macedonia, April 2018.

[65] Ibid.

[66] Ibid.

As shown above, in 2015 several legislative and policy developments have taken place that departed from a strict crimmigrant approach of an *apprehension-detention-return* system that does not differentiate between asylum seekers and others. However, it seems that this has also changed significantly in 2016–2017 and it is questionable whether, in the new situation marked particularly by unlawful pushbacks, it is still possible to assess that the system is not disproportionately criminalising migrants. Even a watertight legal system with all procedural guarantees in place is of little significance if it is overshadowed by the unlawfulness of daily police regimes.

3.4 Montenegro: A Steady Increase of Migrant Criminalisation

Montenegro, officially an EU candidate country since 2010, is a small state located at the Adriatic coast with a population of a half a million people. Generally, it is not on the main migration route. However, in the last two years as the conditions on the route have tightened, all countries in the WB region are witnessing transiting migrants and refugees. While people do not enter this country *en masse*, Montenegro has seen an increase of new arrivals and adjusted its policies to the new situation by introducing restrictions.

As in all other countries, the scope of criminalisation on the level of legislation has slightly increased. In total, 61 offences (crimes or minor offences) have been identified and defined in relation to migration and border crossing, of which 11 were added in 2011, 2013, and 2014.[67] New definitions of crimes are related to unlawful employment and human smuggling committed by an organised group, and less serious crimes such as a failure of a migrant to declare that a child is staying with him or her.[68] In the field of sentencing, deportation as a discretionary sanction was added in relation to foreigners who commit offences.[69] Irregular stay and irregular border crossing remain a minor offence, but irregular border crossing is prosecuted as a crime in an aggravated form, i.e. if the non-citizen crossing is armed or crosses by force. Human smuggling is a crime if one person is accompanied while crossing the border and if assistance to cross is done for profit.[70]

Until 2017, no asylum seekers were detained in Montenegro, as the limitation of movement of asylum seekers was not allowed by law. While Asylum Act guaranteed full freedom of movement for asylum seekers, in the past there was a problem of de facto limitation of the movement of minor asylum seekers. Before the opening of the asylum centre in 2014, minor migrants and asylum seekers have been placed

[67] See Aliens Act (Official Gazette of Montenegro, No. 56/14) and Criminal Code of Montenegro (Official Gazette of Montenegro, No. 40/2013 and 56/2013).

[68] Expert questionnaire for Montenegro, April 2018.

[69] Article 48 of the Minor Offences Act, Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/11 and 51/17.

[70] Expert questionnaire for Montenegro, April 2018.

Table 4 Detention of irregular migrants in Montenegro per year

Year	2012	2013	2014	2015	2016	2017
No. of migrants	219	75	42	112	132	234

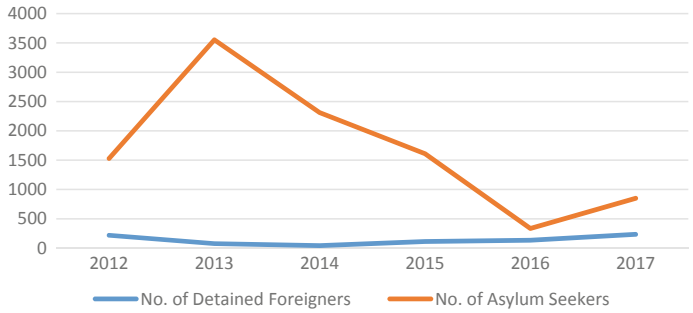

Fig. 3 Asylum and detention of irregular migrants Statistics in Montenegro per year

in the migrant detention centre Ljubovic even in those cases where the legal conditions for detention were not fulfilled. The Montenegrin government claimed that there are no other more appropriate reception facilities for unaccompanied minors available, while the detention centre has separate premises for the accommodation of minors and employs professional staff who specialise in dealing with children. This problem was later resolved, and for a few years Montenegro was standing out in the region for its non-incarcerative asylum policy. This did not last long. In 2018, legal provisions were introduced which now allow detention of asylum seekers.[71] With this development, Montenegro is joining all other countries in the region that already provide for restriction of freedom of movement for asylum seekers under legally defined conditions.

While asylum seekers may only be detained as of 2018, the detention of irregular migrants who did not apply for asylum was already possible before. Until 2013, Montenegro did not have a migrant detention centre. The placement of irregular migrants who were apprehended in the territory of Montenegro was solved differently, on a case-by-case basis, by placing them in facilities such as NGO shelters and hotels, or by renting private residential facilities with security provided by the Police. The scope of detention remained steady, as there was no increase in legal grounds for detention of irregular migrants in recent years. The current detention centre established in 2013 has a capacity for 46 people. As in the case of BiH, the construction of the detention centre used for the incarceration of irregular migrants was financed by an IPA 2008 project titled "Support to Migration Management in Montenegro" which provided for 50% co-financing from the EU (Table 4; Fig. 3).

One of the focuses in the research methodology that forms a base for this analysis was on the share of migrants in prisons. In general, this information was difficult to

[71] Ibid.

gather as the statistics do not exist or are not publically available. Montenegro was of the few examples where some information was obtained on this issue. Data shows that the share of migrants in prisons is about 20–25%, which is quite a significant proportion. This is explained by the fact that the largest number of detainees is represented by migrants who have been prosecuted for any of the violations prescribed by the Aliens Act and the Border Control Act (for migration and border crossing related minor offences) for which they were fined, but because they did not have the means to pay, the fine was replaced by a prison sentence. Hence, their imprisonment is usually not a consequence of a conviction in a criminal proceeding but constitutes administrative detention.[72] The problem of administrative detention imposed after an inability to pay a minor offence fine is a broader criminological problem that is present in several countries in the region and beyond and is not limited to Montenegro.

The data for Montenegro thus show that the country's policies, while lenient towards migrants, for the time being, are slowly catching up with the rest of the region when it comes to the level of restrictiveness.

3.5 Serbia: Criminalisation of Migrants Seeking Asylum Through Minor Offences Fines

In Serbia, the largest country in the Western Balkans region and an official candidate for EU membership since 2012, similar trends of increasing migrant criminalisation can be observed as in all other counties in the region. On the legislative level, several changes have taken place in recent years as new definitions of crimes and minor offences were added by the legislator to the list of offences related to migration and border crossing. Sanctions for existing offences became stricter. So generally, the level of criminalisation increased. On the other hand, irregular entry or stay remain minor offences and are not considered crimes, as they are in most of the other WB states.[73]

Serbia was strongly affected by the "refugee crisis" from the very beginning when the number of arrivals began to rise in 2014. During 2015, about 800,000 migrants and refugees from the Middle East and North Africa crossed the country, with a peak of 20,000 people in one day in September. Serbia lies in the middle of the region and, due to its geographical position, crossing it is the most direct way to reach southeastern external borders of the EU. Since migrants perceive Serbia as a transit country[74] and during the crisis spent less than two days on its territory, the authorities approached the crisis by providing minimum humanitarian relief, while

[72] Ibid.

[73] Expert questionnaire for Serbia, April 2018. See also European Council on Refugees and Exiles (2018b).

[74] Lukić (2016).

at the same time avoiding any intervention that would incentivise the prolongation of their stay.[75]

However, responding to the demands of the EU to safeguard its borders and consequently to reduce the flow of refugees, the Serbian state, in the early stages of mass migration movements, introduced a system of registration of the people entering the country; all people who entered in Serbia were photographed, and their personal information was entered into a database of asylum seekers. The registration system started loose; some people were registered and others were not, but gradually, responding to criticisms expressed by several EU Member State, the authorities continued with more strict and accurate controls on the entry points.[76]

Until September 2015, a legal framework differentiating people in need of international protection but were not willing to stay in Serbia from those who were willing to stay did not exist. However, in September 2015, the Serbian Government issued a decree introducing the so-called transit-certificate: a document issued to people who expressed an intention to seek asylum to a police officer of the Ministry of Interior and who were registered in line with Article 23 of the Asylum Act. This certificate, issued from December 2015 to February 2016, was only temporary, legalising the holder's stay for 72 h.[77] To properly initiate the asylum procedure, holders had 15 days to report to the accommodation centre indicated on the document to officially submit the asylum request and benefit from the reception conditions.[78] This model was later also adopted by Macedonia, as mentioned above.

After Hungary completed the border fence and the EU-Turkey agreement on stricter controls on the migratory movement from Turkey was signed, national priorities in Serbia changed as well. The Serbian government started focusing on border security, which also meant that people entering the country were no longer able to leave as easily, and were consequently stranded in Serbia. The EU plans to externalise border control and at the same time use border security as a condition for EU membership materialised in Serbia.[79] In July 2016, mixed military and police units were created and sent to the borders of Serbia with Macedonia and Bulgaria. On the northern borders with Croatia, the EU Member States assisted Serbia with prevention of border crossings.[80] At the time of research (spring 2018), Serbia still hosted around 4500 stranded migrants who faced problems due to non-existent legalisation, return, or integration programs. The vast majority of these refugees and migrants used to have a transit certificate, and today it seems that they are considered as asylum

[75] Serbia expert interview 1, 7 February 2018; Serbia expert interview 2, 2 March 2018, Serbia expert interview 3, 12 March 2018.

[76] Ibid.

[77] Article 22(1) of the Asylum Act of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 109/2007; Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger, Official Gazette, No. 81/2015.

[78] Serbia expert interview 1, 7 February 2018; Serbia expert interview 2, 2 March 2018, Serbia expert interview 3, 12 March 2018.

[79] Ibid.

[80] Ibid.

Table 5 No. of sanctions issued by minor offences courts in Serbia against potential refugees per year

Year	2015	2016	2017
No. of sanctions	9134	2221	920

seekers, but only a few (236) formally applied for asylum.[81] Currently, the Serbian Parliament is discussing the new legislative package containing draft laws on asylum, foreigners, and state border control, which contain changes in the procedures and aim at resolving these outstanding legal issues.

While the legislative situation in Serbia resembles those in the rest of the WB region, a specific widespread practice of sanctioning migrants for minor offences was reported for Serbia. Namely, during 2015 when the numbers of mass arrivals were at their peak, the Serbian Ministry of the Interior was initiating minor offences proceedings for irregular entry or stay against people who could be *prima facie* refugees (as most of the sanctioned individuals came from Syria, Afghanistan and Iraq), and the minor offences courts were sanctioning them. People were sanctioned according to the Aliens Act,[82] the State Border Protection Act,[83] and the Minor Offences Act.[84] In recent years, the statistics show that the practice of sanctioning asylum seekers for violations mentioned above decreased. However, it is still being used (Table 5).

Recognising that the practice of sanctioning people for irregular entry is problematic if used against someone who is seeking protection has been highlighted by the National Preventive Mechanism (NPM) of the Republic of Serbia, a state mechanism mandated to supervise the treatment of people in detention in line with the Optional Protocol to the Convention against Torture, Inhuman and Degrading Treatment or Punishment. The Serbian NPM issued recommendations to the police and minor offences courts to terminate this practice and training was carried out to equip the state officials involved with knowledge on Geneva Convention standards on non-penalization of refugees.[85]

Another problem identified in our research was detention of irregular migrants to secure testimonies in criminal proceedings against persons suspected of human smuggling or human trafficking. The problem was considered unlawful, as there is no legal provision in the Serbian law that would allow for detention on these grounds. The practice was observed in the months between May and November 2015.[86]

As all other WB states, Serbia also has one detention centre only (in Padinska Skela) with a capacity of sixty-six beds. The maximum period of detention is

[81] Ibid.

[82] Republic of Serbia, Aliens Act, Official Gazette of the Republic of Serbia, No. 97/2008.

[83] Serbia, State Border Protection Act, Official Gazette of the Republic of Serbia, No. 24/2018.

[84] Serbia, Minor Offences Act, Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016 and 98/2016—Constitutional Court Decision.

[85] Expert questionnaire for Serbia, April 2018.

[86] Ibid.

Table 6 Detention of asylum seekers in Serbia per year compared to the number of people who expressed the intent to apply for asylum

Year	2015	2016	2017
No. of detained persons who expressed intention to apply for asylum	474	43	29
Total number of expressions to apply	487,124	12,821	6199

180 days. There are plans to enhance the detention capacity, not by building of a new detention centre but by increasing the number of beds to one hundred. However, unlike in most of the other WB states, renovation of the detention centre in Serbia will not be funded by the EU, but by the Swiss Embassy in Belgrade and International Organization for Migration (IOM).[87] The reason for the increase in the number of beds is to create a separate section for women.[88]

According to common opinion, detention is not a normal way of treating migrants in Serbia, as the policy of tolerance and openness declared by the authorities was widely promoted by national media.[89] Even the migrants who refuse to enter the legal asylum procedure are tolerated in a way that they are accommodated in the reception and asylum centres. Hence, the policy of punishing people with detention is not a priority (Table 6).

As it is also evident from the above statistics, there is a decreasing trend in detaining migrants, and a tiny percentage of new arrivals is detained. Serbia is therefore not relying on detention in managing its migration policy and, unlike BiH, for instance, is not using detention to deter new arrivals.

The state's reaction to the 2015 refugee crisis negatively affected the ability to provide services to migrants by the local population. Namely, until the escalation of the 2015 crisis, irregular migrants were a possibility to rent rooms in private hostels, but that became prohibited with the explanation that such provision of accommodation would constitute "abuse of law" by the hostels' owners. Subletting rooms and apartments to irregular migrants is now forbidden and could be punishable by the provisions of Serbian Criminal Code[90] for irregular border crossing and smuggling people (Article 350(2)). From the information obtained through Serbian media, there were a couple of cases in 2016 and 2017 when some hostel owners were accused of such crimes.

In the field of return, the situation is similar to that in other neighbouring countries. The Serbian Government has signed very few readmission agreements with other countries. Consequently, those who were detained in the detention centre following the expulsion procedure are simply released without any documents after the

[87] Ibid.

[88] Serbia expert interview 1, 7 February 2018; Serbia expert interview 2, 2 March 2018, Serbia expert interview 3, 12 March 2018.

[89] Ibid.

[90] Serbia, Criminal Code, Official Gazette of the Republic of Serbia, Nos. 85/2005, 88/2005 and 107/2005.

expiration of the maximum duration of the detention. The government has extremely limited resources for forced removals, which are therefore not implemented at all.[91]

Unfortunately, this is not the whole story related to deportations. Serbia joined the group of the WB countries that carry out pushbacks to its neighbours. There are reports of such pushbacks to Macedonia and Bulgaria between 2016 and 2017. At the same time, it is experiencing pushbacks to its territory from Hungary and Croatia.[92] In the absence of statute-based return options and funds, the pressure of the EU institutions and the EU Member States on Serbia to safeguard the southern EU borders are now leading to—pushbacks.

4 The Effects of the EU Conditionality on Migrant Criminalisation

We can conclude that some severe forms of migrant criminalisation aspects are not overwhelmingly present in the Western Balkans region. For instance, assistance to migrants is not criminalised. In only one analysed country out of five (Kosovo which is heavily influenced by the US) illegal crossing of state borders is considered a crime punishable by imprisonment, while in all others it is still considered a minor offence, which is also the most common situation among the EU Member States. Besides, being a migrant is not an aggravating circumstance in sentencing for crimes unrelated to migration.

However, many other indicators of migrant criminalisation are present in the region, and they are on the rise. In many of the analysed countries, EU funds are used for construction or renovation of detention centres, which not only increases the minimum standards in these buildings but also the number of people who can be detained. The EU is pressuring countries to conclude readmission agreements that facilitate return. Return is limited due to the lack of resources. However, if it exists, it is carried out to other countries in the region and not to countries of origin, so countries are spending considerable resources to perpetually shuffle the same migrants amongst each other, which renders the system rather inefficient. Non-immigration authorities (e.g., hospitals, schools) in general are not obliged to report immigrants to the police. There are a few exceptions. For instance, in Kosovo, public or private health institutions that admit foreigners for treatment are obliged to inform the nearest police station within twenty-four hours that they have treated an irregular migrant. Furthermore, specific crimmigration problems have been identified in each analysed country: BiH with its systematic detention; Kosovo by defining irregular state border crossing as a crime; Macedonia with its pushback and large-scale incarceration practices; and Serbia by sanctioning of *prima facie* refugees for minor offences and pushbacks.

---

[91] Serbia expert interview 1, 7 February 2018; Serbia expert interview 2, 2 March 2018, Serbia expert interview 3, 12 March 2018.

[92] Expert questionnaire for Serbia, April 2018.

While support for capacity building for border policing prevents border crossings *en masse*, it also allows for pushbacks, which are prohibited by the international law. Visa liberalisation that promoted change in the Western Balkans[93] and eased the life of nationals of these countries, on the one hand, but increased criminalisation of people arriving to and transiting these countries on the other. It is crucial to ensure that future liberalisation processes place more emphasis on the non-security related aspects of these societal and political changes, including those that concern other vulnerable groups such as people from conflict-torn areas seeking protection. The situations in the researched countries show that in addressing the EU's response to the migrant crisis that emphasises security, policies are promoted that lead to the criminalisation of migrants in the Western Balkans. The EU, with its conditionality in the field of border control, migration, and asylum systems, contributes both to establishment of a protection system, but also to the criminalisation of migration. Following legislative harmonisation with EU law, the number of definitions of crimes and minor offences related to crossing the border and migration increased in all analysed countries.

As EU accession, security, border control, institution-building, and introduction of technologies for border surveillance are top priorities for the candidate and potential candidate countries, universal human rights have become a secondary concern. It is questionable whether this is acceptable in the process in which countries are striving to become members in that prestigious club called the EU, which praises itself for being an area of "freedom, security and justice". It is also questionable what kind of message this is sending to the candidate and potential candidate states, in the sense that this club does not care what kind of treatment is provided for migrants. This is particularly problematic since the EU is already losing its status of a guarantor of stability and democratic institutions.[94] It is also questionable whether this is the right way of preparing the EU candidate countries for membership—are they going to be able to abide by high human rights standards expected from them when they become the EU members? And more importantly, are they going to participate in the solidarity and burden-sharing mechanisms in the field of migration and asylum, as is expected today from the EU Member States?

References

Amnesty International (2015a) Good News! Macedonia: refugees, asylum seekers and migrants in the reception Center for Foreigners "Gazi Baba" Released (UA 46/15), press release, 28 July 2015. http://www.amnestyusa.org/get-involved/take-action-now/good-news-macedonia-refugees-asylum-seekers-and-migrants-inthe-reception-center-for-foreigners-gaz

Amnesty International (2015b) Macedonia: thousands trapped and at risk of violence as border sealed, 15 Aug 2015. https://www.amnesty.org/en/latest/news/2015/08/macedonia-thousands-trapped-and-at-risk-of-violence-asborder-sealed

[93] Fererro-Turrión (2015, p. 18).

[94] Balkans in Europe Policy Advisory Group (2016).

Amnesty International (2018) Annual Report 2017/2018, Croatia. https://www.amnesty.org/en/countries/europe-and-central-asia/croatia/report-croatia

Balkans in Europe Policy Advisory Group (BiEPAG) (2016) EU enlargement in the Western Balkans in a time of uncertainty. http://www.biepag.eu/wp-content/uploads/2017/03/BIEPAG-The-Crisis-of-Democracy-in-the-Western-Balkans.-Authoritarianism-and-EU-Stabilitocracy-web.pdf

Bosnia and Herzegovina (2015, November 17) Aliens Act, BiH Official Gazette, No. 88/2015

Bosnia and Herzegovina (2016, February 19) Asylum Act, BiH Official Gazette, No. 11/2016

Bosnia and Herzegovina (2009) Migration profile Bosnia and Herzegovina. https://www.msb.gov.ba/dokumenti/arhiva/?id=5454

Celador GC, Juncos AE (2012) The EU and border management in the Western Balkans: preparing for European integration or safeguarding EU external borders? Southeast Eur Black Sea Stud 12(2):201–220

Delo (2018, July 16) Bo Velika Kladuša postala novi Idomeni? https://www.delo.si/novice/svet/bo-velika-kladusa-postala-novi-idomeni-71429.html

Dnevnik (2018, June 14) Ali v Sloveniji res ni več mogoče zaprositi za azil? Kaj naj storimo zdaj? https://www.dnevnik.si/1042825662

European Commission (2018a) Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, Accompanying the document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018 Communication on EU Enlargement Policy, {COM(2018) 450 final}, p 25. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf

European Commission (2018b, August 10) EU supports Bosnia and Herzegovina in managing the migration flows with additional €6 million, Press release. http://europa.eu/rapid/midday-express-10-08-2018.htm

European Council on Refugees and Exiles (2018a, March 2) Push backs and human rights violations at Bulgarian and Greek borders with Turkey. https://reliefweb.int/report/greece/push-backs-and-human-rights-violations-bulgarian-and-greek-borders-turkey

European Council on Refugees and Exiles (2018b) Serbia: new act on asylum and temporary protection adopted, 10 April 2018. https://www.asylumineurope.org/news/10-04-2018/serbia-new-act-asylum-and-temporary-protection-adopted.

European Council (2016, March 18) EU-Turkey statement, Press release. http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

European Court of Human Rights, *Saadi v UK*, Application no. 13229/03, judgement of 29 January 2008

European Parliament (2016, January) The Western Balkans: Frontline of the migrant crisis, Briefing. http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282016%29573949

European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98

Feijen L (2008) Facing the asylum-enlargement nexus: the establishment of asylum systems in the Western Balkans. Int J Refugee Law 20(3):413–431

Fererro-Turrión R (2015) The EU approach to the Western Balkans: a security or political issue? Europolity 9(2):11–27

FYR Macedonia, Aliens Act, Official Gazette of the Republic of Macedonia, Nos. 35/2006, 66/2007, 117/2008, 92/2009, 156/2010, 158/2011, 84/2012, 13/2013, 147/2013, 148/2015 and 217/2015

Grabbe H (2014) Six lessons of enlargement ten years on: the EU's transformative power in retrospect and prospect. J Common Market Stud 52:41

Human Rights Watch (2016, January 20) Bulgaria: pushbacks, abuse at borders. Halt summary returns, beatings, robbery of Asylum seekers. https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders

Kogovšek Šalamon N (2016) Asylum systems in the Western Balkan countries: current issues. Int Migr 54(6):151–163. https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12273
Kosovo, Criminal Code of the Republic of Kosovo, Code No. 04/L-082, 2 April 2012
Lukić V (2016) Understanding transit Asylum migration: evidence from Serbia. Int Migr 54(4):31–43
Luli E (2015) The Western Balkans between internal transitions and the EU integration process, 9 Europolity: continuity & change Eur. Governance 111, 126
Minor Offences Act, Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016 and 98/2016—Constitutional Court Decision
Montenegro, Criminal Code of Montenegro, Official Gazette of Montenegro, No. 40/2013 and 56/2013
Montenegro, Aliens Act, Official Gazette of Montenegro, No. 56/14)
Montenegro, Minor Offences Act, Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/11 and 51/17
O'Nions H (2008) No right to liberty: the detention of Asylum seekers for administrative convenience. Eur J Migr Law 10:149–186
Serbia, Decision on issuing a certificate of having entered the territory of Serbia for migrants coming from countries where their lives are in danger, Official Gazette, no. 81/2015
Serbia, Aliens Act, Official Gazette of the Republic of Serbia, No. 97/2008
State Border Protection Law, Official Gazette of the Republic of Serbia, No. 24/2018
Trauner F (2007) EU justice and home affairs strategy in the Western Balkans. Conflicting objectives in the pre-accession strategy. In: Centre for European Policy Studies Working Document No. 259. http://aei.pitt.edu/7383/2/7383.pdf
Trauner F (2008) The Europeanisation of the Western Balkans: deconstructing the EU's routes of influence in justice and home affairs, paper presented to the ECPR Fourth Pan-European conference on EU politics, Riga, 25–27 Sept 2008. http://www.jhubc.it/ecpr-riga/virtualpaperroom/059.pdf
Wolff S (2008) Border management in the Mediterranean: internal, external and ethical challenges. Camb Rev Int Aff 21(2):253–271

Pushback as a Technology of Crimmigration

Emina Bužinkić and Maddalena Avon

Abstract The chapter discusses a politically situated, critical ethnographic account of a particular form of violent and forced expulsions or *pushbacks* of refugees to Serbian territory by the Croatian police. Working within the framework of transnational feminist theory and recent critical analysis of the state of people on the move, we posit that the *refugee* subject has transformed now to constitute a threatening subject—one that is repeatedly criminalised and dehumanised through physical police violence and denied access to international protection mechanisms. We explore the particularity of the subject formation of the *refugee* during the so-called refugee crisis (*izbjeglička kriza*) and the creation of the refugee as a parahuman to be expelled from the state territory. We also argue that the question of the illegality of the pushbacks conducted by the Croatian police needs to be reframed and discussed instead as a legalised action, justified through the securitisation paradigm and protected by the law. Lastly, we argue that this practice of violence against people on the move rarely undergoes criminalisation.

[1] "Corridor" here refers to the formalized, state-organised transport of refugees in the period 2015–2016 alongside the so-called *Balkan route* that refers to the non-formal pathway to Europe used by refugees and others (Bužinkić and Hameršak 2016).

E. Bužinkić (✉)
Centre for Peace Studies and Welcome Initiative, Zagreb, Croatia
e-mail: ebuzinki@umn.edu

University of Minnesota, Twin Cities, Minnesota, USA

M. Avon
Center for Peace Studies, Zagreb, Croatia
e-mail: maddalena.avon@cms.hr

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_8

1 Pushback as a Technology of Crimmigration

Between October 2015 and April 2016, when the borders of the Balkan corridor[1] were closed off, there were numerous accounts of reported expulsions of refugees[2] on the borders perpetrated by the Slovenian, Croatian, Hungarian, Serbian, and Macedonian border police (Banich et al. 2016a, b; Moving Europe 2016). These expulsions continue until today. Describing a *dangerous game* played by the border police, the Belgrade Centre for Human Rights, Macedonian Young Lawyers Association and Oxfam (2017) state:

> People who are trying to access the EU in search of safety and dignity are being routinely abused by law enforcement officials in countries in the Western Balkans. State agents responsible for upholding fundamental rights are instead subjecting people to violence and intimidation and denying access to asylum procedures to those seeking international protection. Governments in the region must immediately end these violations and initiate processes to ensure safety and dignity for people on the move in their territories.[3]

Specifically, an increasing number of refugee reports denounced Croatian border police expelling refugees to Serbia. Dozens of cases of expulsion or *pushbacks*[4] were reported by refugees themselves within that period, despite the *open-border policy*[5] operating along the *Balkan route* during the late 2015 and the first quarter of 2016, as well as during the rest of the 2016 and up until today.[6] We posit that

[2]This chapter uses the word *refugee* and the expression *people on the move* as synonyms. The word refugee, as we use within this chapter, exceeds the narrower definition provided through the Geneva Conventions. According to Betts and Collier (2017) the Geneva Convention is an inadequate tool for addressing the current state of refugee and humanitarian crises; there were accounts of multiple violations of the Geneva Convention. Moreover, two scholars argue that the entire international humanitarian system needs to be rebuilt.

[3]Belgrade Centre for Human Rights, Macedonian Young Lawyers Association, Oxfam (2017, p. 1).

[4]The terms "expulsion" and "pushback" both refer to forcible returns of refugees conducted by the border or regular police often accompanied with physical and psychological violence. According to the Belgrade Centre for Human Rights, Macedonian Young Lawyers Association and Oxfam, "By pushing back those seeking safety and dignity over a border, states abdicate responsibility for examining their individual cases. Pushbacks encompass the legal concept of collective expulsion, which is prohibited by Article 4 of Protocol No 4 to the European Convention on Human Rights (ECHR). This refers to the 'prohibition of collective expulsion of aliens', which occurs when a group is compelled to leave a country without reasonable and objective examination of individual cases. Pushbacks violate international and EU law because they undermine people's right to seek asylum, deny people of the right to due process before a decision to expel them is taken, and may eventually risk sending refugees and others in need of international protection back into danger." (p. 1).

[5]"Open-border policy" generally refers to the free movement of people between different jurisdictions. In this chapter, the *open border policy* term is specifically contextualised in the 2015 and 2016 when German chancellor Angela Merkel announced welcoming policy toward Syrian and other refugees followed by the French president Hollande and Austrian minister of foreign affairs Kurz. That humanitarian impulse established the corridor along the so-called Balkan route. Cf. Hall and Lichfield (2015).

[6]Bužinkić and Hameršak (2016); Are You Syrious, Centre for Peace Studies, No Name Kitchen and Welcome! Initiative, Reports on Push Backs, 2017a, b, c, 2018.

pushbacks should be analytically and politically constituted as forms of systemic violence against refugees and criminalisation of migration. Therefore, this chapter is an ethico-political discussion on *governmentality of crimmigration* characterised through the discursive regimes of *enemizing* refugees and deploying securitisation technologies such as policing and militarisation of refugees.

2 In a Limbo

At the end of January of 2017 activists of the two movements *Welcome Initiative* and *Are You Syrious?*,[7] including the authors, had visited Belgrade and documented the experiences of violent expulsions from Croatia, particularly the Croatian-Serbian border, of more than thirty refugees. We had visited the railway warehouse (*železnički magacin*) and the park near the railway station, as well as one of four refugee camps in the municipality of Šid in the proximity of the Croatian-Serbian border. In addition to young men and male minors, eight of us recorded multiple occurrences of border and in-territory violence against families, women, and older adults originating from Afghanistan, Iraq, Pakistan, and Syria. As we conversed with these individuals at the time, we kept field notes and made audio recordings of the narratives shared with us. Our interest was in documenting refugees' encounters with the Croatian border and regular police, both at the borders and in-territory such as police stations. In this chapter, we analyse the Croatian-Serbian border and police stations as locations of *crimmigration*, where perpetual accounts of violence and dehumanisation are taking place, one of which is denying access to international protection mechanisms such as the ability to claim asylum. We were focused on understanding the details of those violent encounters to recognise the pattern(s) and shape our public political work. Information gathered through the field notes and audio recordings was compared among all of us and thematically coded, and then utilised for a report. We have used audio recordings and additional documentation we collected (photos of injuries, photos made by the refugees if kept, medical documentation, GPS locations, etc.) to support our findings. A few days after our visit, we published the first of our reports, titled *The report on illegal and forced pushbacks of refugees from the Republic of Croatia*. The report was presented at the press conference and was aired in the national and local media. It condemns the Croatian police and the European border regime for the deployment of violence against such a vulnerable group. This report was also

[7] Welcome! Initiative [welcome.cms.hr] was established in September 2015 as a collaborative network of human rights, feminist, peace and environmental organizations as well as volunteer-individuals who have been advocating for justice for refugees in Croatia and transnationally. Initially, Are You Syrious? started as a movement of individuals providing relief from summer 2015 in the Croatian-Serbian border areas and across the Western Balkans, and today operates as a non-governmental organization. Both entities collaborate in documenting violent expulsions of refugees to Serbia and Bosnia, provide support and legal aid to refugees and draw attention to the institutional racism and unacceptable police violence against refugees.

established as a fundamental tool of the *Welcome Initiative* and the *Are You Syrious?* for further public advocacy and mobilisation of the solidarity action.

Each of our reports, starting with the first one, introduced personal narratives. Therefore, we are starting our analysis here with introducing experiences of two men, Mohamad and Abas. Mohamad spat out blood as he remembered what had occurred a few days ago when Croatian police violently expelled him from the country. As he was standing at the concrete block of the collapsing warehouse behind the railway station in Belgrade, he flashed his bruised skin under the T-shirt and trousers he was wearing and described his 'crime' of illegal crossing of the Croatian-Serbian border and the punishment from the Croatian police force. He entered the door of a freezing cold room in a warehouse where five other young men were trying to warm up during the sub-zero days of late January. All of his companions had visible bruises on their bodies, marking the spots where they were beaten by batons, fists, and legs. They had all attempted to cross the Croatian-Serbian border multiple times, and every time they were beaten and denied entry into Croatia despite seeking asylum.[8] Mohamad and his companions were worn out struggling to survive on the streets of Belgrade during the harsh winter while facing hunger, lack of money and clothes, and the xenophobic brutality of Serbian right extremist groups as well as the occasional violence of the Serbian police. Mohamad took a light jacket and a scarf and walked to the largest room of the warehouse across the frozen and muddy ground littered with waste while he spoke about his determination to go to Europe, far from the everyday violence he had experienced in Pakistan and was experiencing in Serbia and Croatia. In a room smelling of burnt plastic, he greeted a few men who shared their recent experiences of violent encounters with the Croatian police at the same spot located by the railway in no man's land between the borders of Croatia and Serbia.

One of the men standing there was Abas from Afghanistan, who was with a group of 24 people, mainly Afghan young people and minors, when they arrived in Croatia in early January 2017. As they approached Zagreb, the police spotted them and stopped them using physical force. Abas was beaten with a baton while the police demanded that he and his companions take off their shoes and clothes. They were forced to stand naked and barefoot in the snow. After calling for backup, the police officers were joined by three or four police cars and approximately twenty other police officers, some with dogs, who then proceeded to beat the group of refugees. Overhearing the conversation, another group of refugees approached Mohamad and Abas and recollected their own experience of being transported to the Serbian border near the railway line, taken out of the vehicles and abused. One of them repeatedly told the police that they sought asylum, but the police brutality would not stop, and the rude expressions and arbitrary denial of asylum continued. The group of refugees recalled that their mobile phones and money were taken away from them as well as their shoes—after which they were forced to run barefoot to Serbia.

[8]This chapter uses the words *asylum* and *international protection* as synonyms referring to the adopted definition of the Geneva conventions.

Fig. 1 Explanatory map of Western Balkan region. Medecins Sans Frontières, 2015, Balkan Route

As we stated in our report issued in the late January of 2017,[9] the majority of people we have spoken to were violently expelled or pushed back from Croatia, particularly from the Croatian-Serbian border and the police stations deeper in the state territory[10] mainly to the railway connecting the Croatian town of Tovarnik and the Serbian town of Šid, where they were further exposed to physical violence. Also, their testimonies led to the conclusion that there was a clear pattern of denied access to international protection coupled with various forms of violence (Fig. 1).

The refugees we had spoken to recount the following forms of violence and dehumanisation: long hours and multiple days of detention in the police stations with no access to interpreters; being subjected to various forms of threats, mockery, and humiliation; forced signing of documents in Croatian or in another non-understandable language; and physical violence. Additionally, refugees routinely described their complete denial of access to the asylum process, recounting how individual police officers arbitrarily granted or denied access and how asylum-seekers were forcibly compelled to sign documents in a language they did not understand.[11] The stories represent methods used to deter refugees from their rights: violence at the

[9] Are you Syrious?, Welcome! Initiative, The report on illegal and forced pushbacks of refugees from the Republic of Croatia (Zagreb 2017).

[10] Most refugees refer to the border crossings of Šid-Tovarnik and Bajakovo, while the police stations in which our correspondents sought asylum were located in the towns of Đakovo and Vinkovci, situated in relative proximity to the border crossings as well as in Zagreb, the capital and its suburbs (Zaprešić). Several other stations were mentioned in the interviews, but we were unable to determine their locations.

[11] One of the refugees we interviewed was later able to take with him (probably by accident) the document that he was required to sign: a consent form that stated the asylum-seeker was required to leave Croatia and the EEA (European-Economic area) within 30 days. Despite the 30-day period, he was pushed back from the country the same day.

borders by the official regime, mistrust of or violence by the citizens, survival and struggle for food, warmth, basic safety, and struggles with bureaucracy. Refugees take one step forward and two steps back. They walk on the edge. In a Biblical sense, where the word limbo (limbus) originates from, it often refers to *infernum* or hell, and the situation resembled a living hell.

Here we submit that not only should *pushbacks* be analysed through the prism of overstepping the authority by individual police officers, but also that they should be analytically and politically constituted as forms of systemic violence against refugees and criminalisation of migration. Despite explicit asylum claims by those on the move, violent expulsions performed by the Croatian border police have been recorded, analysed and criticised by numerous international human rights organizations[12] and local civic initiatives and non-governmental organizations[13] (Are You Syrious? and Welcome! Initiative 2017a, b, c, 2018; Jesuit Refugee Service 2017). Despite those warnings, expulsion remains an ongoing practice while at the same time a firmly furtive action run by the heads of the police and the state. Upon the presentation of the fourth report on violent expulsion of refugees from Croatia, we claim that "given the frequency and patterns of police behaviour, we cannot characterise it as isolated and sporadic cases of illegal expulsion as well as of benign 'deterrence.' Police behaviour reveals consistent, planned and systematic measures of deprivation of freedom of movement without a legal basis, the denial of access to international protection and violation of the non-refoulement principles".[14]

3 *Enemizing* Refugees

The *long summer of migration* of 2015 and the continuation of the forced movements of refugees known as the *refugee crisis (izbjeglička kriza)* yielded two contrasting representations of the refugee. One representation framed and gendered refugees as weak, suffering and help-seeking subjects, while the other representation framed and racialised refugees as dangerous subjects. While the former representation remains active in the discourse of production of the refugee subject formation, the latter prevailed in dedicated adherence to political motives of painting the refugee as an enemy—an enemy to both the nation and to individual safety. We argue that the coining of the term *refugee crisis* produced a continuously expanding window for *enemizing* and *criminalising refugees* within already existing and iterated dynamics of the exclusionary and rigid politics of the *Fortress Europe*[15] The occurrence and reiteration of the *refugee crisis* brings to the fore a few mutually corresponding layers

[12] Human Rights Watch (2017); Medicine du Monde (2016); Doctors of the world (2017); UNHCR (2016).

[13] Are You Syrious? and Welcome! Initiative (2017a, b, c).

[14] Are You Syrious?, Centre for Peace Studies, No name kitchen and Welcome! Initiative (2018).

[15] Betts and Collier (2017), Sigona (2018). In addition to the reference, the term Fortress Europe is a commonly used term to describe the state of migration and asylum policies entailing rigidity

of the label *enemy* as the coinage that has and continues to steer migration, asylum policies, and political decision of the peripheral European states such as Croatia, and conditions the public perception. Despite generating critical discussions in the civil society and academia, we argue that this coinage has primarily encouraged the notion of the upcoming and immutable burden to the European countries as an outbreak of the *crimmigration governmentality*. Despite the empathy and compassion, the burden for the nation-states and fear of the unstoppable threat carried by the refugees was loudly discussed and problematized. It is not surprising that the state policies of securitisation have come to a fore. The refugee was and is an embodied crisis itself,[16] unrestrainable threat and fear in its *illegality*. Hence the restrictive political decisions and forms of governmentality through violation and controlling of a refugee subject. In the words of Achile Mbembé, "power continuously refers and appeals to an exception, emergency, and fictionalised enemy".[17]

The clear example of violation and controlling of refugee subject emerged in the October of 2015 when eight African men were pushed back by the Slovenian border police to Croatia during the government-organised transit of refugees by bus from the temporary transition camp Opatovac situated close the Croatian-Serbian border. Their expulsion was a forerunner of the *racial profiling* accounts that led to an official agreement reached between the heads of the police of Austria, Slovenia, Croatia, Macedonia, and Greece,[18] during the high-level meeting held in February of 2016 in Zagreb, Croatia. The agreement has legalised *racial profiling* and expulsion of refugees based on the accounts of the discretionary decision who is the *real and true refugee*. In addition to being already excluded from their countries of origin, explicit markers such as skin colour, phenotypic markers, languages, and clothing further prevented many people on the move from breaking through the sealed borders of the seemingly open Balkan corridor, known as the *Balkan route*,[19] At the same time, that disqualification operated as an exclusionary political framework for the arbitrary recognition and labelling of Syrian migrants as real refugees, Afghans[20]

---

and exclusiveness in their principles, securitisation, detention and militarisation in their action, and humanitarian crises and human losses in their consequence.

[16] Sigona (2018, p. 458).

[17] Mbembé (2003, p. 16).

[18] Joint statement of the heads of the police services of 18 February 2016.

[19] Bužinkić and Hameršak (2016).

[20] Afghans were excluded from the Balkan corridor already in February 2016, as Welcome! Initiative denounced: http://welcome.cms.hr/index.php/hr/2016/02/20/na-svjetski-dan-socijalne-pravde-krenula-diskriminatorna-stroza-rasna-profilacija-izbjeglica/. These disqualifications were only an overture to what later resulted in Joint way forward declaration, the migration deal which was, after months of negotiations signed between the EU and Afghanistan: https://free-group.eu/2017/04/11/eu-afghanistan-joint-way-forward-on-migration-issues-another-surrealist-eu-legal-text/.

Joint Way Forward declaration allows the Member States to deport an unlimited number of Afghan migrants back to their home country, unless they have permission to remain in Europe. It was signed during the Afghanistan donor conference which took place in Brussels on 4 and 5 October 2016 and brought together representatives from 75 countries and 26 international organizations: https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf.

and Iraqis as semi-real[21] refugees, and all others as *economic migrants* who were denied the right to move. The initial reception of refugees by the Croatian state from "refugees welcome" to "refugees well gone" and "migrants unwelcome"[22] has come to its reveal rapidly. The New Keywords Collective discusses this phenomenon as follows:

> […] in the face of the proliferation of alternating and seemingly interchangeable discourses of 'migrant' or 'refugee crisis', the primary question that must be asked is: Whose 'crisis'? In fact, this is fundamentally a 'crisis' of (postcolonial) state power over the transnational human mobility of those whose movements are otherwise presumptively disqualified as 'illegal' (effectively, on the grounds of global class, race, or nationality inequalities). Thus, we may begin to appreciate that this 'crisis' is really a moment of the governmental impasse that is being mobilised and strategically deployed for the reconfiguration of tactics and techniques of border policing.[23]

The subject formation of a refugee as a threat constitutes complex imagery that produces justification for the institutions of power to turn the regulatory mechanisms such as border control to the *technologies of hegemony*[24]). This can be mainly seen in criminalisation of the illegal crossings of the borders which does not only come through a form of the legal-*ized* consequences such as detention and expulsion but also through a publicly inserted stigmatization that reifies stereotypes of those representing the highest risk to a nation[25] and that circularly replicate those technologies of hegemony and criminalisation.

Another dimension to notice is a mobilisation of a new kind of subjectivity, that of a terrorist especially reified recently after the terrorist attacks in Europe. That discourse has risen globally after 9/11 in the United States and terrorist attacks in Europe, and has been operating hand in hand with the discourse of Islamophobia, where Muslims are constructed as violent oppressors and terrorists.[26] Grewal[27] discusses that in the weeks following 9/11 these subjects were both produced by the state through criminalisation, and also through existing technologies of racialised surveillance. Engaging further with Grewal's scholarship, we acknowledge that there is a firm connection between what she calls the *racialised notion of danger* and what she calls the "notion of danger that became allied with knowledge, visibilities, and institutions as technologies of power".[28]

As she further discusses, the notions of danger and security are allied producing multiple power mechanisms as a form of governmentality. Drawing parallels with the racialization, criminalisation, and the incarceration in the United States, Grewal writes as follows:

---

[21] Bužinkić and Hameršak (2016).

[22] Ibid.; Sigona (2018).

[23] New Keywords Collective "Europe/Crisis: New Keywords of 'the Crisis' in and of 'Europe'." In Europe at Crossroads Near Futures Online 1, 2016.

[24] Grewal (2003).

[25] Grewal (2003).

[26] El-Haj and Renda (2010), Božičević et al. (2017), Grewal (2003), Šeta (2016).

[27] Grewal (2003).

[28] Ibid., p. 201.

> From the criminal at one level of risk for violence to the 'terrorist' at a higher level representing a risk to the nation, we can see the progressively higher level of risk associated with particular bodies within specific locations. While the 'criminal' might still have the resource to some legal rights, the person designated a 'terrorist' has lesser resource since he or she is a threat to the health of a nation. Understanding 'risk' in this way can enable us to see how the identification of a 'population at risk' are allied to the idea that racial and gendered (and often sexual) minorities are often a danger to themselves and others, and thus have to be subjects to forms of state, community and self-regulation.[29]

Grewal's piece explains well (and clearly) that the notion of danger (or what she calls "higher level risk") is linked to a refugee body as a body of the other, of the one that is called a terrorist, such as Abas and Mohamad. Engaging with Grewal's theoretical approach, we submit that criminalisation of migration is both the power mechanism of the state as well as a form of governmentality in Foucauldian sense[30] while the *refugee* is a complex category of visibility produced and perpetually replicated through the governmentality and technology of crimmigration. The fear of the terrorist Other, as argued by Grewal, "exacerbated the circulation of discourses of security and the regimes of knowledge of the Other that created fear within the public".[31] Similarly, we posit that the terrorist imagery was constructed in order to fortify the fragile state of affairs of the European Union.

4 Normalisation, Policing, and Securitisation

Those regimes of "knowledge" of the others introduce and widely implement the technology of *enemizing* and what the New Keywords Collective explain as *managed inhospitality*[32] characterised with borderless manners of hardening the *global border regime* thus normalising omnipresent control and surveillance. The global

---

[29] Ibdi., p. 202.

[30] Michel Foucault has been hugely influential in shaping understandings of power. The French postmodernist developed the idea that 'power is everywhere', diffused and embodied in discourse, knowledge and 'regimes of truth' (Foucault 1991; Rabinow 1991). Foucault challenges the idea that power is wielded by people or groups by way of 'episodic' acts of domination or coercion, seeing it instead as dispersed and pervasive. 'Power is everywhere' and 'comes from everywhere' so in this sense is neither an agency nor a structure (Foucault 1998, p. 63). Instead it is a kind of 'metapower' or 'regime of truth' that pervades society. Foucault uses the term 'power/knowledge' to signify that power is constituted through accepted forms of knowledge, scientific understanding and 'truth' (https://www.powercube.net/other-forms-of-power/foucault-power-is-everywhere/).

Governmentality, in a Foucauldian way, refers not only to political structures; rather, it designated the way in which the *conduct* of individuals or of groups might be directed. To govern, in this sense, is to control the possible field of action of others. The word 'govern/mentality' refers to both the processes of governing and a mentality of government (http://criticallegalthinking.com/2014/12/02/governmentality-notes-thought-michel-foucault/).

[31] Grewal (2003, p. 213).

[32] New Keywords Collective (2016).

border regime proliferates *violent borders*[33] denying movement and access to protection while being composed of walls, barbed wire fences, thermovision cameras, guard dogs and essentially as "increased architectural hardening at the ports of entry into the nation, and these have centred particularly around the instantiation of hyper-militarised border technologies".[34] Border militarisation globally represents, according to Reece Jones, the pervasive influence of military strategies, culture, technologies, hardware",[35] and policing the border.

Hyper-militarisation of the borders and technologies of the *securitisation* mirrors security-driven engineering of migration, or what Lorenzo Pezzani of the Watch the Med and Forensic Oceanography calls *militarised border regime*.[36] Securitisation and security-based technologies have become the central aegis of the militarised regime of border control deploying a choreography of pushbacks and removal of undesirable subjects. Pezzani argues that there is "a certain aesthetic regime that operates in the borders. The ultimate goal is to show that border violence and death at the border is not a kind of tragic side-effect of border policing, but it is really a structural outcome, even at times a deliberate goal, of it".[37] Jones describes those tragic consequences as *deadly spaces of violent security practices*.[38]

Engaging within a transnational feminist theory framework, we analyse the militarisation of the border regime as a prolonged hand of policing people on the move while it perpetually "produces subjects of politics that 'justify' the transformation of everyday social, economic and cultural governance into emergency police enforcement and military occupations".[39] Situating his analysis in the contemporary transnational security practices, Amar describes these produced subjects as *parahumans—hybrids* of para-militarisation and humanitarianism. Drawing on Amar's scholarship, we argue that the refugee subject is conceived as *parahuman* shaped in its racialised and *enemised* existence, thus "hypervisibilised subalterns who become fetishised subjects of politics."[40] Amar claims that parahuman subjects embody the power of human-security state where those subjects became hypervisible and exposed to the gaze and action of the state and the police. As argued by Jones, the border security policies of the European Union have become normalised and "constructing barriers to prevent so-called illegal crossings is now seen as a key function of the state […] restricting movement at borders through walls, security agents, and mutual agreements with neighbouring states".[41]

Policing and militarisation as twinned logics of securitisation appear as instruments of the state terror deployed by the border police. This police-centred human

[33] Jones (2017).
[34] Davies (2017).
[35] Jones (2017, p. 39).
[36] Fekete et al. (2018).
[37] Ibid., p. 71.
[38] Jones (2017).
[39] Amar (2013, p. 209).
[40] Ibid.
[41] Jones (2017, p. 48).

security regime combining denial of access to the international protection and the violent expulsion discourse speaks of perpetual para-humanisation of refugees while it mirrors the technologies and regimes of criminalisation taking place at borders. Jones argues that "the borderline itself is an ideal location to observe how police and military combine into an all-encompassing logic of perpetual war, surveillance, and security"[42] while adding that the "borders are an efficient system for maintaining political control of an area through agreements and documents that are backed up with the threat of violence".[43] Threat turns into overt violence by the border police as an expression of the ultimate force in preventing the literal move across the border.

5 Reframing the (Il)legality of Crimmigration

The core of this discussion is in the inter-relationality of the deployment of police brutality in pushbacks of refugees, and the denial to the mechanism of the international protection (asylum). As Fekete claims "in today's Europe, the imperative of a deterrent asylum system means that border defence, not the protection of life, remains the priority at Europe's frontiers".[44] And this is the reality that operates through the production of parahumans while normalising the logic of the repressive doctrines of the *security state*.[45] Within that logic, any perilous border crossing is portrayed as a threat and illegality that needs to fight back with the repressive securitisation practices.

While focusing on cases of documented pushbacks specifically at the Croatian-Serbian border, this chapter calls for a continued, more sharp and critical discussion of border violence on a more global scale. This discussion encounters limitations if situated only within the Croatian migration management due to the duty of the enforcement of the Schengen Borders Code, thus the duty of protection of the external borders of the European Union. Also, this discussion branches off to a discussion on challenges in envisioning possible counter-political action solely at the Croatian-Serbian border, since the technology of *pushbacks* is not an isolated act of the Croatian border police but rather a chain reaction within the border control regime deployed by all the EU Member States and the Balkan countries from Croatia to Greece (known as the *Balkan route*). However, the Croatian-Serbian border remains one of the central locations along the borders of the European Union deploying border violence that needs further critique, and alternation of political action.

To conclude, this discussion is concerned with the nature of *pushbacks* and critical re-examination of the current approach in framing that particular form and technology of crimmigration. While we have been documenting and critically discussing the state terror located along the Croatian–Serbian border and recently Croatian–Bosnian

[42] Ibid., p. 40.
[43] Ibid., p. 117.
[44] Fekete (2017, p. 2).
[45] Amar (2013), Jones (2017).

border and Croatian–Montenegrin border and the Croatian in-territory, we have condemned *pushbacks* as violent and illegal expulsion of refugees, since denial of access to the international protection (asylum) and violence against those in search of safety is counter-constitutional and in contrast to the core of the international humanitarian law. However, we argue that we need to reframe illegality of this securitisation doctrine and its regimes of policing and militarisation actions and regard them as legal and/or becoming legal-ized. While the *in flagranti* furtiveness of the *pushbacks* indicates illegal action by the official bodies, the materialised legality comes through the Schengen Borders Code:[46]

> "Border control comprises not only checks on persons at border crossing points and surveillance between those border crossing points, but also an analysis of the risks for internal security and of the threats that may affect the security of external borders. It is therefore necessary to set out the conditions, criteria and detailed rules governing checks at border crossing points and surveillance at the border."[47]

It is precisely the Schengen Borders Code that the Croatian border police and the Ministry of the Interior arm themselves with while producing the illegality of refugees and justifying the legality of their own actions. Demonstration of that change also emerges in the clear deterioration of the Dublin regulation and seismic shifts of the asylum system, as well as in the vast dysfunctionality of the Geneva conventions and the international humanitarian law. This current situation represents a slope and profoundly *broken refugee system*[48] that is undergoing a rigid transformation with an uncertain yet detrimental outcome for people on the move.

While examining *pushbacks* and other technologies of the police border violence we need to engage more thoroughly with the discourses of normalisation and securitisation[49] by grasping at least two sides of the same coin. One regards the approach that the global border regime demonstrates that the nation-state contains the political power.[50] As Jones further argues while polemicising with Wendy Brown's book *Walled States, Waining Sovereignty*:

> The hardening of borders represents a rearticulation and expansion, not a retreat, of state power […] reassertion of state power specifically through the construction of walls, fences, and other security apparatus of the border. The second indication that states retain their central role in the control of political space is the increased cooperation between the states in the management of their borders. […] work together against shared threats to their sovereign control over the territories. […] States work together at borders to manage and regulate—to make legible to each other—people who do not acknowledge the state's exclusive right to control the territory: migrants, smugglers and terrorists.[51]

---

[46] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[47] Regulation (EU) 2016/399, Article 8.

[48] Betts and Collier (2017).

[49] Amar (2013).

[50] Jones (2017).

[51] Jones (2017, p. 69).

The other one considers us becoming cognizant with the complexities of the crimmigration governmentality that exceeds traditional legal technologies of state power but unifies flagrant and unflagrant languages and technologies of control and surveillance, produces subjects of control while criminalising them and the solidarity shown within those contested political spaces. By understanding these complexities and their deterrence, we are coming closer to revisiting and framing counter-political action envisioning freedom of movement and safety for all.

References

Amar P (2013) The security archipelago. Human-security states, sexuality politics and the end of neoliberalism. Duke University Press, London

Are You Syrious, Centre for Peace Studies, No Name Kitchen and Welcome! Initiative (2018, Feb 28) Fourth report on illegal pushbacks of refugees from the Republic of Croatia in the period from June 2017 to February 2018. https://www.cms.hr/system/article_document/doc/501/IZVJE_TAJ_O_NEZAKONITIM_I_NASILNIM_PROTJERIVANJIMA_IZBJEGLICA_IZ_REPUBLIKE_HRVATSKE.pdf

Are You Syrious and Welcome! Initiative (2017a, Jan 30) Report on illegal and forced push backs of refugees from the Republic of Croatia. http://welcome.cms.hr/index.php/en/2017/01/30/report-on-illegal-and-forced-push-backs-of-refugees-from-the-republic-of-croatia/

Are You Syrious and Welcome! Initiative (2017b, Mar 7) Second report on illegal and forced push backs of refugees from the Republic of Croatia. http://welcome.cms.hr/wp-content/uploads/2017/03/DRUGI-IZVJE%C5%A0TAJ-O-NEZAKONITIM-I-NASILNIM-PROTJERIVANJIMA-IZBJEGLICA-IZ-REPUBLIKE-HRVATSKE.doc

Are You Syrious and Welcome! Initiative (2017c, May 29) Report on the new wave of violence against refugees on Croatian borders. http://welcome.cms.hr/wp-content/uploads/2017/05/Izvje%C5%A1taj-o-novom-valu-nasilja-prema-izbjeglicama-na-granicama-Republike-Hrvatske.pdf

Banich S, Brnardić S, Hameršak M, Kekuš S, Marčetić I, Piškor M, Sindičić M (2016, Mar 16) Izvješće o sustavnom kršenju ljudskih prava u zatvorenim dijelovima Zimskog prihvatno-tranzitnog centra u Slavonskom Brodu, od strane hrvatskih vlasti. http://welcome.cms.hr/wp-content/uploads/2016/03/Izvjestaj_o_krsenjima_ljudskih_prava_u_izbjeglickom_kampu_u_Slavonskom_Brodupdf

Banich S, Gerbig L, Homberger A (2016, Jan 28) Report on systemic police violence and push-backs against non-SIA people conducted by Croatian Authorities. http://moving-europe.org/wp-content/uploads/2016/01/28.01.2016_Report-Police-Violence-and-Push-Backs.pdf

Belgrade Center for Human Rights, Macedonian Young Lawyers Association and Oxfam (2017) A dangerous 'game'. The pushback of migrants, including refugees, at Europe's borders. https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf

Betts A, Collier P (2017) Refuge. Rethinking refugee policy in a changing world. Oxford University Press, New York

Božičević G, Bužinkić E, Domladovac M, Dragičević I, Konjikušić D, Lalić S, Matejčić B, Senta C, Vidović T (2017) Zbornik: Razumijevanje rasizma i ksenofobije. Centar za mirovne studije, Zagreb

Bužinkić E, Hameršak M (2016) Kamp, koridor, granica. Institut za etnologiju i folkloristiku, Centar za mirovne studije, Inicijativa Dobrodošli i CEDIM – Centar za istraživanje etničnosti, državljanstva i migracija, Zagreb

Davies D (2017, Oct 30) Hard infrastructures, diseased bodies. Refugee Hosts (blog). https://refugeehosts.org/2017/10/30/hard-infrastructures-diseased-bodies/
Doctors of the world (2017) Annual Report-https://www.medecinsdumonde.org/en/actualites/publications/2018/07/05/annual-report-2017
El-Hay A, Renda T (2010) 'The beauty of America': nationalism, education and the war on terror. Harv Educ Rev 80(2):242–287
European External Action Services (2016) Joint way forward on migration issues between Afghanistan and the EU. https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf
Fekete L (2017) Migrants, borders and the criminalization of solidarity in the EU. Race and Class 59(4):65–83
Fekete L, Webber F, Edmond-Pettitt A (2018) Humanitarianism: the unacceptable face of solidarity. Institute of Race Relations, London, http://www.irr.org.uk/publications/issues/humanitarianism-the-unacceptable-face-of-solidarity/
Grewal I (2003) Transnational America. Race and Gender after 9/11. Soc Identities 9(4):198–240
Hall A, Lichfield J (2015) Germany opens its gate: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a 'similar statement'. Independent
Human Rights Watch (2017, Jan 20) Croatia: asylum seekers forced back to Serbia. https://www.hrw.org/news/2017/01/20/croatia-asylum-seekers-forced-back-serbia
Jesuit Refugee Service (2017, Jan 3) Priopćenje o navodnim nezakonitim udaljavanjima izbjeglica s područja RH. http://www.jrs.hr/2017/01/03/priopcenje-o-navodnim-nezakonitim-udaljavanjima-izbjeglica-s-podrucja-rh/
Jones R (2017) Violent borders. Refugees and the right to move, Verso, London
Mbembé A (2003) Necropolitics. Public Culture 15(1):11–40
Medecins du Monde (2016) Annual report. https://issuu.com/medecinsdumonde/docs/annual_report_m__decins_du_monde_-_
Medecins Sans Frontières (2015, Dec) Balkan route. https://msf.lu/en/countries/balkan-route
Moving Europe (2016) Croatia: Đlavonski brod transit camp for migrants and refugees. Monitoring. http://moving-europe.org/croatia-slavonski-brod-transit-camp-for-migrants-and-refugees/
New Keywords Collective (2016, Mar) Europe/Crisis. New Keywords of 'the Crisis' in and of 'Europe'. Near Futures Online 1 "Europe at a Crossroads". http://nearfuturesonline.org/europecrisis-new-keywords-of-crisis-in-and-of-europe-part-3/
Šeta Đ (2016) Forgotten women: the impact of Islamophobia on muslim women. European Network Against Racism, Brussels
Sigona N (2018) The contested politics of naming in Europe's Refugee Crisis. Ethn Racial Stud 41(3):456–460
UNHCR (2016) Weekly updates. https://data2.unhcr.org/en/search?country=722&text=&type%5B%5D=document&partner=&sector=&date_from=&date_to=&country_json=%7B%220%22%3A%22722%22%7D&sector_json=%7B%220%22%3A%22%22%7D&apply=

Crimmigration and Nationalist Paranoia

Veronika Bajt

Abstract In recent years, European borders have become subject to augmented securitisation, surveillance and militarisation, while EU migration policies are increasingly based on exclusion and denial of migrants' rights. Migration across the globe, both in public policy debates and in everyday life of ordinary people, has increasingly become associated with fear, hate, terrorism, and social conflict. While migration law is taking over elements of criminal law (i.e. the criminalisation of migration or "crimmigration"), nationalism and racist hate speech spur threatening consequences for migrants' fundamental rights. The chapter analyses how the migration phenomenon has become reduced to a question of security and how migrations are increasingly considered solely in terms of "management" of people on the move, who in consequence have become de-personalised as "flows". It focuses on the interlinking between the concepts of crimmigration and national identity by drawing on theories of nationalism. It argues that the biggest potential for conflicts can arise from an atavistic understanding of nation-states as monolithic units of primordial ethnocultural bonds that can easily be mobilised for populist and nativist political gains. It proposes that situations such as the recent European "refugee crisis" can be better understood when nationalism is analysed not only as a political movement, ideology, or discourse but also as a form of collective paranoia that fosters crimmigration.

1 Prelude to Crimmigration

> The nineteenth century did not have migration crises like those we have seen in the twentieth and twenty-first centuries—with refugees crowded into camps or migrants desperately running across borders hoping not to be caught—because migrants, regardless of their reasons for migrating, were allowed entry to most countries. Immigration to the New World and within Europe, Africa, and Asia was largely unrestricted.[1]

[1] Peters (2017, p. 2).

V. Bajt (✉)
Peace Institute, Ljubljana, Slovenia
e-mail: veronika.bajt@mirovni-institut.si

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_9

A rise in xenophobia and hate speech against migrants,[2] in particular Muslims, has been apparent in the West. Such a trend is especially conspicuous when taking into consideration the 2015 "refugee crisis" in Europe.[3] Since the 1980s, the situation has worsened for people seeking refuge from armed conflict, political persecution, poverty, environmental decay, and economic desolation. The last decade has seen the Central American children refugee crisis in the United States of America, the Rohingya refugee crisis in Australia and Southeast Asia, and the Syrian refugee crisis in Europe. "Instead of providing a safe haven for those fleeing conflict, persecution and violence, in all three cases, wealthy countries—including the United States, Australia and the European Union (EU)—have prevented entry to those seeking a better life".[4] Expectedly, then, many national jurisdictions have adopted increasingly restrictive immigration control systems. Moreover, developments worldwide demonstrate that the power of exclusionary, nationalist, and racist ideas remains strong, forging movements and political parties that can result in policies with deadly consequences. Countless daily manifestations of racist hate speech and nationalist prejudice are a reminder of the continuing importance of racism and nationalism as a social and political force in the contemporary global environment, for they remain a vibrant influence on current social and political movements and state policies. Moreover, governments of various orientations have become increasingly quick to deploy criminal justice measures to address the "immigration problem".

So-called pushbacks[5] along the Western Balkans are creating an increasing number of human rights violations that do not seem to bother the EU Member States' elites while increasing share of the population prefers to look away from the plight of people attempting to escape Syria, Pakistan, Afghanistan, and other countries across the globe. Borders are subject to increasing securitisation, surveillance, and militarisation, while immigration policies are increasingly based on exclusion and denial of rights with the purpose of control over migrants. Even though existing research bears

[2]The term "migrant" is used here to signify the mobility of people as free agents. It pertains to immigrants/emigrants, settlers, refugees, asylum seekers, and in general people as individuals with their own personal stories and reasons for migrating. In so doing I wish to abstain from reifying categorisations based on legislation and police records that factually determine their life trajectories. I am not denying that the reality of many people is shackled in official categories defining their migration either as documented/legal or undocumented/illegal, employment-related (economic) or asylum seeking, to name just the most often discussed. However, the complexity of human existence often precludes such clear-cut classifications.

[3]While it is a commonly accepted practice to speak of various refugee crises to note the processes of a heightened and usually sudden movement of people, I consider the term "refugee crisis" a misnomer. It is factually always a crisis of response to the increased number of people crossing borders to seek refuge, be it in the European Union or in a particular nation-state. Rather than speaking of a refugee crisis in 2015–2016, I would rather highlight the situation as a crisis of the EU.

[4]Peters (2017, p. 1).

[5]For refugees and others who have the right to international protection from persecution and serious human rights violations, pushbacks stand in the way of seeking protection and enjoying their right to an individual assessment of their claims. Pushbacks are happening in different ways. Brutality, intimidation, and devious tactics by authorities have been widely documented to engender a climate of fear and mistrust amongst people on the move. See Regvar (2018).

hardly any evidence of immigration-crime nexus, migration law is taking over elements of criminal law (i.e. the criminalisation of migration or "crimmigration"). This chapter follows from the need to understand these processes by analysing them as a form of nationalist paranoia. As such, it attempts to understand the causes and present the consequences of crimmigration by turning back to the theories of nationalism and elucidating the workings of nationalist and racist prejudice against migrants, the fear of immigration, and the rise of xenophobia and hate speech in Europe and globally. Thus, the chapter attempts to demonstrate the strong interlinking between the phenomena of crimmigration and nationalism.

While migration law is adopting elements of criminal law, with migrants increasingly being treated as "symbolic assailants",[6] nationalism and racist hate speech spur threatening consequences for migrants' fundamental rights. Migration, both in public policy debates and in everyday life of ordinary people, has increasingly become associated not only with issues of integration, multiculturalism, questions of belonging, loyalty, identity, and co-existence, but also with the fear of terrorism, "population mixing", Islamophobia and social conflict. The chapter will examine whether these phenomena are something novel that has caught us all off guard or indeed something that should have been expected. I will show that there is nothing fundamentally new by purposefully turning back to the theory of nationalism in order to understand the current crimmigration phenomenon better. The nation-state, despite its factually receding power, remains the public risk manager[7] and thus provides an illusion of safety and protection against the myriad of risks. The psychology of nationalism enables us to see that one of the biggest potentials for conflicts can still arise from a primeval understanding of contemporary states as monolithic units of primordial ethnocultural bonds that become mobilised for political gains of right-wing parties. In this chapter, these trends are addressed by concentrating on nationalism as an ideology in a time of receding power, even a crisis of traditional ideologies of modernity. While increasingly dominant neoliberalism replaces movements and ideologies that have otherwise been critically addressing the status quo, nationalism evades definition, but simultaneously maintains its position even in today's globalised world. Paradoxically connected both with the democratic aims of political representation and with populist radical right-wing forms, nationalism remains a powerful force that still mobilises people. This is why nationalism may have succeeded precisely where other ideologies have failed: "It travels theoretically light, without excess conceptual baggage, and therefore possesses greater rallying power".[8]

Addressing a gap in the existing research on crimmigration, this chapter stems from theoretical reflections on nationalism that clarify the unabated appeal of national identities in a contemporary world marked by processes of transnationalism, globalisation, and regionalisation. Rather than being surprised at the continuous power of ethnic, national, racial, or religious identifications (as well as prejudice, animosity, and conflict), the persistence of nationalism and national identity are elucidated

[6] Jiang and Erez (2018).

[7] Hosking (2016).

[8] Schwarzmantel (2008, p. 91).

in this chapter by pointing to their roles as emotional anchors in the contemporary world of increased uncertainty and insecurity. Namely, theoretical attempts to diminish negative perceptions of the Other, such as the so-called intergroup contact theory,[9] fall short of explaining why nation-states and national attachments continue to hold sway over people's feelings of belonging and loyalty. What is more, the nation-state encourages nationalist and racist exclusion of non-members, Others, as exemplified in crimmigration measures against foreign nationals. Constantly propagating the "superiority" of the western civilization, political elites vote for "an endless succession of wicked and appalling discriminatory laws," contends Alain Badiou: "For those without citizenship, it has been, and continues to be, not a state of law but a state of exception—a state of no-law".[10] It is the disenfranchised, minorities, and non-nationals who are insecure, not wealthy nationals, Badiou argues, alerting us to the fact that it is always "the intellectual, however deplorable, that precedes a leader who then builds a following".[11] I take a cue from this because the role of the elites has had a central role in research on nationalism and all crimmigration policies emanate from elite engagement.

The chapter consists of three sections: the first section elucidates the concepts and theories of nationalism that best help explain the causes for contemporary crimmigration trends. The second section points to the consequences of crimmigration that leave little hope for a significant change in migration management in any near future. As argued here, crimmigration is an expected consequence of nation-state's attempt to exert its power inwardly onto its nationals and outwardly against non-members. Theoretical starting points are based on findings of social psychology and theories of nationalism, which enable understanding of the process of constructing the national identities in relation to the so-called Significant Others, from which I then derive the notion of Dangerous Others. In so doing, the last section of this chapter proposes crimmigration to be a result of collective nationalist paranoia.

2 Revisiting the Study of Nationalism

As an ideology and discourse, nationalism became prevalent in Western Europe and North America in the second half of the eighteenth century. It became the subject of historical enquiry in the mid-nineteenth century and entered social sciences in the early twentieth century. Scholars from several disciplines began thoroughly researching nationalism only in the 1960s, responding to the anti-colonial and the so-called ethnic nationalisms of the time. By the middle of the twentieth century, most theorists had deemed nationalism to be a thing of the past. Nationalist "outbursts" were confined to the "less developed" regions of the world, considered to represent archaic remnants of the pre-modern past and mere exceptions to the rule; nationalism was

[9] Pettigrew (1998).
[10] Badiou (2012).
[11] Ibid.

deemed to be "over".[12] All this changed with the collapse of communism when the post-Cold-War reality suddenly appeared suffused with nationalist sentiment. The break-up of multinational political entities such as the Soviet Union and Yugoslavia caught most social scientists off guard, revealing their failure to comprehend what was developing in front of their eyes. When the so-called ethnic conflicts broke out in the 1990s, engulfing central Africa as well as Europe, it turned out that the dominant "modernist" approach to nationalism—which sees nationalism as a form of politics that arises in close association with the development of the modern state[13]—was ill-equipped for conceptualisation of contemporary events. This invited a development of alternative theories, such as "ethno-symbolism" that stressed the importance of pre-modern collective identities for understanding the incessant appeal of modern feelings of national belonging.[14]

Consequent theoretical explorations shifted their focus away from debates about the history and development of nations and nationalism that have long preoccupied much of the mainstream research and turned to the examination of nations and nationalisms as part of the nation-state.[15] This meant not only a temporal shift in research from analysing national movements and development of nations and nationalism before the rise of the modern state but also a modification of study focus that now centres on nationalism after the formation of the nation-state. This theoretical literature on nationalism is usually dubbed as postmodernist or constructivist, and rather than understanding it as a particular type of political movement or ideology, nationalism is primarily studied as a form of discourse or a system of cultural representations.[16] The classical modernist theory of nationalism, concerned primarily with the political aspect of the phenomenon, has long been expecting its demise. Yet, as argued here, far from dying out once independent statehood is achieved, nationalism and nation-building are features of the so-called established democracies ("old, continuous nations")[17] as much as they are a part of the "young" (e.g. post-communist) so-called nationalising states.[18] Hence, building and preserving a separate national identity in today's world is not only an anachronistic and primordial backward looking trait of ethnocentric nationalists but also a relentless feature of all modern nation-states. Moreover, nationalising policies can be found in "established democracies" as much as in the "new" nation-states.

A considerable portion of the EU Member States and aspiring future members consists of recently formed nation-states that emerged from the vestiges of the

[12] McCrone (1998, p. 1).

[13] E.g. Gellner (1983), Hobsbawm (1990) and Breuilly (1994).

[14] E.g. Smith (1986) and Hutchinson (1994).

[15] E.g. Billig (1995) and Hearn (2006). Cf. Fox and Miller-Idriss (2008).

[16] E.g. Anderson (1991), Bhabha (1990) and Özkirimli (2005).

[17] E.g. Seton-Watson (1977).

[18] Rogers Brubaker speaks of the need to study "nationalising nationalism" of the existing states. His conceptualization of a "nationalising state" describes "the tendency to see the state as an 'unrealized' nation-state, as a state destined to be a nation-state, the state of and for a particular nation". See Brubaker (1996, p. 63).

multi-ethnic political entities of Central and Eastern Europe (i.e. Czechoslovakia, Yugoslavia, and the Soviet Union). Having (re)established political expression in the form of sovereign statehood, they have been required also to relinquish some of their sovereignty to supranational bodies (e.g. the EU). Nevertheless, in the build-up and aftermath of the revolutions and reforms of the late 1980s and early 1990s, "national histories" were recovered, reconsidered and reformulated, "national programmes" were implemented and "national interests" came to the fore. The content of these "national projects" has had a significant impact on the ideals and foci of contemporary national policies, which increasingly (re)produce raptures and exclusion. Faced with processes of globalisation and European integration, it has been assumed that the sheer adoption of "democratic" and "liberal" principles would appease the nation-building processes that were in any case seen to be in contradiction with the contemporary "post-modern" world. Such expectations, however, are at odds with the actual processes of nationalisation that continue to baffle many researchers keen on seeing the demise of the nationalist paradigm. In contrast, all nation-states—not only the "new" post-communist "historic latecomers" or "nations without states"[19] such as Scotland or Catalonia—invest substantive energies into (re)construction and reproduction of separate national identities. By implementing nationalising policies, the states also promulgate their myths of common national destiny that is distinctly related to the "core" nation, thus producing exclusionary divides between "us" and "them".

History is full of examples of practices that, through the processes of administrative state activity, had pushed out all signs of ethnic plurality and heterogeneity. Policies of violent homogenisation of nation-states still create myths about one national history, culture, language, which are also institutionalised as "ours", "national", i.e. the norm. The establishment of the state is even directly linked to "pathological homogenisation" since it is always based on the construction of members (insiders) and non-members (outsiders). The establishment of non-members is a political process in which "diversity" becomes "difference", that is, Otherness, which is treated as "a threat to be disposed of in one way or another.[20] Therefore, in most cases, the process of nation-state formation has always been a process of destruction of certain nations. France, as a paradigmatic example, had supplanted the "local" identities of Alsace, Bretton and other nations to establish the idea of a single French nation.[21] The source of nationalist feelings is therefore connected with the processes of state mobilisation of different classes and strata to combat the common enemy, and is not a result of an ethnic or linguistic community,[22] which is why it is essential to analyse contemporary crimmigration with nationalism theory in mind.

[19] Guibernau (1999).

[20] Rae (2002, p. 3).

[21] See Weber (1976).

[22] Giddens (1985).

2.1 Nationalist Exclusion and Construction of Difference

The financial and economic crisis in recent years has fuelled the rise of various populist and radical right-wing groups. As one such timely example, virulently anti-Semitic and racist, with a heavy nostalgia for the Third Reich, the Greek Golden Dawn combined both legal (running for elections) and illegal action (violently assaulting migrants). The Hungarian Guard, a paramilitary militia of the Jobbik party, terrorises the Roma in Hungary, the English Defense League and the UK Independence Party (UKIP) virulently oppose immigration in the United Kingdom, as do Forza nuova and Northern League in Italy, the True Finns party in Finland, the National Front in France, the Danish People's Party, the Swiss People's Party, or the Slovenian Democratic Party—to name just a few examples. The United States administration under President Donald Trump has separated children from their undocumented migrant parents and incarcerated them. A myriad of other even more gruesome examples could further be listed that associate with radical right-wing political parties. Nationalist exclusion is meant to represent these movements' chauvinist stance that denies equal rights of minorities based on their ascribed national, ethnic, religious and other difference. It signifies not only the racist/nationalist prejudice and discrimination but also encompasses the political programmes that deny the right to have rights for all groups that happen to be defined as outsiders.

Biased or at least skewed media representations have frequently augmented discriminatory attitudes towards minority groups, especially migrants, though hate speech is far from limited to media and extremist groups, and has become part of mainstream political discourse. The link between racism and nationalism is evident across the globe, where exclusionary "national interests" are put to the fore, claims of "patriotic" endeavours for the "homeland" are made, and populist hate speech frequently intersects with sexist, homophobic, racist, and generally intolerant discourse. Attempting to explain and justify opposition to immigration, the so-called theories on "the role of nativism suggest that high levels of immigration in the past led to a backlash and closure, as natives and immigrants increasingly came into conflict with each other over jobs, social welfare benefits, neighborhoods, and culture".[23] Ample research confirms that most migrants assimilate and integrate. For nativism to explain restrictions, it would have needed to increase in the late twentieth and early twenty-first centuries significantly, which it did not. In fact, anti-immigration political movements, parties, and associations were present in every era: "The 1840s had the Know-Nothing Party in the United States; the mid-1800s had anti-Asian immigration groups in Australia, Canada, New Zealand, and the United States" and "the 1920s saw the rise of anti-Southern and Eastern European immigration groups throughout the New World".[24] What we are witnessing in the contemporary radical right, therefore, is nothing substantially new.

[23] Peters (2017, p. 6).

[24] Ibid.

Even, if not primarily, in the post-modern world, the nation-state and its role as public risk manager and guarantor of the fiscal covenant is needed because "capitalism involves betting on the success of investment long before that success can be demonstrated" and hence the nation-state remains the main defence against its extremities.[25] Its function of protecting public welfare, however, is increasingly put under question with arguments that European states can no longer afford "the luxury of a comprehensive welfare state in a fiercely competitive global economy".[26] Moreover, the "main protection against the risks of the global economy remains national" since all international institutions—albeit successful—had been created, not elected, which means, "they do not represent the demos of any country".[27] And this is essential.[28] Nations, namely, have to determine the foundation of their being, and national myths, as sets of beliefs that a community holds about itself, serve as unifying mechanisms. Consolidating the group inwardly, mythical accounts of what unites "our" nation at the same time distinguish the "us" from outsiders—the Others. It has to be emphasised that nationhood is not something one is born with, despite commonsensical beliefs in the perennial and primordial roots of ethnicity, but it is rather a cognitive process of recognition through socialisation. It is, therefore, essential for the establishment of coherence that the factors, which lead to members of two groups seeing each other as different rather than as members of a unifying collective, are frequently "mythical" rather than "factual".[29] This is vital for understanding the continuing need for the nation-state's construction of the outsider, the Other, the enemy.

To be successful, nationalism needs to be supported by different social classes. It needs the illusion of the homogeneity of the nation and mass public support. In the so-called established nations, of course, this public support ebbs and flows, yet national affiliations remain quite firmly grounded. For this to be possible, the reality of the nation plays a key role. The role of elites in the processes of historical nation-formation has been extensively studied, and the enlightened intelligentsia are recognised as being the first to lead the way into a new era where religious authorities had lost their influence.[30] Due to changes in the political organisation of social life and the consequent emergence of the modern nation-state, their function was to construct national identities. Sometimes, these were already present in the form of stable ethnic identities and just needed some re-appropriation. Frequently though, considerable "re-inventing" was necessary. It has thus been the task of the educated classes to

[25] Hosking (2016, p. 216).

[26] Ibid.

[27] Ibid., p. 217.

[28] Where nation-states fail to ensure basic social security and provision of welfare, social movements tend to quickly recognise the void and step in by adopting the role of the public risk manager and social protector. The Golden Dawn has been known to provide meals and medical aid in times of excessive clampdown against Greece due to its financial debt. However, it only offered welfare provisions to the Greeks, to the in-group, to "our own" people, constructing immigrants as the outsider and the enemy in the battle for scarce resources.

[29] Kolstø (2005, p. 3).

[30] Cf. Gellner (1983), Hobsbawm (1983) and Anderson (1991).

explore the specific history of their nation and provide "maps" of their community.[31] Though representing only a small portion of the population, without the "national vision" of these nation-builders, nations would lack the appearance of the realness so significant for emotional identification, and people could not be mobilised for "national goals", at least not as readily. What the classical theories of nationalism leave out, however, is the contemporary continuation of the nationalist construction of difference. Rather than limiting the theoretical gaze to nation-building processes that are habitually analysed as a matter of the past, they need to be studied as continually evolving. In the present, nation-states have far from stopped investing in the myth-making nationalist constructions of separate national histories and identities. Also, as emphasised by Eric Hobsbawm (1983), what becomes a national tradition is often partially or even wholly invented, yet always meaningfully constructed to enhance national identity and the feeling of togetherness.

3 Migration as a Crime: Securitising Borders, Management of People

New and increasingly "technical forms of governance have been taken into use to control state territories," whereas governmental practices "perpetually aim at making territory calculable".[32] Border issues and crime control share the discourse of protection and security, while criminal and immigration law traditionally act as gatekeepers of membership that define the terms of social inclusion and exclusion. Even though interactions and networks are increasing,

> the state is still a crucial organizer of territorial spaces and creator of meaning for them, even though these spaces are becoming increasingly porous […] instead of being mere neutral lines, borders are important institutions and ideological symbols that are used by various bodies and institutions in the perpetual process of reproducing territorial power.[33]

Anti-immigration (nativist) voices raise concerns over what will happen to the existing Western states' welfare systems when confronted with increasing numbers of non-nationals, i.e. immigrants. Drawing on the Scandinavian tradition of a universally generous welfare state, Ugelvik poses an important question: "How can a historically relatively homogeneous welfare state understand and handle a new situation with an unprecedented queue of potential new welfare state subjects that threatens to take up its resources?"[34] Warning bells about "the erosion of trust, social cohesion, and social harmony" frequently accompany what has been understood as "unprecedented influx of immigrants to Western societies".[35] In a time of mass migration, refugees, asylum

[31] McCrone (1998, p. 53).
[32] Paasi (2009, p. 213).
[33] Ibid.
[34] Ugelvik (2013, p. 185).
[35] Helbling et al. (2016, p. 744).

seekers, and undocumented migrants are habitually perceived as uninvited guests at best and as threatening intruders at worst, making any hospitality towards them appear as an act of altruism too far.[36] All states restrict border access, but immigration is criminalised most sharply in the case of asylum. According to Catherine Dauvergne, this is the case because asylum seekers have few options. Thus the "incentives" that "discourage their movement must by definition be harsher than the persecutory conditions they face at home". Moreover, because a "successful asylum claim defeats the sovereign aspiration of the closed border, it is always in the foreground of policy makers' concerns".[37]

Discussing "penal nationalism", Vanessa Barker[38] shows the welfare state to be quintessentially a national project that serves national interests and maintains national membership. In response to mass mobility, it can only be preserved as such by deployment of penal power and criminal justice system, thus fortifying the nationally based welfare regime. Barker maintains that penal power for migration/border control, as a critical form of state power, performs important social functions beyond crime reduction and control. Namely, it provides social security, reinforces national sovereignty and national identity, protects national interests, and therefore sustains the security of the welfare state for nationalistic purposes. The consequences of crimmigration leave little hope for a significant change in migration management in any foreseeable future. Immigration authorities progressively adopt new policing strategies in the "mobilization of pre-crime-type frameworks in the intent management of potentially risky travellers".[39]

> Police are increasingly becoming involved in immigration activities including novel 'high policing' functions like people-smuggling as well as more traditional 'low policing' activities through the use of immigration powers to expedite control over troublesome populations. Agencies not traditionally involved in policing or immigration control have also become enmeshed in migration-related matters, including the Navy and Customs which operate in a hybrid space in which interdiction and humanitarian objectives intertwine in relation to intercepting asylum seekers.[40]

Exercising penal power to manage migration and control the nation-state's borders brings a structuring role into action by fortifying the political authority of the state, its territory, and the people within its boundaries. Relating the existing research on nationalism to contemporary phenomena of crimmigration, I here extend the analytical view backwards in time and outwards across space. Studies confirm how immigration law "has regularly been deeply wedded to the criminal law and its characteristic means of surveillance, investigation, punishment, and redress".[41] The nation-state, namely, has developed specific institutions to regulate and control human mobility,

[36] Zedner (2013, p. 48).

[37] Dauvergne (2013, p. 77).

[38] Barker (2018).

[39] Pickering and Weber (2013, p. 107).

[40] Ibid., p. 108.

[41] Vigneswaran (2013, p. 112).

especially differentiating between nationals and non-nationals. The national membership in this way constructs specific categorisations for people on the move, who become regarded as "objects of criminal suspicion and/or concern".[42] One of the most common ways in which state officials conduct criminal investigations is by employing ethnic/racial profiling—a term generally used to describe situations in which "ethnicity functions as an indicator of criminal propensity, typically by law enforcement officers in the context of a traffic stop".[43] Many states have come to perceive immigrants as responsible for certain forms of criminal activity and as a consequence

> Government officials have focused their anti-crime policing practices on particular minority groups, often leading to systematic harassment, persecution, and cases of wrongful imprisonment. While this sort of profiling comes in many different forms, perhaps the most widely publicized version in current discourse is the profiling of Muslims, and Muslim youth in particular, as suspects in anti-terrorism investigation.[44]

The topic of national identity has again become considerably important, particularly over the last decade and concerning various state leaders who made it an important political issue in the context of ongoing globalisation and European integration processes. Existing research indicates, "an overlap exists between politicians' articulation of exclusive notions about the contours of national identity and heightened expressions of civic and ethnic national identity within public opinion".[45] Elite mobilisation along more inclusive lines appears ineffective, which suggests that "exclusionary arguments play a more important role, at least in terms of attitudes about national identity, than inclusionary ones".[46] This is why, I argue, the elites invest in the construction of the enemy by crimmigration measures and rhetoric of Othering that instils fear.

It is essential to distinguish between, on the one hand, amorphous multitude of individuals who, in principle, do not reach the general public with their xenophobic and anti-immigration statements and acts and, on the other hand, political actors, decision makers, policymakers, who are all factually significant generators of public discourse and therefore bear the greatest public accountability for the consequences of their rhetoric and actions. Consequently, it is the political actors—at the local, national, European, and global level—that bear the primary responsibility for the rise of hate speech and often consequent crimmigration. It is, therefore, crucial to draw attention to systemic inequalities and call for accountability of political elites, whose actions facilitate the rise of hate speech, which in turn enables the enactment of crimmigration measures and anti-immigration policies. It is necessary to elucidate the systemic denial of rights of marginalised groups—quintessentially migrants, whose voice holds an underprivileged position in society. Governments compete with one another on interrelated issues of security and the so-called immigration

[42] Ibid., p. 111.

[43] Batton and Kaldeck (2004, p. 30).

[44] Vigneswaran (2013, p. 118).

[45] Helbling et al. (2016, p. 744).

[46] Ibid.

problem "just to obscure the fact that they are primarily serving the interests of the economic oligarchy (and) have patiently covered the void left by a temporary eclipse of communism with the nonsensical cloak of Islamic peril and the disintegration of our 'values'," as succinctly put by Badiou.[47] "They are the ones who must be held accountable today for the rise of a rampant fascism, the development of which they have tirelessly encouraged".[48]

4 Nationalism as a Form of Collective Paranoia

An overview of the prevailing theories of nationalism shows that the existence of the Other is an implicit assumption in understanding the nation, but the relationship between the "core", dominant nation and the Others remains largely unexplored theoretically. Only a handful of contemporary studies of nationalism[49] analyse the complexity of the establishment and fluidity of the relationship between the dominant nation and the so-called Significant Others. And yet, it is generally accepted that national identity is defined not only from within, in self-categorisation processes that define our place in social groups, but also necessarily from the outside, in the process of recognising and distinguishing one's own people from other nations.[50] National identity becomes meaningful only by differentiation, and it is precisely the Significant Others that condition the creation or lead to transforming the identity of one's own group, i.e. in-group. Members of the nation are not more or less similar, it is about our feeling that we are *closer* to each other compared to the Others. National identity thus has no meaning on its own. It acquires meaning only in confrontation with other nations. It is namely the common enemy who "unites us". A common enemy contains a stereotyped image of the Other, usually also a dehumanised attitude to the out-group. In this context, people live in a world of fear, where the constant readiness for the arrival of the enemy means an endless paranoid search for subtle hints about the peril of danger. Suspicion is one of the main ingredients of a paranoid thinking syndrome, in addition to feelings of superiority, hostility, fear of loss of autonomy, projections, and illusions.[51] The phrase "paranoid thinking style" describes exaggeration, suspicion, and conspiracy fantasies and in itself is pejorative.[52] Although this kind of thinking is usually labelled as lunatic when it comes to an individual, the inconsistency in views of nationalist extremists fits very well into the xenophobic repertoire when it comes to group dynamics. Paranoia thus becomes

[47] Badiou (2012).
[48] Ibid.
[49] E.g. Triandafyllidou (1998).
[50] Guibernau (2007) and Triandafyllidou (1998).
[51] Robins and Post (1997).
[52] Cf. Hofstadter (1964).

part of a nationalistic movement, and it invokes action against the Other, making it possible to unify within the collectivity.[53]

Danilo Kis wrote that nationalism is paranoia, collective and individual paranoia. As collective paranoia, it stems from fear and envy and is thus in some way a summary of many individual paranoias.[54] In the narrower psychological sense, paranoia is defined as a mental disorder where a person lives in constant fear from others as if they want to harm you, as if they are dangerous, they threaten you.[55] Stemming from such an understanding of individual paranoia, this section draws parallels between collective paranoia and nationalist practices of constructing Dangerous Others as those that become opposition to our group or community, which crucially defines "us" as members of the nation. Moreover, Dangerous Others are seen as actually threatening "our" identity, nation, culture. Here we can observe an interesting dividing line between the actual threat on one side, and fear on the other, which has been highlighted by researchers of paranoia, since anxiety is a response to a threat that is not evident.[56] It is an ancient and powerful human emotion that emanates from fear of destruction, death. Therefore, when we are analysing the notion of the Other, we are exploring the relation between reality and fabrication.[57] It is about establishing boundaries, borders and difference between groups, which is indispensable for any self-identification and the idea of the exclusivity and presumed historical uniqueness of one's nation. I here use the term paranoia mostly to refer to the nationalist political elite (its discourse and consequent policies). However, it is the use of paranoid modes of expression by "regular" people that makes the phenomenon significant. In concordance with a theory of nationalism, where it is the nationalist elite that provides the base for any nationalism to develop into a mass movement, paranoia is of course also not always a collective condition. As Vezjak describes, standard examples of the interpretation of social events begin by recognising a specific individual's paranoia, who then assumes power, introduces autocratic control of society and moulds it in a way that corresponds to his or her mental image and needs.[58]

Hence, nationalism can also be understood as a type of collective paranoia. This does not deny the common definitions and more frequent interpretations of nationalism. On the contrary, nationalism is all this and more, and because of its adaptability to each specific circumstances, it retains its power and position in the "post-national"

[53] Paranoia marks something that is outside reason. See Slapšak (2016, p. 203). The concept has not reached outside of humanistic and social sciences and only marks a significant place within theoretical psychoanalysis, post-structuralism, literary theory, and aesthetics. Outside of these disciplines, however, where its use is most widespread (e.g. in current affairs political commentary), it remains without reflection. In other words, "we know what paranoia is, we can identify paranoid political movements or paranoid rhetoric—but what *makes* a social phenomenon paranoid, we do not know exactly". See Plavčak (2016, p. 18). For more on paranoia in view of psychopathology and its positioning within the social context, see Vezjak (2016).

[54] Kis (1996, p. 13).

[55] Pregelj et al. (2013).

[56] Langman (2006, p. 75).

[57] Wingfield (2005, p. 1).

[58] Vezjak (2016, p. 11).

world. However, through the analysis of nationalism as paranoia, we see elaboration and abuse of the notion of Dangerous Others for maintaining the status quo of the ruling elites and the existing system. Exclusion and fear of Dangerous Others and politics of hate on the one hand, and the concrete reality of socio-economic hardships reinforce the power of collective paranoia, which is directed against various scapegoats. This is precisely the mobilisation mechanism often deployed by both the ruling elites and various fringe political actors who gather votes and public support by instilling populist fears of the Other to achieve their political and ideological goals.

The nationalist construction of the Other is not concerned with what actually is, for the very idea of danger is enough. This aspect is especially topical in the current situation of incitement against immigration in the West, where all "non-Western" is being classified as a threat of different culture and generally non-democratic values. Abundant emphasis on patriotism is here a characteristic, while at the same time also a denial of any racism of the in-group. Negative attitudes towards multiculturalism and immigration are frequently reflected in nationalist hate speech. A prominent example is the so-called refugee crisis, i.e. increased immigration to Europe, especially from 2015 onward, particularly from Syria, Afghanistan, and Iraq. Withdrawn from the centre of media interest in "migration problematic", the tragic stories of people who drowned in the Mediterranean Sea while en route from Africa to Europe have now been replaced by a narrative of migration as a threat to the nation and society. In the framework of "post-democracy", the media become tools in the service of elite political and corporate interests.[59] We can identify typical mobilisation moments that reflect the nationalist paranoia: calls for the protection of "our" women, i.e. fear of strangers as rapists, and instigating fear of losing "our culture", national identity, civilisation, etc. Most frequently in times of the so-called post-reality, the common denominator for hatred is Islam or "other" culture. This is particularly evident in the case of conspiracy theories, where facts and disinformation or fiction become entwined in the unregulated online environment of the "new" media.

In Europe, the debate on the role of Islam has intensified after attacks on women in Germany on the 2015/2016 New Year's Eve. Theorisation of gender and nationalism has clearly described the construction of a nationalist woman as a symbolic representation of the whole nation. The category of the "woman" is constructed in a way that serves the nationalist agenda. The woman serves the biological, cultural and symbolic reproduction of the nation. The woman most clearly reproduces the boundaries of the nation and carries in her its supposedly unique characteristics.[60] In nationalist mythology, a man is, conversely, defender of the people, "our" women, and "our" borders. The male and female principles are distinguished, and their superior/subordinate or active/passive role is clear. The rape of "our" women is, therefore, penetration of the whole people, interference in the national body, which results in defamation. In a symbolic sense, therefore, any "mixing" (e.g. racial, cultural) leads to loss of the nation's purity, one's own specificity and culture. The paranoia of

[59] Pajnik (2016).

[60] Yuval-Davis (1997).

the Other—especially (young single) males—is, therefore, an essential part of the nationalist repertoire.

This kind of discourse is not accompanied only by rightist groups and media. It is necessary to recognise it as inherent in the structure of the nation-state. Every time a political personality speaks of migrants as "devious" and "calculating" or refugees as a "serious security threat", the media is present to reproduce such discourse.[61] Nationalist rhetoric was part and parcel of every press conference about increased border controls in Slovenia between August and December 2015. Along the Western Balkans migratory route, nationalist political discourse was part of militarisation policies of the borders and society by increasing the powers of the army as well as securitisation of the border by setting up a razor wire fence between Austria, Hungary, Slovenia, and Croatia, and it could be heard in Ljubljana, Brussels as well as in New York at the United Nations Conference.

Alongside a lack of public response to anti-refugee rhetoric, hate speech became normalised, and the political discourse on "economic migrants" (i.e. undeserving of the right to enter the EU) easily shifted the attention of the public from the evident peril and misery of refugees to discussions about the alleged pressure of immigration on already limited natural resources, social rights and the welfare state. The public debate avoids—or shifts to the margins—any problematisation of the existing social relations of power and the role of neoliberalism, which is, in fact, devastating all acquisitions of the welfare state. The weakest social classes become a handy scapegoat for the disintegration of the system. In this logic, the Roma and asylum seekers allegedly deplete social transfers, homosexuals and (single) women without children are supposedly causing the extinction of the nation and a demographic catastrophe, and migrants, in general, bring terrorism and the collapse of the Western civilisation. Nationalism, as collective paranoia, thus becomes the last bulwark of everything "ours", because it does not concede to the parsing of the factual causes for the actual state of affairs, but prefers instant recipes that see the solution of the crisis in a strict demarcation from, even the destruction of the Other. It is precisely the rhetoric about the "rivers", "floods" of refugees and the fear that Europe will be overwhelmed by the "waves" of immigration, which enables the mobilisation of people on the basis of collective nationalist paranoia. The idea of a Dangerous Other, whose culture is understood as fundamentally different and thus threatening, makes it possible to tighten asylum and immigration policy, violate migrants' human rights, and militarise the society. It is necessary to distinguish at least three aspects of nationalist paranoia: (1) what is being (re)produced by traditional mainstream media; (2) what is expressed as public opinion on digital social platforms under the aegis of freedom of speech; and (3) what is the political discourse of the ruling elites that have the power to create policies. Combined, these three factors enable and reproduce criminalisation of migration.

[61] Pajnik (2016).

5 Conclusion

A mere look at daily developments across the world reveals the still present power of national affiliations, counteracting initial claims that globalisation processes would necessitate the end of nationalism and the inevitable decline of the nation-state form. Political realities indicate the enduring presence of national identities and loyalties that can be described broadly as "ethnic". These continue to hold their importance, while also becoming important in new ways[62] and thus questioning the expected demise of nationalist forms and attachments. Though each nationalism is particular and hence unique at least to a certain degree, nationalisms share the same basic modus operandi in always putting the nation above all else and the ever-present need to create, promulgate, and defend a separate national identity.

The chapter attempted to show the interlinking between the concepts of crimmigration and nationalism, proposing that situations such as the recent "refugee crisis" in Europe can be better understood when nationalism is analysed not only as a political movement, ideology, or discourse but also as a form of collective paranoia. Drawing on the concept of Significant Others as essential constructions in every national identity formation, I analysed the symbolic Otherness of immigrants as Dangerous Others. The chapter elucidated the concepts and theories of nationalism that best help explain the causes for contemporary crimmigration trends. Crimmigration was shown to be an expected consequence of the nation-state's attempt to exert its power inwardly onto its nationals and outwardly against non-members. Proposing that crimmigration represents an expected outlet of collective nationalist paranoia, whose purpose is to maintain the status quo of the ruling elites and the existing system, I analysed how the migration phenomenon has become reduced to a question of security, which results in progressive securitisation of borders and increased overall surveillance and militarisation of the society. Establishing control over migrants, the processes of immigration have shifted to nation-states' discourse of "management" of the people, who in consequence have become "de-personalised" as "flows". Governments across the world resort to penal nationalism and emphasise the rhetoric of security in their management of the so-called immigration problem, doing so to maintain the status quo of the Western privilege, all the while primarily serving the interests of the economic oligarchy.[63] In public discourse, exclusionary arguments have been noted by researchers to play a more critical role, at least regarding attitudes about national identity.[64] The consequences of crimmigration hence leave little hope for a significant change in migration management in any foreseeable future.

The broader context of the present chapter extends any specific geographical context, as well as the timely situation of the European "refugee crisis". It pertains to global discussions on migration, integration, terrorism, militarisation, and the overwhelmingly ubiquitous security discourse, but also refers to the processes of global neo-colonial exploitation and dismantling of entire countries and regions of the global

[62] Fenton (1999).

[63] Badiou (2012).

[64] Helbling et al. (2016).

South, which is suffocating in wars, violence, poverty, and overall deprivation. The West is well aware of the suffering and global inequality on the one hand, and its own privilege on the other. No wonder then that fear and xenophobia in native populations are successfully addressed by populist movements with simple formulas that divide the world into two poles, the Us versus Them, Our versus Their culture, Our civilisation versus Their barbarism. Thus, Dangerous Others are constructed as scapegoats who can efficiently mobilise people for the idea of protecting their own nation against arbitrarily defined outsiders. The processes of creating nationalist paranoia in the sense of instilling fear of the Other—quintessentially the immigrant—facilitate the political actors in adopting a series of measures to preserve their privileged position. Even though right-wing political parties are more readily accepting stringent crimmigration policies, this goes for governments across the globe, regardless of their political orientation. The nationalist fear of losing one's own identity—but factually privilege—namely intensifies raptures within the nation-state population, dividing people who could otherwise unite against predatory neoliberal elites and potentially demand social change that is long overdue.

References

Anderson B (1991) Imagined communities: reflections on the origin and spread of nationalism. Verso, London

Badiou A (2012) The racism of intellectuals. Warscapes, 7 June 2012. http://www.warscapes.com/opinion/racism-intellectuals

Barker V (2018) Nordic nationalism and penal order: walling the welfare state. Routledge, London

Batton C, Kadleck C (2004) Theoretical and methodological issues in racial profiling research. Police Q 7(1):30–64

Bhabha H (ed) (1990) Nation and narration. Routledge, London

Billig M (1995) Banal nationalism. SAGE Publications, London

Breuilly J (1994 [1982]). Nationalism and the state, 2nd edn. University of Chicago Press, Chicago

Brubaker R (1996) Nationalizing states in the old 'New Europe'—and the new. Ethnic Racial Stud 19(2):411–437

Dauvergne C (2013) The troublesome intersections of refugee law and criminal law. In: Aas F, Bosworth K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford

Fenton S (1999) Ethnicity. Racism, class and culture. MacMillan, London

Fox J, Miller-Idriss C (2008) Everyday nationhood. Ethnicities 8(4):536–563

Gellner E (1983) Nations and nationalism. Blackwell, Oxford

Giddens A (1985) The nation-state and violence. Polity Press, Cambridge

Guibernau M (1999) Nations without states: political communities in a global age. Polity Press, Cambridge

Guibernau M (2007) The identity of nations. Polity, Cambridge

Hearn J (2006) Rethinking nationalism: a critical introduction. Palgrave Macmillan, Hampshire

Helbling M, Reeskens T, Wright M (2016) The mobilisation of identities: a study on the relationship between elite rhetoric and public opinion on national identity in developed democracies. Nations Natl 22(4):744–767

Hobsbawm EJ (1990) Nations and nationalism since 1780: programme, myth, reality. Cambridge University Press, Cambridge

Hofstadter R (1964) The Paranoid style in American politics. Harper's Magazine. https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics
Hobsbawm EJ (1983) Introduction: inventing traditions. In: Hobsbawm A, Ranger T (eds) The invention of tradition. Cambridge University Press, Cambridge
Hosking G (2016) Why has nationalism revived in Europe? The symbolic attractions and fiscal capabilities of the nation-state. Nations Natl 22(2):210–221
Hutchinson J (1994) Modern nationalism. Fontana Press, London
Jiang J, Erez E (2018) Immigrants as symbolic assailants: crimmigration and its discontents. Int Crim Justice Rev 28(1):5–24. https://doi.org/10.1177/1057567717721299
Kis D (1996) On nationalism. Perform Arts J 18(2):13–17
Kolstö P (ed) (2005) Myths and boundaries in South-Eastern Europe. Hurst & Company, London
Langman L (2006) The social psychology of nationalism: to die for the sake of strangers. In: Delanty G, Kumar K (eds) The SAGE handbook of nations and nationalism. SAGE, London, pp 66–83
McCrone D (1998) The sociology of nationalism: tomorrow's ancestors. Routledge, London
Özkirimli U (2005) Contemporary debates on nationalism: a critical engagement. Palgrave Macmillan, Hampshire
Paasi A (2009) Bounded spaces in a 'borderless world': border studies, power and the anatomy of territory. J Power 2(2):213–234
Pajnik M (2016) Migration in the mirror of mediatised anti-politics. In: Kogovšek Šalamon N, Bajt V (eds) Razor-wired. Reflections on migration movements through Slovenia in 2015. Mirovni inštitut, Ljubljana, pp 63–70
Peters ME (2017) Trading barriers: immigration and the remaking of globalization. Princeton University Press, Oxford
Pettigrew TF (1998) Intergroup contact theory. Annu Rev Psychol 49:65–85
Pickering S, Weber L (2013) Policing transversal borders. In: Aas F, Bosworth K, Bosworth M (ed) The borders of punishment. Migration, citizenship, and social exclusion. Oxford University Press, Oxford
Plavčak R (2016) Thinking as a socio-political phenomenon. Časopis za kritiko znanosti 266 (Social psychopathology and paranoia), pp 17–33
Pregelj P, Kores Plesničar B, Tomori M, Zalar B, Ziherl S (eds) (2013) Psihiatrija. Psihiatrična klinika, Ljubljana
Rae H (2002) State identities and the homogenisation of peoples. Cambridge University Press, Cambridge
Regvar U (2018) Poročilo o ugotovitvah in opažanjih o izvajanju postopkov vračanja in spoštovanja načela nevračanja (non-refoulement). PIC, Ljubljana
Robins RS, Post JM (1997) Political paranoia: the psychopolitics of hatred. Yale University Press, New Haven
Schwarzmantel J (2008) Ideology and politics. SAGE, London
Seton-Watson H (1977) Nations and states. Methuen, London
Slapšak S (2016) Pronoia, perinoia, paranoia: genre, terms and historical seminatic. Časopis za kritiko znanosti 266 (Social psychopathology and paranoia), pp 202–207
Smith AD (1986) The ethnic origins of nations. Blackwell, Oxford
Triandafyllidou A (1998) National identity and the 'Other'. Ethnic Racial Stud 21(4):593–612
Ugelvik T (2013) Seeing like a welfare state: immigration control, statecraft, and a prison with double vision. In: Aas F, Bosworth K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford
Vezjak B (2016) Psychopathology in the social area: from normality to pathology and back. Časopis za kritiko znanosti 266 (Social psychopathology and paranoia), pp 7–15
Vigneswaran D (2013) Making mobility a problem: how South African officials criminalize migration. In: Aas F, Bosworth K, Bosworth M (ed) The borders of punishment. Migration, citizenship, and social exclusion. Oxford University Press, Oxford
Weber E (1976) Peasants into Frenchmen: the modernization of rural France 1870–1914. Stanford University Press, Palo Alto (CA)

Wingfield NM (2005) Introduction. In: Wingfield NM (ed) Creating the other: ethnic conflict and nationalism in Habsburg Central Europe. Berghahn Books, New York, pp 1–18
Yuval-Davis N (1997) Gender & nation. SAGE, London
Zedner L (2013) Is the criminal law only for citizens? A problem at the borders of punishment. In: Aas F, Bosworth K, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford

State Coercion of Migrants

Refugees and the Misuse of the Criminal Law

Yewa S. Holiday

Abstract Refugees typically commit offences of irregular entry and stay as a result of their flight from persecution, for example, involving the use of false papers or no papers or deception to enter a country. Despite being protected from penalisation by Article 31(1) of the 1951 Refugee Convention, refugees are routinely prosecuted in many countries in Europe, Africa and in the United States. This chapter considers the use of the criminal law in criminalising refugees focussing in particular on England and Wales and concludes that it is a misuse of the criminal law. This is because these prosecutions do not conform to principles of criminalisation. Instead, they focus on the refugee being in an irregular situation, which is used to infer that the refugee is a certain type of person who ought to be criminalised. The chapter examines Spena's ideas relating to *Täterstrafrecht*, an illiberal authoritarian criminal law model, and relates these ideas to the criminalisation of refugees. The refugee background that ought to result in no prosecution is ignored. One of the causes of the prosecution of refugees lies in this illiberal authoritarian form of criminal law. The consequences for refugees include the lack of protection under Article 31(1) of the Refugee Convention which culminate in conviction, imprisonment, delay to asylum claims and refugee determinations, and entrench a precarious situation where, for example, refugees find it difficult to obtain work, travel to visit relatives or obtain citizenship.

1 The Prosecution of Refugees

This chapter examines the situation of refugees who are prosecuted to conviction for irregular migration in circumstances that are contrary to the mandatory requirement in international refugee law that refugees *not* be penalised for irregular entry or

This paper was written while working at Queen Mary University of London, London, UK.

Y. S. Holiday (✉)
Queen Mary University of London, London, UK
e-mail: y.holiday@sylvanresources.co.uk

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_10

presence in a country. Article 31(1) of the 1951 Refugee Convention provides that state parties shall not impose penalties on refugees, including asylum seekers,[1,2] who have 'come directly from a territory where their life or freedom was threatened' due to their irregular entry or presence. This protection is restricted by the requirement that refugees make themselves known to the authorities without delay and show good cause for the illegal entry or presence. The African Union has produced guidelines which provide for the exemption of penalties for asylum-seekers pending refugee determination as long as they have presented themselves to the authorities without delay.[3] Regionally, there is widespread evidence of legislation exempting refugees from offences of irregular entry and presence, for example, in Africa, the Americas, Asia and Europe.[4]

Despite this, refugees are prosecuted worldwide,[5] for example, in Europe,[6] the Americas,[7] Asia,[8] the Middle East[9] and Africa.[10] It should be noted that while this chapter is focused on refugees, the prosecution of other migrants also raises serious legal and human rights concerns.[11]

While refugees have experienced prosecution in this way globally, the chapter focuses in particular on the UK. There are various reasons for this. Firstly, the UK has a sophisticated analysis of the relevant law in its case law, which has developed since the seminal case of *ex parte A* in 1999. This case involved four refugees, one of whom was convicted of possessing a false passport when he tried to enter the UK to claim asylum and three of whom were convicted of possessing false passports and attempting to obtain services of deception when they were stopped in transit intending to seek asylum in Canada. This was not the first prosecution of these offences in the UK (for example, *R v T* 1998; *R v O* 1999; *R v S* 1999). However, the *Adimi* case was the first time a UK court examined the reach of Article 31(1) in the context of the prosecution of refugees. The High Court of England and Wales held that it was unlawful to prosecute refugees for offences relating to irregular entry and presence without any reference to Article 31(1).

Secondly, the UK provides two defences to protect refugees: a 'refugee' defence, specifically for refugees, which was introduced by the government as a response to the

---

[1] Goodwin-Gill (2003, pp. 185–252); *R v Uxbridge Magistrates' Court ex parte A* (2001).

[2] All refugee cases in this chapter have been anonymised.

[3] Goodwin-Gill (2003, p. 252).

[4] Ibid., pp. 189–201, 244, 247, 251–252.

[5] Costello (2017, pp. 20–27).

[6] *R v Uxbridge Magistrates' Court ex parte A* (2001), Flynn and Cannon (2011), *R v M and others* (2013); Case C-148/13 *Q*, n.d.; Costello (2017, p. 22); *Ekathimerini.Com* (2016).

[7] UNHCR (2006), American Civil Liberties Union and others (2013), Human Rights Watch (2013).

[8] *H v. Department of Labour*, CRI 2006-485-101 (New Zealand High Court) (2007); Hathaway (2005, pp. 370–372), USCRI (2007), Blay (2011, p. 174).

[9] Global Detention Project (2015a, p. 7; 2015b, pp. 12, 28–29, 55–56, 70–71, 85–86).

[10] Hathaway (2005, pp. 371–372), *Al-Dahas v Attorney-General and Others* (2007), UNHCR (2013, pp. 8–9), Global Detention Project (2015c, pp. 14–15).

[11] Costello (2017, p. 8).

ex parte A case and a 'reasonable excuse' defence which refugees and others can use. Considerable empirical research has also been done in the UK, for example, on the situation of the criminalisation of refugees in Scotland,[12] on the topic of immigration crime generally in courts near Heathrow airport[13] and on the criminalisation of refugees in England and Wales in the context of Article 31(1).[14] The UK research in relation to the cases identified reveals that most refugees plead guilty on the advice of solicitors and barristers, the defences are rarely used and are never raised during police interviews.[15] Part of the cause of the criminalisation of refugees in countries such as the UK which incorporate Article 31(1) as a defence may lie in the conceptualisation of Article 31(1) as a defence which is aired during the trial rather than as a form of immunity or bar to prosecution thus preventing a trial from taking place at all (as in the case of diplomatic immunity). This issue is, however, beyond the scope of this chapter.

Another reason to focus on the UK is the existence of the Criminal Cases Review Commission (CCRC), an independent public body that has the power to refer wrongful convictions to appeal courts (under the Criminal Appeal Act 1995). It has brought many of the refugee convictions to light by referring these cases to appeal courts since 2005.[16] Without a body such as the CCRC, it would be more difficult to discover the extent of refugee prosecutions.

The question this chapter addresses is why are refugees prosecuted for offences of unlawful entry and stay without any—or inadequate—reference to Article 31(1)? There are many causes for the criminalisation of refugees[17] but this chapter interrogates the theoretical criminal law reason for criminalisation. The argument in this chapter concentrates on the cause of the prosecution of refugees, which is located in the system of the criminal law itself. The criminal law in liberal European democracies such as the UK is generally thought of as being liberal on the model of liberal utilitarianism or legal moralism. However, this chapter argues that refugees experience the criminal legal system—in relation to offences of irregular entry and presence—as illiberal and authoritarian and it is the illiberal and authoritarian nature of the criminal response to refugees, which causes their criminalisation. Alessandro Spena's models of *Täterstrafrecht,* which focuses on 'wrongbeings', and *Täterstrafrecht*, which focuses on wrongful acts, can co-exist as even liberal criminal regimes will contain illiberal aspects which are inspired by the *Täterstrafrecht* model.[18] I argue that the substantive prosecution of refugees for irregular entry and stay offences globally is

[12] Christie (2016).

[13] Aliverti (2013).

[14] Holiday (2018), Holiday (2019).

[15] Ibid.

[16] The author worked at the CCRC for 15 years and reviewed the first four cases, which were referred to an appeal court in 2005.

[17] Holiday (2018), Holiday (2019).

[18] Spena (2014).

an example of the illiberal *Täterstrafrecht* model, not that any particular system of criminal law follows such a model.[19]

The chapter first outlines the meaning and importance of Article 31(1) for refugee protection and the situation in the UK before examining the cause of the criminalisation of refugees on which this chapter focuses: the illiberal and authoritarian nature of the criminal law as it affects refugees who migrate in irregular ways. The chapter then reviews the consequences of the criminalisation of refugees, which flow from the illiberal and authoritarian nature of the criminal law. The chapter concludes that further research is required on the type of criminal law theory, which might protect refugees.

2 Article 31(1) of the 1951 Refugee Convention

Article 31(1) was drafted because it was accepted that refugees often did not have the necessary papers for travel because their states of nationality persecuted them or they had to leave suddenly and that due to their 'precarious' position,[20] they were dependent on others to help them in their flight from persecution.[21]

Article 31(1) is a mandatory norm of protection for refugees which includes asylum-seekers (at least until they have been determined not to be refugees in a fair refugee determination procedure).[22] It provides that refugees fleeing persecution shall not be penalised on account of irregular entry or presence provided that they come within the criteria of requiring protection, they make themselves known to the authorities without delay and show good cause. The protection is very broad: penalisation may include prosecution to conviction, fines, imprisonment,[23] summary deportation,[24] the delay, obstruction or denial of access to asylum and channelling those who arrive without proper documentation into 'an inferior refugee procedure'.[25]

Costello has noted that the phrase 'coming directly' is the most 'contentious element' of Article 31(1).[26] However, the consensus of the drafters was that only those who had been granted refugee status or another form of permanent protection would be excluded from the protection of Article 31(1) if they subsequently moved

[19] Cf Günther Jakob's Feindstrafrecht enemy model. Jakob divides the criminal law into "antithetical (yet complementary) paradigms" of enemy and citizen law, Ohana 2014. This model is not discussed here as it does not altogether fit the prosecution of refugees in the UK. For example, if refugees were "the enemy", they would not be able to overturn their convictions in appeal courts or apply to a review body. It may however fit prosecution in other countries.

[20] UN ECOSOC (1949, pp. 9–16, 24).

[21] 'Statement of van Heuven Goedhart (UNHCR), UN Doc. A/CONF2/SR.35 (1951)', n.d.

[22] Goodwin-Gill (2003, p. 193), Noll (2011, p. 1252), Costello (2017, pp. 10–17).

[23] Goodwin-Gill (2003), Noll (2011, pp. 1262–1264).

[24] Goodwin-Gill (2003, pp. 189, 195–196), Noll (2011, p. 1262); Costello (2017, pp. 32–33).

[25] B010 v Canada (2015), [57].

[26] Costello (2017, p. 29).

to a country using irregular means.[27] In *ex parte A*, the High Court of England and Wales noted three considerations in the context of 'coming directly…'. These were the length of stay in the transit country, the reasons for delaying there and whether or not the refugee was protected there from the persecution they were fleeing. Refugees may exercise choice where to seek asylum due to the differing responses of states to requests for asylum.[28]

The 'coming directly…' provision is about whether or not an asylum-seeker is able to obtain protection in an intermediate country. It is not about the way in which the refugee reaches the country of asylum. Factors which militate against an asylum-seeker's ability to obtain protection in an intermediate country include poor asylum reception and detention conditions,[29] civil war,[30] no refugee determination procedure,[31] or a procedure which excludes non-Europeans, as in Turkey,[32] being in transit,[33] fear of return to the country of persecution or dependence on an 'agent'.[34] Given these factors, some countries have dispensed with the 'coming directly' provision entirely, for example, Spain[35] and Canada, where section 133 of the Immigration and Refugee Protection Act 2001 states that a person who has claimed refugee protection and 'who came to Canada *directly or indirectly* from the country in respect of which the claim is made' may not be charged with an offence connected to irregular entry or presence.[36]

Article 31(1) also requires asylum-seekers to bring themselves to the attention of the authorities without delay.[37] No strict time limit is to be applied as the delay depends on the circumstances of the particular case.[38] Article 31(1) will therefore apply to refugees who have spent a long time in a country if there is a good reason for the delay[39] and those who have not had a chance to seek regularisation of their status,[40] for example, because they arrived in a lorry or shipping container. This situation must however be distinguished from those cases where the person is not trying to find the means to continue the journey; where a refugee remains in a country for a long period of time, for example a year, with no intention of contacting the

[27] 'Statement of van Heuven Goedhart (UNHCR), UN Doc. A/CONF2/SR.35 (1951)', n.d.; Goodwin-Gill (2003, pp. 218–219).

[28] *Ex parte A* (2001), Costello (2017).

[29] *MSS v Belgium and Greece*, n.d.; Global Detention Project (2015d).

[30] *R v S and D* (2012).

[31] *R v M* (2010).

[32] *R v M and others* (2013).

[33] *R v HHM* (2011).

[34] *R v A* (2008).

[35] Noll (2011, p. 1257, Footnote 62).

[36] The offences relate to document offences, misrepresentation, possession, forgery and identity fraud under IRPA and the Canadian Criminal Code. The emphasis is the author's.

[37] Costello (2017, pp. 27–30).

[38] *Ex parte A* (2001), Goodwin-Gill (2003, p. 217), Costello (2017).

[39] *Ministry of the Interior v Felicitas LJ* (1982).

[40] Grahl-Madsen (1997).

authorities, but then learns she or he is about to be discovered and for that reason gives him or herself up, Article 31(1) cannot be invoked.[41] Factors to be considered in an assessment of delay include access to legal advice,[42] fear of authority figures, language barriers, advice from smugglers, the fear of removal to the country of persecution, reunion with family members,[43] age and mental deficiency.[44]

The requirement of showing good cause for irregular entry or stay so as not to disqualify Article 31(1) protection is generally satisfied if the asylum seeker can show that she or he was reasonably travelling on false papers, had to resort to subterfuge out of necessity, or there were good reasons for delay.[45]

Article 31(1) does not prevent the charging of an asylum-seeker as long as no conviction is imposed on any person found to be a refugee who complies with the other requirements of Article 31(1).[46] A general policy to prosecute asylum-seekers will 'almost inevitably' lead the State into a breach of its international obligations.[47] Additional circumstances which would allow a penalty of prosecution would be where there is a failure to interpret Article 31(1) in a flexible way which gives effect to its protective function and which takes account of the way in which refugees travel in their flight from persecution, for example, by denying the application of Article 31(1) to transit or by requiring asylum seekers to act in the same way as the ordinary traveller. A large number of guilty pleas which suggest a policy of prosecuting without considering the refugee context or a presumption of prosecution would transform prosecution into penalty.[48] Where there is ignorance—or little awareness—by prosecuting authorities of Article 31(1) protection, the presumption must be that prosecution is a penalty.

State parties must amend their penal codes or the criminal law to ensure that no person *entitled* to the benefit of Article 31(1) runs the risk of being found guilty of an offence.[49] As Goodwin-Gill has stated, 'Refugees are not required to have come directly from their country of origin' and 'the real question is whether effective protection is available for the individual…'.[50]

---

[41] Ibid.; Gallagher and David (2014, p. 166).

[42] Goodwin-Gill (2003, p. 219).

[43] Goodwin-Gill (2003).

[44] *R v H* (2008), COPFS (2015).

[45] Costello (2017, pp. 30–32).

[46] Goodwin-Gill (2003), Hathaway (2005, p. 407).

[47] Goodwin-Gill (2003).

[48] Holiday (2014), Christie (2016).

[49] Goodwin-Gill (2003, p. 187).

[50] Ibid., p. 218.

3 The Situation in the UK

The types of offences used to prosecute refugees in the UK in relation to unlawful entry and presence include both immigration and criminal offences. The immigration offences (so called because they are contained in legislation including the word 'immigration' in the name of the Act)[51] include various offences outlined within the Immigration Act 1971 ('the 1971 Act') and within the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ('the 2004 Act').

The criminal offences, on the other hand, include those in the Forgery and Counterfeiting Act 1981, such as using a false passport (section 3) and the possession and use of identity documents belonging to others under sections 4 and 6 of the Identity Documents Act 2010 ('the 2010 Act') (which replaced offences in section 25 of the Identity Cards Act 2006). These offences which are used to prosecute refugees for irregular entry and presence do not fit the classical paradigm of criminal law offences (murder, rape, property). They are often situational offences (for example, possession offences) or offences of strict liability.

It is important to note that Article 31(1) has no limit to the offences which fall within its protection as long as the offence relates to irregular entry and presence and the refugee otherwise satisfies the criteria in Article 31(1). UK domestic criminal law purports to give effect to Article 31(1) via defences: a 'refugee defence' in section 31 of the Immigration and Asylum Act 1999 ('the 1999 Act') and a 'reasonable excuse' defence contained in some of the offences. The refugee defence (in England, Wales and Northern Ireland) *only* applies to the criminal offences noted above and two of the immigration offences in the 1971 Act. In Scotland, the defence additionally applies to fraud and uttering a forged document.[52] The refugee defence is not available to a refugee who fails to provide a passport on entry to the UK (an offence under section 2 of the 2004 Act). Instead, section 2 has a reasonable excuse defence. One of the offences has both a refugee defence and a reasonable excuse defence available.[53] There is therefore a patchwork of protection for refugees which is more restrictive in its scope than Article 31 (which has no restriction in terms of offences).

The limited nature of the defences in UK domestic law can be seen in the Channel Tunnel cases. These refugees were convicted of causing an obstruction to an engine or carriage using the railway under section 36 of the Malicious Damage Act 1861 which is not an offence to which the refugee defence or a reasonable excuse applies.[54] Nevertheless, this offence as committed by refugees fleeing persecution falls within Article 31(1).

---

[51] Aliverti (2013).

[52] Section 31(4)(a) and (b) of the 1999 Act.

[53] Section 6 of the 2010 Act.

[54] *R v H* (2015); *R v M and V* (2016).

4 The *Täterstrafrecht* Model of Criminal Law as a Cause of the Criminalisation of Refugees

The principle of non-penalisation in Article 31(1) is a fundamental human rights principle. This is because of its link with freedom—refugees are fleeing a state of nationality or residence where they are not free from persecution on one of the grounds of politics, religion, nationality, race or particular social group—and the link with the idea that people ought not to be criminalised for offences relating to their status. There are other principles (and emerging principles) of non-penalisation. For example, Article 5 of the Smuggling Protocol mandates that smuggled migrants shall not become liable to criminal prosecution for being smuggled.[55]

There are emerging principles of non-penalisation in the European Union context. The Court of Justice of the European Union has held that the terms of the Returns Directive (Directive 2008/115/EC) which applies to 'illegally' staying nationals of non-EU states ('third country nationals') must be interpreted so as to prioritise the return of such people to their state of origin rather than their prosecution in the EU state for offences relating to staying in an irregular manner.[56] Another example, is Article 8 of the EU Trafficking Directive (Directive 2011/36/EU) which encourages the non-prosecution of victims of human trafficking for offences committed as a result of their trafficked status.[57] The conduct committed by these migrants—whether as refugees, smuggled migrants, trafficking victims or irregularly present—is not the kind of conduct which ought to be caught within the criminal law.

The Refugee Convention provides direction, in the form of Article 31(1), for the national regulation of the criminal law in relation to those offences which are committed by refugees in the course of entering or being present in a country in the course of their flight from persecution. This link between the prohibition on penalisation of refugees in international refugee law and regulation in the domestic criminal law of states underlines the need for a theory of criminalisation based on the liberty and freedom of the individual, individual criminal responsibility, the harm principle and the requirement for wrongful conduct as good reasons for criminalisation, as well as respect for the human rights of the individual. Such a theory would help to protect refugees from prosecution.

One of the causes of the prosecution of refugees appears to lie in the 'control of undesirables' which is at the heart of the *Täterstrafrecht* model of criminal justice. Spena considers this model in the context of the norms criminalising 'illegal immigration' in Italy.[58] Spena does not discuss possession offences and specifically excludes refugees from his analysis. Nevertheless, his arguments are a useful way of analysing

---

[55] *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Organized Crime 2241 UNTS 480, n.d.*; Gallagher (2017).

[56] Mitsilegas (2014, pp. 57–75).

[57] *R v L, HVN, THN, T v R, The Children's Commissioner for England and Human Rights Commission* (2013).

[58] Spena (2014, pp. 635–636).

the offences of irregular entry and stay used against refugees. Spena uses the concepts of pure and spurious forms of *Täterstrafrecht*, illiberal authoritarian models which share some aspects with strict conceptions of liberal utilitarianism and legal moralism, and *Täterstrafrecht*, a liberal criminal law theory which respects the harm principle, the requirement for wrongful conduct, individual criminal responsibility, liberty and human rights.[59] Spena uses these concepts to argue that the criminalisation of 'illegal immigration' as found in Italy and Europe represent an example of a *Täterstrafrecht* approach to criminal law.[60]

Spena's analysis is relevant to the prosecution of refugees because there are parallels between the global prosecutions of refugees and the spurious *Täterstrafrecht* model, which pays lip service to the requirement for harm and wrongful conduct. It is important to note that the models of the authoritarian, anti-liberal *Täterstrafrecht* and the liberal *Täterstrafrecht* can co-exist. Liberal criminal regimes may contain illiberal aspects inspired by the *Täterstrafrecht* model.

Before considering the pure and spurious forms of the *Täterstrafrecht* model, this chapter will examine the relevant features of traditional criminal law theories drawn from variations of liberal utilitarianism and legal moralism. While the former focuses on the function of the criminal law as being justified by 'the greatest happiness of the greatest number'[61] and deals with criminal justice as a policy instrument to be limited by Mill's harm principle,[62] legal moralism enforces the demands of morality or moral wrongdoing.[63]

4.1 Liberal Utilitarianism and Legal Moralism

Liberal utilitarianism is unable to justify the way in which individuals are singled out, censured and punished as criminal wrongdoers. This is because it is an account of when it is useful to punish individuals in the furtherance of some desirable social goal or policy objective such as deterring future wrongdoing.[64] The utilitarian account does not provide a principle to ensure that '*no further injustice* is done by punishing those who did not have a fair opportunity to conform to the law's demands'[65] or who, for example, were wrongly convicted.

[59] Spena (2014).

[60] Ibid., p. 640.

[61] Hart (1983, p. 181).

[62] Mill (1974, p. 68), Thorburn (2011, p. 85), Duff (2013), Ashworth and Zedner (2014), Farmer (2016, p. 2).

[63] Thorburn (2011, pp. 86–96), Duff (2013).

[64] Hart (1983, pp. 193–194), Thorburn (2011, p. 90).

[65] Thorburn (2011, p. 90).

The harm principle has been criticised for being over-inclusive in that it includes the risk of harm or 'precautionary criminalization'[66] or a 'setback to interests'[67] rather than actual harm and it is unable to provide limits to the growth of the criminal law.[68] Liberal utilitarianism can therefore tend to the control of threats rather than the punishment of harms and favour community and state interests over the individual.[69]

Legal moralists argue that it is necessary to start from the idea of wrongdoing because it would be unjustifiable for the state to punish a person for conduct which was not morally wrong.[70] In contrast to liberal utilitarians, legal moralists argue that to single out individuals for censure and punishment where no offense has been committed but 'merely in order to deter undesirable conduct' cannot be justified. The criminal law's function is seen to be enforcing the demands of morality. Rather than being treated as a means, the criminal justice system respects individual criminal responsibility and therefore the agency of the individual. Legal moralism has been attacked because of its acceptance of vigilantism (on some accounts of legal moralism), its difficulty in accounting for the criminal law's "fundamentally coercive nature" and its "deeply illiberal" nature.[71]

Accounts of legal moralism such as Duff's prioritise the trial and the practice of a community calling its members to account for wrongdoing.[72] In this account of legal moralism, it is the trial and not punishment that is 'the core' of the criminal justice system. However, Duff's account does not assist in identifying which wrongs might be criminal and could lead to over-criminalisation because any conduct could be made criminal if there was agreement among the polity.[73]

4.2 Pure Täterstrafrecht Model

In its pure form, *Täterstrafrecht* is a criminal law model which criminalises types of offenders (*Tätertypen*), rather than types of offences (*Täterypen*), so that people are punished because they fit a *Tätertyp* or stereotype.[74] A model of the criminal law based on *Täterstrafrecht* focuses not on wrongful acts but on 'wrongbeings.' The model therefore does not conform to the requirement that there be wrongful conduct or harm as in a liberal *Täterstrafrecht* model. Being a certain type of person or conforming to a certain stereotype becomes the wrong which triggers the punishment. In its pure form, criminality is inherent in a person and is separated from or is not dependent on

[66] Spena (2015, p. 18).
[67] Feinberg (1987).
[68] Thorburn (2011, p. 88), Duff (2007, p. 138), Harcourt (1999).
[69] Dubber (2001, pp. 838–850).
[70] Thorburn (2011, p. 86).
[71] Ibid., pp. 87–92.
[72] Duff (2013), Thorburn (2011, p. 94).
[73] Farmer (2016, pp. 18–19).
[74] Ibid., p. 641.

the actual commission of a crime.[75] Spena concludes that the *Täterstrafrecht* model is an 'abuse of criminal law' because the criminal law bans certain categories of people instead of banning their acts or omissions. It thus violates basic liberal principles by punishing an individual for his or her status and uses the criminal law to achieve non penal aims.[76]

A major characteristic of the *Täterstrafrecht* model is its preoccupation with stereotypes or *Tätertyp* at the expense of people as individuals or human beings. 'Actors' are considered only in the sense of possessing certain traits which link them to the stereotype.[77] This stereotype or *Tätertyp* is first 'constructed' at a social and political level, by identifying certain descriptive traits, such as Jew and Pole in Nazi Germany or vagrant and asylum seeker in contemporary Europe. This labeling is linked to a normative judgment or qualification such as criminality, dangerousness, deviancy, disloyalty or enmity.[78] A stereotype such as that Poles and Jews are disloyal persons and enemies of the German people or that vagrants and asylum seekers are dangerous and criminals is created.[79] Spena then describes this stereotype as being 'poured into' the definition of a crime, as its 'descriptive traits' are made (directly or indirectly) into elements of the crime definition. Finally, the stereotype (and the crime with it) is applied in its entirety to those persons who happen to possess the 'descriptive traits' on the basis of which the stereotype (and thus the crime) have been constructed.

When an individual's traits match the 'descriptive' part of the stereotype, that person will be picked out as an example of the relevant *Tätertyp* and will therefore be deemed to be the appropriate target of the normative judgment that is assumed to be necessarily connected to the stereotype (such as dangerousness, deviancy). The *Täterstrafrecht* model is not interested in individual criminal responsibility. It is instead concerned with 'dehumanizing actors,' a process which denies them as people, thereby subsuming their entire personality under a readymade stereotype.[80] This idea of innate criminality,[81] that criminality is determined by biology, was also evident, for example, in the USSR and the US when the 'scientific legitimization of correlations between criminality and abnormality resulted in tangible criminalization processes' such as forcible sterilization laws relating to criminals in the US, and other countries including Sweden, Australia, Switzerland, Norway and Canada.[82]

The aims of the *Täterstrafrecht* model of criminal law mirror this dehumanising concept of actors. Both the liberal *Täterstrafrecht* and the authoritarian anti-liberal

[75] Ibid., p. 642.
[76] Ibid., p. 636.
[77] Ibid., p. 644.
[78] Ibid.
[79] Ibid.
[80] Ibid., pp. 644–645.
[81] Ibid., p. 642.
[82] McGuire (2011, pp. 161–163).

Täterstrafrecht ideal-types are concerned with preventing socially harmful or dangerous actions or states of affairs to 'protect order and society.[83] In a liberal *Täterstrafrecht* model based on either liberal utilitarianism or legal moralism, criminals are treated as rational and moral beings, whose behaviour can be influenced so that they can choose to refrain from wrongful conduct. This is because the *Täterstrafrecht* model is based on the idea that individuals are free both to choose how to act and to act how they choose; and that this freedom represents a value that should be respected and secured by the state.[84] The values of individual liberty and privacy represent, from a liberal perspective, compelling reasons for limiting criminal law's intervention.

In the *Täterstrafrecht* model, criminals—whether potential or actual—are seen as sources of social harm or disorder with innate or socially induced criminal inclinations.[85] If criminals are inherently so, state and society cannot expect them to refrain from committing crime and it therefore makes no sense to enter into a practical and moral dialogue to get them to refrain from acting in a criminal way.[86]

In the *Täterstrafrecht* model, crimes are pre-empted by directly selecting and picking out those persons who, because of their matching a given stereotype (*Tätertyp*), can be presumed to be, for example, dangerous, deviant, or disloyal and therefore inclined to act in a socially harmful or undesirable way. These persons are punished to prevent them from manifesting their inherent criminality. Individuals are not free to choose how to act. Nor are they free to act how they choose. Their freedom is not, in any case, a sufficiently important good in the *Täterstrafrecht* model to override the interests of society.[87]

The emphasis in this model is on society rather than the individual. It is being part of a community which gives individuals their 'specifically human standing and sense'.[88] As a result, the prevention of social harms and disorder is deemed a more important end than the protection and respect for individual liberty. To this extent, it is a utilitarian philosophy. The interest of individuals are a reflection of society's interests, so that the protection of society encounters no real obstacle in the individual's liberty and privacy. There is therefore no need to make criminal law's intervention dependent on the fact that the individual actually commits a crime.

4.3 Spurious Täterstrafrecht Model

Spena observes that the nearest equivalent to *Täterstrafrecht* in English law is the requirement for an act and the admissibility of situational offences such as vagrancy

[83] Spena (2014).
[84] Ibid., p. 646.
[85] Ibid., p. 645.
[86] McGuire (2011).
[87] Spena (2014, pp. 646–647).
[88] Ibid., p. 647.

offences. It has been argued, in the US context, that vagrancy laws substitute 'status for the traditional requirement of conduct'.[89] The 30 definitions of vagrant in the US vagrancy statutes attest to this (for example, the common law vagrant, the healthy beggar, the loiterer, the dissolute misspender of time, the common prostitute, the common gambler, the common drunkard, the drug addict, the juvenile vagrant and the expelled non-resident).[90]

However, as Spena notes, there are differences between the *Täterstrafrecht* model and situational offences. While situational liability focuses on a situation, or state of affairs, in which the defendant happens to find him or herself, the *Täterstrafrecht* model is concerned with the stigmatisation or discrimination of certain persons who belong to a particular stereotype. While situational liability focuses on a person's *being in a certain situation*, *Täterstrafrecht* focuses instead on his/her *being a certain type of person*. Spena acknowledges, however, that the two concepts may overlap as the criminalisation of 'being in a certain situation' can be used as a way to infer that the person is, in fact, 'a certain type of person.' Due to the link between situational and status liability, Spena argues that it is possible that offences whose definition revolves round the requirement of an act may, in fact, be examples of 'spurious' *Täterstrafrecht*.[91]

Unlike the pure form, the hybrid forms of the *Täterstrafrecht* model assign 'some limited role' to the actions of the person.[92] Spena argues that the hybrid *Täterstrafrecht* model is more insidious than the pure form because although it appears to accept the principle of criminalisation of wrongful conduct, this is merely a formal deference because a person's actions or omissions only come into the assessment of criminal responsibility as 'symptoms' of his or her 'wrongbeing.' These types of offences do not refer to the way in which the person has reached his or her situation. When a refugee is found to be in possession of a false passport or to have no identity document to produce on arrival, how the refugee got to be in that situation is nearly always deemed to be unimportant. Situational offences, such as the possession of a false passport or the failure to produce a genuine one, reflect a state of affairs which is sufficient to make the refugee liable. In this way, the requirement for wrongful conduct or an actus reus is dispensed with. The person's acts do not matter per se and are not seen as demonstrating criminal responsibility but rather they are important for what they are perceived to reveal about the actor. As Spena explains, 'Actions, thus, are only nets to catch the relevant *Tätertypen*'.[93]

Legislation inspired by the hybrid *Täterstrafrecht* model may be found in modern liberal democracies. Spena notes the laws against vagrancy and idleness, widespread in the nineteenth century but still on the statute books in the UK and US as well as crimes of possession.[94] In relation to 'illegal immigration', Spena notes that the law

[89] Dubin and Robinson (1962, p. 104).

[90] Ibid., pp. 108–111.

[91] Spena (2014, p. 640).

[92] Ibid., p. 642.

[93] Ibid.

[94] Dubber (2001).

is set out in such a way as to make only certain categories of migrants qualify as 'illegal'—that is, 'the poor coming from non-visa-exempt countries' of Africa, parts of Asia, and parts of eastern Europe.[95]

4.4 The Criminalisation of Refugees

Spena links what he terms a 'shift in perception',[96] that is, the hostile social and political attitudes towards 'immigrants, strangers and foreigners' with the norms criminalising 'illegal immigration'. Guild has noted that an illegal immigrant is 'someone in respect of whose presence on the territory the state has passed a law making mere existence a criminal offence'[97] and that the individual may acquire 'quite different and normatively charged titles'.[98] The division of foreigners into 'legal and irregular is made exclusively on the basis of the host state's knowledge of the individual'.[99] As Guild notes the 'allocation of the term 'immigrant' or 'migrant' is not neutral. In many circumstances, particularly in Europe, it is already normatively loaded with a security-related content'.[100] The normative load carried by the term 'bogus' asylum seeker has been analysed by Cohen who held that 'it contributed to an environment where physical assaults on asylum seekers take place'.[101]

Using Spena's ideas on *Täterstrafrecht* and Guild's and Cohen's ideas about the terminology of migration, the relevant descriptive traits, when applied to refugees, could include asylum seeker, immigrant, migrant, stowaway or refugee. In Europe, as noted by Guild, the descriptive traits raise questions connected with security, crime and terrorism. Qualification might include illegal, unlawful, bogus/fake, not genuine. The descriptive trait and the normative judgment are then 'poured into' the crime definition of the offences of irregular entry and presence.[102]

The response by Europe to refugees at its borders and within Europe demonstrates how these 'migrants' fit within a spurious *Täterstrafrecht* model which results in some individuals who manage to reach certain countries being prosecuted for offences of irregular entry and presence. For example, newspaper reports in the UK have used the stereotypes of 'migrant', 'economic migrant', 'desperate migrants', 'illegal immigrant', 'illegal migrant', 'opportunists'.[103] These stereotypes are made up of a descriptive part with a qualification or sometimes include the qualification or

[95] Spena (2014, p. 648).

[96] Ibid., p. 636.

[97] Guild (2009, p. 15).

[98] Ibid., p. 13.

[99] Ibid., p. 14.

[100] Ibid.

[101] Cohen (2011), Guild (2009, p. 13).

[102] Although *mens rea* may theoretically be required for some offences, in practice refugees in the UK appear to plead guilty to these offences.

[103] *The Telegraph* (2015), *The Daily Telegraph* (2015a, b, c).

normative judgment within the term itself. Some reports describe the 'migrants' as asylum seekers and refugees while others assume they are 'economic migrants'.[104]

The emphasis in Europe is on security and crime. As well as the stereotypes and the framing of crime and security, it is clear that prevention is also at work. British police work in France (and Belgium) with equipment designed to deter people before they arrive in the UK.[105] French and British police in Calais are equipped with devices which can detect heartbeats and CO_2 and are meant to uncover stowaways.[106] Countries in Eastern Europe build walls, following the concept initiated by Spain in its enclaves of Melilla and Ceuta, and states focus on preventing refugees from entering their territory by land or sea.[107]

The way in which refugees become liable to prosecution can be illustrated by a newspaper report from 2015 and two cases of refugees being prosecuted and imprisoned. A Sudanese 'migrant', Mr. A, who managed to evade border controls at Calais in France, reached Bedfordshire, a county in England, by clinging to the underside of a lorry. The report described the man as an 'illegal immigrant' who 'may now attempt to claim asylum in a bid to avoid deportation'.[108] The descriptive trait and the normative judgment are evident in the news report. He was questioned by police in connection with an 'immigration offence'. There was no information in the news report about why he left the Sudan, how he reached France and why he came to the UK in the way he did. The limited role assigned to actions can be seen in this case. He clung to the underside of the lorry to get to the UK. This is not seen as an indication that he is a potential refugee with no papers but rather as evidence that he is a particular *Tätertyp* of 'illegal immigrant' who is necessarily therefore a potential criminal and security risk as the police are involved and there is talk of an offence. The 'crime' that he could be charged with might be failing to produce a passport at an asylum interview (under section 2 of the 2004 Act) but this does not hinge on any act Mr. A has committed to reach the UK.

R v T and *R v L* are two cases involving refugees who were convicted of failing to provide genuine passports on entry or at an asylum interview.[109] Mr. T arrived in the UK in a lorry. He claimed asylum as soon as he could but was immediately charged with an offence of irregular entry or presence. Mr. L arrived by plane whereupon he claimed asylum. He was also immediately charged. They were both advised to plead guilty despite having a reasonable excuse defence and relevant case law available to them.[110] They were imprisoned within a couple of days of arriving in the UK for a few months. Both were subsequently granted refugee status. Mr. S fled from the Cameroon and was arrested in transit in the UK because he had a false passport.[111] He

[104] *The Telegraph* (2015), *The Times* (2015).

[105] Kilroy (2015).

[106] *The Times* (2015).

[107] De Haas et al. (2018, pp. 19, 30), De Haas (2008, pp. 9, 11).

[108] *The Telegraph* (2015).

[109] *R v L (Sudan)* (2014), *R v T (Eritrea)* (2012).

[110] *T (Burma) v DPP* (2006).

[111]

was advised to plead guilty by his barrister who said that his previous unsuccessful claim for asylum and the fact that he failed to claim asylum in transit countries were detrimental and meant that he could not rely on the refugee defence despite case law.[112] He was viewed as a failed, and therefore bogus, asylum seeker. He also spent months in prison. Mr. S was subsequently granted refugee status.

These examples show the way in which the prevention of social harm and disorder and the protection of borders are made paramount and trump any protection and rights the individual may have by virtue of being a refugee under the Convention. There is a limited *actus reus* (non-possession of the right document or possession of the wrong one). This links with the dehumanized concept of actors in Spena's *Täterstrafrecht* model and the claim that this is done as a means 'to secure social order and protect society'.[113] It also links with the idea of prevention as 'an incapacitating and neutralizing pre-emption'.[114] Crimes are pre-empted by selecting and picking out persons who because they match a given stereotype—'illegal immigrant', 'bogus asylum seeker'—are presumed to be criminal and deviant. The criminalisation of being in a certain situation—being a refugee without genuine papers—is used to infer that the person is a certain type of person. There is little ground for prosecution by way of an act, just merely by situation, but the criminal law is not interested in how the refugee got into the situation.

5 Consequences of Criminalisation

Refugees existing and moving within a *Täterstrafrecht* model of criminal law therefore experience the criminal justice system as illiberal and authoritarian. The consequences for refugees of this are varied, extending from a lack of protection to prolonging the precarious nature of being a refugee beyond the journey of escape to the country of escape. The most important consequence is that state parties to the Refugee Convention are failing to protect refugees in accordance with the 'fundamental principle … of non-penalisation'[115] in Article 31(1). Instead, refugees are convicted in circumstances that amount to a breach of their right not to be penalised. They face terms of imprisonment ranging between two to sixteen months. A further consequence is that their asylum claims and refugee determinations are delayed until after they are released.[116] Their job opportunities are restricted. For example, one refugee trained to be a teacher but was unable to obtain work due to having

R v S and D (Cameroon) (2012).

[112] *R v A (Somalia)* (2008).

[113] Spena (2014).

[114] Ibid., p. 646.

[115] UNHCR (2010).

[116] *R v M and A (Somalia)* (2010).

a conviction,[117] another could not work as a nurse,[118] and Mr. B had to work as a dustbin man as he was unable to obtain work as a licensed taxi driver due to his conviction.[119] Moreover, refugees with convictions for irregular entry were unable to benefit from a Home Office policy granting families asylum who had been in the country for a number of years.[120] Refuges with families in the US and Canada are unable to travel to visit relatives if they have convictions.[121] The precarious nature of their status as refugees which results in them being undocumented and thereby at risk of prosecution for irregular entry and presence is compounded in the state to which they escape due to the illiberal and authoritarian Täterstrafrecht model of criminal law.

6 Concluding Remarks

Spena's analysis is relevant to the prosecution of refugees because there are parallels between these prosecutions and the spurious *Täterstrafrecht* model. Refugees experience the criminal justice system as illiberal and authoritarian. There is a clash in the criminal justice system between a spurious *Täterstrafrecht* model which criminalises on the basis of situation and a liberal model centred on the rights of the individual derived from international refugee and human rights law. The rights of individual refugees are ignored in an illiberal process where refugees and asylum seekers are prosecuted precisely because they are perceived to conform to a stereotypical image. The actual refugee background which should result in no prosecution or, at the least, enable a defence to be run is often ignored. The use of possession—and non-possession—offences against refugees fleeing persecution raises significant questions about the misuse of the criminal law and the rule of law because refugees seem to be prosecuted not for what they have done but because of who they are.

Mitsilegas and Guild have noted that the criminalization of 'migrants' in the EU is linked to 'the securitization of migration at a global level and the establishment in policy and law of a link between migration and organized crime.' Mitsilegas has observed that this 'securitisation approach' has resulted in criminal law enforcement being prioritized over the rights of 'migrants'.[122] This is seen in the criminalisation of refugees for offences of irregular entry and stay where the *Täterstrafrecht* model with its emphasis on society (as opposed to the individual), on security (as opposed to individual rights), and on order (as opposed to freedom) has transformed the criminal justice system to the extent that the rights of refugees are truncated or diminished to a vanishing point.

---

[117] *R v S and D (Cameroon)* (2012).

[118] *R v L (Somalia)* (reference to the Crown Court by the CCRC) (2015).

[119] *R v M and others* (2013).

[120] *R v A, A, N and S (Iran and Libya)* (2005).

[121] Ibid.; *R v A (Somalia)* (2008).

[122] Mitsilegas (2014, p. 74).

The principle of non-penalisation of refugees for offences of irregular entry and presence is perhaps best understood as making these offences *exempt* from prosecution in national courts. An essential feature of why refugees commit offences of entry and stay lies in their 'unfreedom' which originates in their country of origin and follows them in their flight from persecution. Refugees flee because the states from which they flee do not claim 'to speak in the name of everyone's claim of freedom equally'.[123] To flee because one's life is in danger or because one is under threat of persecution on one of the grounds in Article 1A(2) of the Convention explains the nature of the refugee's flight which is often precarious and tainted by deception and illegality. Article 31(1) can be seen as a norm agreed by states to ensure 'each person's claim to freedom simply in virtue of being human'.[124] Article 31(1) recognises that to penalise refugees for the circumstances of their entry or presence when they have fled from persecution would undermine their claims to freedom, as set out in Article 1A(2). Further research is required to determine the type of criminal law model which would support the fundamental principle of non-penalisation in Article 31(1) in acting as a limiting principle of the criminal law.

References

Al-Dahas v Attorney-General and Others (2007) 143 ILR 331

Aliverti A (2013) Crimes of mobility. Routledge, Abingdon

American Civil Liberties Union and others (2013, July 28) Joint letter to the attorney general Lynch calling for end to illegal entry/reentry prosecutions at the border. Human Rights Watch. https://www.hrw.org/news/2015/07/28/joint-letter-attorney-general-lynch-calling-end-illegal-entry/reentry-prosecutions

Ashworth A, Zedner L (2014) Preventive justice. Oxford University Press, Oxford

B010 v Canada (2015) SCC 58

Blay S (2011) Regional developments: Asia. In: Zimmerman A (ed) The 1951 convention relating to the status of refugees and its 1967 protocol, a commentary. Oxford University Press, Oxford, pp 145–184

Case C-148/13 Q. n.d. European Court of Justice, 17 July 2014

Christie G (2016) Prosecuting the persecuted. Scottish Refugee Council

Cohen S (2011) Folk devils and moral Panics. Routledge, Abingdon

COPFS (2015) Policy on Application of Section 31 of Immigration and Asylum Act 1999 in Respect of Refugees or Presumptive Refugees. COPFS

Costello C (2017) Article 31 of the 1951 convention relating to the status of refugees. UNHCR Division of International Protection

De Haas H (2008) Irregular migration from West Africa to the Maghreb and the European Union. IOM

De Haas H, Czaika M, Flahaux M-L, Mahendra E, Natter K, Vezzoli S, Villares-Varela M (2018) International migration: trends, determinants and policy effects. DEMIG/IMIn Working Paper No. 142. International Migration Institute Network

Dubber MD (2001) Policing possession: the war on crime and the end of criminal law. J Crim Law Criminol 91:829

[123]Thorburn (2011, p. 98).

[124]Thorburn (2012, p. 280).

Dubin GV, Robinson RH (1962) The vagrancy concept reconsidered: problems and abuses of status criminality. NY Univ Law Rev 37:102
Duff A (2007) Answering for crime. Oxford University Press, Oxford
Duff A (2013) Theories. In: Zalta EN (ed) Stanford encylopedia of philosophy. http://plato.stanford.edu/entries/criminal-law/
Ekathimerini.Com (2016, July 17) Greece charges Turkish asylum seekers with illegal entry. http://www.ekathimerini.com/210527/article/ekathimerini/news/greece-charges-turkish-coup-asylum-seekers-with-illegal-entry
Farmer L (2016) Making the modern criminal law. Criminalization and civil order. Oxford University Press, Oxford
Feinberg J (1987) The moral limits of the criminal law, vol 1: harm to others. Oxford University Press, Oxford
Flynn M, Cannon C (2011) Immigration detention in Switzerland. GDP
Gallagher A (2017) Whatever happened to the migrant smuggling protocol? IOM
Gallagher A, David F (2014) The international law of migrant smuggling. Cambridge University Press, Cambridge
Global Detention Project (2015a) Immigration detention in Jordan. GDP
Global Detention Project (2015b) Immigration detention in the Gulf. GDP
Global Detention Project (2015c) The detention of asylum seekers in the Mediterranean region. GDP
Global Detention Project (2015d) The uncounted: the detention of migrants and asylum-seekers in Europe. GDP
Goodwin-Gill GS (2003) Article 31. In: Feller E, Turk V, Nicholson F (eds) Refugee protection in international law. Cambridge University Press, Cambridge
Grahl-Madsen A (1997) Commentary, Rev edn. UNHCR
Guild E (2009) Security and migration. Polity
H v. Department of Labour, CRI 2006-485-101 (New Zealand High Court) (2007)
Harcourt BE (1999) The collapse of the harm principle. J Criminol Law Criminol 90:109
Hart HLA (1983) Utilitarianism and natural rights. In: Essays in jurisprudence and philosophy. Clarendon Press
Hathaway JC (2005) The rights of refugees. Cambridge University Press, Cambridge
Holiday Y (2014, July 19) Penalising refugees. EU Law Analysis (blog). http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html
Holiday Y (2018) The court of appeal and the criminalisation of refugees. CCRC
Holiday Y (2019) The criminalisation of refugees in England and Wales in the context of Article 31(1) of the 1951 refugee convention. Brill
Human Rights Watch (2013) Turning migrants into criminals. The Harmful impact of US border prosecutions. HRW
Kilroy C (2015) The role of international and domestic law in creating the refugee crisis which faces Europe. Eur Hum Rights Law Rev 6:559
McGuire MR (2011) Abnormal law: teratology as a logic of criminalization. In: Duff RA, Farmer L, Marshall SE, Renzo M, Tadros V (eds) The structures of the criminal law. Oxford University Press, Oxford
Mill JS (1974) On liberty. Penguin
Ministry of the Interior v Felicitas LJ (1982) 86 ILR 504
Mitsilegas V (2014) The criminalisation of migrants in Europe. Challenges for human rights and the rule of law. Springer
MSS v Belgium and Greece. n.d. (2011, January 21) App no 30696/09, European Court of Human Rights
Noll G (2011) Article 31. In: Zimmerman A (ed) The 1951 convention relating to the status of refugees and Its 1967 protocol, a commentary. Oxford University Press, Oxford, pp 1243–1276
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Organized Crime 2241 UNTS 480. n.d

R v A, A, N and S (Iran and Libya) (2005) unreported (CCRC reference to Isleworth Crown Court)
R v A (Somalia) (2008) UK HL 31
R v H (2008) EWCA Crim 3117
R v H (2015) unreported
R v HHM (2011 EWCA Crim 3304
R v L (Somalia) (reference to the Crown Court by the CCRC) (2015) unreported
R v L, HVN, THN, T v R, The Children's Commissioner for England and Human Rights Commission (2013) EWCA crim 991
R v L (Sudan) (2014) unreported (CCRC reference to Isleworth Crown Court)
R v M and A (Somalia) (2010) unreported
R v M and others (2013) EWCA Crim 1372
R v M and V (2016) EWCA Crim 1733
R v O (1999) 1 Cr App R(S) 230
R v S (1999) 1 Cr App R(S) 490
R v S and D (Cameroon) (2012) unreported (CCRC reference to Isleworth Crown Court)
R v T (1998) 1 Cr App R(S) 372
R v T (Eritrea) (2012) unreported (CCRC reference to Croydon Crown Court)
R v Uxbridge Magistrates' Court ex parte A (2001) QB 667
Spena A (2014) Iniuria Migrandi: criminalization of immigrants and the basic principles of the criminal law. Crim Law Philos 8:635
Spena A (2015, June 1) A just criminalization of irregular immigration: is it possible? Crim Law Philos 1
Statement of van Heuven Goedhart (UNHCR), UN Doc. A/CONF2/SR.35 (1951). n.d
T (Burma) v DPP (2006) EWHC 2701 (Admin)
The Daily Telegraph (2015a, June 23) Calais mayor tells Britain: help Us or leave EU
The Daily Telegraph (2015b, June 25) Europe's porous borders are beyond our control, sec. Leader
The Daily Telegraph (2015c, June 25) Migrants beat Calais security despite "search of Every Lorry"
The Telegraph (2015, June 25) Sudanese Migrant
The Times (2015, June 25) 950 Migrants
Thorburn M (2011) Constitutionalism. In: Duff RA, Farmer L, Marshall SE, Renzo M, Tadros V (eds) The structures of the criminal law. Oxford University Press, Oxford
Thorburn M (2012) Proportionate Sentencing. In: Zedner L, Roberts JV (eds) Principles and values in criminal law and criminal justice. Oxford University Press, Oxford
UN ECOSOC (1949) A study on statelessness. E/1112, E/1112/Add.1
UNHCR (2006) Advisory opinion on criminal prosecution of asylum-seekers for illegal entry, 2 March 2006. UNHCR
UNHCR (2010) Introductory Note. UNHCR
UNHCR (2013) UNHCR Intervention before the High Court of Kenya in the Case of Kituo Cha Sheria and Others v. The Attorney General, 12 March 2013, Petition No. 115 of 2013. UNHCR
USCRI (2007) World Refugee Survey 2007—India. USCRI

Expulsion on the Grounds of Public Policy or Public Security: What Are the Limits of Punishment?

Christelle Macq

Abstract Expulsion of aliens is a matter of domestic law in which States enjoy a broad discretionary power (Hailbronner and Gogolin in Aliens, Max Planck encyclopaedia of public international law. Oxford University Press, Oxford, 2015; Murphy in Am J Int Law 107:164–194, 2013). European law and institutions leave a broad margin of appreciation in that field to the Member States. In addition to the expulsion of illegal aliens, national authorities may, on the grounds of public policy and public security, revoke a legal resident's residence permit and expel him or her, regardless of his or her level of integration within the host country. The Belgian legislature recently extended the scope of expulsion measures to all legal residents. The chapter analyses the evolution of expulsion measures highlighting the limits set by the European legal framework and questioning their underlying logic.

1 General Context

The European legal framework leaves a wide margin of appreciation to national authorities regarding their sovereign power to revoke the residence permit and expel a non-citizen residing legally on their territory. However, this sovereign power to expel a legal resident is still restrained by overarching European Union (EU) law and general principles and is subject to the Court of Justice of the European Union (CJEU). EU law and institutions establish a set of minimum conditions that the Member States must meet when considering the expulsion of a non-citizen legal resident. Moreover, Member States must conform to the standard for fundamental rights established by the European Convention on Human Rights and the case law of the European Court of Human Rights. However, despite these restraints, European legal framework and institutions still grant a broad margin of discretion to the Member

C. Macq (✉)
Interdisciplinary Research Centre on Deviance and Penalty (CRID&P), European Rights and Migration Team (EDEM), Catholic University of Louvain (UCLouvain), Louvain-la-Neuve, Belgium
e-mail: christelle.macq@uclouvain.be

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_11

States when exercising their power to expel a legal resident under arguments of criminal policy.

This broad margin of discretion is exemplified by Belgium national authorities and policy. The latter provides the opportunity to analyse the issues raised by the expulsion and banishment of a legal resident regarding their practical impact as well as their underlying logic. Adopted under security concerns, the Act of 24 February 2017[1] and the Act of 15 March 2017[2] have considerably extended the scope of removal, expulsion and prohibition to entry and stay that Belgian authorities may order concerning aliens residing lawfully on Belgian territory. Moreover, these legislations removed procedural guarantees previously prescribed by the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners[3] (Aliens Act).

Since the enactment of these Acts on April 2017, Belgian law now allows for the revocation of a residence permit and the expulsion and a prohibition to entry and to stay for *any* legal resident on the grounds of public policy and national security. This is a significant change as, previously, the Aliens Act precluded any imposition of a measure of expulsion and prohibition to stay and entry for long-term residents, defined by the Aliens Act as foreigners born in the Kingdom or who arrived before the age of twelve years and who have been there mainly and regularly since.[4] Moreover, administrative authorities may adopt such measures regardless of any criminal conviction, whereas, previously, such measures necessarily required a criminal conviction. The Belgian legislature adopted these amendments while transposing EU

[1]The Act of 24 February 2017 amending the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 29 April 2017) hereinafter "The Act of 24 February 2017".

[2]The Act of 15 March 2017 Amending Article 39/79 of the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 29 April 2017) hereinafter "The Act of 15 March 2017".

[3]The Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 31 December 1980) (Aliens Act).

[4]Article 21, now repealed, of the Aliens Act specified that "cannot in any case be returned or expelled from the Kingdom: 1° the foreigner born in the Kingdom or arrived before the age of twelve years and who has been there mainly and regularly since, 2° the recognized refugee […]".

legal framework,[5] citing both European Directives and CJEU case law in the justification of the legal amendments.[6] The two legal instruments grant a wide margin of appreciation to national authorities.

This chapter analyses Belgium migration law and policies, focusing on the Act of 24 February 2017 and the Act of 15 March 2017 and highlighting the underlying influence of the European legal framework and institutions. First, we outline the grounds for expulsion of legal residents under Belgium law and the accompanying procedural guarantees. Next, we question the practical implications of this recent expansion of expulsion measures, especially in consideration of their (non)compliance with the protection of fundamental rights ensured by the European Convention on Human Rights as interpreted by the European Court of Human Rights. Lastly, we argue that these recent Acts reflect a growing trend in the intersection of migration policy (i.e., the expulsion of legal residents) with concerns for public security known as *crimmigration* law and policies.

[5]The new Acts implement the following directives: Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, (OJ 2001 L149/34); Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents 2003 (OJ 2004 L16/44); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, (OJ 2003 L 251/12); Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ 2004 L 158/77); Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, (OJ 2004 L261/19); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, (OJ 2008 L348/98); Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, (OJ 2009 L155/17); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on 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, (OJ 2011 L337/9); Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, (OJ 2016 L 132/21). These directives allow the Member States to withdraw a permit residence, expel and pronounce a prohibition measure on entry and stay over a legal resident in pursuance of their task of maintaining public order.

[6]Bill of 12 December 2016 Amending the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, n° 2215/001, Doc. Parl, Ch. Repr., Sess. ord., 2016–2017.

2 Legal Framework

2.1 Grounds for Expulsion

The new Belgian law now authorises the Minister or the Aliens Office to revoke the residence permit, expel, or pronounce a prohibition of entry and stay[7] for all legal residents regardless of their residence status[8] on various grounds of "public order or national security".[9]

2.1.1 Rationae Materiae: Grounds of "Public Policy" and "National Security"

Belgian law authorises the Minister or the Aliens Office to revoke the permit of a legal resident and order him to leave the territory on the grounds of public policy and national security.[10]

Furthermore, the Minister or the Aliens Office can order a prohibition of entry and stay on the Belgian territory or the territory of all the Member States of the European Union for a period left to their discretion.[11]

The applicable rules depend on the residency status of the foreigner concerned. The higher the degree of integration of the legal resident, the higher the degree of protection against expulsion must be. Accordingly, the more "solid" the foreigner's residence status, the more serious the behaviour justifying for terminating his legal residence must be. Thus, depending on his residence status, the legal resident may be expelled simply for "reasons" of public policy or national security, or for stricter "*serious* reasons of public policy and national security" (emphasis added), or for the even more constrained "*compelling* reasons of national security" (emphasis added).

These terms replace the necessity of harm to public policy or national security previously required by Belgian law to expel a legal resident. The Belgian legislature changed the terminology used so that "any foreigner who represents a threat to public order or national security may be removed and deported, even if he has not

[7] The Minister or the Aliens Office can order a prohibition of entry and stay in Belgian territory or the territory of all the Member States of the European Union for a period left to their discretion. See Article 74/11 (third-country nationals) and Article 49 *nonies* (the EU citizens) of the Aliens Act.

[8] Articles 20, 21, 22, 44 *bis*, 45 of the Aliens Act.

[9] Articles 20, 21, 22 and 44 *bis* of the Aliens Act.

[10] Articles 20–24 (third-country nationals) and Articles 44 *bis*–45 (Union citizens) of the Aliens Act.

[11] The Aliens Act authorises the Minister or the Aliens Office to order a prohibition of entry and stay on the Belgian territory or on the territory of all the Member States of the European Union over third-country nationals (74/11) and to order a prohibition of entry and stay on the Belgian territory over the EU citizens (Article 49 *nonies*).

been convicted".[12] Whereas before, a criminal conviction was necessary to expel a legal resident, now "[a]ny relevant element informing the administration on the dangerousness of the person concerned has to be taken into account. The existence of one or more convictions may be part of this bundle of indices but, in principle, it will not be a condition *sine qua non*".[13] Therefore, this change of terminology significantly expands the scope of Belgian expulsion policies, widening the margin of discretion for national authorities, who can now order the expulsion of a legal resident simply on the grounds of public policy and national security, regardless of any criminal conviction.

The lack of a precise definition of what constitutes "public policy" or "national security" reinforces this wide margin of action. Because these terms result from the implementation of European directives, the Belgian parliamentary work refers to the definition given by these texts as well as to the interpretation of these notions by the CJEU.[14] However, the European texts,[15] as well as the CJEU's indications, leave a broad margin of discretion to national authorities. According to CJEU,

> Member States essentially retain the freedom to determine the requirements of public order, in accordance with their national needs which may vary from one Member State to another and from 'time to time'.[16] At most, the Court requires, that when an expulsion policy deviates from an established principle in the name of 'public policy', that there exists a 'present and sufficiently serious threat' affecting one of the fundamental interests of society.[17]

Therefore, the existence of a previous criminal conviction can only be taken into account as far as the personal conduct, which gave rise to that conviction constitutes evidence that the Foreigner represents a present threat to the requirements of public policy.[18] Moreover, what constitutes a behaviour threatening 'one of the fundamental interests of society' is not clearly defined. Regarding the notion of "public security",

---

[12]Bill of 12 December 2016 amending the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, n° 2215/001, Doc. Parl, Ch. Repr., Sess. ord., 2016–2017: 19.

[13]Bill of 12 December 2016 (n 13): 19.

[14]Bill of 12 December 2016 (n 13): 20.

[15]Thus, some directives on legal migration state in their preamble that the notion of public order can cover the conviction for serious offenses and that the notions of public order and public security notably cover cases of membership or support for an association that supports terrorism or has (had) extremist aims. See among others: 8th Recital of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents2003 (OJ 2004 L16/44) and Recital 14 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12).

[16]ECJ, judgement of 10 July 2008, case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23; ECJ, judgement of 17 November 2011 C-430/10 *Gaydarov* [2011], ECR I-11637 § 32; ECJ, judgement of 17 November 2011, C-434/10 *Aladzhov* [2011], ECR I-11659 § 34; ECJ, judgement of 22 May 2012, C-348/09 *P. I.* [2012], § 23.

[17]ECJ, Judgement of 4 October 2012, case C-249/11, *Byankov* [2012], § 40; ECJ, judgement of 24 June 2015, case C-373/13, *H.T.* [2015].

[18]ECJ, judgement of 19 January 1999, case C-348/96, *Calfa* [1999], ECR I-00011 § 24.

the Court of Justice specifies that it "covers both a Member State's internal and external security",[19] encompassing

> a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests".[20]

Again, the Court leaves a wide margin of discretion for interpretation to national authorities. For example, applying these conditions, the Court allowed the expulsion on the grounds of public policy and public security of a Romanian sentenced to 8 months imprisonment for theft.[21] Moreover, the Court admitted that the support of terrorist activity[22] or involvement in drug trafficking[23] might justify an expulsion on the grounds of public policy and public security.

During the preparatory work for the law of 24 February 2017, some Members of Parliament were concerned by the lack of definition of public policy and national security. They noted the large window of potential interpretations for these imprecisely defined terms. One MP cited as an example the recent removal to Baghdad of an Iraqi described as a dangerous terrorist in the media. According to the preparatory documents, even the federal prosecutor asked for the case to be dismissed, which raises doubts whether this person really was a terrorist.[24] The inconsistency in practices within the Aliens Office was part of this concern. Although the Office often adopts such measures on the basis of serious offences, the "public order" aspect is not always obvious. So, members of the parliament asked for precision about the current practice of the OE concerning this notion.[25] These issues remain unanswered. Belgian administrative courts and the European Court of Justice should provide valuable information in this regard in the future.

Moreover, within their opinion on 26 September 2016, the Council of State invited the legislature to clarify these notions in the text of the law.[26] The legislature ignored these recommendations, leaving the content of these notions, for the main part, to the free discretion of the administrative authorities.[27] Despite calls for more precise definitions, the legislator provided to the Minister and the Foreigner's Office still offers a wide margin of discretion.

---

[19]ECJ, judgement of 23 November 2010, case C-145/09, *Tsakouridis*, [2010], ECR I-11979 § 43; ECJ, judgement of 24 June 2015, case C-373/13, *H.T.*, [2015], § 78.

[20]ECJ, judgement of 23 November 2010, case C-145/09, *Tsakouridis*, [2010], paragraph 44; ECJ, judgement of 24 June 2015, case C-373/13, *H.T.*, [2015], § 78.

[21]ECJ, judgement of 14 September 2017, case C-184/16, *Petrea*, [2017].

[22]ECJ, judgement of 24 June 2015, case C-373/13, *H.T.* [2015].

[23]ECJ, judgement of 23 November 2010, case C-145/09, *Tsakouridis* [2010].

[24]Report made on behalf of the Committee on the Interior, General Affairs and Civil Service, n° 2215/003, Doc. Parl, Ch. Repr., sess. ord. 2016–2017: 25.

[25]Report made on behalf of the Committee on the Interior, General Affairs and Civil Service (n 19): 16.

[26]Council of State's opinion n° 59.854/4, 26 September 2016, Doc. Parl, Ch. Repr., sess. ord. 2016–2017: 92.

[27]Bill of 12 December 2016 (n 13): 6–8.

2.1.2 Rationae Personae: Every Legal Resident Regardless of His Residence Status

Since the enactment of the Act of 24 February 2017, any legal resident, regardless of residence status, may be expelled from Belgium and prohibited from re-entering the country for a period left to the Minister or the Aliens Office discretion.

- National authorities may withdraw the residence permit and expel every non-citizen[28]

The right to deprive and expel any legal resident from the Belgian territory constitutes a fundamental change to the preceding Aliens Act, which did not allow for the expulsion of long-term residents and recognised refugees.[29] A foreigner either born in Belgium or having arrived in Belgium before the age of 12 and having consistently lived within the country, as well as the those recognised as refugees, could not, under any circumstances, be deprived of their right to stay and, subsequently, expelled from Belgium. Introduced first by ministerial circular, then by legislative action,[30] this absolute protection against expulsion for long-term residents echoed a campaign initiated by various associations denouncing the eminently discriminatory, inhumane, ineffective, and penalising nature of this type of measures for long-term residents.[31] These associations highlighted the particularly severe impact that expulsion of long-term residents would have on the right to private and family life of "offenders," some of whom have spent all or most of their lives in Belgium. In prohibiting the expulsion of long-term residents and refugees within the Aliens Act, the Belgian legislator was partially motivated by these concerns; it justified the introduction of this right to not be expelled by appealing to the disproportionate consequences experienced by long-term residents on their social and family lives.[32]

This chapter asserts that the Act of 24 February 2017 is a step backwards as it abolishes these protections. The legislator justified the removal of these absolute protections by arguing for the necessity to give the administrative authorities absolute discretion/freedom to adequately address threats to public order and national security. Authorities highlighted the case of Salah Abdeslam as an example of the necessity for administrative authorities to have absolute authority and discretion. Salah Abdeslam

---

[28] Any person who is not a Belgian national.

[29] Article 21, now repealed of the Aliens Act specified that "can not in any case be returned or expelled from the Kingdom: 1° the foreigner born in the Kingdom or arrived before the age of twelve years and who has been there mainly and regularly since, 2° the recognized refugee […]".

[30] The Act of 26 May 2005 amending the Act of 23 May 1990 on the inter-State transfer of sentenced persons and the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 10 June April 2005): 26718.

[31] "*Collectif Solidarité contre l'Exclusion*", 38 (May/June 2003): 41–42; Rolin (2002), Liebermann (2000), De Schutter (1997, pp. 177–189), Jaspis (2002).

[32] Bill of 13 January 2005 amending the Act of 23 May 1990 on the inter-State transfer of sentenced persons and the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, Doc. Parl., Ch. Repr, sess. ord. 2004–2005, n° 1555/001: 9.

is one of the perpetrators of terrorist attacks in France.[33] He does not have Belgian citizenship, but was born in Belgium and had always lived there until the attacks. The government emphasised that it was impossible to withdraw his residency permit and expel him because, as a long-term resident, he was protected against expulsion. The government requested the abolition of this absolute protection to "allow again the removal of very dangerous foreigners constituting a threat to society".[34]

The Belgian legislature insists that the new Acts comply with European law and jurisprudence.[35] While European directives and the European Court of Justice do allow a state to expel a legal resident (including long-term residents) on the grounds of public policy and public security, the expulsion of a long-term resident is permitted only under strict conditions; the Member States may expel a long-term resident solely where he/she constitutes an "actual and sufficiently serious threat" to public policy or public security.[36] Moreover, before expelling a long-term resident, Member States must take into account to the following considerations: the duration of residence within their territory; the age of the person concerned; the consequences for the person concerned and family members; and, the links with the country of residence or the absence of links with the country of origin.[37] While the Belgian legislator included these guidelines within the text of the Foreigner's Act,[38] these guidelines depended on the specific circumstances of each case, ultimately leaving their application and effect mainly to the national authorities' discretion.

The Court of Justice has had several occasions to rule on these criteria.[39] In their López Pastuzano decision, the Court stated that the adoption of expulsion measure "may not be ordered automatically following a criminal conviction, but rather requires a case-by-case assessment".[40] When applied in a case-by-case analysis, these considerations leave a wide margin of discretion to national authorities.

The new Belgian law fully uses the flexibility provided by the jurisprudence of the Court of Justice. The new Belgian provisions do not contradict the European Court of Justice case law but anticipate it regarding specific issues. In this way, the

---

[33] Salah Abdeslam is a Belgium-born French national of Moroccan descent. In April 2018 he was convicted and sentenced to 20 years in prison for his involvement in the attacks in Paris on 13 November 2015 (in which 130 people were killed and 368 others were injured) through providing logistical support for the assailants, driving them to their target locations, and having some involvement in the manufacture of the explosives used.

[34] Report made on behalf of the Committee on the Interior, General Affairs and Civil Service (n 19), p. 5.

[35] Ibid., p. 30.

[36] As explained before the Court of Justice requires, that when an expulsion policy deviates from an established principle in the name of "public policy", that there exists a "present and sufficiently serious threat affecting one of the fundamental interests of society". See among others ECJ, judgement of 4 October 2012, case C-249/11, *Byankov* [2012], § 40; ECJ, judgement of 24 June 2015, case C-373/13, *H.T.* [2015].

[37] See Council Directive 2003/109/EC 2003 (OJ 2004 L16/44).

[38] Article 23 of the Aliens Act.

[39] See among others ECJ, judgement of 7 December 2017, case C-636/16, *López Pastuzano* [2017]; ECJ, judgement of 8 December 2011, case C-371/08, *Ziebell* [2011].

[40] ECJ, judgement of 7 December 2017, case C-636/16, *López Pastuzano* [2017], § 27.

Aliens Act does not presuppose any conviction in order to take expulsion measures even if the European Court of Justice has not yet had an opportunity to consider if a prior conviction is (or not) required to apply these measures. Therefore, it will be interesting to follow the evolution of the case law on this issue, to see whether the Court of Justice will apply these measures even if there are no convictions. These clarifications could contradict the Aliens Act.

- National authorities may order a prohibition measure on entry and residence for any legal resident regardless of status

Since the enactment of the Act of 24 February 2017, administrative authorities may issue an entry ban, i.e. a prohibition of entry to and stay in Belgian territory over all legal residents. This is a fundamental change; previously, only third-country nationals were subject to this measure.[41] While Article 44 *nonies* of the Aliens Act, implemented by the Act of 24 February 2017, allowed the government to order a prohibition measure on entry and residence with respect to a Union citizen for a period left to the Minister's discretion, the Foreigner's Act still confined this prohibition to Belgian territory. This a significant difference from the prohibition measure on entry and residence that may be ordered over third-country nationals who can be prohibited to enter and to stay in the territory of all European Union Member States.

The Belgian legislature justifies this extension to Union citizens by arguing that it is necessary to effectively combat certain forms of crime. The "Dutch example" was emphasised during parliamentary proceedings. The Netherlands drastically reduced the number of burglaries committed by Romanian gangs by introducing the undesirability declaration (*ongewenstverklaring*) mechanism similar to a prohibition of entry and stay with respect to citizens of the European Union.[42]

Belgian legislator indicated to limit the adoption of such a measure against Union citizens or similar[43] to the Belgian territory in order to ensure respect for "the fundamental right to freedom of movement, inherent in European citizenship".[44]

Although EU law recognises the right of the EU citizens to move and reside freely within the territory of the Member States,[45] it authorises restrictions on this right. Namely, the 2004/38 Council Directive allows limitations and restrictions on the right to free movement of EU citizens and their families.[46] This text subjects such

[41] Article 1, 3° of the Aliens Act defines the third country national as "any person who is not a Union citizen or a person benefiting from the Community right of free movement as defined in point 5 of Article 2 of the Schengen Borders Code".

[42] Report made on behalf of the Committee on the Interior, General Affairs and Civil Service (n 19), pp. 5–6.

[43] Union citizen or a person benefiting from the Community right of free movement as defined in point 5 of Article 2 of the Schengen Borders Code.

[44] Bill of 12 December 2016 (n 11), p. 9.

[45] The Article 45.A of the Charter of fundamental rights of the European Union states: "Every citizen of the union has the right to move and reside freely within the territory of the member states" (OJ 2010 C 83/389).

[46] Articles 27, 28, 29, 32 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside

restrictions to several conditions, such as conditions of duration. The EU citizens excluded on the grounds of public policy or public security should be able to

> submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order. They will have to put forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. […] The Member State concerned shall reach a decision on this application within six months of its submission".[47]

The Belgian legislator repeats, *a minima*, these requirements in the Foreigner's Act but does not go further.

It is important to note that generally, the Aliens Act limits the period of prohibition to five years regardless of the status of the person concerned. However, the Minister or the Aliens Office may order a prohibition on entry and stay of more than five years if the third-country national or the Union citizen represents a "serious threat to public policy or public security".[48] So, again, the decision-making authorities exercise substantial discretion when subjecting Union citizens to prohibitions to entry or stay for more than five years. For example, Belgian authorities recently ordered a prohibition on entry and stay for 15 years with respect to a Moroccan citizen who was born in and had always resided in Belgium, because of his deemed/known participation in a terrorist group.[49]

2.2 Legal Safeguards

The Belgian legislator tries to constrain the extension of the scope of these measures by implementing several guarantees, based on European legislation and case law, within the text of the Foreigner's Act; these constraints seek to provide sufficient protection against arbitrariness and ensure a fair balance between the various interests involved.[50] The constraints call for (1) the implementation of a grading system, (2) the requirement of an individual examination, (3) and the obligation to inform and/or to hear the person affected by such measures.

---

freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ 2004 L 158/77).

[47] Article 32 of Directive 2004/38/EC (OJ 2004 L 158/77).

[48] Article 44 *nonies* (Union citizens) and Article 74/10 (third country nationals) of the Aliens Act.

[49] CCE n° 201 039, 13 March 2018.

[50] Bill of 12 December 2016 (n 11), p. 19.

2.2.1 A "Grading System"

This grading system, directly inspired by the texts of EU directives and the Court of Justice of the European Union case law, requires that the more "solid" the foreigner's residence status is, the more serious the behaviour justifying the end of his legal residence should be.[51] Specifically, as already stated, depending on his residence status, the legal resident may be removed for "reasons of public policy or national security", for "serious reasons of public policy and national security" or for "compelling reasons of national security".[52]

There are different standards for expulsion with regard to different groups of people. Namely, national authorities expel Union citizens; third-country nationals admitted or authorised to stay for a limited or unlimited period as well as foreigners holding a long-term residency permit in another country of the European Union for reasons of public policy or national security.[53] By contrast, national authorities may expel Union citizens and family members with permanent residence status, established third-country nationals, third-country nationals who have the status of long-term resident in Belgium and residents authorised or entitled to stay for more than three years *only* for *serious* reasons of public policy or national security.[54] Moreover, EU citizens who are minors or who have resided in Belgium for a continuous period of ten years may be expelled *only* on "imperative" grounds of public policy or national security.[55]

The ambiguity of what exactly constitutes as a "serious reason" or "imperative grounds" makes the application of these terms as grounds for expulsion problematic. It is therefore impossible to determine with precision the degree of gravity required to switch from one requirement to another. Again, preparatory documents refer to the interpretation of those terms by the Court of Justice of the European Union's case law.[56] According to the Court, a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or peaceful coexistence of nations, or a risk to military interests, may affect public security.[57] "Serious reasons" would suggest that the circumstances of the case must be more serious, and "imperative grounds

[51] Ibid., pp. 6–7.

[52] Ibid., pp. 6–7.

[53] Article 21 of the Aliens Act.

[54] Article 22 of the Aliens Act.

[55] Following Recital 24 of Directive 2004/38/EC (n 34): "Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989."

[56] Bill of 12 December 2016 (n 11), pp. 23–25.

[57] See, inter alia, ECJ, judgement of 10 July 1984, case 72/83 *Campus Oil and Others* [1984] ECR 2727, §§ 34 and 35; ECJ, judgement of 17 October 1995, case C-70/94 *Werner* [1995] ECR I-3189,

of public security" would require that the circumstances of the case be even more serious. It follows that the concept of "serious reasons" is much broader than the concept of "imperative grounds of public security", which "presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as it is reflected by the use of the words "imperative reasons".[58]

In light of this reasoning, the Court of Justice considers that the same facts may fall under the concept of "serious reasons of public order or national security" as well as that of "compelling reasons" since the appreciation of their gravity has to be done regarding their circumstantial context.[59] The Court leaves the degree of gravity of the infringement to the discretion of national authorities on the basis of an individual examination of the case.

As the Court leaves the degree of gravity of the infringement required to switch from one notion to another to the discretion of national authorities, the "protection" introduced for long-term residents, is primarily based on the use of notions leaving a wide range of discretion to the decision-making authorities. Therefore, this protection appears, in our view, artificial.

2.2.2 An Individual Examination

The Aliens Act requires an individual examination of the proportionality of the residence permit withdrawal, expulsion or prohibition to enter and to stay. Administrative authorities have to appreciate the proportionality of these decisions regarding all interests in balance.

The 24 February Act 2017 enumerates a list of criteria that the administrative authorities have to take into account when they assess the proportionality of those decisions.[60] It requires national authorities to make these decisions only on the basis of an individual examination of all the interests at stake. Moreover, it forbids justifications not directly related to the individual case concerned or due to reasons of general prevention.[61] In stating these criteria, the Aliens Act repeats an obligation previously laid down by the European texts and institutions. The Court of Justice has consistently held that, before taking such measures, national authorities have to make a balance between the exceptional nature of the threat to public security, on the one

§ 27; and ECJ, judgement of 25 October 2001, case C-398/98 *Commission v Greece* [2001] ECR I-7915, § 29.

[58] ECJ, judgement of 23 November 2010, case C-145/09, *Tsakouridis* [2010] ECR I-11979, § 41.

[59] ECJ, judgement of 24 June 2015, case C-373/13, *H.T.* [2015], §§ 79–93.

[60] Several criteria have to be considered in the decision-making as the gravity or nature of the offense against public order or national security, the length of residence, the existence of connections with the country of residence or lack of connection with his/her country of origin, the age and the consequences for the person affected and his/her family members.

[61] Article 23 (third-country nationals), Article 44 *bis*, para 4, Article 45 para 2 (Union Citizens) of the Aliens Act.

hand, and the risk of compromising the social rehabilitation and of violating fundamental rights, on the other.[62] Therefore, the Belgian legislature does not reinforce or expand on the existing guarantees but merely requires the minimum standard already laid down by European law. Moreover, these terms are undefined and very broad in their scope. They leave again to national authorities a wide margin of discretion.

2.2.3 The Right to be Heard and to be Informed

The Act of 24 February 2017 introduced in the Aliens Act the obligation to inform the persons affected by a withdrawal of their residence permit, expulsion or a prohibition to enter and to stay. The decision-making authorities have to notify beforehand their intention to make such a decision. Within fifteen days from the receipt of that letter, the person affected is entitled to report facts to the authorities that could influence the decision.[63]

However, these rights to be informed and to be heard might not be respected "if this is contrary to the interests of state security", in case of "special circumstances", or if the foreigner is "unreachable".[64] Moreover, the period of fifteen days may be extended or reduced if it is deemed "useful" or "necessary".[65] Therefore, the effectiveness of these requirements to ensure the right to be heard and to be informed is highly questionable. Moreover, the compliance of these requirements with the Community legal order is doubtful. This right is enshrined in Article 41 of the Charter of Fundamental Rights of the Union. It is, moreover, a general principle of Union law considered by the Court of Justice as an integral part of the rights of the defence.[66] It guarantees to all persons the opportunity to make known, in a useful and effective way, their point of view during the administrative procedure and before the adoption of any decision likely to adversely affect their interests.[67] The Court states that "the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is to enable the competent authority effectively to take into account all relevant information".[68] The Court considers that "the authorities of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide

[62] ECJ, judgement of 23 November 2010, case C-145/09, *Tsakouridis*, [2010] ECR I-11979, §§ 50–51.

[63] Article 62 of the Aliens Act.

[64] Ibid.

[65] Ibid.

[66] ECJ, judgement of 5 November 2014, case C-166/13, *Mukarubega,* [2014], § 45; ECJ, judgement of 11 December 2014, case C-249/13, *Boudjlida,* [2014], § 34.

[67] ECJ, judgement of 22 November 2012, case C-277/11, *M.*, § 87; ECJ, *Mukarubega*, § 46.

[68] ECJ, judgement of 18 December 2008, case C-349/07, *Sopropé*, [2008], § 49; ECJ, *Mukarubega*, § 47.

for such a procedural requirement".[69] Thus, the implementation of that principle may not make it impossible in practice, or excessively difficult, to exercise the rights of the defence conferred by the Community legal order.

The introduction of these rights within the Aliens Act aims to balance the removal of procedural rules previously existing. Previously, several categories of legal residents had the right to submit their defence about the decision of withdrawal, expulsion or prohibition to enter and stay in front of an independent Advisory Committee on Aliens and to be assisted by a lawyer; the Act of 24 February removed this requirement.[70]

Moreover, the Act of 15 March 2017[71] removed the suspensive effect of the appeal lodged against a decision of withdrawal, expulsion or prohibition to enter and to stay ordered on imperative grounds of public security. Therefore, the legislator removed the suspensive effect of the appeal against those measures as ordered against foreigners enjoying the highest standard of protection.

In light of the above, contrary to the contents of the preparatory documents,[72] the guarantees surrounding the expulsion of a legal resident appear to have been reduced rather than reinforced.

3 Practical Impact Versus Fundamental Rights

The expulsion of a legal resident and his/her prohibition to entering and residing on the Belgian territory may have dramatic consequences on his/her family and social lives. S/he might experience separation from family, social ties and professional network if forced to return to a country that s/he barely knows.

The violent nature of the practical consequences of such expulsion measures question their compliance with the obligation of national authorities to respect fundamental rights protected by international instruments such as the European Convention on Human Rights. In particular, we next analyse the compliance of these measures with (1) the right to private and family life and (2) the prohibition of inhuman and degrading treatment dictated by European Court of Human Rights case law.

[69] ECJ, *Sopropé*, § 38; ECJ, *M.*, § 86; ECJ, judgement of 10 September 2013, case C-383/13, *MG and NR* [2013], § 32.

[70] Article 32 of the Aliens Act.

[71] Article 3 of the Act of 15 March 2017.

[72] Bill of 12 December 2016 (n 11), p. 19.

3.1 The Right to Private and Family Life

The forced expulsion of a legal resident who has family, cultural and social ties with his/her country of residence interferes with the right to private and family life protected by Article 8 of the European Convention on Human Rights. This interference does not necessarily result in a violation of the Article 8, as it authorises interference by a public authority with the exercise of this right as long as it is following the law and is necessary in a democratic society.[73] The European Court of Human Rights has consistently held that in assessing whether an interference with a right protected by Article 8 was necessary for a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of discretion.[74] However, as the State's margin of discretion goes hand-in-hand with European supervision, ultimately, the Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8.[75] The Court's task consists of ascertaining whether the imposed measures strike a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the public's interests on the other.[76] The Court adopts a case-by-case analysis, applying the proportionality test in consideration with criteria specific to the case at hand,[77] thus leaving a wide margin of appreciation to national authorities.

It should be noted that these criteria do not lead to the same conclusion in similar cases.[78] Moreover, the control of the Court remains marginal, as the Court considers that "where the independent and impartial domestic courts have carefully examined the facts and adequately balanced the applicant's interests against the more general

[73] Thym (2008).

[74] ECtHR, judgement of 9 October 2003 (GC), No 48321/99, *Slivenko* et al. *v Latvia*, § 113; ECtHR, judgement of 2 August 2001, No 54273/00, *Boultif v Switzerland*, § 48.

[75] ECtHR, judgement of 2 August 2001, No 54273/00, *Boultif v Switzerland*, § 48; ECtHR, judgement of 14 September 2017, No 41215/14, *Ndidi v. The United Kingdom*, § 76.

[76] ECtHR, judgement of 2 August 2001, No 54273/00, *Boultif v Switzerland*, § 48; EctHR, judgement of 18 October 2006 (GC), No 46410/99, *Üner v. the Netherlands*, § 54; EctHR, judgement of 23 June 2008, No 1638/03, *Maslov v. Austria*, § 76.

[77] The Court elaborated these criteria in *Boultif case* (n 56) and clarified those in the *Üner case* (n 56) and the *Maslov case* (n 56). According to the Court, national authorities have to take into account the following criteria: the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children from the marriage, and if so, their age(s); the seriousness of the difficulties the spouse is likely to encounter in the country to which the applicant is to be expelled; the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.

[78] See among others, dissenting opinion of judges Costa, Zupančič and Türmen in the case *Üner v. the Netherlands* (n 56).

public interest in the case, the Court has not to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities".[79] This implies that the Court relies on the domestic court's decision regarding the proportionality assessment of the measures adopted.

According to the Court, these principles apply "regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there".[80] Leaving a wide margin of appreciation to national authorities, the Court recently concluded that there has been no violation of Article 8 in the case of an expulsion ordered with respect to an alien arrived in the host country at a very young age and who had always lived there.[81]

3.2 The Prohibition of Inhuman and Degrading Treatment

Article 3 of the European Convention on Human Rights prohibits in absolute terms torture and inhuman or degrading treatment or punishment. The Court has stated on many occasions that Article 3 enshrines one of the most fundamental values of democratic societies[82] considering that "even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment".[83] Therefore, the Court has consistently stated that, where substantial grounds have been shown for believing that the person concerned, faces a real risk of being subjected to treatment contrary to Article 3 if deported, national authorities have an obligation not to deport the person in question to that country.[84] In a recent case *X v. Sweden,* the Court reiterates the absolute character of this right confirming and enhancing its preventive and protective purpose in expulsion-related cases.[85] Within *X v. Sweden*, the Court analysed the compliance of the expulsion of a suspected terrorist to his home country, Morocco, with Article 3. The applicant essentially claimed that, since the Moroccan authorities knew that he was considered a security threat in Sweden, he would be arrested upon return and tortured as a suspected terrorist. The Court,

[79] In the *Ndidi v. The United Kingdom* case (§§ 80–81), the Court declined to substitute its conclusions for those of the domestic courts, which had thoroughly assessed the applicants' personal circumstances, carefully balanced the competing interests and took into account the criteria set out in its case law, and reached conclusions which were neither arbitrary nor manifestly unreasonable.

[80] ECtHR, *Üner v. The Netherlands* (n 56), § 55.

[81] See among other examples the case *Üner v Netherlands* (n 56) and the case *Ndidi v United Kingdom* (n 55). D'Hondt (2017), Saroléa (2018, pp. 503–521).

[82] See a.o. ECtHR, judgement of 28 February 2008, no. 37201/06, *Saadi v. Italy* [GC], § 127; ECtHR, 23 August 2013, no. 59166/12, *J.K. and others v. Sweden*, § 79.

[83] See a.o. ECtHR, judgement of 28 July 1999, no. 25803/94, *Selmouni v. France* [GC], § 95; ECtHR, judgement of 23 October 2006, no 59166/12, *J.K. and others v. Sweden*, § 79; ECtHR, judgement of 9 January 2018, No. 36417/16, *X v. Sweden*, § 55.

[84] See a. o. ECtHR, judgement of 28 February 2008, no. 37201/06, *Saadi v. Italy* [GC], §§ 124–125.

[85] Gatta (2018, pp. 3–7).

considering the existence of a risk for the applicant to be subjected to ill-treatment once returned to Morocco,[86] directed Sweden not to proceed with the enforcement of the expulsion.[87] Therefore, the absolute character of Article 3 remains preventive and protective in expulsion-related cases such as in the case of the expulsion of a legal resident on the grounds of public policy and public security.

Under that jurisprudence, the Belgian administrative courts have repeatedly refused to expel a suspected terrorist to Morocco because of the risk of violation of Article 3 in their home country.[88]

4 Underlying Logics: A Form of Crimmigration

Juliet P. Stumpf posits that the expansion of immigration consequences, such as deportation or exclusion grounds based on criminal convictions, constitutes "one of the two horns of *crimmigration* law defined as the letter and practice of law and policies at the intersection of criminal law and immigration law" (Stumpf 2013, emphasis added).[89] The author identifies two critical markers that signal when the processes of crimmigration law may turn into punishment: "when the motives of the authorities enacting and enforcing the criminalising process are to exact a sanction; and when the non-citizen commonly experiences the process as punitive".[90]

The expansion of the measures of removal, expulsion and prohibition for entry and stay meet the two markers outlined by Stumpf. Belgian authorities stated that they expanded the scope of these measures to fight against serious and organised crime and terrorism. In practice, these measures, usually adopted, following conviction are, in our view, used as a punishment more than a deterrence mechanism to combat future crime. Moreover, it should be observed that, as expulsion measures usually overlap with criminal convictions or criminal proceedings, non-citizens experience their expulsion and banishment as a "double punishment".[91] Therefore, these measures clothed with many attributes of criminal law appear to blur the boundaries between immigration law and criminal law participating to what scholars call the "criminalization of immigration law".[92]

---

[86] *X v. Sweden* (n 63), §§ 57–61.

[87] *X v. Sweden* (n 63), §§ 62–63.

[88] CCE n° 217 025, Judgement of 5 March 2018; CCE n° 201 039, judgement of 13 March 2018; CCE n° 202 098, judgement of 6 April 2018; CCE n° 203 271, judgement of 27 April 2018.

[89] Stumpf (2013a, pp. 7–8).

[90] Stumpf (2013b, p. 60).

[91] In the *Uner case*, the applicant emphasised that "he would have preferred to serve a longer sentence if it had prevented him from being deported and unable to return to his family life in the Netherlands". See ECtHR, judgement of 18 October 2006 (GC), No 46410/99, *Üner v. the Netherlands*, § 40. See in the same way: ECtHR, judgement of 5 October 2000 (GC), No 39652/98, *Maaouia v. France*, § 32.

[92] Stumpf (2006, pp. 367–376).

These underlying logics question the legal nature of these measures. In Belgian law, these measures are of administrative nature. Some applicants brought the question of their legal nature before the European Court of Human Rights. They asked the Court to recognise the punitive nature of these measures, arguing that they perceived them as a second punishment even worse than the penal punishment.[93]

Nevertheless, the Court considers that,

> even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the power of the Contracting States to expel aliens.

Moreover, the Court rules that

> a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment. The Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society and such administrative measures are to be seen as preventive rather than punitive in nature.[94]

However, the administrative nature of this measure does not appear to be so obvious to all judges of the Court. In a dissenting opinion joined to the *Üner* case, Judges Costa, Zupančič and Türmen expressed their disagreement:

> Whether the decision is taken by means of an administrative measure, as in this case, or by a criminal court, it is our view that a measure of this kind, which can shatter a life or lives—even where, as in this case, it is valid, at least in theory, for only ten years (quite a long time, incidentally)—constitutes as severe a penalty as a term of imprisonment, if not more severe. This is true even where the prison sentence is longer but is not accompanied by an exclusion order or expulsion. That is why some States do not have penalties of this kind specific to foreign nationals, while others have largely abolished them in recent times.[95]

The denial of the penal logic underlying these measures has legal consequences. Procedural guarantees surrounding immigration law are far less protective than procedural guarantees surrounding criminal proceedings. Belgian law offers a good example to understand the lack of effectiveness of the procedural guarantees surrounding the implementation of administrative measures as expulsion. As their punitive nature is not recognised, these measures are not accompanied by the higher guarantees surrounding criminal proceedings.

This reinforces the difference of treatment created by the application of these measures to non-citizens. First, they experience a double punishment not applicable to

---

[93] ECtHR, judgement of 18 October 2006 (GC), No 46410/99, *Üner v. the Netherlands*, para 40 and ECtHR, judgement of 5 October 2000 (GC), No 39652/98, *Maaouia v. France*, § 32.

[94] ECtHR, judgement of 18 October 2006 (GC), No 46410/99, *Üner v. the Netherlands*, para 56 and ECtHR, judgement of 5 October 2000 (GC), No 39652/98, *Maaouia v. France*, § 39.

[95] Joint dissenting opinion of judges Costa, Zupančič and Türmen in *Üner v. The Netherlands*, § 17; see also the dissenting opinion of the Judges Costa and Tulkens in the *Baghli case*, EctHR, no. 34374/97, *Baghli v. France*, judgement of 30 November 1999.

nationals and, also, the imposition and execution of this punishment reserved for them offer far less procedural guarantees that those surrounding criminal proceedings.[96]

This questions with even more acuity the compliance of these measures with the principle of equality and non-discrimination. The difference of treatment created by such measures between national citizens and non-citizens has given rise to jurisprudential and doctrinal controversies for years.[97] Fifteen years ago, the Belgian legislature excluded long-term residents of the scope of these measures recognising the discriminatory character of such measures applied to non-citizens who were born or had always lived in the country.[98] Since April 2017, the Belgian legislature has gone backwards reviving the debate on the justifications to treat in such a different way a person convicted (or under criminal proceedings) on the grounds of his/her nationality.

During the legislative proceedings on adoption of the Act of 24 February 2017, some Members of the Parliament, worried about the creation of second-class citizens, wondered "how these measures could be applied to those born and who have always lived in Belgium? Don't we have to consider these individuals as a result of our society?"[99] They asked for an inclusive society "in which individuals living since a while have to be considered as citizens with the same rights and obligations".[100]

After due analysis, we observe that Belgian law is currently taking the opposite direction. Since the entry into force of the new Acts, any legal resident, regardless of residency status, may be expelled from Belgium and prohibited from re-entering the country for a period left to the discretion of the Minister or the Aliens Office. Besides, the power of the administrative authorities was reinforced to the detriment of the effective protection of non-citizens' rights. The Belgian law evolution is not contrary to the European legal framework and the actual position of European institutions. The Belgian legislature just stepped into the breach opened by European legal framework and institutions that give all leeway for the Member States to go this way.

---

[96] See about this issue the case *Engel and others v. The Netherlands* (ECtHR, judgement of 8 June 1976 (GC), No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and others v. The Netherlands*). Since this case, the Court has consistently held that the guarantees of Article 6 ECHR have to be applied to an administrative sanction when this sanction has a predominantly dissuasive and repressive character. The Court considers that a sanction which is not qualified in domestic law as a penalty may be considered as falling within the scope of the criminal aspect of Article 6 by the Court when it has a predominantly dissuasive and repressive character. However, the Court has consistently stated that expulsion measures are of preventive nature and refused to apply the guarantees attached to Article 6 ECHR to those measures. See among others: ECtHR, judgement of 18 October 2006 (GC), No 46410/99, *Üner v. the Netherlands* and ECtHR, judgement of 5 October 2000 (GC), no. 39652/98, *Maaouia v. France*.

[97] Guild and Minderhoud (2001, p. 16).

[98] Bill of 13 January 2005 amending the Act of 23 may 1990 on the inter-State transfer of sentenced persons and the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, *Doc. Parl.*, Ch. Repr, sess. ord. 2004–2005, n° 1555/001: 9.

[99] Report made on behalf of the Committee on the Interior, General Affairs and Civil Service (n 19), pp. 12–13.

[100] Report made on behalf of the Committee on the Interior, General Affairs and Civil Service (n 19), pp. 12–13. However, their suggestions were rejected by the coalition.

References

Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 31 December 1980) (the Aliens Act)
Act of 24 February 2017 amending the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 29 April 2017)
Act of 15 March 2017 amending article 39/79 of the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 29 April 2017)
Act of 26 May 2005 amending the Act of 23 May 1990 on the inter-State transfer of sentenced persons and the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners (M.B., 10 June April 2005)
Bill of 13 January 2005 amending the Act of 23 May 1990 on the inter-State transfer of sentenced persons and the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, no 1555/00, Doc. Parl., Ch. Repr, sess. ord. 2004–2005
Bill of 12 December 2016 amending the Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreigners, no 2215/001, Doc. Parl, Ch. Repr., Sess. ord., 2016–2017
CCE n° 201 039, 13 March 2018
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L16/44)
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12)
Council of State's opinion n° 59.854/4, 26 September 2016, Doc. Parl, Ch. Repr., sess. ord. 2016–2017
Court of Justice of the European Union (1984) Case Campus Oil and Others C 72/83
Court of Justice of the European Union (1995) Case Werner C-70/94
Court of Justice of the European Union (1999) Case Calfa C-348/96
Court of Justice of the European Union (2001) Case Commission v Greece C-398/98 […]
Court of Justice of the European Union (2008) Case Jipa C-33/07
Court of Justice of the European Union (2010) Case Tsakouridis C-145/09
Court of Justice of the European Union (2011) Case Gaydarov C-430/10
Court of Justice of the European Union (2011) Case Aladzhov C-434/10
Court of Justice of the European Union (2011) Case Ziebell C-371/08
Court of Justice of the European Union (2012) Case P. I. C-348/09
Court of Justice of the European Union (2012) Case Byankov C-249/11
Court of Justice of the European Union (2015) Case H.T. C-373/13
Court of Justice of the European Union (2017) Case López Pastuzano C-636/16
De Schutter O (1997) La proportionnalité de l'éloignement d'étrangers pour motifs d'ordre public. Rev. dr. étr. 93:177–189
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ 2004 L 158/77) (OJ 2004 L 158/77)
Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L348/98)
D'Hondt B (2017) Of course a stranger must conform: reading the Ndidi judgment with Euripides' Medea, Strasbourg Observer Blog. https://strasbourgobservers.com
European Court of Human Rights, judgment of 28 May 1985, No 9214/80; 9473/81; 9474/81; Abdulaziz, Cabales and Balkandali v. The United Kingdom
European Court of Human Rights, judgment of 28 July 1999, No. 25803/94, Selmouni v. France [GC]

European Court of Human Rights, judgment of 5 October 2000 (GC), No. 39652/98, Maaouia v. France
European Court of Human Rights, judgment of 2 August 2001, No. 54273/00*, Boultif v Switzerland*
European Court of Human Rights, judgment of 9 October 2003 (GC), No. 48321/99, Slivenko et al v Latvia
European Court of Human Rights, judgment of 18 October 2006 (GC), No. 46410/99, Üner v. the Netherlands
European Court of Human Rights judgment of 28 February 2008, No. 37201/06, Saadi v. Italy [GC]
European Court of Human Rights, judgment of 23 June 2008, No. 1638/03, Maslov v. Austria
European Court of Human Rights, judgment of 23 August 2013, No. 59166/12, J.K. and others v. Sweden
European Court of Human Rights, judgment of 14 September 2017, No. 41215/14, Ndidi v. The United Kingdom
European Court of Human Rights, judgment of 9 January 2018, No. 36417/16, X v. Sweden
Gatta LF (2018) ECtHR, 9 January 2018, X v. Sweden, Appl. No. 36417/16. National security and expulsion of a suspected terrorist; protection of human rights prevails over security. Cahiers de l'EDEM: 3–7
Guild E, Minderhoud P (2001) Security of residence and expulsion: protection of aliens in Europe. Kluwer Law International, The Netherlands
Hailbronner K, Gogolin J (2015) Aliens, Max Planck encyclopaedia of public international law. Oxford University Press, Oxford
Jaspis P (2002) Faut-il mettre fin à la double peine? La Libre Belgique
Liebermann P (2000) Double peine pour double faute, en finir avec le bannissement des immigrés. Rev. drt. étr. 109:355–358
Murphy SD (2013) The expulsion of aliens and other topics: the sixty-fourth session of the International Law Commission. Am J Int Law 107:164–194
Rolin X (2002) La double peine, une punition de la nationalité. Rev. dr. étr. 118:205–216
Saroléa S (2018) L'arrêt Ndidi c. Royaume-Uni ou le coup de règle de la Cour européenne des droits de l'homme (obs. sous Cour eur. dr. h., arret Ndidi c. Royaume-Uni. Revue trimestrielle des droits de l'homme 503–521
Stumpf PJ (2006) The crimmigration crisis: immigrants, crime, and sovereign power. Am Law Rev 56:367–419
Stumpf PJ (2013a) Social control and Justice: Crimmigration in the age of fear. Guia MJ, van der Woude M, van der Leun J (eds) Social control and justice crimmigration in the age of fear, 7–16. Eleven International Publishing, The Netherlands
Stumpf PJ (2013b) The process is the Punishment in Crimmigration Law. In: Franko Aas K, Bosworth M (eds) The borders of punishment, migration, citizenship, and social exclusion. Oxford University Press, Oxford, pp 58–75
Thym D (2008) Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay? Int Compar Law Q 57(1):87–112

On the Use of Asylum Testimonies in Criminal and Quasi-Criminal Proceedings: *H. and J. v the Netherlands and Jaballah (Re)*

Didem Doğar

Abstract The number of asylum requests made to countries in the Global North involves an increasing amount of legal challenges. One of the challenges is the question of what happens to asylum seekers who are suspected of serious criminality. At present, there is a policy of separating possible foreign criminals from asylum seekers. A growing number of European countries resort to refugee law instruments to identify foreign criminals. However, resorting to refugee law instruments to detect possible criminals might violate the rights of the accused. This chapter analyses this tension between immigration law and criminal law through two key decisions: the *H. and J. v. the Netherlands* of the European Court of Human Rights, and *Jaballah (Re)* from Canada.

[1]United Nations Department of Social and Economic Affairs, "Bringing about positive change for people on the move" (21 February 2017). www.un.org/development/desa/en/news/population/bringing-about-positive-change-for-people-on-move.html.

[2]In this chapter, an asylum seeker is a person who requested protection, but his/her claim has not determined yet. "Asylum-Seekers", www.unhcr.org/asylum-seekers.html.

[3]In this chapter, a migrant is a person who moves across international borders voluntarily for reasons other than saving his/her live or preserve his/her freedom. "Migrant definition" UNHCR Emergency Handbook, emergency.unhcr.org/entry/176962/migrant-definition.

[4]According to the UN Security Council's Resolution 2178, foreign terrorist fighters are "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict". UN Security Council, Resolution 2178 (2014), UN Doc. S/RES/2178, 24 Sep. 2014.

[5]Vietti and Bisi (2016, p. 501).

D. Doğar (✉)
Faculty of Law, McGill University, Montreal, Canada
e-mail: didem.dogar@mail.mcgill.ca

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_12

1 Introduction: Something Rotten in the Realm of Crimmigration

Today, there are nearly 244 million people on the move.[1] On the move are not only asylum seekers[2] or migrants[3] but also foreign fighters.[4] Asylum seekers and foreign fighters unwittingly share a fundamental feature: they are both crossing international borders, yet for opposite reasons.[5] In such a mixed migration flow, host states have a challenging task to discern who is a refugee and who is a possible criminal. Due to the fear of foreign fighters in mixed migration flows, host states adopted policies constraining access to refugees. One of these policies derive from a widely recognised international legal instrument: *Convention Relating to the Status of Refugees.*[6]

Article 1F of the 1951 Refugee Convention (exclusion provision) excludes from international refugee protection those against whom there is serious suspicion of having committed war crimes, crimes against humanity, a serious non-political crime before entrance to the country of refugee, and crimes against peace or, those who have been guilty of acts contrary to the purposes and principles of the United Nations.

One of the main purposes of this provision was to render the perpetrators of certain heinous acts "undeserving of international protection as refugees",[7] while the other purposes are to prevent impunity from justice and safeguard the refugee-receiving country from criminals who pose a danger to the country.[8] However, a growing number of European countries resort to the exclusion provision to identify perpetrators of serious international crimes.[9] Since some excludable crimes are so grave under international law, particularly the ones enumerated under Article 1 F (a) including genocide, war crimes and crimes against humanity, host states are empowered to investigate, try, and punish "their perpetrators on the basis of the principle of universal jurisdiction".[10] Identifying said perpetrators using the exclusion provision creates a dangerous state of affairs: the exclusion provision, when intertwined with the concept of criminality, deviates substantially from the human rights-centred intent of refugee law.[11]

In what follows, I argue that identifying perpetrators of serious international crimes through law relating to asylum and immigration, particularly through Article 1F of the 1951 Refugee Convention,[12] violates procedural rights. In the first section,

---

[6]Convention Relating to the Status of Refugees, (28 July 1951), UNTS 189 at 137. Henceforth "1951 Refugee Convention".

[7]UN High Commissioner for Refugees, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), HCR/GIP/03/05, online www.refworld.org/docid/3f5857684.html.

[8]Kaushal and Dauvergne (2011), Larsaeus (2004). See also UNHCR, Guidelines on Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, 4 Sept. 2003, p. 2); Gilbert (2003, p. 425).

[9]Reijven and van Wijk (2015).

[10]Lawyers Committee on Human Rights (2000), p. 322.

[11]Dauvergne (2013).

[12]There are other means to identify perpetrators of serious international crimes through law relating to asylum and immigration. As an example, Article 2 of the EU Council Decision numbered

I explain the intersection between refugee law and criminal law. Specifically, I analyse two issues at stake: (i) the applicability of right not to incriminate oneself to refugee status determination process, which is administrative, (ii) the admissibility of self-incriminating statements as evidence in the subsequent criminal trial. In the second part, I analyse the Dutch judgment, which is endorsed by the European Court of Human Rights (ECtHR or European Court or the Court), and then a Canadian case to demonstrate how these two states employ asylum procedure to detect possible criminals (for the Netherlands) and to use the asylum testimony as evidence in a subsequent process whereby the Applicant's liberty and security interests are engaged (in Canada) in defiance of due process of law.

The present study is based principally upon doctrinal research into European Union and Canadian legislation, academic studies, reports of international or non-governmental organisations, and relevant cases from Canada, the ECtHR and the European Union (EU) countries, particularly from the Netherlands. Having founded a special Article 1F unit in 1997, the Netherlands established a longstanding practice with regards to the implementation of Article 1F.[13] The country also has a robust war crimes unit.[14] Canada is chosen because of geographical proximity but also because it falls outside of the ECtHR jurisdiction and thus, provides a different perspective on the issue.[15]

2 Emerging Practice: Identifying Possible Perpetrators of Serious Crimes Through Law Relating to Asylum and Immigration

The intersection of refugee law and criminal law has been subject to academic debate. According to Catherine Dauvergne, the developments in international criminal law, which emerged as a result of the trials held in the International Criminal Tribunals for Former Yugoslavia and Rwanda in the 1990s, are directly transposed onto refugee law.[16] During the drafting period of the 1951 Refugee Convention, specific rules concerning war crimes, crimes against humanity, and crimes against peace were not foreseeable. It was not yet known that the legal interpretations of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda and the International Criminal Court would significantly affect

2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes requires members states to take necessary measures during permanent residency application if the information shows that an applicant is a suspect of genocide, war crimes, and crimes against humanity, these acts may be investigated and prosecuted.

[13]Redress, International Federation for Human Rights (2010, p. 14).

[14]The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands. Human Rights Watch Report (September 2014, p. 2).

[15]Canada also has a specialized police, prosecution or immigration unit. Ibid.

[16]Dauvergne (2013) p. 3.

refugee law. Specifically, the seminal interlocutory decision of the *Tadic*[17] was not foreseeable onwards of 1951. It was with the *Tadic* case that the violations of war crimes began to include acts committed both in international and non-international armed conflicts.[18] At the time that the 1951 Refugee Convention was prepared, war crimes were only considered within the meaning of an international armed conflict.[19] Additional Protocols I and II of the Geneva Conventions, which for the first time provided detailed humanitarian rules applicable to non-international armed conflicts, were also adopted on 8 June 1977.[20] Particularly, Additional Protocol I regulates the individual criminal responsibility such as command or superior responsibility.[21] These developments in international criminal and humanitarian law have a significant impact on the implementation of Article 1F. For example, following the *Tadic* case, UNHCR considers crimes committed during the Kurdish Civil War in Iraq, and the armed conflict between the Iraqi Security Forces and Multi-National Forces and insurgent groups after 2004 within the meaning of war crimes section of the exclusion provision.[22]

These developments occurred after the adoption of the 1951 Refugee Convention, and, within the context of international criminal law, were transposed onto refugee law without considering the adverse effects. First, the punitive approach is now used in the interpretation of the exclusion provision. This means criminal law concepts are selectively embedded into refugee law. An asylum seeker suspected of Article 1F crimes is heavily subject to the criminal law provisions without any of its accompanying protections.[23] As an example, courts do not consider a high standard of proof required for criminal law for exclusion cases.[24] Excluding an asylum seeker on the basis of a much lower standard of "serious reasons to consider", which is lower than the civil standard of balance of probabilities, is sufficient.[25] Since the Article 1F adjudication process requires adjudicators to interpret and apply the criminal law provisions, states started to utilise refugee law for prosecution of foreigners. In addition, states resort to non-criminal mechanisms to punish serious international crimes

[17] *Prosecutor v. Dusko Tadic aka "Dule"* (Decision on the Defence Motion on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 August 1995.

[18] UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), online www.refworld.org/docid/3f5857d24.html. p. 11, fn. 22.

[19] Ibid., p. 11.

[20] International Committee of the Red Cross, "Protocols I and II additional to the Geneva Conventions", online www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm.

[21] Kai Ambos, Development of International Criminal Law and Tribunals, Encyclopedia of Criminology and Criminal Justice at 1030–1045.

[22] UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq, (31 May 2012) online www.refworld.org/docid/4fc77d522.html 145.

[23] Kaushal and Dauvergne (2011, p. 58).

[24] Ibid.

[25] Ibid.

[26] in defiance of due process. These detrimental consequences resonate mostly in the European context.

Since 2003, the European Union (EU) has embraced the punitive approach to immigration law. The EU Council decision dated 8 May 2003 stipulates that

> The member states should ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and prosecution of genocide, crimes against humanity and war crimes.[27]

Following the EU Council decision, many EU Member States initiated collaboration between the countries' immigration offices and their respective prosecution services for prosecuting immigrants and asylum seekers who are suspected of having committed certain crimes. For example, the specialised war crime units were founded within the Immigration and Naturalization Department of the UK Border Agency in 2004.[28] Having founded a special Article 1F unit in 1997, the Netherlands is a pioneer in this area. Since then the unit has been forwarding Article 1F cases to the Dutch Prosecution Service when a case meets the criteria of Article 1F.[29]

However, this emerging practice of heightened collaboration between the states' immigration offices and their respective justice departments to prosecute individuals who are excluded from refugee protection on the basis of Article 1F crimes is at odds with the due process of law. The concept of due process symbolises the idea of justice in its broadest terms.[30] Procedural justice provides persons with a fair opportunity to affect the outcome of a decision.[31] Procedural rights guarantee that the rule of law is observed in a way that they will ensure "objectivity, impartiality and accountability".[32] The breach of procedural rights can significantly impair substantive laws. The procedure of excluding asylum seekers from protection on the basis of Article 1F crimes is based on criminal law, but without having its accompanying protections.[33] Accompanying protections of criminal law include procedural rights such as the presumption of innocence and the right to fair trial. These guarantees are not bestowed upon individuals who are excluded from protection in accordance with administrative law standards and are, subsequently, subjected to criminal proceedings as per criminal law standards.

In the following part, I analyse the right not to incriminate oneself to demonstrate the dichotomy of resorting to criminal law instruments in deciding exclusion cases without providing safeguards of criminal law. This dichotomy occurs when these

---

[26] Ibid.

[27] Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003.

[28] Redress, International Federation for Human Rights (2010) p. 13.

[29] Ibid at 14.

[30] Vogler (2012).

[31] Halsbury's Laws of Canada—Administration Law (2013 Reissue), Guy Régimbald, Matthew Estabrooks (Contributors); HAD—3 Requirement of Procedural Fairness.

[32] Ibid.

[33] Reijven and van Wijk (2014) at 267.

cases are subsequently referred to prosecution services for a possible criminal trial. I chose the right not to incriminate oneself among other procedural guarantees since I believe this principle is the most relevant to the exclusion practice.

3 The Troubled Due Process of Law in the EU for Asylum-Seekers Suspected of Criminality

The right not to incriminate oneself emerged under English law and is based on the disinclination to compel anyone, on pain of punishment, to give incriminating evidence against himself.[34] The ECtHR affirmed that the right to remain silent under police questioning and the right not to incriminate oneself are largely recognised international standards and central to a fair procedure under Article 6 of the European Convention on Human Rights (ECHR).[35] The European Court also confirmed that avoiding "miscarriages of justice"[36] is the *raison d'être* of these standards. In addition to the ECHR, Article 48 of the Charter of Fundamental Rights of the EU stipulates that a suspect is presumed innocent by authorities until proved guilty according to law. The presumption of innocence includes *inter alia* remaining silent and not to self-incriminate. The right not to incriminate oneself is applicable from the very beginning of the accusation process and is a vital component of the principle of presumption of innocence. How is the right not to incriminate oneself relevant to asylum law?

One of the key elements of refugee status determination (RSD) system is maintaining confidentiality during the process.[37] In the Netherlands, RSD interviewers assure applicants that their testimony will be kept confidential and will not be shared with third parties.[38] Reijven and Wijk support the idea that sharing information provided by asylum applicants who could be excluded from protection on the basis of criminality can be in the interest of security and justice.[39] Although they warn that information sharing with a wide range of actors is not encouraged, "carefully sharing sections of information about a selected number of high-risk individuals" with a limited number of institutions could be the solution.[40] In a similar vein, the Supreme

[34] Keane and McKeown (2011, p. 595).

[35] *John Murray v. the United Kingdom*, (Application no. 18731/91), ECtHR judgment 8 February 1996, § 45.

[36] Ibid § 42.

[37] According to the UNHCR, the integrity of the asylum system requires that "information given on the basis of confidentiality must remain protected" even when a final decision is exclusion from protection. UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), www.refworld.org/docid/3f5857d24.html § 104.

[38] "[U]nless this is necessary in the execution of the Aliens Act and in supervising aliens". Reijven and van Wijk (2015, pp. 6–7).

[39] Ibid.

[40] Ibid at 13.

Court of the Netherlands concluded that the use of testimony obtained during the asylum procedure as evidence in a criminal procedure did not breach the *nemo tenetur* principle or the right not to incriminate oneself in a case against two former members of the KhAD/WAD, the Afghan State Intelligence Agency in 2008.[41] In deciding so, the Supreme Court asserted "the use of such information and the violation of privacy had been proportional."[42] This case will be discussed further below.

According to ECtHR jurisprudence, the right not to incriminate oneself falls under the notion of a fair trial within the meaning of Article 6 of the ECHR.[43]

> Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and the fulfilment of the aims of Article 6 … The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[44]

The ECtHR considers "the nature and degree of compulsion", "the existence of any relevant safeguards in the procedure", and "the use to which any material so obtained is put" to determine if a procedure quashes the very essence of the right not to incriminate oneself.[45] All criminal proceedings regardless of the type of a criminal act must contain the general requirements of fairness embedded in Article 6. Although "the public interest in the investigation and punishment of the particular offence" at stake may be "weighed against the individual interest that the evidence against him be gathered lawfully", "public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights", including the right not to incriminate oneself guaranteed by Article 6 of the ECHR.[46] In addition, statements made by the applicant before any criminal charge can constitute an infringement of his right under Article 6 if the statements were later used in criminal proceedings.[47]

In addition to the ECtHR jurisprudence, the recent EU Directive No. 216/343 requires the Member States to assure that suspects and accused persons have the right to remain silent for the criminal act that they are suspected or accused of

---

[41] Ibid at 9.

[42] Ibid at 9.

[43] Case of *Jalloh v. Germany*, Application no: 54810/00. Judgement (merits and just satisfaction), GC 11 07 2006, § 100; *J.B. v. Switzerland*, no. 31827/96, § 64; *Saunders v. The United Kingdom*, § 68; *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 40; *J.B. v. Switzerland*, no. 31827/96, § 64; *Allan v. the United Kingdom*, no. 48539/99 § 44.

[44] Saunders v. The United Kingdom, § 68; Case of Jalloh v. Germany, Application no: 54810/00-Judgement (merits and just satisfaction), GC 11 07 2006, § 100. *H. and J. V. The Netherlands*, § 68; *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 40*; J.B. v. Switzerland*, no. 31827/96, § 64; *Allan v. the United Kingdom*, no. 48539/99, § 44.

[45] Case of *Jalloh v. Germany*, Application no: 54810/00. Judgement (merits and just satisfaction), court (Grand Chamber) 11 07 2006 § 101; *O'Halloran and Francis v. the United Kingdom* [GC], § 55; *Bykov v. Russia* [GC], § 104.

[46] Case of *Jalloh v. Germany*, Application no: 54810/00. Judgement (merits and just satisfaction), court (grand chamber) 11 07 2006 § 97; Heaney and McGuinness v. Ireland, no. 34720/97 § 57-58.

[47] *Saunders v. The United Kingdom*, § 74.

having committed.[48] The Member States are also obliged to observe the right not to incriminate oneself. The exercise of the right to remain silent and the right not to incriminate oneself cannot be used against suspects; any evidence gathered in breach of these rules cannot be considered for the criminal offence concerned.[49] The Member States were expected to adopt legislation complying with the provisions of the Directive by April 2018,[50] though the legal implementation of the Directive within domestic law is not foreseeable as of the writing of this chapter.

As to the intersection between exclusion practice and criminal law, during the exclusion proceedings, if an asylum seeker remains silent for any allegation or question concerning his involvement in an organisation infamous for human rights violations, what would happen?

In examining this question, I will first look at the procedural rules laid down by UNHCR, a leading organisation for providing recommendations on the application of Article 1F.[51] UNHCR also conducts refugee status determination process in countries where the relevant national legislation is absent.[52] Then, I will proceed to the Dutch practice of Article 1F.

International refugee instruments do not regulate procedures relating to the refugee determination system.[53] The ultimate decision lies on the adjudicator, who assess the claim of an asylum applicant, to determine if the applicant has established a "well-founded fear of persecution."[54] Proof or (oral or documentary) evidence establish the facts supporting asylum claims. In this process, the "burden of proof" refers to a duty to produce evidence in order favourably prove any alleged acts.[55] UNHCR regards, as a general legal principle, that burden of proof belongs to the person submitting a claim.[56] Thus, as a principle, an asylum seeker has the burden of establishing the accuracy of his claim. Once the applicant renders "a truthful account of facts" vis-à-vis the claim, s/he fulfills the burden of proof.[57] However, considering the complexities of the refugee determination system -including difficulty for an asylum seeker to provide evidence to prove his claim- the applicant and state generally

[48] Article 7 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

[49] Ibid., Article 7.

[50] Ibid., Article 14.

[51] Reijven and van Wijk (2014) p. 249.

[52] Ibid.

[53] UNHCR, "Note on Burden and Standard of Proof in Refugee Claims", § 2.

[54] Ibid., § 2.

[55] Ibid., § 5.

[56] UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, § 196.

[57] UNHCR, "Note on Burden and Standard of Proof in Refugee Claims", § 6.

shares the burden of proof.[58] Even in the case of a shared burden of proof, the asylum applicant is expected to

> (i) Tell the truth and assist the examiner to the full in establishing the facts of his case. (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence. (iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.[59]

UNHCR further notes that the asylum seeker's lack of cooperation can lead to rejection of his asylum request (non-inclusion) in some cases.[60] If the lack of cooperation implies that "the basics of an asylum claim" cannot be established, the issue of exclusion becomes irrelevant,[61] and the applicant's request can be rejected because he could not establish his case.

As I will discuss a Dutch judgement, the following provides a summary of the Dutch legal landscape. Since April 2001, the Aliens Act 2000 regulates the admission, residence and expulsion of foreigners in the Netherlands. These issues are further regulated in the Aliens Decree, the Regulation on Aliens and the Aliens Act Implementation Guidelines. Provisions of the General Administrative Law Act (*Algemene Wet Bestuursrecht*) is also applicable to proceedings under the Alien Act 2000 unless stipulated otherwise in the Act.[62] In the Netherlands, the Minister of Justice is the ultimate authority to grant, reject, cancel or not process an asylum residence permit.[63] The Minister of Justice can issue asylum residence to a refugee within the meaning of the 1951 Refugee Convention.[64] According to Section 30 (a) of the Aliens Act, such a permit can be cancelled or not renewed if the refugee has provided false information or "has withheld information in circumstances where such information would have led to the rejection of the original application to issue or renew the permit."[65] The individuals excluded from protection as per Article 1F are barred to obtain any

---

[58] UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), www.refworld.org/docid/3f5857d24.html § 105.

[59] UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, § 205.

[60] UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), www.refworld.org/docid/3f5857d24.html § 111.

[61] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, § 35.

[62] ECtHR Third Section Decision Application no. 42331/05 *A.A.Q. against the Netherlands*, § 37.

[63] Section 26 (1) of the Aliens Act 2000.

[64] Section 27 (1) a of the Aliens Act 2000.

[65] Aliens Act 2000.

other subsidiary protection or a regular residence permit.[66] In addition, they can be arrested, detained and do not have access to "basic rights".[67] Their files are automatically referred to the local war prosecutor who has a group of investigators helping her on these files.[68] If they cannot be *refouled,* excluded individuals perceived "the *de facto* consequences" of the exclusion decision as punishment.[69]

Let's assume a hypothetical case in which the asylum applicant provides detailed and truthful assertions regarding his role and rank in an army that is infamous in the host country. After the person is excluded from protection on the grounds of an Article 1F crime, his file is shared with the prosecution office; he is prosecuted, found guilty, and eventually imprisoned due to his high rank in this army. In this case, the applicant established the facts of his refugee claim; yet, the oral evidence provided by him during his refugee determination interviews is ultimately used against him during the follow-up criminal procedure. Can we argue that his right not to incriminate oneself is infringed?

Let's assume another scenario whereby the asylum applicant refuses to give detailed information regarding his status and roles in the same army because of the prospects of prosecution. Did he discharge the burden of proof to establish his case?

Answers to these questions might change from case to case and depend on national legislation. In the second scenario, according to the UNHCR rules, the asylum applicant could not discharge his burden of proof as he was not able to assist the examiner to the full in establishing the facts of his case; could not provide all pertinent information regarding himself and his past experience; eventually, failed in answering questions put to him. As a result, he would probably be denied refugee status due to the lack of cooperation. If this scenario occurs in the Netherlands, his status will be eventually withdrawn since such information would have led to the rejection of the original application. Under criminal law, this individual exerted his procedural right to remain silent to avoid providing self-incriminating statements. Then, which standard applies: that within administrative law or that within criminal law?

There are several examples from the EU Member States laying out the dichotomy above. As outlined above, in the Netherlands, if there are serious reasons for considering that an asylum seeker was involved in serious international crimes, a case is automatically referred to Article 1F unit. Such indications include statements provided by the asylum seeker.[70] Frequently, asylum applicants "themselves provide information that gives reasons to believe that they committed or facilitated international crimes"[71] during the RSD proceedings. If the adjudicators further question what kind of activities "they were engaged in, it may even happen that applicants

[66] Reijven and van Wijk (2014, p. 253).

[67] Ibid at 259.

[68] Maarten P. Bolhuis, Hemme Battjes and Joris van WijK, "Undesirable but Unreturnable Migrants in the Netherlands", RSQ, p. 74.

[69] Reijven and van Wijk (2014, p. 259).

[70] Reijven and Wijk (2014, p. 252).

[71] Reijven and Wijk, (2015, p. 5).

confess having perpetrated certain crimes."[72] Sources other than self-incriminating statements of asylum seeker rarely trigger the exclusion from protection.[73] In addition, according to Dutch law,[74] information provided by the asylum applicant "can be shared with law enforcement agencies to prosecute the applicant".[75] Other European countries such as the United Kingdom and Denmark similarly "maintain the information flow between their immigration departments and their respective justice departments to prosecute those denied refugee statuses because of serious criminality".[76] Likewise, Norway shares information with prosecution and police once "first indications of a possible 1F decision arise during initial interviews."[77] Information revealed by asylum seekers as a necessary part of the asylum process can create an irreconcilable tension between a state's right to information and an individual's right against self-incrimination. In the following section, I will analyse the Dutch case law to demonstrate how the current policy of maintaining the information flow between states' immigration and their respective justice departments violates procedural rights.

4 Two Afghan Asylum Seekers in the Netherlands

The Netherlands permits the use of statements obtained during the asylum-seeking procedure to be used as evidence within criminal procedures. Asylum seekers challenged this practice both before the Supreme Court of the Netherlands and the ECtHR where the applicants argued that the use of their information in criminal proceedings violated their rights under Articles 6 and 8 of the ECHR in the decision of *H. and J. v. the Netherlands (dec.)* of 13 November 2014. The ECtHR upheld the decision of the Supreme Court of the Netherlands on the grounds that the use of statements of asylum applicants as evidence in criminal procedure does not violate the *nemo tenetur* principle and the right not to incriminate oneself.[78]

In the *H. and J. v. the Netherlands,* both asylum applicants were ex-members of the KhAD/WAD, the Afghan State Intelligence Agency under the state's past communist regime. During their RSD interviews, both applicants provided a detailed description of their positions and roles in Afghanistan. They were both assured that their information would be kept confidential during their interview process. In 1994, the Dutch Immigration and Naturalisation Service rejected Mr. H.'s request for

[72] Ibid.

[73] Ibid.

[74] Article 2.2 of the *Vreemdelingencirculaire* (VC) 2000, Reijven and Wijk (2015) p. 9.

[75] Reijven and Wijk (2015), at 9.

[76] Didem Doğar, The Conversation, *The trouble with impunity: War crimes and a humanitarian agency*. www.theconversation.com/the-trouble-with-impunity-war-crimes-and-a-humanitarian-agency-94563.

[77] Reijven and van Wijk (2015) p. 15.

[78] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014.

asylum on the basis of Article 1F(a) of the 1951 Refugee Convention under crimes against humanity and also under Article 1 of the Convention against Torture. Mr. H.'s appeal before the Dutch administrative tribunals also failed. On the contrary, Mr. J. was initially granted refugee status but subsequently, his status was withdrawn based on Article 1F. After both Afghans were excluded from protection on the basis of Article 1F crimes,[79] their files were transferred to the public prosecutor for possible prosecution. During the criminal investigation, Mr. J. was informed about his right not to self-incriminate, but the police department submitted a report that contained information previously incriminating himself to the public prosecutor. The report included Mr. J.'s statements to the Dutch Immigration and Naturalisation Service. Likewise, during the criminal investigations against Mr. H., the authorities informed him about his right to remain silent. The legal dichotomy here is that both applicants had already provided self-incriminating statements during their RSD interviews, which subsequently established a ground for their criminal investigations.

Both asylum applicants were tried before a regional court of The Hague for bearing command responsibility for torture as ex-members of the KhAD. The regional court convicted (i) Mr. H. of complicity in and bearing command responsibility for torture and sentenced him to twelve years' imprisonment, and (ii) Mr. J. of violation of war crimes and sentenced him to nine years' imprisonment. Both asylum applicants appealed to the Court of Appeal, which in return upheld the regional court's decisions on the substantive part but quashed its decisions on the technical grounds. For the self-incriminating statements, the Court of Appeal ruled that Mr. H. was required to provide information about his background because he had willingly subjected himself to the Netherlands. Although Mr. H's right to respect for his private life under Article 8 of the Convention was interfered -because of the file transfer- the situation was justified to prosecute war crimes.

Mr. J. challenged the decision before the Supreme Court of the Netherlands. During the appeal process, the Advocate General held that although an asylum seeker might feel "pressurised into speaking" to provide complete and accurate information to the immigration office, this practice does not amount to coercion.[80] In addition, confidentiality as undertaken by the Dutch Immigration and Naturalisation Service cannot be interpreted as an assurance not to disclose it to the prosecuting authorities. Similar to the regional and appeal courts' judgments, the transfer of the file interferes with Mr. J.'s rights under Article 8 of the ECHR. However, this interference was justifiable because of the suspicion of war crimes. Considering that Mr. J. cannot be deported to Afghanistan due to the principle of *non-refoulement*, he should not "enjoy impunity" in the Netherlands. As a result, the Supreme Court of the Netherlands dismissed Mr. J.'s appeal.

---

[79] According to the Dutch Immigration and Naturalisation Service's decision, there are serious reasons to believe that Mr. H. had committed (in a leadership role or as a co-perpetrator or accomplice) crimes against humanity as per Article 1F (a), or in the alternative, that he had been guilty of acts contrary to the purposes and principles of the United Nations as per Article 1F (c). Mr. J.'s refugee status was withdrawn on the grounds of Article 1F. *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014, §§ 9, 16.

[80] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 § 44.

Both asylum applicants challenged the Dutch decisions before the ECtHR under Articles 8[81] and 6[82] of the ECHR. They claimed that the conviction decisions were based on incriminating statements obtained during the asylum-seeking proceedings under the assurance of confidentiality. These incriminating statements were later used during their criminal investigations, in defiance of the *nemo tenetur* principle.

In its decision, the European Court affirmed that the right to remain silent under police questioning and the right not to incriminate oneself are central to a fair procedure under Article 6 of the ECHR. The ECtHR also confirmed that avoiding "miscarriages of justice"[83] is *raison d'être* of these standards. However, the Court ruled that the use of Afghan asylum seekers' incriminating statements, which were obtained during the asylum proceedings in return for a promise of confidentiality, is "natural."[84] In addition, the use of these statements in the criminal investigation "has no bearing on the fairness of the criminal proceedings".[85] The applicants voluntarily entered the Netherlands and, hence, bore the burden of proof to prove their stated fear of persecution was well-founded. Because the statements were offered voluntarily, the Court found their claims that the incriminating statements were made under coercion to be contradictory and baseless. Moreover, given that the applicants were not deported and enjoy safe shelter in the Netherlands, the government of the Netherlands has a burden to prosecute the applicants for the crime of torture. A practice of promising confidentiality in exchange for an asylum applicant's honest statements should not be an excuse to protect "the guilty from condign punishment".[86] At this moment, one might question how could the ECtHR possibly be sure that the asylum applicants were guilty? In the end, the European Court unanimously found their applications inadmissible.

[81] In this chapter, I will not examine their complaints under Article 8, which set forth that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[82] The relevant part of Article 6 of the Convention reads as follows "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…".

[83] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 at § 68.

[84] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 at § 77.

[85] Ibid., § 80.

[86] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 at § 78.

4.1 *H. and J. v. the Netherlands and the ECtHR Jurisprudence on the Right Not to Incriminate Oneself*

H. and J. v. the Netherlands was not the first decision of the European Court assessing the right not to incriminate oneself within the meaning of Article 6. The ECtHR has been examining the right not to incriminate oneself under Article 6 since 1993 with its decision of *Funke v. France*.[87] However, *H. and J. v. the Netherlands* was the first decision where the Court analysed excluded individual's rights within the meaning of Article 6.

Although I believe that the possible human rights violations caused by the implementation of Article 1F are somehow unique -as discussed earlier Article 1F is heavily subject to criminal law provisions while its decisions are made according to administrative law standards- in what follows I will discuss *H. and J. v. the Netherlands* in comparison to other key decisions of the ECtHR. The *Saunders v. the United Kingdom* will be the predominant one in the discussion since this decision shows the stalemate in the ECtHR jurisprudence most clearly.

In the case of *Saunders*, Mr. Saunders, who was a director and chief executive of Guinness PLC in the United Kingdom, was suspected of having committed criminal offences during the takeover of a public company.[88] As a result of the rumours about the criminal offences at the time of the bidding, the U.K. Secretary of State for Trade and Industry appointed inspectors to investigate the allegations under the U.K. Companies Act 1985.[89] During the investigation, the Applicant answered the questions set to him by the inspectors, who in return found strong evidence of criminal acts having been committed. They shared transcripts of the Applicant's interviews and other documentary evidence with the Prosecution Service.[90] The prosecution used the transcripts of the interviews in a criminal trial which led to the Applicant's conviction for conspiracy, false accounting, and theft.[91]

During the investigations, the Applicant knew that the answers given to the inspectors could be used as evidence in criminal proceedings as it was explicitly set forth in the Companies Act 1985.[92] Refusal to answer the questions during the investigations could have led to a contempt of court, "and the imposition of a fine or committal to prison for up to two years".[93]

In its judgement, the European Court found that the Applicant's answers regardless of being directly self-incriminating were used during "the proceedings in a manner which sought to incriminate the applicant".[94] Since the Companies Act 1985 permits

---

[87] Ashworth, "Self-Incrimination in European Human Rights Law- A Pregnant Pragmatism?" p. 752.

[88] *Saunders v. The United Kingdom*, §§ 14–18.

[89] Ibid., § 18.

[90] Ibid., § 20.

[91] Ibid., §§ 31–34. Later, the Court of Appeal quashed that conviction for one count and reduced his sentence to two and a half year's imprisonment, § 38.

[92] The Companies Act 1985, Section 434 (5).

[93] Saunders v. The United Kingdom, § 50.

[94] Ibid., § 72.

"the subsequent use in criminal proceedings of statements obtained by the inspectors" of a regulatory body, the applicant's right not to incriminate oneself has been infringed.[95] In comparison to the *Saunders*, in the *H. and J. v. the Netherlands*, the Court failed in analysing whether or not the asylum applicants' answers were used in subsequent proceedings in an incriminating manner. As was the case in *Saunders*, the Dutch legislation permits the use of statements obtained by the Immigration and Naturalization service officers in the subsequent criminal proceeding. However, unlike *Saunders*, the Court ruled that the Applicants' right not to incriminate oneself within the meaning of Article 6 has not been infringed. Why is that the case?

First, the ECtHR took a different standpoint in analysing the *H. and J. v. the Netherlands*. The Court ruled that since the Applicants were not deported, the Netherlands had a duty to prosecute them.[96] This reasoning goes against legal methodology because in almost all criminal trials the state has a duty to prosecute wrongdoing under international or domestic law. In *Saunders*, the U.K. had a duty to prosecute fraud, theft, and conspiracy; in *Heaney and McGuinness*, Ireland had a duty to prosecute terrorist acts; in *Funke v. France*, France had a duty to prosecute tax evasion offences; in *Jalloh v. Germany,* Germany had a duty to prosecute drug offences whereas in the *H. and J. v. the Netherlands*, this duty was towards an act of torture. Either, the Court implied but could not state that duties arising under international law prevails over domestic law or that prosecuting an act of torture is so vital that this end can outweigh the importance of procedural standards. The latter could have been more reasonable but would have been against the Court's reasoning in *Saunders*. In *Saunders*, the Court

> …does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure…it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.…Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.[97]

In *H. and J. v. the Netherlands*, the European Court did not apply the general requirements of fairness contained in Article 6, including the right not to incriminate oneself; certainly, did not question whether the use of statements made by the applicants prior to their being charged in subsequent criminal proceedings constituted an infringement of the right. The only reasonable explanation here is that the Court outweighed the Netherlands' duty under international law to prosecute foreigners who allegedly committed torture over the Applicants' right to fair trial. Although the ECtHR reversed its position regarding the public interest argument under *Saunders*

[95] Ibid., § 75–76.

[96] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 § 73.

[97] *Saunders v. The United Kingdom*, § 74.

in its later decisions, the Court still defined the legal parameters. In *Heaney and McGuinness*, and *Jalloh v. Germany*, the European court ruled that although "the public interest in the investigation and punishment of the particular offence" at stake may be "weighed against the individual interest that the evidence against him be gathered lawfully", "public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights", including the right not to incriminate oneself guaranteed by Article 6 of the ECHR.[98] Conversely, the ECtHR did not analyse if public interest concerns extinguish the very essence of Applicants' defence rights in the *H. and J. v. the Netherlands*.

Second, the European Court relied on the arbitrary reasoning of willingness in the *H. and J. v. the Netherlands.* The Court ruled that since the Applicants entered the Netherlands of their own accord and asked for its protection, they had the burden of proof to convince the Netherlands Government that their stated fear of persecution was well-founded. Because they had the burden of proof, asking all truth from the Applicants -without explaining that these truthful statements were going to be the basis for their prosecution- is not "incongruous."[99] Thus, an argument that "the applicants' statements to the immigration authorities were extracted under coercion is…baseless".[100]

This bizarre reasoning could be, possibly, applicable only to foreigners. At the outset, no one questions that the Applicants entered the Netherlands and asked for its protection willingly. Nor did anyone question if they had the burden of truth to establish their cases. The legal question here was whether or not the use of their statements that were obtained during an administrative process in the subsequent criminal trials infringed their rights under Article 6. The legal reasoning requires the ECtHR to have followed the following steps: (i) how the ECtHR interpreted coercion and compulsion in its early jurisprudence; (ii) if the ECtHR uses the willingness argument, what the boundaries of this argument are (i.e. is it only relevant to foreigners or could it be used in other circumstances?); (iii) what the result of a refusal by the Applicants to answer the questions during refugee status determination interviews is (i.e. is there any finding of contempt of court or is it only denial of status?); (iv) if the refusal leads to denial of refugee status and residence permit, is this result as severe as the prospects of imprisonment?; and, (v) considering the *Saunders* judgement, was there any legal means to prevent the admissibility of self-incriminating statements as evidence in the subsequent criminal procedure?

For example, in its later decisions of *O'Halloran and Francis v. United Kingdom, Jalloh v. Germany, and Bykov v. Russia*, the Court analysed "the nature and degree of compulsion", "the existence of any relevant safeguards in the procedure", and "the use to which any material so obtained is put", to determine if a procedure quashes the

[98] *Jalloh v. Germany*, Application no: 54810/00. Judgement (merits and just satisfaction), GC 11 07 2006, § 97; *Heaney and McGuinness v. Ireland*, no. 34720/97, 1997–1999 § 57–58.

[99] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014 § 75.

[100] Ibid., § 75.

very essence of the right not to incriminate oneself.[101] The ECtHR did not analyse any of these questions in the *H. and J. v. the Netherlands.*

The ECtHR's reasoning could only suggest that because the Applicants entered the Netherlands willingly, they willingly provided self-incriminating statements to the state. Along with this reasoning whatever the state asks them to answer is justifiable because they entered the country of their own accords. This reasoning is dangerous as the European Court justifies a difference in treatment between citizens of the Council of Europe member states and non-citizens who are suspected of criminality. Deportation and extradition are the key terms that the Court uses in assessing the procedural rights of a foreigner who is suspected of criminality. This is where the arbitrariness lies: although the ECHR explicitly set forth that everyone is subject to Article 6, the ECtHR narrows down a foreigner's claim to a mere fact: a foreigner who is seeking protection. Conversely, the Court does not use the similar logic in other cases. To show how dangerous this line of thought could be I will apply the same reasoning to the case of *Saunders*. The Applicant became the chief executive of a well-known British company of its own accord, entered the bid of his own accord, knew that his company and the bid would be subjected to the British Law, and enjoys a safe shelter in the UK -given that as a citizen- he cannot be deported to another country. The UK Government hence had a duty to prosecute the applicant for the crimes of fraud and theft. Compelling the Applicant to answer the questions related to these crimes and using them in the follow-up criminal trial should not be an excuse to protect "the guilty from condign punishment".[102]

Third, what the European court found "natural" in *H. and J. v. the Netherlands* is unnatural for its jurisprudence. The Court ruled that the use of Afghan asylum seekers' incriminating statements in return for a promise of confidentiality is "natural."[103] For the Court,

> it is difficult to imagine an asylum system functioning properly if asylum-seekers are not given the assurance that their statements will not come to the knowledge of the very entities or persons from whom they need to be protected….Consequently, the Court cannot find that once these statements were in possession of the Government the Deputy Minister of Justice was precluded by Article 6 of the Convention from transferring them to the public prosecution service, another subordinate Government body, to be used by it within its area of competence.[104]

Let's examine this statement in light of other decisions of the ECtHR. In *Saunders*, the Court did not ask if the corporate system in the U.K. could function properly if the Applicant's statements do not come to the knowledge of the very entities or persons from whom they got a licence to operate. Nor did the Court analyse whether the transfer of statements from the Trade Department to the Prosecution Service

---

[101] Case of *Jalloh v. Germany*, Application no: 54810/00. Judgement (merits and just satisfaction), court (grand chamber) 11 07 2006 § 101; *O'Halloran and Francis v. the United Kingdom* [GC], § 55; *Bykov v. Russia* [GC], § 104).

[102] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014, § 78.

[103] *H. and J. v. the Netherlands*, Appl. Nos. 978/09 and 992/09, ECtHR, 13 November 2014, § 77.

[104] *H. and J. v. the Netherlands*, § 77, 78.

was within the U.K. Government's area of competence. In *Heaney and McGuinness*, the Court did not question whether the law enforcement system to protect public from terrorist acts could function properly if the state does not compel the terrorist suspects to answer their whereabouts. In *Funke v. France*, the ECtHR did not consider whether a tax system in France could function properly and fairly, if the Applicant is not compelled to show certain documents to the state.[105]

The two legal issues at stake in *H. and J. v. the Netherlands* were whether (i) asking full collaboration from the asylum applicants when there is a prospect of criminal prosecution can be considered coercion within the meaning of Article 6 considering the results of denial, and (ii) there is any procedural safeguards in the Netherlands to prevent the use of asylum interviews in the subsequent criminal trials. The Court failed to analyse both.

5 In Canada, the Security Certificate Procedure Violates the Procedural Rights of Asylum Seekers

On the other side of the Atlantic, in Canada, the situation is no different. Although the Canadian legal framework well-defines the procedural rights for accused, it does not recognise the same rights for the accused asylum seekers. For example, the Supreme Court of Canada (SCC) highlights the absolute nature of procedural guarantees, which emerged "as a response to the abusive practices of the prerogative courts of the sixteenth and seventeenth centuries"[106] in its decision of *R. v. Noel.* Judges created absolute prohibitions in England during the eighteenth and nineteenth centuries to prevent abusive practices. The right not to incriminate oneself is a rule derived from "trial fairness and the prevention of abuse."[107] The SCC earlier affirmed that the principle against self-incrimination is "overarching",[108] and "the single most important organizing principle in criminal law."[109] The Canadian Charter of Rights and Freedoms also regulates the right not to incriminate oneself under Article 11(c) and 13.[110] Protecting individuals from being indirectly compelled to incriminate themselves[111] is the *raison d'être* of Section 13. Specifically, Article 11(c) of the *Charter* ensures that a person charged with an offence has the right not to be compelled to be a witness in proceedings against his or herself in respect to the offence. However, Linda Fuerst argues that this safeguard is not applicable to a person who is

[105] *Funke v. France,* § 42.

[106] *R. v. Noel,* [2002] 3 S.C.R. 433 at § 113.

[107] Ibid.

[108] R. v. White, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417, at paras. 44-45.

[109] R. v. P. (M.B.), [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555.

[110] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[111] Dubois v. The Queen, [1985] 2 S.C.R. 350 at p. 358, and reiterated in Kuldip, at p. 629.

compelled to provide evidence "in a securities regulatory investigation or an administrative proceeding, as the individual is not 'charged with an offence'".[112] Failing to apply Article 11(c) within administrative proceedings is problematic in the security certificate proceedings.

The situation in Canada differs from its European counterpart in two respects. First, Canadian judicial authorities can use the statements obtained during the asylum proceedings as evidence not in a criminal proceeding but rather in the quasi-immigration proceeding called the *security certificate process*. Asylum applicants who are subject to the security certificate process could be removed from Canada for reasons of national security, human rights violations and participation in organised serious crimes.[113] Although this process has technically no criminal nature, the security certificate process can end up removing an asylum seeker to the frontiers of a country where he could face ill-treatment and death penalty. Second, considering that Canada can deport foreigners in violation of the principle of *non-refoulement*, the Canadian practice has more serious consequences for foreigners compared to Europe where the principle of *non-refoulement* is endorsed by the ECtHR, even if an asylum applicant can pose a danger for natural security. [114]

The security certificate process in Canada contains both administrative and judicial components. Once the security certificate prepared by the government authorities is issued, the certificate is reviewed by the Federal Court for its reasonableness. In case in which the Federal Court finds the certificate reasonable, it becomes a removal order. The decision of the Federal Court is open to appeal. During this process, the Canadian government is entitled to issue a warrant for the arrest of the foreigner, if it considers that the foreigner poses a danger to national security or to the public safety. Once a foreigner or a permanent resident is detained, the Federal Court reviews the detention decision after 48 hours and at least once every six months to decide whether detention is necessary. The most controversial part of the security certificate process is that the classified information must be kept confidential and be veiled from the public and the accused person. Instead of full disclosure, an unclassified summary of the case is provided to the accused person for information purposes.[115] During

[112]Linda Fuerst, "The Privilege Against Self-Incrimination: Disclosure in Cross-Border Investigations" p. 2, available at: http://www.litigate.com/files/15286_The%20Privilege%20Against%20Self-Incrimination.pdf [Fuerst, "Privilege"].

[113]Public Safety Canada, "Security Certificates", www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx.

[114]Expulsion and Extradition Factsheet of the ECtHR www.echr.coe.int/Documents/FS_Expulsions_Extraditions_ENG.pdf. In the case of *Chahal v. United Kingdom*, the ECHR ruled that an alleged terrorist could not be expelled to India where there was a real risk of his right under Article 3 of the Convention to be free from torture, inhuman or degrading treatment or punishment would be violated. *Chahal v. UK*, Appl. no. 70/1995/576/662, ECtHR, Grand Chamber, 15 November 1996.

[115]IRPA, sections 77–85; Public Safety Canada, "Security Certificates", www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx.

judicial reviews or appeal stage, the judge may appoint a special advocate to protect the interests of the accused foreigner.[116]

The consequences of the security certificate are serious: removal from Canada to the country where there is a likelihood of ill-treatment and death penalty for the accused foreigner. This consequence is as severe as the "prospect of loss of liberty"[117] in criminal law. Criminal law offers substantial protection for the rights of the accused due to the serious consequences of a likelihood of confinement and conviction. Strong protection for the rights of the accused is neglected in the security certificate process, though a foreigner is *de facto* accused of possessing a danger to national security or to an individual. Although the foreigner is subjected to the accusation, and detained in some cases, the statements of the asylum seeker before the Immigration and Refugee Board of Canada (IRB) obtained during an administrative procedure is one of the sources that the federal court relies on to determine whether a security certificate is reasonable.

This absence of procedural rights to the accused in the security certificate procedure resonated mostly in the case of *Jaballah (Re)*[118] of 26 February 2010 before the Federal Court of Canada. In the case of *Jaballah (Re)*, Mr. Jaballah, who sought asylum in Canada, argued *inter alia* that the use of his testimony before the IRB in the subsequent security certificate proceedings violated Article 13 of the *Canadian Charter of Right and Freedoms,* which regulates the right not to incriminate oneself. The Applicant further argued that he was a compellable witness before the IRB and thus, he was compelled to testify and provide evidence against himself during the refugee adjudication process. In Canadian law, a compellable witness is a person who can be compelled to provide evidence in court under the proceedings for contempt in case s/he refuses to obey.[119] The prosecution cannot compel a person charged with an offence to be a witness in her case.[120] Conversely, a person subject to administrative proceedings can be compelled by the authorities to provide evidence. However, in exceptional situations, the right not to incriminate oneself within the meaning of section 13 is relevant in administrative proceedings. If an administrative proceeding exposes the person to "true panel consequences, such as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large" then the person has the right not to incriminate herself.[121]

In *Jaballah*, the Federal Court ruled that the applicant's prior testimony before the IRB is admissible before the Federal Court, as the use of prior evidence would not

[116]IRPA, section 87 (1).

[117]Dauvergne used this example to explain the consequences of the loss of refugee status. Dauvergne (2013) at 6.

[118]*Jaballah (Re)* 2010 FC 224.

[119]Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, "The Law of Evidence in Canada, Fifth Edition", Lexis-Nexis Canada § 13.46.

[120]Canadian Charter of Rights and Freedoms, see R.S.C. 1985, App. II (No. 44), s. 11(c).

[121]Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, "The Law of Evidence in Canada, Fifth Edition", Lexis-Nexis Canada § 8.255.

violate the principles of fundamental justice. In its ruling, Justice Dawson mentioned that the applicant's refugee claim is his own free decision. As a consequence, the applicant was not compelled to provide evidence as he chose to advance his refugee claim. Failing to provide personal information or to attend a hearing would have only constituted the abandonment of the refugee claim; there would have been no penalty or proceeding for contempt. In addition, the Applicant did not hold an adversarial position to the state in the refugee hearing unless cessation or exclusion clauses are applied. When an adversarial relationship between the state and an individual exists, the *Charter* protections including the right not to incriminate oneself are involved.[122]

One key consideration here is that once the asylum application is referred to the inadmissibility proceedings, which was the case in *Jaballah*,[123] his refugee application is directly suspended as per section 103(1)(a) of the IRPA, and then terminated as per section 104(2)(a) of IRPA- section 46.1(2) of the previous act, Immigration Act of 1976-. Thus, it is technically not possible to apply the exclusion clause before the Refugee Board because an immigration officer can apply the inadmissibility clause and report it to the Minister (of Citizenship and Immigration).[124] If the Minister of Citizenship and Immigration decides to refer the case, it is then heard by the Immigration Division for inadmissibility.

It is true that the applicant was free to file an asylum application in Canada but does it justify that his statements that were made under oath under the refugee adjudication process can be used as evidence in a subsequent process whereby his "liberty and security interests are so engaged"?[125] This is a controversial one and takes us back to the dilemma that I analysed under the case of *H. and J. v. the Netherlands*: once an applicant filed the asylum application of his own accord, can all subsequent proceedings be considered as being done under his own accord?

Justice Dawson cited the SCC's decision in *R. v. Fitzpatrick*[126] to determine whether there is any limit on the right not to incriminate oneself. Accordingly, the right not to incriminate oneself should be ascertained in line with two rationales: "first, to protect against unreliable confessions, and second, to protect against the abuse of power by the state."[127] In light of these two rationales, Justice Dawson concluded that the applicant's testimony before the IRB was not a confession and that "there is little danger of abusive state conduct arising out of the voluntary participation in a refugee claim and the subsequent use of that testimony."[128]

Despite of all its shortcomings, this decision is still considered as progress because Justice Dawson excluded from evidence the testimony of the applicant from his previous security certificate hearings. The Federal Court acknowledged that using the

---

[122] Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, "The Law of Evidence in Canada, Fifth Edition", Lexis-Nexis Canada § 8.290.

[123] *Jaballah*, § 6.

[124] IRPA, section 44(1), Immigration Act 1976 45(2)-46(1).

[125] *Jaballah (Re)* 2010 FC 224, § 78.

[126] *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.

[127] Ibid., § 98.

[128] Ibid § 100.

prior testimony in the current security certificate proceedings would violate principles of fundamental justice and thus, the Ministers were not allowed to rely on them in making their case against the Applicant.[129] In addition, Justice Dawson ruled that the gravity of the liberty and security interests involved in the security certificate proceeding require proportionate procedural protections that satisfy "the common law duty of fairness and the requirements of fundamental justice".[130]

6 Consequences of Criminalisation and Concluding Remarks: What Do the Canadian and Dutch Case Law Tell Us?

The observed states and the ECtHR mostly do not consider the waiver of the right not to incriminate oneself in relation to asylum seekers. More importantly, there is no discussion or oversight over the use of administrative instruments in criminal procedure. The Dutch and Canadian practices highlight the quandary of establishing criminal or quasi-criminal grounds[131] by using statements obtained in an asylum procedure. In other words, with this emerging practice, criminal charges are based on evidence gathered in the administrative process, which fails in providing safeguards to accused as recognised under criminal law. This emerging practice threatens fundamental rights, as states are now able to justify evading criminal procedural law by appealing to asylum law and disguising charges as issues of national security.

Therefore, I argue that where a case that initially falls under immigration law leads to a criminal trial or removal of a person from host states—be it the exclusion or security certificate procedure—these proceedings should include procedural safeguards and integrate the rules of the right to presumed innocence, notably the right not to incriminate oneself. At the beginning of the asylum-seeking process, individuals must be informed of what they might be accused of at the end of this administrative proceeding. Alternatively, procedural safeguards should be provided to prevent the use of testimony obtained in the asylum proceeding as evidence in criminal proceedings. If states continue to use the compulsory questioning powers during asylum procedure, the use of the evidence in the subsequent criminal trials must be prevented. Unlike the Netherlands, in Canada, the prior testimony provided during an administrative proceeding can not be used in a criminal case because of the Charter rights. However, as the case of Jaballah demonstrated, the prior testimony classified as voluntary can still be used in a security certificate process.

This chapter highlights how asylum seekers have been trapped by the current system, face legal pressure to incriminate themselves without having received sufficient information about the process in return. Those who fight against impunity for grave

[129] Ibid., § 87.

[130] Ibid., § 77.

[131] In Canada, the use of the asylum seeker's testimony is problematic regardless of the weight given to this testimony in the subsequent security certificate proceeding.

human rights violations may well find my arguments implausible. However, it is an illusion to rely on the impunity arguments. An Angolan soldier who claimed -during RSD interviews- to have participated in the brutal acts of cutting out eyes and dis-embodiment of the heads of supporters of an opposing party was told to leave the Netherlands, after being excluded. Reijven and Wijk's research shows that he was not prosecuted. He just "left the asylum centre and was never heard of again".[132] He is not the only one. There were 745 definite exclusion decisions in the Netherlands between January 2000 and November 2010; only four of them were prosecuted and convicted.[133] This means that many other "possible criminals" are not prosecuted and probably living in the same country due to the principle of non-refoulement. Then we need to ask whom and why states are prosecuting? If the underlying argument is that states do not want to create a safe shelter for perpetrators of grave human rights violations, what about those who were never subjected to criminal proceedings. The prosecuted individuals- at least in the Netherlands- do not even constitute 1% of the total excluded individuals.

Another common illusion is that providing stronger procedural rights to asylum seekers will allow "criminals" to enter a host country and hence, will harm the whole refugee law system. First, these people already entered and -in most of the cases- have lived in host countries for a long time before any exclusion decision is rendered.[134] Even if they are suspected of criminality on the basis of Article 1F crimes, they are not mostly deported because of the principle of non-refoulement. Second, if states are sure that these people are "criminals" then they ought to recognise procedural rights to the accused foreigner. The right to a fair trial is a fundamental one and certainly not a favourable choice or luxury that a state awards to a foreigner. Canada and the Netherlands are both parties to the International Covenant on Civil and Political Rights, which sets forth that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law."[135] Failing to apply this rule to asylum seekers who are suspected of criminality is non-justifiable. Otherwise, the current practice in the observed states is at odds with the established principles of criminal law—*Ei incumbit probatio qui dicit, non qui negat*.

Acknowledgements The chapter is part of the author's doctoral thesis, which is supported by the Fonds de recherche du Québec – Société et culture (FRQSC) doctoral research scholarship.

[132]Reijven and van Wijk (2015) .p 12.

[133]Reijven and van Wijk (2014, pp. 255–256).

[134]An Afghan excluded individual expressed that "'Because of you I am 1F, our kids have 1F.' My children say: 'why have you said you were in the military, why didn't you lie?' Because of the war I lost my brothers, parents and family. But because of the injustice here I lost my spouse, kids and life." For a detailed analysis of the profile of excluded individuals and their living conditions, see Reijven and van Wijk (2014) p. 260.

[135]Article 14 (2) of the ICCPR.

References

Canadian Legislation

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
Immigration and Refugee Protection Act (IRPA), SC 2001, c. 27, 1 Nov 2001
Interpretation of the Convention Refugee Definition in the Case Law (Immigration and Refugee Board of Canada, 2010)

International Instruments

Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on 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 (recast), OJ L 337/9, 20 Dec 2011
Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings
European Union Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003
European Council Common Position of 27 December 2001 on combating terrorism (2001/930/CFSP). Article 16
Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM/2013/0821 final-2013/0407 (COD)
The statute of the Office of the UNHCR, contained in the Annex to UN General Assembly Resolution 428 (V) of 14 December 1950. UNGA Resolution 428 (V) (14 Dec 1950)

Court Cases

H. and J. v. the Netherlands, Appl. Nos. 978/09 and 992/09, ECtHR, 13 Nov 2014
Jaballah (Re) 2010 FC 224
Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 Aug 1995
R. v. Noel, [2002] 3 S.C.R. 433
The Supreme Court of the Netherlands, 8 July 2008, LJN BC7421

Secondary Materials

Monographs & Articles

Crépeau F (2011) Anti-terrorism measures and refugee law challenges in Canada. RSQ 29:4

Crépeau F, Nakache D (2006) Controlling irregular migration in Canada reconciling security concerns with human rights protection. IRPP 12:1
Dauvergne C (2013) The troublesome intersections of refugee law and criminal law. In: Aas KF, Bosworth M (eds) The borders of punishment: migration, citizenship, and social exclusion. Oxford University Press, Oxford
Gilbert G (2003) Current issues in the application of the exclusion clauses. In: Feller E et al (eds) Refugee protection in international law: UNHCR's global consultations on international protection. Cambridge University Press, Cambridge
Gilbert G (2014) Exclusion is not just about saying 'No' taking exclusion seriously in complex conflicts. In: Cantor D, Durieux J-F (eds) Refuge from inhumanity? War refugees and international humanitarian law. Brill/Nijhoff, The Netherlands
Halsbury's Laws of Canada—Administration Law (2013 Reissue), Guy Régimbald, Matthew Estabrooks (Contributors); HAD—3 Requirement of Procedural Fairness
Kaushal A, Dauvergne C (2011) The growing culture of exclusion: trends in Canadian refugee exclusions. IJRL 23:1
Keane A, McKeown P (2011) Privilege. In: The modern law of evidence, 9th edn. Oxford University Press, Oxford, p 595
Larsaeus N (2004) The relationship between safeguarding internal security and complying with international obligations of protection. The unresolved issue of excluded asylum seekers. Nordic J Int'l L 73:69
Lawyers Committee on Human Rights (2000) Safeguarding the rights of refugees under the exclusion clauses: summary findings of the project and a lawyers committee for human rights perspective. Int'l J. Refugee L Supplementary Issue 12
Reijven J, van Wijk J (2015) Alleged perpetrators of serious crimes applying for asylum in the Netherlands: confidentiality, the interests of justice and security. Crim Justice 1:15
Reijven J, van Wijk J (2014) Caught in limbo: how alleged perpetrators of international crimes who applied for asylum in the Netherlands are affected by a fundamental system error in international law. Int'l J Refugee L 26:12
Vietti V, Bisi M (2016) Caught in the crossfire: the impact of foreign fighters on internally displaced persons, asylum seekers and refugees from Syria and Iraq. In: De Guttry A, Capone F, Paulussen C (eds) (2016) Foreign fighters under international law and beyond. Springer, The Hague, p 501
Vogler R (2012) Due process. In: Rosenfeld M, Sajó A (eds) The Oxford handbook of comparative constitutional law. Oxford University Press, Oxford

Other Materials

Ambos K. Development of international criminal law and tribunals, encyclopaedia of criminology and criminal justice at 1030–1045
Andrew Ashworth, 'Self-Incrimination in European Human Rights Law — A Pregnant Pragmatism?' (2008) 30 Cardozo Law Review 751
Canada's Program on Crimes Against Humanity and War Crimes 9th Annual Report 2005–2006 (Canada Border Services Agency Citizenship and Immigration Canada Department of Justice Royal Canadian Mounted Police)
Canada's Program on Crimes Against Humanity and War Crimes 2011–2015: 13th Report (Canada Border Services Agency Department of Citizenship and Immigration Department of Justice Royal Canadian Mounted Police, 2016)
Canadian War Crimes and Crimes Against Humanity Manual (Immigration and Citizenship Canada, 2016)
Challenging the Myths: Refugees in Canada (Social Planning Council Oxford, 2016)

CATO Institute (2015, Nov 18) Syrian refugees don't pose a serious security threat. Online: www.cato.org/blog/syrian-refugees-dont-pose-serious-security-threat
Doğar D. The conversation, the trouble with impunity: war crimes and a humanitarian agency. www.theconversation.com/the-trouble-with-impunity-war-crimes-and-a-humanitarian-agency-94563
Dubois v. The Queen, [1985] 2 S.C.R. 350
European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5
Fuerst L. The privilege against self-incrimination: disclosure in cross-border investigations, 2. www.litigate.com/files/15286_The%20Privilege%20Against%20Self-Incrimination.pdf
Funke v. France, (Application no. 10828/84) ECtHR judgment, 25 February 1993
Heaney and McGuinness v. Ireland, Application No. 34720/97, ECtHR, 1997–1999
International Committee of the Red Cross. Protocols I and II additional to the Geneva Conventions. www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm
Interpretation of the Convention Refugee Definition in the Case Law (Immigration and Refugee Board of Canada, 2010)
Jalloh v. Germany, Application no: 54810/00. Judgement (merits and just satisfaction), GC, ECtHR, 11 July 2006
John Murray v. the United Kingdom, (Application no. 18731/91), ECtHR judgment, 8 February 1996
Jennings G (2012) Canada: the six-minute criminal defence lawyer 2012—protection against self-incrimination—Update on Section 13 of the charter, Mondaq
Maarten P. Bolhuis, Hemme Battjes, Joris van Wijk, Undesirable but Unreturnable Migrants in the Netherlands. Refugee Survey Quarterly: hdw019
Public Safety Canada. Security certificates. www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx
R. v. P. (M.B.), [1994] 1 S.C.R. 555
Redress, International Federation for Human Rights (2010) Strategies for the effective investigation and prosecution of serious international crimes: the practice of specialized war crimes units
Saunders v. the United Kingdom (Application no. 19187/91), ECtHR judgment, 17 December 1996
Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, "The Law of Evidence in Canada, Fifth Edition", Lexis-Nexis Canada
United Nations Department of Social and Economic Affairs (2017, Feb 21) Bringing about positive change for people on the move. www.un.org/development/desa/en/news/population/bringing-about-positive-change-for-people-on-move.html
UNHCR (2006, Feb 7) UNHCR Guidelines on the application in mass influx situations of the exclusion clauses of Article 1F of the 1951 Convention relating to the Status of Refugees. www.refworld.org/docid/43f48c0b4.html
UNHCR (2003, Nov 20) Procedural standards for refugee status determination under UNHCR's Mandate. www.refworld.org/docid/42d66dd84.html
UNHCR (2003, Sept 4) Guidelines on international protection No. 5: application of the exclusion clauses: Article 1F of the 1951 Convention relating to the status of refugees. HCR/GIP/03/05. www.refworld.org/docid/3f5857684.html
UNHCR (2011, Dec) Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 convention and the 1967 protocol relating to the status of refugees. HCR/1P/4/ENG/REV. 3. www.refworld.org/docid/4f33c8d92.html
UNHCR (2003, Sept 4) Background note on the application of the exclusion clauses: Article 1F of the 1951 convention relating to the status of refugees. www.refworld.org/docid/3f5857d24.html
UNHCR (2009, July) UNHCR statement on Article 1F of the 1951 convention. www.refworld.org/docid/4a5de2992.html
UNHCR (2012, May 31) UNHCR eligibility guidelines for assessing the international protection needs of asylum-seekers from Iraq. www.refworld.org/docid/4fc77d522.html

UNHCR (2014) Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report—Universal Periodic Review: Republic of Turkey

"Time Bandits": Time as a Factor of the "Criminalisation of Legality" of Asylum Seekers. An Example from Trieste, Italy

Davide Pittioni and Tomaž Gregorc

Abstract The recent migratory flow imposes a reflection surrounding the practices of subjectivation of immigrants inside the "welcoming/accommodation machine". The extreme bureaucratisation, in the Italian case governed by the police and state apparatuses, unambiguously brings to light the extension of the administrative-technocratic dispositive that supports the actual practices of identification of subjects in late neoliberal societies from borders to the core of everyday life: cities. Even once through the border, asylum seekers condition is usually related to an absolute absence of documents—in French terms *sans papiers*—and is exactly the system of welcoming or accommodation that assumes the responsibility to fill this bureaucratic void in the life of immigrants. In addition to the *sans papiers* phenomenon, we witness another process of criminalisation: what we decided to address as "criminalisation of legality". With this concept we describe a specific condition when an asylum seeker is de jure legalised—having applied and been recognised by the state apparatus as an asylum seeker—but de facto there are elements of discontinuity in this process marked by renewals of his permit of stay.

D. Pittioni (✉) · T. Gregorc
Trieste, Italy

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_13

1 From Borders to City Centres—A Move in the Perspective of Analysis

From a legal point of view, an asylum seeker is "a person who is out of his home country and presents in another country an asylum request to obtain refugee status as defined by the 1951 Refugee Convention signed in Geneva or to gain other forms of international protection. Until the final decision of the competent authorities, this person is an asylum seeker and has the right to live in the country of destination legally. Thus an asylum seeker is not comparable to an irregular immigrant, even if he or she can arrive in a country without identification documents, in an irregular way or through the so-called 'mixed migratory flows' composed of potential asylum seekers and irregular immigrants" (Glossary of keywords for the application of the Rome Papers, 2012).[1] The need to introduce this additional definition of asylum seekers into the wider context of a code of professional conduct for correct information about immigration, developed by *Consiglio Nazionale dell'Ordine dei Giornalisti* (CNOG)[2] and *Federazione Nazionale della Stampa Italiana* (FNSI)[3] in June 2008, derived from the misperception and misuse of news regarding the policies on migration and reception in Italy.[4] Words like "illegal immigrant", "irregular", "refugee", "migrant", were used—and even now remain misused—confusingly in political propaganda and many information circles, causing hidden processes of discrimination and exclusion in public debates. This produced obvious counterproductive effects on different discourses about reception/accommodation, asylum requests and, in more general terms, in the debate about migratory flows and arrivals in Italy in the last few years.

This chapter addresses the processes and dynamics of criminalisation that cause asylum seekers to experience on a personal or intimate level what we call the "criminalisation of legality"—an alternate state of living condition and (un)certainty in which a fully legalised person experiences his everyday life as an illegal situation. In particular, we focus on the position of the asylum seeker during a series of legal procedures or obligatory steps, occurring over time, within the *asylum machine*[5]:

---

[1] *Glossario delle Linee Guida per l'applicazione della Carta di Roma*. The definition is taken from: https://www.cartadiroma.org/cosa-e-la-carta-di-roma/glossario/.

[2] National Council of the Order of Journalists.

[3] National Federation of Italian Press.

[4] https://www.cartadiroma.org/chi-siamo/.

[5] We conceptually prefer to call the asylum system the *asylum machine*, taking in consideration the concept of *abstract machines* developed by Deleuze and Guattari in their *A thousand plateaus* where they write: "There is no abstract machine, or machines in the sense of a Platonic Idea, transcendent, universal, eternal. Abstract machines operate within concrete assemblages: They are defined by the fourth aspect of assemblages, in other words, the cutting edges of decoding and deterritorialization. They draw these cutting edges. Therefore they make territorial assemblage open onto something else, assemblages of another type, the molecular, the cosmic; they constitute becomings". Deleuze and Guattari (2004, p. 562). In other words: the machine is not a technical device, but a social composition and concatenation. It is a conception of the machine as an arrangement of technical, bodily, intellectual, and social components.

Beginning with a formal request or start of the asylum procedure to the response of the local commission[6] to procedures to obtain various documents (electronic permit of stay and travel document) in relation to the reception/accommodation system. Protracted waiting times to obtain these documents—and its consequences—inside the accommodation/reception system or settlement, produces a process of internalisation or embodiment of illegality. The explosive mix migrants experience is a situation of insecurity and uncertainty about the final response of an asylum procedure, of what we could call the ontological-existential position as asylum seeker (as an ex illegal migrant), and last but not least a precarious position characterized by working/economic, documental/bureaucratic and existential insecurity. All of this produces a deep sense of illegality, even though one has a full right to stay according to national and international laws. It is a false perception of illegality—a perception that is unrelated to any actual formal or legal procedure/status yet represents the reality of an asylum seeker inside the asylum machine.

A delay in the process of renewal of the permit of stay, for example, has a domino effect on the access to most bureaucratic procedures and services that an asylum seeker has right to: fiscal code,[7] health care system,[8] residency paper,[9] ID card,[10] different local services (job centres, schools and training institutions, to name just a few). The reception system generally assumes the responsibility of filling in this bureaucratic void: "The right to take part in the reception system is a fundamental right of asylum seekers, a fixed point around which rotates the actual access to all the rights as defined by law; a right that determines and measures the concreteness of the protection that is to be applied to whoever asks for international protection and, even if explicit or well done on paper, can be reduced to a minimum, if not transformed into actual access to orientation to the services, attention to single cases and different vulnerabilities, good use of resources".[11] We argue that if we want to clearly understand the specific condition of the "criminalization of legality" and how this affects the everyday lives of asylum seekers, we must concentrate our analysis on ruptures or intermittence in the asylum machine: a reality often full of contradictions between written laws (even favourable) and their real-life application that creates dramatic effects of confusion, bewilderment and stress. This implicates a move from the traditional point of analysis at the borders to a new point of analysis at the city, from geographical peripheries to the centre. What we call the *biopolitics*[12] of the

[6] In Italian language called "Commissione territoriale".

[7] The bureaucratic base for all personal documents and work-related issues.

[8] An exception is the right to access emergency hospital departments, creating "false" emergencies, artificially saturating a system dedicated to emergencies with non-urgent medical issues and thus creating social tensions or even hostile behaviour of professional medical staff.

[9] Giving access to priority medical issues for specialist visits, for example.

[10] Essential for access to education or to obtain a bank account.

[11] Bove (2015, p. 171).

[12] A raw definition of biopolitics, a concept developed by Foucault is as follows: "The second, formed somewhat later, focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision

asylum machine[13] is more evident at the point of reception (where the asylum seeker is "welcomed"[14] or settled) than at the point of entry (where a potential asylum seeker crosses the border).

Furthermore, the same aggressiveness—to control, to sort, to stop etc.—a country may apply at the point of entry is practised, replicated and even, in some cases, amplified in the cities at the point of reception. This is due to the fact that, while typically crossing borders is usually associated with an emergency logic (and long-term living or staying is not), the *biopolitics* inside the asylum machine transposes this cross-border emergency logic to the everyday living situation of asylum seekers, keeping them in a constant state of emergency. As our findings suggest, this emergency logic is internalised by asylum seekers, producing high states of alienation, dissociation and lack of interest in self-care with the individuals. These depressed states, in turn, work as a destructive influence in the potential process of emancipation.

The perimeter of the proposed analysis is based on the current situation in the city of *Trieste* and, more broadly, in *Friuli Venezia Giulia* region,[15] where the authors work as social workers[16] in a small reception facility. Most of the data and situations we present are a combination of the more recent officially available data (up to December 2017),[17] unstructured interviews with asylum seekers,[18] and unofficial or personal statistics extrapolated from those interviews and our work from the end of 2017 to May 2018.

---

was effected through an entire series of interventions and *regulatory controls: a biopolitics of the population*" (Foucault 1975, p. 193).

[13]For a critique of most biopolitical analysis also related to the reception system and accommodation see: https://www.researchgate.net/publication/316738710_Beyond_the_Biopolitics_of_the_Refugee_Totality_Global_Capitalism_and_the_Common_Struggle.

[14]We are using the term "welcomed" in a clear relation and approval of the *Refugees Welcome* struggle.

[15]Friuli-Venezia Giulia is one of the 20 regions of Italy, and one of five autonomous regions with special statute. The regional capital is Trieste. Friuli-Venezia Giulia has an area of 7924 km^2 and about 1.2 million inhabitants. A natural opening to the sea for many Central European countries, the region is crossed by the major transport routes between the east and west of southern Europe. It encompasses the historical geographical region of Friuli and a small portion of the historical region of Venezia Giulia—known in English also as Julian March—each with its own distinct history, traditions and identity.

[16]In Italian language, we prefer to speak about *operatore del sociale*. In a lack of a better translation we address this kind of work as social work. Rather than working with different kinds of marginalized or disadvantaged groups, we see the *operatore del sociale* as etymologically—and conceptually—linked to the term "society" and, to make a long story short, its work is to operate as a guide and link between different understandings of everyday life and as a mediator and facilitator of the access to specific state (and non-state) services, e.g. the Italian health-care system, labour market or simply how and where to buy everyday tools.

[17]At the time of writing this article, the data are not yet published. We sincerely thank Italian Consortium of Solidarity and Caritas Trieste for letting us access and use these data. Moreover, we decided to present the data/current situation as of December 2017 in Trieste avoiding yearly statistics, for the simple reason that this is the most immediate official reality in our city.

[18]In some cases we could call them friends. Thank you: Saber, Chyenar, Khamo, Haji and Tagimul.

2 Drowned by Numbers: The Tangle of the Reception System

In Trieste, as in the rest of Italy, additional reception agreements have been introduced in recent years to complement the ordinary reception system within the so-called C.A.S. *Centri di accoglienza straordinaria*—Extraordinary reception centres or *extra-S.P.R.A.R.* systems. *S.P.R.A.R.* or *Sistema di protezione per richiedenti asilo e rifugiati* (Protection system for asylum seekers and refugees) is the centrally managed national reception system. It has highly standardised and clearly defined rules and requisites for the reception. In contrast, the CAS systems are not run at the national level, but by local authorities (at a municipality level), and are subject to an endless variety of different dynamics, rules and standards.[19] On paper, the Italian reception system, according to the provisions of Decree 142/2015, is divided into three phases: first aid and first assistance; first level of reception or accommodation (that can take place within existing collective centres or new ones to be introduced/built); and a second level of reception entrusted to the accommodation facilities run under the SPRAR system. The aim of the first level of reception is to offer hospitality to asylum seekers, where there is a need for initial accommodation, and determine their legal status. The second level of reception includes SPRAR facilities, established in 2002, as networks of local authorities that, relying on existing competent third sector realities or NGOs, carry out projects for the accommodation of asylum seekers and holders of international and humanitarian protection. We are talking of projects that implement an integrated accommodation, concentrated on individual life project to regain individual autonomy. In reality, however, the free places guaranteed by the SPRAR system are largely insufficient to accommodate all those who would be entitled: this is what led to the opening of numerous CASs, accommodation facilities that are strongly influenced by an emergency logic, with the risk that "for an indefinite and dangerously long time, asylum seekers can be accepted in a parallel, merely essential condition and within collective centres, where they are structurally prevented from starting any individual trajectories".[20]

In the past years, the city of Trieste has been experiencing a tremendous increase in arrivals of asylum seekers coming from both the so-called "Balkan Route" and from northern European countries in a smaller migration pattern. At the end of 2015 and at the beginning of 2016 the number of asylum seekers held in the CAS system was approximately 1000,[21] in the following months we witnessed an increase in arrivals and the number stabilised at approximately 1200 arrivals/settlings by the

[19]For more information about SPRAR and CAS in Slovenian language see: Lipovec Cebron and Gregorc (2016, pp. 194–202). For an overview of the Italian reception system in English see: http://www.asylumineurope.org/reports/country/italy/reception-conditions/short-overview-italian-reception-system.

[20]Bove (2015, p. 174).

[21]Report ICS-Caritas (2015–2016). The numbers for the years 2015–2016 are overall elaborations of the data presented in the Official report: *L'accoglienza e la tutela dei richiedenti asilo e dei titolari di protezione internazionale o umanitaria a Trieste. Dati Statistici settembre 2015 aprile 2016*—Accommodation and protection of asylum seekers and holders of subsidiary and humanitarian

end of 2017. Although these numbers are above national averages, we stress that the reception system in Trieste (managed by the municipality in collaboration, through a formal agreement, with the local prefecture and run by ICS and Caritas) has never kneeled under a logic of emergency and its aim was always to establish and run a system of decentralized and built-in reception and accommodation in the area,[22] trying to adapt to and follow the dynamics and standards of the SPRAR system. As emphasized by Bove, "preserving the goal of a consistent and widespread or scattered reception and aiming to overcome the contradictions generated by an unreasonable administrative watershed that channels people with identical legal statuses into considerably distanced routes, the Trieste reception network has set in motion a mechanism founded on the same principles as SPRAR, we might even say it represents a more flexible version of it".[23] However, as we argue further on, even if the welcome or reception system is well-organised, the surrounding context, packed with technical-administrative lingering and shortages, triggers inside this system nearly the same reactions or responses as a full emergency context.

The distribution, on a total of 1280 receptions at the peak of arrivals, in December 2017,[24] was as follows: 685 people were accommodated in various private apartments scattered throughout the city, 424 in small reception facilities (of which 60 were emergency places, meaning places not included in the official accommodation announcement), 107 in a hub of first or temporary accommodation, and last but not least 70 people were placed in the SPRAR system. To conclude, the vast majority of asylum seekers/holders of protection were settled in a context of decentralised or scattered accommodation system. Regarding the country of origin, the distribution of asylum seekers in December 2017 was as follows: the majority were from Pakistan (422), followed by Iraq (270, mainly Kurds) and Afghanistan (201); people from other countries were few, due to the geographical position and historical context of Trieste, there were Serbs (mostly Roma) and Kosovars, representing a unique case in the Italian reception system for asylum seekers. As far as age is concerned, 39% were 26–35 years old and 37% 18–25, males representing 88% of the total.

Concerning the legal position of the accommodated, in the same period 3.5% had refugee status, 19% obtained subsidiary protection, 5.1% held a humanitarian protection, 13.6% were appellants, i.e. people with a negative response by the local commission but appealing in civil court, 32.3% were asylum seekers, 8.3% had not yet formalized their asylum request, and 18.1% were identified as "Dublined".[25] Our findings suggest that, due to long waiting times between one document and

protection in Trieste. Statistic data September 2015 April 2016. The pages of the report are not numerated.

[22] Report ICS-Caritas (2015–2016).

[23] Bove (2015, p. 187).

[24] All the data and various citations from here on are taken from the not yet published report "The reception and protection of asylum seekers, refugees and people with subsidiary and humanitarian protection in Trieste" written by ICS—Italian Consortium of Solidarity Onlus and Caritas Trieste; as in the previous report, pages are not numerated.

[25] Meaning that their fingerprints were recorded in the *Eurodac* and that they were identified as official asylum seekers in another European country. In these cases, the Italian government is trying—or

another (or a first document), any difference in the perception of legal status (asylum seeker, dublined, not yet formalized, refugee, etc.) by country of origin or place of accommodation (be it a hub or a flat inside the reception system) is suspended. This fact brings in play the *transversal* nature of the process of "criminalisation of legality". This is a specific condition in which a person is de jure legalised—having applied and having been recognised by the state apparatus as an asylum seeker or having even obtained a kind of protection—but has de facto restricted access to services and is unable to live a normal life. The main reason for these restricted or limited accesses is of an administrative nature: one of the health-care districts, for example, imposed a single day for renewals or changes of the health-care cards of asylum seekers/refugees, creating an alternative lane for people inside the accommodation system in opposition to the regular lane for citizens and other non-citizens. This went even further when the same district imposed to NGOs a procedure of booking appointments for renewals. This extraordinary administrative regulation becomes even more evident in the case of residencies. The administrative unit at one point banned people inside the accommodation system to use an administrative address guaranteed by local agreements—initially thought for homeless people, but in the past used also by asylum seekers and refugees inside the accommodation system—that let them access most advanced local services, for example free public dental care, urgent specialist visits or access to regional funds for workfare projects and other subsidies.[26] By the same means, this ban also denies access to private services such as having a bank account (obligatory to receive a wage). These are only some examples of what we meant with the divide between factual and legal positions of asylum seekers and refugees inside the accommodation system.

Returning to the map of specific legal position of the welcomed in the reception system, we want to highlight a further element: almost 30% of people inside the reception system are holders of a protection, because—in compliance with the provisions of Legislative Decree 142/2015—the system of extraordinary reception (*CAS*), in analogy with the ordinary *SPRAR* system, guarantees a period of additional settling after the legal recognition of a protection, with the aim of encouraging a further trajectory or project of socio-occupational and housing autonomy. As already underlined, a small percentage of asylum seekers is included in *SPRAR* projects: these are mainly dedicated to holders of international and humanitarian protection, because—as the organizations promoting those projects explain—"holders of a protection that have undergone a significant project of rooting in the local social tissue or that present some kind of vulnerability, are more likely to be encouraged towards the SPRAR system to continue their project of social inclusion, within the limits of available places" (ICS and Caritas 2016), favoured by the specific resources of this type of reception. Overall, in Trieste's *SPRAR*, there are 70 accommodation places,

tried—to contact the first country of entry in the EU or to identify the competent government for the asylum request. Under the Dublin III Regulation, their permit of stay cites the reason *dublino*.

[26]At the time this chapter was written, we could not imagine the formulation of the so-called Salvini decree (October 2018) which—among other things—implements the principle that asylum seekers cannot be registered inside the civil registry office, forbidding asylum seekers to have actual residence.

less than in previous years and in clear disproportion compared to the *CAS* system. The *SPRAR,* in fact, has turned into a further level of accommodation (sometimes colloquially defined as third level of accommodation), righteous in some way, but also quite exclusive, for the requirement of an advanced project in autonomy of the holder of protection that excludes, unintentionally, all those that succumb to the "criminalisation of legality" process.

To conclude, the reported data refer to the static situation of December 2017: these are the statistics drawn up by the organisations directly involved in the reception and accommodation system. As an annotation, we can add that the flow seems stabilized or unaltered, if not in the numbers, certainly in the modalities: between summer and autumn, we witnessed an increase in arrivals, probably favoured by less adverse climatic conditions, while between winter and spring 2017 a general stabilization of the migration flow has occurred. Moreover, we could say that after 2016, following the closure of the "Balkan Route", or in any case, with the intensification of repression and border controls practised by some countries, it is increasingly difficult to use this migration route. For this reason, the geographical distribution by country of origin of the people welcomed in the reception system has changed considerably: the majority of new arrivals are from northern European countries, where an asylum request has already been submitted and/or rejected. As a result, the ethnic composition of asylum seekers has changed: for example, the presence of Iraqi Kurds coming mainly from Germany and the Scandinavian countries, which was irrelevant before 2016, is of considerable statistical interest in 2017.

On the whole, the reception system in Trieste, and its host organizations, has managed to adapt to changes in migratory flows, trying at their best to maintain an undisputable commitment to a scattered or decentralized accommodation, and to avoid the opening of large accommodation centres, until now successfully, but the tangle remains due to large numbers and the surrounding (institutional and informal) context. What follows is a description and analysis of ruptures and issues of legal and administrative nature concerning asylum seekers and protection holders, operated mainly by the police apparatuses and other state security bodies that tend to deal with the management of the migratory flows (and settlement) as a "problem" or an emergency. Paradoxically, creating long term waiting periods and thus artificially extending the accommodation period of holders of protection, who lose (or did not have from the start) any interest to stay in Trieste, in Italy or in a reception system; or in other words: in our experience a considerable amount of holders of protection would leave the accommodation system as soon as their documents—especially the travel document—are ready, thus making the entire reception system more flowing. The underlying logic is to address migration as a problem of public order. The numbers we discussed before, as we shall see, are not irrelevant, especially in relation to the technical-administrative timing, but are far from being the only cause of the "criminalisation of legality".

3 Stalled by Law: Time and Procedures

Administratively, the asylum application procedure begins at the moment an individual enters Italy[27] and expresses the desire to make an asylum request. The legal reference framework is governed by Legislative Decree 142/2015, in which Italy has implemented the 2013/33/EU directive laying down rules on the reception of applicants for international protection and Directive 2013/32/EU on common procedures for the purpose of recognition and revocation of the status of international protection. For several years a process has been underway in the EU that pushes towards the adoption of common measures on immigration and asylum, which led to the conclusion of two Conventions: that of Schengen, signed on 19 June 1990 and entered into force in 1995, and that of Dublin for the determination of the Member State responsible for examining the application of an asylum request submitted by a person from a Third Country, signed on 15 June 1990 and entered into force on 1 September 1997. With subsequent EU directives, the framework of the Conventions gets progressively more detailed. With the Directive 2013/32/EU, in particular, important innovations in the field of asylum are introduced that affirm "which are the primary objectives: to establish common procedures (and not minimum standards) both, for the purpose of the recognition of the international protection status, and that of the revocation of the same; to encompass within the scope of the directive not only applications made in the territory of single States, but including border zones and transit areas, and also applications presented in territorial waters[28]; clarify some legal concepts such as 'subsequent application' and 'applicant in need of special procedural guarantees'".[29] Above all, with reference to this discussion, it deals with fixing homogeneous and short timed procedures in examining the application for international protection.[30] In the Article 31(2) of the above-mentioned directive, for example, it is written: "Member States shall ensure that the examination procedure is completed within six months on the lodging of the application". However, prolongations are allowed, in particular when: "(a) a complex issues of fact and/or law are involved; (b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time limit; (c) where the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13".[31]

Moreover, the time limit of 21 months is defined as the final deadline, specifying that the Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall be informed of the delay; and receive, upon

[27] Often irregularly, given the lack of legal routes or methods made impracticable by the increasingly restrictive measures of entry into the EU or even the European continent.

[28] Article 3.

[29] Brambilla and Morandi (2015, p. 75).

[30] Directive 2013/32/EU, Article 31.

[31] Directive 2013/32/EU, Article 31. For more information, see Brambilla and Garbin (2015) and Brambilla and Morandi (2015).

his or her request, information on the reasons for the delay and the time-frame within which the decision on his or her application is to be expected.[32]

Returning to the Italian legislative decree 142/2015, among the guarantees that are introduced, there is an explicit indication for the staff in charge of the acceptance of the procedure. Article 10 of the decree provides specific training—adequate to their duties and responsibilities—for police personnel working at the offices responsible for receiving applications for international protection. This is very important because it should, and could, guarantee a higher standard in the relationship between asylum seeker and the administrative-technocratic apparatus as a whole. In many cases, however, the procedure ends up becoming a depersonalizing *dispositif*,[33] in which people most often are not aware of what is happening. The right to be informed, fully and completely, in terms of the entire procedure of requesting international protection is thus, in many cases, suspended. As social workers we witness daily the state of confusion experienced by asylum seekers: the complexity (especially legislative, given the overlapping nature of different plateaus) of the entire *dispositif*, assembled in several cases with what we could call procedural smudges in the whole process, drives the asylum seeker towards a position of ignorance, from which it is almost impossible to realise and acquire the intake of their subjective position as an immigrant, asylum seeker and a person with his or her individual obligations and responsibilities guaranteed and defined by law. In most cases, the disclosures supporting a decision or step in the asylum procedure are reduced to a formal info paper translated in different languages without real or in-depth legal orientation[34] mostly entrusted to the NGOs.[35] As we heard many times, "me no understand" is the result of this position of ignorance. Or as one Iraqi asylum seeker told us: "I didn't really understand why the commission denied me protection. I am not from Turkey, I already proved I am an Iraqi Kurd; I have no further proves to that. They must give me protection", repeatedly asking us to explain what was written on the notification of the commission. The same person was completely unaware of the difference between the commission interview and the appeal procedure in front of a judge, confusing all the time this two different levels, acting as it is always the commission he was referring to. This led him to a condition of almost total ignorance of the severity of his condition and a general apathy. It was hard for us to make him understand all the

[32]Directive 2013/32/EU, Article 31.

[33]Conceptualized by Michel Foucault, a *dispositif* (apparatus) is: "…, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. … Thus, a particular discourse can figure at one time as the programme of an institution, and at another it can function as a means of justifying or masking a practice which itself remains silent, or as a secondary re-interpretation of this practice, opening out for it a new field of rationality. … a formation which has as its major function at a given historical moment that of responding to an *urgent need*. The apparatus thus has a dominant strategic function (Foucault 1980, pp. 194–195).

[34]In some extent, this is a common experience of each citizen in contact with the contemporary bureaucracy system, but with different impacts.

[35]Due to large numbers, even the best NGO cannot always guarantee enough time to each person.

shades of this complex system.[36] In this case, we see the void between the person and the system. Or in other words: at this level of the asylum machine, we therefore see the depersonalizing power of a *dispositif* fully deployed, which, by organising bureaucratic practices and speeches, ends up expelling the interested subject, or the asylum seeker, from the entire process, causing a high state of alienation.

Getting to the everyday reality of the events we witness, we will try to describe the process of the asylum request by identifying all the steps that the subject in the asylum machine must fulfil: after having set foot in Italy, the subject-migrant, presenting himself at the police headquarters, expresses his or her intention to apply for asylum. The police then issued an invitation for the formalisation of the request, which in high-arrival periods—in the case of Trieste—may imply up to 3 months of waiting. This is a clear exception to what should be the rule because the law states that the record of the statements of the applicant (the so-called *C3 Form*) shall be drawn up within three working days from the expression of his or her desire to request international protection, or within six days if the will is expressed to the Border Police Office. Furthermore, it is envisaged that the terms will be extended by ten working days in case of a high number of requests as a result of substantial arrivals (Article 26, Decree 25/08 modified by Decree 142/2015). The problem, which in the law does not have a peremptory character and is almost never applied, is circumvented by the fact that the asylum seeker is unable to provide an address of availability: presenting such an address is a fundamental guarantee for the decree we refer to, and is postponed to the day of the appointment when the asylum seeker is already accepted in an accommodation facility or in any case has his or her own address. Through this first invitation, in fact, the subject-migrant obtains also the right to access the reception system,[37] organized on a local basis according to agreements between the prefecture and the NGOs that directly manage the reception process. It is only the latter that provides the asylum seeker with the necessary orientation/information (and address) for the completion of the asylum application procedure. In this first period, the asylum seeker, being the first step incomplete, is not in possession of the necessary documentation to have full access to local systemic assistance, he lacks a fiscal code that is the basis to access the health-care system and a variety of other services. Subsequently, subject to an invitation to the police headquarters with all the necessary documentation, there is a final formalization of the asylum request, which allows the migrant to obtain a permit—or, to be accurate, a receipt of this permit, and to complete the so-called *C3* Form or what is called, in the language of asylum seeker communities, the "short interview". This is a first acquisition, by the police headquarters, of the personal data, various displacements and life of the asylum seeker; information regarding life in the country of origin, movements to and within Europe and EU countries, and reasons, in short, for the asylum request. A

[36] At the end, in October 2018 this person unexpectedly left the accommodation system before obtaining a response from the court. We lost contact with him.

[37] A simple formula: no invitation paper, no accommodation place. This becomes a serious issue in winter if an asylum seeker arrives in Trieste on a Friday afternoon, and will not receive this paper until Monday morning.

question that the asylum seeker is not obliged to answer, as the local commission is the only body in charge of assessing the asylum application. This is also a first recognition of the subject that allows the police to assign the asylum seeker his or her status of in Italy, through his or her statements and subsequent verification of fingerprints in the *eurodac*[38] database. This means that the person officially becomes an "asylum seeker" if Italy is the first EU country, where he or she applies for asylum, or a "Dublin", meaning a subject that has already completed the formalization of the asylum request in another EU country.[39] Regulation n. 604/2013/EU, the so-called "Dublin III" Regulation, deals in fact with identification of "the criteria and mechanisms for determining the Member State responsible for examining an application for international protection, with the aim of ensuring that the application is examined only by one of the Member States, and to prevent the so-called secondary internal movements, that is to say the phenomenon when the applicant for international protection freely chooses the Member State where to submit his or her application or asylum request".[40] It is therefore a regulation that, confirming the general rules laid down by previous regulations, and even earlier by the Dublin Convention, introduces an additional guaranteed element for asylum seekers: it admits, in fact, "the explicit provision of the impossibility of proceeding to the transfer of an applicant for international protection if there are reasonable grounds to believe that there are systemic shortcomings in the asylum procedure or in the conditions of the reception system in the Member State identified as competent for the person requesting asylum (Article 3, paragraph 2, second paragraph)" (Ibid., 63). In the case of Trieste, for many years affected by arrivals from the so-called "Balkan Route", this has prevented numerous transfers to countries deemed unsafe (such as Hungary and Bulgaria). But in recent times, the police apparatus on the eastern border of Italy has adopted increasingly stringent policies for the full release of documentation to subjects recognized as Dublin: when the person is recognized in the *Eurodac* system, a permit of stay with the reason of stay as *dublino* is issued, conditional to the period of time needed for the definition of the Dublin procedure or, in different words, until a clarification by the Member State competent for the asylum request. In these cases, for example, the *C3* Form is not completed and in some cases, the police refuse to issue a permit. Except for particular cases, after this first formalization the police headquarters in Trieste issue just a receipt of the permit of stay, not the original one (the so-called "yellow paper"): a fact that in many cases constitutes a real problem for access to local services, that creates situations to be solved in experimental forms, often entrusted

[38] "Regulation (EU) N. 603/2013 of the European Parliament and of the European Council of June 26th 2013, establishes Eurodac for the comparison of fingerprints to obtain an effective application of Regulation no. 604/2013/EU that establishes the criteria and mechanisms for determining the Member State responsible for the examination of an application for international protection". Brambilla and Morandi (2015, p. 60).

[39] The modalities of asylum in other EU countries may be different: in some cases, the simple release of fingerprints to the security forces does not coincide with the will of the person to seek asylum in that country, even if formally—for the Dublin treaties—it is in that country that the asylum seeker should carry out his/her request/procedure.

[40] Brambilla and Morandi (2015, p. 61).

to the daily relationships that exist between asylum seekers, social workers and the services in question.

Now the *real* asylum procedure can start: arriving to the local commission competent for the examination of the asylum request, at the moment and with the current number of arrivals, will take at least 10 months for a "normal" asylum seeker (known as "fresh asilo" in asylum seekers communities) and several additional months for asylum seeker *dublin* to be heard by the commission. Here, to be honest, we should introduce a further distinction: that between cases of activated *dublin*, meaning those cases in which the asylum seeker is involved in a procedure of expatriation to the first country of asylum request in EU, and cases where the *dublin* expires due to the passing of time, transforming itself into a "normal" asylum request after the deadline defined by law. In the first situation, the strategy adopted in most cases by asylum seekers is an appeal—supported by lawyers—with a simple wish to obtain the right to be recognized as competence of Italy, and/or to extend the settling time within the EU. The decision of the Dublin Unit can in fact be challenged within 60 days at TAR (Lazio Regional Administrative Court) by the asylum seeker. In the second situation, however, we can talk of total uncertainty, determined by the fact that in many cases there is no official ratification of the transition to a "normal" asylum request, even long time after the deadline of the terms and conditions for the activation of the *dublin*. The Dublin III Regulation, in fact, "substantially maintains the procedure for taking on responsibility of the applicant for international protection, as well as timings".[41] It means "the Member State concerned with the application for international protection, must invest the State identified as competent in the request to take responsibility of the applicant within three months from the formalization of the request, under penalty of taking competence to examine the application. In turn, the identified State must respond to this request within two months to acknowledge the competence. If there is no response, the principle of tacit consent is applied. The entire procedure, therefore, can last up to five months, that can be reduced in case of an urgent procedure".[42] One of the interviewed guests of our accommodation facility, in Italy from July 2016, does not yet have so far a permit of stay with the reason of stay for asylum: he holds a permit of stay that expired at the end of April 2018, but the reason of stay is still *dublin* even if he has been based in Trieste for 21 months. Despite reassurance by the legal office of the association where he is accommodated, after several accurate checks that confirmed the transition to a "pure" asylum request, he continues to perceive himself as a *dublin.* This is the main cause of his daily worries and of a general impression of "being in a problematic situation", that—in his own words—"something is not right with my asylum application procedure", accompanied by persistent doubts in his legal security. This is a clear example of criminalization of his status, with negative effects on the subjectivation of the single. This example outlines what we address as "criminalization of legality".

The above-described distinctions significantly mark or even totalize the whole period of waiting for the hearing in the local commission: a permit of stay with the

[41] Ibid., p. 66.

[42] Ibid., p. 66.

purpose of asylum is valid for 6 months, the one for *dublin* only for 3. This means that a large number of people is continually forced to renew their permit of stay at the police headquarters, creating distortions, breaches, dysfunctions and slowdowns in the offices in charge. At the moment, not without reason, the renewal times are extremely long: several months can pass (up to 4, 5 or 6 months, in rare cases even more) from the expiration date of the permit to the actual renewal. This consequently affects all the associated documents: e.g. the health card. And this already insecure and confused situation comes along a feeling of continuous precariousness, due also to the increasingly stringent controls by the police. Often, in our experience, we hear from asylum seekers about the controls to which they are exposed: in the street, any time of the day, they are asked to show a document that has usually expired. This activates a series of long and exhausting (we could even say humiliating) controls by the same *apparatus* that is in charge of the renewal. Being constantly exposed to this kind of requests and controls creates considerable short circuits in the subjectivation process and favours a general feeling of living in a "state of illegality", especially in those asylum seekers with less "cultural means" or contextual tools to understand the situation.

The numerous times one must show up at the police station for a renewal, often with long waiting times and chaotic queues of people waiting for the release/renewal of a document,[43] can only reinforce this feeling of legal precariousness.[44] These moments are often a playground for brawls, tensions and bickering. The notification of the date of the hearing by the commission—in our experience the most awaited moment in the life of an asylum seeker—takes also place at the police station: one or two months usually pass from the date a person receives the commission paper to the final audition by the nearest local commission.[45] The waiting time for the response[46] varies from one week to four months: and after the response, there are several cases that entail further complications due to changes in personal data,[47] formal errors,[48] bureaucratic slowdowns, etc. When the outcome of the hearing in the commission

[43]This involves all the foreigners—non Italian citizens—living and working in Trieste.

[44]We invite you to pass by Trieste Questura early (3–5 a.m.) on a Wednesday morning. It is not uncommon to see up to one hundred people forming a queue, waiting for the door to open and for the distribution of the queue tickets that starts at 8:30 a.m.

[45]For Trieste, the commission was until July 2018 in Gorizia, from July on is in Trieste.

[46]Where an asylum request is approved by the assignment of some kind of protection, or rejected.

[47]Change of name, surname and date of birth, in some cases even country of origin.

[48]Typos in surnames or names, resulting in further complications because the commission issues an electronic permit of stay. If the data differ from those in the home country document (be it ID card or passport), there will be serious problems for the holder. We had such a case with one of our interviewees; after waiting several months for the amendment of a typo by the commission, he decided to keep the wrong name and legally change the one recorded in his home country. Sometimes there are even worse cases of formal errors, such as a copy-paste error, done by the commission in which a part of the response is entitled to one person while another part (this might be the part where the decision is reported) is entitled to another person.

eventually arrives, it can be positive, if the person is considered eligible for an (international) protection (refugee status, subsidiary status or humanitarian status[49]), or negative, with the possibility to appeal against this decision in 30 days. In this case, the asylum seeker remains an asylum seeker in the form of an appellant.[50] Based on our personal experience, errors in issuing the "final" documents are not uncommon: from discrepancies in personal data to further delays for a variety of reasons (e.g. holidays). In addition, after recognition of a state of protection, the asylum seeker must formalize again his permit of stay (even if the previous one has not yet expired, due to a change in the reason of stay), issued as a receipt pending the definitive or electronic permit of stay. To get there, the protection holder must report to the police station after a certain period to record his or her fingerprints permanently. One of our interviewees, a person who had been granted humanitarian protection (with two-year validity), had to wait more than six months for this fingerprint appointment: it means that a quarter of the period of validity of the permit has been "frozen",[51] waiting for the situation to be unblocked, determining a further lengthening of the accommodation time, and perpetuating a sense of illegality. We can conclude that what is an administrative-technical fault, an unscrupulous organization of work, or a "simple" oversight in a bureaucratic procedure for the state apparatus, for the person exposed to this process is a re-experience of illegality.

To draw a line, we can say that, based on unstructured interviews we carried out between the end of 2017 and May 2018 and on our general observation of the surrounding reality, we note a deep embodiment of legal procedures in the everyday life of asylum seekers, generating a considerable amount of psychosomatic disorders. All the deadlines and renewals, the obstacles, the complications and, more generally, the stages of a long and complex process that are in many cases exhausting and incomprehensible, deeply mark the lives of asylum seekers, who end up identifying themselves primarily as objects within these procedures. Procedures that are by their nature—as described above—precarious, intermittent, sub-legal. Our daily contact and observation—this is particularly obvious for those people who lived in Europe for many years and come to Italy with the "status of *dublin*"—leads us to witness in them a deep feeling of dilatation of time, an extreme uncertainty about the righteousness of procedures, the precariousness of their documents that causes potent effects of stress that vanishes only when a person obtains his or her electronic permit of stay, linked

[49]Humanitarian protection is a type of protection issued by the Italian government, usually when a person would not have the same amount of rights or access to a functional system (usually health-care system) in his home country as he has in Italy. For details see: https://www.asgi.it/asilo-e-protezione-internazionale/permesso-soggiorno-motivi-umanitari-scheda-analisi/. From October 2018 with the above-mentioned Salvini decree, the Humanitarian protection is to be abolished. The result will be an enormous number of illegalized easily exploitable work force.

[50]Significant changes in the case of appeals were recently introduced by the Minniti-Orlando decrees, the more meaningful being the one that foresees only a first degree appeal, cancelling the existing second degree appeal, and thus considerably reducing the right to disagree with a court decision for the asylum seekers and accelerating the process of expulsion from Italy.

[51]For example, it is almost impossible to obtain a regular contract of work with only a receipt of a permit of stay, as it is also almost impossible to get a regular house-renting contract.

to a form of protection and therefore definitive. Only this final event constitutes an element of certainty on which the overall precarious life of an asylum seeker hooks. "Am I still *dublin*?" we often hear them say. We ask ourselves: what can you reply in the eyes of the bureaucratic flattening of this *dispositif* into which the asylum seeker is dragged? What counter-measures can be mobilized? On closer inspection, these are issues that concern general forms of subjectification—not necessarily linked to the particularity of the legal status of an asylum seeker—and that directly interrogate the modes of construction of subjectivation within highly bureaucratized societies as are those of this neoliberal era.

4 Criminalisation of Legality: An Attempt to Reorganise the Society and Its Economy

The attempt to outline the administrative-technocratic processes, to which an asylum seeker is subject, shows the specific ways or conditions that allow the asylum seeker to remain legally, or to-become legal, in the country that has taken the responsibility for his or her asylum request. As we tried to highlight, this legality is characterized by precariousness that transforms it in something merely virtual. The split between the legal plateau, guaranteed by international and national conventions, and the reality plateau—the everyday life including access to different kinds of services—is unavoidable and filled with material effects on the life of asylum seekers. It emerges as an unavoidable contradictory context, which directly affects the existential perspective of the subjects interpellated by and in it, creating a frame of frustrating existence within which different forces considerably shape lives and times of asylum seekers, dragging them on a disarray of expectation. The time-perspective of a life characterized by waiting—of a renewal, a document, a notification, an access to a service—drives in many cases the person away from a different time-perspective: one of planning or, rather, of an individual life project-taking in a radically different context (compared to the one of the country of origin). By this means, only people with "advanced cultural and social tools"[52] are able to orient themselves clearly in this new condition, in our experience outnumbered by a vast majority of humiliated and marginalized persons. This triggers an alarm: the process of "criminalization of legality" by all means paves the way to a further collapse of the social plateau (or of the society as a whole), mystifying the work of social inclusion and creating new forms of discrimination and social marginalization.

The explanatory frameworks of this process of split between legal and real that produces the "criminalization of legality", still in progress and—to tell the truth—filled with attempts to reorganize the current composition of the legal system, society

[52]Be it due to a favourable social context they come from or to a particularly open or experiment-oriented personality.

and its economic system, are manifold. In an attempt to structure them, we identified the following possible—and in some cases contradictory[53]—explanations:

(a) a way to discourage (new) arrivals;
(b) a lack of organization of the overall system in charge of the reception of asylum applications;
(c) the assignment of the management of migratory flows to the police;
(d) the governance, management and use of the migrant workforce under the *dispositif* of control and differentiated inclusion of subjects.

4.1 The Discouragement of (New) Arrivals

It is undeniable that EU migration policies have often the aim to discourage arrivals, repressing migration flows and hindering the free movement of people. The underlying political will that inspires these policies would be a clear separation—within migratory flows—of people that actually hold the right to seek asylum from the so-called "economic" migrants. The recent Minniti-Orlando, the D.L. 13 of 2017 decree, establishes urgent provisions for the acceleration of proceedings concerning international protection, as well as the so-called fight against illegal immigration. For our purposes, the most interesting element introduced by this decree is the abolition of the second degree of judgment in appeals for procedures regarding the right to appeal in case of a rejection of international protection, followed by a simplification of procedures in evaluations of an asylum request. Or, as Guido Savio writes: "ritual chamber, contradictory, purely paper credit, abolition of the second degree: none of these provisions is unconstitutional, but their combined effect allows us to recognize a violation of the principle of equality and that of defence".[54] This legislative example is only one of many that in the wider picture show a political need to accelerate, compress, and regulate in an increasingly restrictive fashion a fundamental right such as asylum seeking. Indeed, to achieve this, the political apparatus and its administrative-technocratic twin invent plenty of (new) regulations, procedures, walls, laws, conventions: and here we find, at the executive level, the procedural tangle of an effective deployment of asylum. In these political lines to discourage migration we should not underestimate the role of extreme bureaucratic precarisation, discussed in this chapter, to which asylum seekers are subject.

[53] We assume that contradictions and paradoxes are the basis of a neoliberal society.

[54] Savio (ASGI) (2017).

4.2 Lack of Organisation of the Overall System in Charge of the Reception of Asylum Applications

This is a more contingent factor, influenced by the increased migratory flow of asylum seekers who came to Trieste (and Italy) in recent years on the wave of an overall increased migratory flow towards the EU. Faced with the growth of asylum applications, the state apparatus that is in charge has not been able to "keep up" with new conditions. Only in the recent, already mentioned, Minniti-Orlando decree there is a decision of "the Home Ministry to hire 250 highly qualified personnel to be assigned to the local commissions for the recognition of international protection".[55] In the case of the Immigration Office of the Police Headquarters in Trieste, however, we have not seen so far an attempt to adapt—at least with more personnel—to the increased burden of paperwork to be dealt with and filled in. Based on our experience, we can say that waiting times for issuing documents continue to lengthen, despite the attempts of the office in charge to reorganize the notification and invitation system of asylum seekers.[56]

4.3 The Assignment of the Management of Migratory Flows to the Police

In our opinion, the fact that the entire management of migratory flows is assigned to the police is in itself a factor of criminalization. The police are in charge of issuing permits and of controlling and expelling migrants. In particular, with the amendments to the Consolidated Act on Immigration[57] by the so-called Bossi-Fini law of 30 July 2002, n. 189, a Central Directorate of Immigration and a special border police unit was established under the Department for Public Security that was given the responsibility to contrast "illegal" immigration, to manage all activities related to the granting of permits to foreign citizens, and to guard and control the land, sea and airport borders of Italy. Migration is therefore placed in the field of maintenance of public order,

[55] Ministero dell'Interno (April 2017).

[56] In the past few years, the Immigration Office of the Police Headquarters in Trieste has tried (has been trying?) to reorganize the summoning of asylum seekers and the subsequent procedure in different ways and by different means, most recently by preparing lists of summoned people for issuing the electronic permit of stay that are sent to the NGOs welcoming those people. The NGOs are then in charge of communicating the date of the appointment. Before this change, the Immigration Office contacted the person directly or the person waiting for this document had to show up several times at the Office, most often to be informed that the document was not yet ready.

[57] The so-called Turco-Napolitano law, March 6, 1998, No. 40, enforced before the current one, aimed, unlike the old Martelli law and several supplementary provisions of a fragmented regulatory framework, to regulate migration as a whole, trying to overcome an emergency logic. It institutionalized—among other things—the CPTs, Centres for temporary stay, dedicated to all foreigners who are "subject to deportation and/or rejection measures, including coercive escort to the border", when these measures were not immediately executable.

favouring a dangerous equation between immigration and crime. In fact, there is a huge daily flood to police headquarters, and in particular to the Immigration Office, which generates the vicious circles of "sub-criminality" mentioned above.[58] The issuing of permit of stay is therefore based on an emergency logic—always mediated by police control—that creates intermediate and permanent levels of citizenship and legality. Even though the existing legislation reiterates the need for adequate training of police personnel working in offices dealing with applications for international protection (as provided for by Decree 142/2015), there is no doubt that the quality of the intervention and the relationship with the asylum seeker is of "securitarian" nature, i.e. linked to the specific role of public security forces. In our opinion, this reasoning remains valid even if one considers the civilian staff employed at the Immigration Office (e.g. interpreters), as they are in any case involved in a "police *dispositif*" and are therefore bound to its specific function, dynamics, power-relations and rules.

4.4 The Governance, Management, and Use of the Migrant Workforce Under the Dispositif of Control and Differentiated Inclusion of Subjects

To explain this point we could cite several official documents of various national and international institutions. Or, as Mezzadra suggests, "[i]t is enough to read the Communication of 4 May 2011 of the European Commission, which points out the issue of migration control and the 'external borders' of the Union, to verify how it stresses—despite the double challenge of the uprisings in Maghreb and Mashriq and the global economic crisis—the need to support the fight against 'irregular' immigration with selective recruitment programmes for a large number of migrants, considered crucial from both the demographic point of view and the general lack of skilled workers in strategic sectors of the European labour markets. *Targeted migration* and *well managed migration* are the terms used by the European Commission (COM (2011) 248 final, pp. 4 and 12 s.), but also by organisations such as the 'International Organization of Migration' (see Andrijasevic and Walters 2010) and national ministries (Mezzadra 2017). In support to this, we could add the reflections of the report "Work immigration in Italy: evolution and perspectives", published in 2011 by the Ministry of Labour and Social Policy. Where we read that the estimated need for new foreign labour for the years to come, assuming that this situation will be "intermediate" as far as it regards labour supply, unemployment rates and the growth in demand: "in this case the total need of foreign labour for 2015 should amount to 510,000 units, which in 2020 would rise to 1,817,000 jobs (or 182,000 average annual entries)" (Report, 2011, 20). It means an annual entry of new foreign workforce of about 180,000 units, which would rise to 264,000 in case of a rough scenario regarding economic indicators. Considering the bottlenecks foreseen by Italian laws

[58] E.g. people subject to check-ups of their expired documents.

on the entry of economic migrants (in practice virtually impossible, as confirmed by the Bossi-Fini law), access to the asylum system becomes the only legal entry tool in Italy.[59]

In general, again with Mezzadra, it can be noted that "the development of historiographic research on labour mobility in capitalism has confirmed and deepened the thesis promoted by Moulier Boutang in that book (*De l'esclavage au salariat. Économie historique du salariat bridé Nda*): that capitalism is characterized by a structural conflict between the set of subjective practices expressed in the mobility of work, certainly to be understood also as a precise answers to the continuous overwhelming of the 'traditional' social structures determined by capitalist development, and the attempt to exercise a 'despotic' control by the capital, through the fundamental mediation of the State".[60] The management and use of the migrant force within the capitalist production system—in which we are staying—remains, therefore, the background of a reflection on migrations. In this chapter, we advance the hypothesis that the intermittency and precariousness of the asylum application procedure, creating de facto voids and discontinuity in the same process (the "criminalisation of legality"), place the migrant in a condition of blackmail that favours the conditions of greater exploitation as a workforce. According to this hypothesis, it can therefore be said that "over the past three decades we have witnessed the growth on a global scale of a mobile and 'irregular' workforce, often with the tacit approval of governments, in order to stimulate accumulation of transnational capital at all levels. This has produced a widespread condition in which, as Anne McNevin writes, 'irregular migrants' are incorporated into the political community as economic actors, while they are denied the status of full members (*insiders*). They are immanent *outsiders*".[61]

Further on, some additional considerations can be added. The entire "intermittent" process in the regulation of the asylum machine, described in the previous paragraphs, could be placed in the interpretative frame of what is called "migration management". Mezzadra notes: "Multiplication of legal statuses, visa flexibility, differentiations of permits of stay: these are the 'recipes' that emerge from the debate on what is now usually referred to as *migration management*, in Europe as well as globally."[62] The model we have tried to describe in the previous pages, therefore, fully corresponds to the paradigm of "differential inclusion" (according to the Mezzadra-Neilson hypothesis)[63] that characterises the *migration management* regimes, and therefore the entry, selection and administration of migrant labour force.

---

[59]This goes even in cases people enter Italy with student visas or by working visa: when expired, to avoid deportation usually people make an asylum request.

[60]Mezzadra (2017).

[61]Mezzadra (2017).

[62]Ibid.

[63]"The perspective of the multiplication of labour emphasizes not the proliferation of meaning along an equivalential chain but the proliferation of borders that cut across and exceed existing political spaces. Corollary to this is the system of differential inclusion, which far from constituting the political through exclusion involves a selective process of inclusion that suggests that any totalization of the political is contingent and subject to processes of contestation" (Mezzadra and Neilson 2008).

5 Abolishment of Differences: Sketches for Further Analysis and Work

In the process of criminalisation of legality it is essential to realise that we talk about a total situation—in relation to a total institution—that, as a consequence abolishes almost every difference in statuses or identities as defined by law or society. Inside this larger *dispositif* the asylum machine so composed, in this particular historical moment, intrinsically creates, as a potentiality and as a reality, a never-ending *subjectivation* process "to re-become illegal". We argue that this process is due to a specific political will (or non-will, if you prefer) simply because such an incomplete subject is more likely to be exploited inside the neoliberal economic system. As opposed to the mainstream differentiation between economic migrants ("that should stay home") and refugees (temporary welcome only if they are "real" refugees), where the former takes the place of the latter ("they are not real refugees, they are here to find a job"),[64] we could reverse this common belief by saying that it is by entering the asylum machine that a refugee becomes "an economic—underpaid—subject-migrant". Also, the binomial of legality-illegality falls off by the process of criminalization of legality: in this period, the refugees are somehow hanging in a "beyond the law" situation or, more precisely, this process creates an exclusion produced by administrative-technocratic apparatuses as *biopolitical* ideology inside this *dispositif*, creating intermittent precariousness or sub-subjectivities through different time strategies.

For example, a person might be a refugee accommodated in a private apartment under the scattered reception project, but if his electronic permit of stay presents an anomaly (a typo, a wrong fiscal code) this person will lose almost all the guarantees and accesses to local services, including his job, health-care insurance, right to travel and, in extreme cases, even the right to accommodation. He would suffer this situation even being a non-citizen settled in the country from a long time,[65] or also as a citizen in a specific precarious situation.[66] This makes the process of criminalisation of legality *transversal*. Even though this temporary but complete suspension of differences has devastating impacts on the life of de-privileged subjects, it also "abolishes differences". It would be interesting to use this as a common platform to create collective spaces of social-imagination going beyond "identity politics". The asylum machine as we intend it, according to Deleuze and Guattari, is a place of potentialities and thus it contains itself the seeds for changes. Inside the machine, there are already bases—maybe only on a molecular level—for its radical change or at least to undertake different trajectories. Keeping this in mind, we can move further on and explore different potentialities of "what to do next" and more important, how

[64] For a little bit different perspective of the debate refugee vs. economic migrant and its implications on a demographic-economic level, see Balibar (2015).

[65] With a receipt of the renewal procedure of his permit of stay.

[66] With an orthographic error resulting in Residence Register Service.

to build conceptual bridges between specific situations[67] and real solidarity networks in order to buck the system of un-will politics and, at the same time, overcome what is known as "the war between poor".[68]

Getting back to the asylum machine: if scattered or decentralised reception system presents an opportunity for an emancipatory process—and we genuinely believe that—we should ask ourselves how to promote such positive action. It is quite evident that even though NGOs in Trieste are doing an excellent job, due to large numbers and specific relations or balances between different local actors built through time, they are also involuntarily keeping the asylum seekers out of most decisional or procedural processes by "nursing" them. This is an obstacle to promote an emancipatory process. On another level, the NGOs are submitted to national laws and controls. These laws define movements of asylum seekers in the country limiting their decisional power over their lives. This reproduces the alienation process or de-involvement of asylum seekers on larger scale issues. It does not mean that the mentioned organisations, although they have to be the carrier of these laws, are not promoting inclusion. It means instead that the problem is rooted in a much more complex (European) *dispositif*. A more consistent approach in order to set ground to different molecular compositions would be open contradictions and ruptures inside the asylum machine instead of trying to avoid them. Easier said than done!

In other words, we could say that if an immigrant starts his journey as a subject (with his or her right to escape),[69] once he gets included in the asylum machine, he becomes an object[70] trapped in the grip of time. Keeping this in mind, we should concentrate our forces and resources to imagine how to regain potentially emancipatory subjectivities and set our further analysis on spaces or folds where at least temporary subjectivities of this kind arise. It is likely that the production of emancipatory subjectivity is possible only in direct conflict with the entire *dispositif* by creating alternative spaces or *heterotopias*,[71] both outside and inside the asylum machine where different *agents*[72] could meet. However, it is hard to expect that people will join such a process that would put them in an even more precarious position. Any conflict—even the most insignificant or small one—inside the *dispositif* produces extreme, even violent reactions from the state apparatuses who consider dissent an illegal act. Therefore, it is paramount to explore and invent subjectivity processes that always consider the extreme precarity of asylum seekers.

---

[67] Such as different legal statuses or different social categories (e.g. asylum seeker, refugee, economic migrant, homeless, holder of a handicap, Roma, Hazara, precarious worker, student, researcher, etc.).

[68] In Italian language "la guerra tra i poveri" describing the paradox situation when de-privileged citizens rage against migrants.

[69] See Mezzadra (2004).

[70] This is a simplification because the level of *objectivation* is just a part of the entire process that creates "intermittent" or easily exploited subjectivities inside the politics of differential inclusions.

[71] For details on this concept see: Foucault (1967).

[72] As intended by Bourdieu (1977).

References

Andrijasevic R, Walters W (2010) The international organization for migration and the international government of borders. In: Environment and Planning D: Society and Space, XXVIII, pp 977–999

Balibar E (2015) Europe and the refugees: a demographic enlargement. openDemocracy, 24 Sept 2015. https://www.opendemocracy.net/can-europe-make-it/etienne-balibar/europe-and-refugees-demographic-enlargement

Bourdieu P (1977) Outline of a theory of practice. Cambridge University Press, Cambridge

Bove C (2015) Accoglienza ed esclusione: il sistema di accoglienza italiano. V.A. Il diritto d'asilo tra accoglienza ed esclusione (Edizioni dell'asino), pp 171–192

Brambilla G (2015) Il percorso dei richiedenti protezione internazionale tra norme e prassi. Un'analisi sulla situazione esistente in Francia e in Svezia e uno sguardo al sistema italiano. V.A. Il diritto d'asilo tra accoglienza ed esclusione (Edizioni dell'asino), pp 94–170

Brambilla M (2015) Il sistema comune europeo di asilo e la normativa italiana in materia di protezione internazionale. V.A. Il diritto d'asilo tra accoglienza ed esclusione (Edizioni dell'asino), pp 57–93

Decreto legislativo (IT) n. 142 del 18 agosto 2015. http://www.meltingpot.org/Decreto-legislativo-n-142-del-18-agosto-2015.html#.WvcadExuLIU

Deleuze G, Guattari F (2004) A thousand plateaus: capitalism and schizophrenia. Continuum, London

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=EN

Foucault M (1967) Of other spaces. In: Dehaene M, De Cauter L (eds) Heterotopia and the city: public space in a Postcivil Society. Routledge, Canada

Foucault M (1975) Discipline and punish: the birth of the prison (trans: Sheridan A, 1995)

Foucault M (1980) The confession of the flesh (1977) interview. In: Gordon C (ed) Power/knowledge selected interviews and other writings, pp 194–228

ICS and Caritas (2016) L'accoglienza e la tutela dei richiedenti asilo e titolari di protezione internazionale o umanitaria a Trieste

Legge (IT) n. 46 del 13 aprile 2017. http://www.gazzettaufficiale.it/eli/id/2017/04/18/17G00059/sg

Lipovec Čebron U, Gregorc T (2016) Asylum seekers—fellow citizens: decentralized models of the reception and accommodation of asylum seekers in Trieste. Časopis za Kritiko znanosti 44(264):194–202

Mezzadra S (2004) The right to escape. Ephemera 4(3):267–275

Mezzadra S (2017) Autonomia delle migrazioni. Lineamenti di un approccio teorico. Euronomade. http://www.euronomade.info/?p=9803

Mezzadra S, Neilson B (2008) Border as method, or, the multiplication of labor. http://eipcp.net/transversal/0608/mezzadraneilson/en

Ministero dell'Interno, Aprile 2017: È legge il decreto Minniti sul contrasto all'immigrazione illegal. http://www.interno.gov.it/it/notizie/e-legge-decreto-minniti-sul-contrasto-allimmigrazione-illegale

Rapporto "L'immigrazione per lavoro in Italia: evoluzione e prospettive" pubblicato nel 2011 dal Ministero del lavoro e delle politiche sociali

Regulation (EU) 604/2013 (sometimes the "Dublin III Regulation"). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604

Savio G (2017) La legge 13 aprile 2017 n. 46 recante disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale. Prime riflessioni interpretative. https://www.asgi.it/wp-content/uploads/2017/07/Scheda-pratica-legge-Minniti-DEF_2.pdf

Migrant Objectification in Television News Discourse in the Context of Criminalisation: An Example Concerning Slovenian Public Television Broadcast News

Rok Smrdelj and Jože Vogrinc

Abstract The chapter discusses how the evening news bulletin on Slovenian public television *Dnevnik* reports about the attempts of migrants to reach Western Europe across the Balkan borders. Based on our analysis of the split-screen television technique utilisation and case studies of two television news bulletins, we argue that migrant objectification, as an effect of television reporting, is the basis for the normalisation of migrant criminalisation. We primarily address reporting where migrants are merely passive objects of control and care, mute objects when spoken of by the media, politicians, police and care providers, and rarely allowed to actively speak on their own behalf and voice their concerns. The combined elements of migrants rarely given voice and so a chance to represent themselves instead of being represented by external instances, and, in some cases, even discursively constructed as an invisible danger, threatening to invade Slovenian (and by extension EU) territory by illegally crossing the Slovenian border, normalises their criminalisation. Additionally, not allowing migrants an autonomous, self-representing voice enables a variety of other discourses, primarily humanitarian discourse and discourse related to securitisation, to be applied to them as exclusively externally defined, mute, and thus objectified topic of discourse.

Jože Vogrinc researched Slovenian Public Television reporting between the summer 2015 and spring 2016 as part of "Research of Cultural Formations" programme conducted at ISH-AMEU in Ljubljana. On the other hand, Rok Smrdelj works on the aforementioned research as a junior researcher in the research programme "Problems of Autonomy and Identities at the Time of Globalisation" (P6-0194) and a scholarship holder of the University Foundation of eng. Milan Lenarčič.

R. Smrdelj · J. Vogrinc (✉)
Department of Sociology, Faculty of Arts, University of Ljubljana, Ljubljana, Slovenia
e-mail: joze.vogrinc@guest.arnes.si

R. Smrdelj
e-mail: rok.smrdelj@gmail.com

N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization*,
Ius Gentium: Comparative Perspectives on Law and Justice 81,
https://doi.org/10.1007/978-3-030-43732-9_14

1 Introduction

The chapter illustrates how seemingly neutral television reporting within Slovenia can have a long-term effect on the public's perception of migrants—the main cultural consequence of such reporting being migrant objectification. We argue that this kind of reporting enables the acceptance of treating migrants as passive objects on to whom it is possible to legitimately apply policy measures such as securitisation[1] and the criminalisation[2] of individuals or groups when they face "the repressive apparatus of the state".[3] Even though securitisation and criminalisation are related, there are conceptual and practical differences between both. Securitisation is justified politically and refers to an "external enemy". It therefore allows for the introduction of repressive state apparatus for migrant control. On the other hand, criminalisation, as applied to migrants, denies them the status of legitimate political agents. Criminalisation classifies them as private individuals who have violated the legal order of states whose repressive apparatus have them "in their claws".

Our basic theoretical point—with crucial political consequences—is that it is not enough to seek media "contribution" to the current trend of securitisation and criminalisation of public discourse on migrants at the level of media *content*, but it is even more urgent to understand the effects of *formal procedures of reporting*, i.e. the use of audio-visual as well as verbal techniques of TV narration and representation on viewers' perception and understanding of structural relations among instances implied in reporting (i.e. anchor, field reporter, and other 'TV representatives' at the event; his/her interviewees as witnesses of the reported event and/or individuals visually recorded as the topic of reporting but not always given a status of active participants with their own voices). However, this specific level of analysis of communicative, social relationships specific to televisual discourse was introduced by Vogrinc in his book *Television Viewer*.[4]

The analysis of effects of such formal procedures goes further than the previous analyses of media treatment of refugees, such as the adaptation of the reporting to the agenda of the current government[5] and the adoption of xenophobic discourse or the discourse concerning securitisation in media.

Our analysis reveals that the television reporting, which is the subject of this research, positions migrants merely as silent objects controlled and passively acted upon by the media, politicians, the police and care providers. Migrants are rarely given a chance to speak for themselves, and in extreme cases, they can be spoken about literally in their (visual) absence. To sum up, our analysis reveals the objectification of migrants within public television media and argues that such objectification enables and normalises migrant criminalisation.

---

[1] E.g. Vezovnik (2017a) and Malešič (2017).

[2] E.g. Palidda (2008, pp. 19–26).

[3] Althusser (2014).

[4] Vogrinc (1995). For instance, this approach was also applied to the analysis of *TV Slovenija* reporting on war in Bosnia (Vogrinc 1996).

[5] Pajnik (2016) and Luthar (2017).

The chapter is composed of five main sections. The first section clarifies why Slovenian public television is taken into consideration. The second section treats the theoretical background for understanding the migrant objectification resulting from television reporting and briefly reviews the extant literature regarding the media's coverage of the refugee crisis. The third section focuses on the chronology of Slovenian public television reporting about the refugee crisis. The fourth section analyses the effects of using television split-screen reporting technique when reporting on migrants (split-screen is a commonly used technique used by daily TV news on national broadcaster *Dnevnik* that results in negative positioning of migrants as mute objects). Lastly, the fifth section concerns two selected daily news bulletins broadcasts by TV Slovenia at *Dnevnik*.

It must be emphasised that this chapter's analysis in sections four and five reveals two types of migrant objectification. Firstly, when migrants were arriving in their most substantial numbers (according to Slovenian government data, the numbers peaked in October and November 2015), the television split-screen reporting techniques were mostly used for reporting on the refugee crisis. This type of reporting silences migrants and turns them into mute masses. However, migrants were seen in this period, but they were not heard. Secondly, when the number of migrants who were crossing the border decreased (according to Slovenian government data, the decline began in January 2016), the reporting concerning migrants changed: they have ceased to be seen or heard, but they are still spoken about, even if only *in absentia*.

2 Why We Chose Slovenian Public Television

Why select Slovenia as an example? Why can a TV discourse of a minor country (and even its less viewed public TV instead of its commercial competition) signify a possibly prevalent trend in media treatment of refugees in the EU?

The year 2015 was pivotal for Slovenia and Central-Eastern Europe in terms of international migration, and the media played a significant role in both creating the so-called "refugee crisis"[6] and perpetuating it even today. The media has been the primary source of information regarding the refugee crisis' development. Consequently, it has a role in co-creating the attitude of the public towards migrants.[7]

We chose to focus on how this crisis was and is reported by (Slovenian) public television broadcasters rather than (Slovenian) commercial television, because the former addresses its viewers as citizens not only of Slovenia but also of the European Union, while the latter addresses its viewers as consumers. When public television

[6]The term "refugee crisis" is put between quotation marks, in order to be distanced from their ideological assumptions. The word "crisis" namely means condition, which causes a similar concern as a disease and therefore requires specific action.

[7]This chapter does not conceptually differentiate between the term "refugee", "migrant" and "asylum seeker", pursuant to such distinction being chauvinistic and impractical; consequently, the term "migrant" is used as it refers to all who cross national borders.

networks report about a certain social group, they should do so in a way that enables viewers to independently evaluate the state's attitude towards such groups.[8]

Therefore, it is necessary to focus on the reporting of public television networks in the countries of passage. One of these countries is Slovenia, which, after the closing of the Hungarian borders on 17 October 2015, became the only country of passage for the migrants who were trying to reach Western Europe from Balkans. This so-called Balkan route starts in the Middle East and continues through Greece, Macedonia, Serbia, Hungary, and through Croatia to Slovenia since the end of summer 2015 and represents a new pattern within modern migration trends. During summer and autumn 2018, this route was modified so that migrants tried to reach Slovenia from Bosnia across the narrowest stretch of Croatian territory clandestinely, across much more difficult terrain than before.

Our decision to focus on Slovenia was further supported by the positioning of the Slovenian government and the national media vis-à-vis this crisis. During the refugee crisis, there was a constant concern whether the Slovenian state as a guardian of the Schengen border, was acting pro-European enough. It must be emphasised that the predisposition towards "Europe" rather than the "Balkans" has been part of the ideological heritage of all Slovenian governing parties since independence and a characteristic of Slovenian media reporting.[9] Furthermore, Slovenia did not have a political strategy in place beforehand for dealing with the migrants concerned. Slovenia was, as the rest of European Union, utterly unprepared for their arrival.

3 Migrant Objectification and Literature Review

In the case of migrant objectification resulting from television reporting, migrants are not the addressee of TV reporting as communication process but its topic, while the addressees of TV reporting are primarily the EU citizens as television viewers. Migrants are objectified indirectly, by not being included as autonomous agents in communication about them.

To understand objectification of migrants as a consequence of formal procedures of TV reporting, we have to return to the epistemological breakthrough in cultural and media studies in the 1980s with the conceptualisation of television as signifying practices. Its main achievement was the inclusion of various distinct levels of audio-visual production of meaning (e.g. image, sound, inscriptions, graphics, etc.) as elements combining into a specific television discourse. The understanding of television news and information programmes in general as a combination of the same codes of meaning used across all genres of television programming was, among others, mostly systematised by John Fiske.[10] This step enabled the interpretation of TV

[8] Hartley (2002, pp. 118–120).

[9] As also found by Vogrinc (1996, pp. 11–18), on analysing media reporting on the Bosnian War.

[10] Fiske (1987).

reporting as achieving cultural effects comparable to other TV genres while different from effects achieved by reporting the same events via print media, for instance.

From this point of view, reporting live from an event during its occurrence differs significantly from the description of the same event in a merely verbal report (regardless of whether it is printed in a newspaper or it appears on a PC, tablet, or smartphone screen). In a news bulletin like *Dnevnik*, a team of actants[11] regularly appears, each with its particular role in a regular way of transmitting the event to the TV viewers as a set of meaningful actions from viewers' point. The role of the TV presenter or anchor is comparable to TV hosts of talk shows and other types of programming in that it holds the TV news discourse together, addresses the audience directly in a visual mode of comfortable closeness, and gives and takes the opportunity to address the viewers to other actants, especially field reporters or his/her guests in the studio. The host's role is crucial in the hierarchy of speakers who can appear in a news item—this hierarchy specifically includes reporter's interviewees in their distinct roles of either participants in the event, its witnesses, or its expert external commentators—as the primary tool to ensure the institutional control of the television channel over news values and its purpose.[12] At the same time, however, the other actants/speakers have other roles determining the overall effects of reporting on television public: the field reporter represents its TV channel and its viewers as his/her addressees against the event itself, while in regard to the public s/he acts as the direct witness to the event in the very moment of the viewers viewing the event "live"; the participants of the event as interviewed by the reporter, on the other hand, represent the event itself directly and thus give the event the essential dimension of its human meaning—they *are* the event in an essential sense, and they give the event its voice in their own words and through their audio-visual appearance together.

While Connell[13] did expose the role of reporter as witness early on, Ellis[14] emphasised the contradictory consequence of regular TV news as addressing the TV public as citizens: as viewers they are constantly being persuaded that via TV news they are present at the site of human suffering while the sequence of non-related items in everyday stream of news frustrates them, since they cannot meaningfully intervene in events in accordance with their consciousness as responsible citizens.

The main consequence of the usual procedures of live field reporting on television is then, obviously, the *involvement* of the viewing public with reported people and their problems.[15] The producers of televisual news must take specific measures to counteract involvement, while on the other hand, changes in formal procedures—conscious or not—produce changes in the level or direction of viewers' responses to

[11] The term "actants" is used here to denote participants inside the semiotic structure of TV discourse (news presenter, field reporter, interviewees etc.), and should be distinguished from the term "agents", used above to denote active participants in social communication versus social actors reduced in social communication to mere topic of discourse of others.

[12] Fiske (1987, pp. 281–308). Critique in Vogrinc (1996, pp. 17–18).

[13] Connell (1980).

[14] Ellis (1982, pp. 164, 170 etc.).

[15] Vogrinc (1995, pp. 152–158); Vogrinc (1996, p. 17).

reporting. For a news channel to not have a reporter in the field and rely exclusively on compiling reports of other information sources for their news output can have an effect of *distancing* the public from the reported events in question.[16]

It should also be added that formal procedures enabling viewers' involvement are not adequately understood as TV crew investment in emotional effects on the audience versus objective, neutral, equi-distanced reporting supposedly enabling public a rational assessment.[17] How can the public rationally intervene in a situation without its human involvement with the people suffering in it? On the other hand, is the fact that a frustrated public reacts cynically to constant suffering of others as 'old news' not in effect a rational, emotional response to years of supposedly objective and rational news? Here we argue precisely that the specific way of reporting "the refugee crisis" and its aftermath in *Dnevnik* has had the effect of objectifying migrants into a silent, passive mass.

However, the year 2015 is pivotal not only with regard to international migration but also concerning the production of research on the media's coverage of the refugee crisis, which increased significantly. However, based on the media which is taken into consideration, some researches analysing the media's coverage of the refugee crisis adopt a multimedia focus[18]; some focus their analysis on selected newspapers[19]; while others related to analysis of television reporting on the refugee crisis, can be compared with regard to our fundamental assumption that both visual and auditive level are encompassed in television discourse. For instance, Hellman and Lerkkanen study a 2-hour-long live television debate by the Finnish public service broadcasting company YLE, where the question of dramaturgy of the show is the main topic. Both authors follow the assumption that television discourse takes place on the visual and on the auditory level.[20] On the other hand, two pieces of research, one by Luthar, who researches the representation of the refugee crisis in the *Odmevi* show, broadcast every evening on Slovenian public television,[21] and the other by Vezovnik who focuses on critical analysis of the discourse related to securitisation on Slovenian public television during the refugee crisis,[22] are mainly based on the transcription of spoken language and do not emphasise the visual dimension.

Furthermore, researches focused on the media depiction of the refugee crisis have largely ignored the question of absence of migrant voice within these depictions. Only two of the aforementioned studies explicitly recognise the absence of migrant voices from Europe's media. The first one is The Council of Europe's report *Media Coverage*

[16] Vogrinc (1996).

[17] As seems to be a paradigmatic response to reporting on war in Bosnia by Preston (1996a, pp. 112–116).

[18] E.g. Bruno (2016), Holmes and Castañeda (2016), Szczepanik (2016), Malešič (2017).

[19] E.g. Fotopoulos and Kaimaklioti (2016), Greussing and Boomgaarden (2017), Chouliaraki and Stolic (2017), Georgiou and Zaborowski (2017), Vezovnik (2017b).

[20] Hellman and Lerkkanen (2017).

[21] Luthar (2017).

[22] Vezovnik (2017a).

of the Refugee Crisis: a Cross-European Perspective[23] which finds the following: "Refugees and migrants were given limited opportunities to speak directly of their experiences and suffering. Most often, they were spoken about and represented in images as silent actors and victims. There were some significant exceptions, but these were time and place specific."[24] Additionally, researchers Chouliaraki and Stolic (*Rethinking Media Responsibility in Relation to the Refugee Crisis: a visual typology of European News* 2017) have established a visual typology of the various ways in which the media represents refugees based on an analysis of European newspaper headline images from five countries (Greece, Hungary, Italy, Ireland, and the United Kingdom). The crucial feature of this typology is that migrants "have been consistently spoken about and spoken for but never spoke for themselves".[25] However, both these studies focus their analysis solely on printed media and not on depictions within daily public television news bulletins, as this chapter examines.

4 Chronology of Media Reporting on the Refugee Crisis

The following chronology is a result of a close tracking of *Dnevnik* daily television news bulletins by the authors of this chapter.[26] The main finding is that reporting of the refugee crisis by *Dnevnik* can be divided into two main periods, corresponding to the main changes in migration direction and intensity.

The first period takes us to the summer of 2015, when reporting on migration was very scarce. What reports there were mainly related to the saving of people from the overcrowded boats in the Mediterranean Sea between Libya and Italy and the collection of those unfortunate migrants who had drowned. In this period, humanitarian discourse dominated. Reporting during the first period is characterised by stemming from where migrants were found, for instance, at border crossings and refugee centres. Reporters included migrant individuals as interviewees in their reports, thus allowing migrants the opportunity to explain to viewers who they were and why they were migrating.

Migrants included within television reports of this first period were presented in the traditional way television uses when reporting about the participants in any event, regardless of who those participants are; they might be creators of an event, its victims and/or witnesses. Even though migrant interviewee names and countries of origin were displayed on the screen, they remained partly anonymous. In terms of humanitarian discourse, those in need are usually given the opportunity to speak, and this enables viewers to get involved and consequently possible to identify with those being reported on; this form of reporting is the basis of empathy towards the people

[23] Georgiou and Zaborowski (2017).

[24] Ibid., p. 3.

[25] Chouliaraki and Stolic (2017, p. 1174).

[26] The list of all broadcast television news reports about the refugee crisis and transcriptions from the summer 2015 is updated and complemented on a weekly basis and kept by the authors.

who are the subject of reporting. For instance, the critical reflection of scholars and journalists who reported on the war in Bosnia and Herzegovina in different countries[27] has long highlighted the procedures by which television distances its audience from the position of those affected: the absence of reporters from scenes; the compilation of agency audio-visual recordings and the text instead of representing their own report; the non-application of an audio-visual record to the event that is in that moment the subject of a verbal message; the fitting of speeches on concrete events with the picture, recorded earlier and elsewhere and with the general meaning of "war events".[28] However, we do not agree with the premature conclusion that reporting, which involves television viewers with the suffering of the people who are its topic, makes the impartial understanding of events difficult to understand.[29] Such a conclusion reflects the liberal ideal of objective, impartial reporting; it does not ask, what is the point in understanding those who are at risk of death.

However, a change in reporting on the refugee crisis at *Dnevnik* occurred on 17 September 2015, when the first larger group of migrants crossed the Croatian–Slovene border by train with the intention of reaching Germany. When migrants were still being intercepted by Frontex ships in the Mediterranean, the events were reported abroad as a humanitarian problem. In other words, these events were generally reported as a secondary problem of European foreign politics. On their way from Greece, through Macedonia and Serbia before reaching Hungary, migrants were being stopped by journalists and interviewed. At that point, the humanitarian discourse of the first period still dominated. After Slovenia became a country of passage, reporting changed dramatically. Migrants were no longer seen as a humanitarian problem but were now a security problem or a threat. Moreover, the reporting of Slovenian public television coincides with trends that were encountered widely across the European press, as for instance The Council of Europe's report *Media Coverage of the Refugee Crisis: a Cross-European Perspective* confirms in the following finding: "The sympathetic and empathetic response of a large proportion of the European press in the summer and especially early autumn of 2015 was gradually replaced by suspicion and, in some cases, hostility towards refugees and migrants."[30]

As already elaborated in the first section of this chapter, in the period typified by the domination of the security discourse, two kinds of television reporting are traced. Firstly, when migrants were arriving in their most substantial numbers in October and in November 2015, a split-screen technique reporting prevailed, and it represents them only on the visual level; they were rarely given a chance to speak for themselves. Secondly, the refugee crisis lost its intensity after January 2016 and reporting concerning migrants changed: the television news bulletin mostly does not present them neither on the visual level nor on the auditory level. In the next two chapters, split-screen technique utilisation and two cases from the period when migrant intensity was diminishing are taken into consideration.

---

[27] Gow et al. (1996).

[28] E.g. Vogrinc (1996, pp. 11–18), Preston (1996b, pp. 119–125), Bašić-Hrvatin (1996, pp. 158–165).

[29] E.g. Preston (1996a, p. 113).

[30] Georgiou and Zaborowski (2017, p. 3).

5 Split-Screen Migrant Reporting

The standard method of showing live field reporting television images during the news is to include establishing and concluding shots of reporters visibly standing where events occur. In this way, the editor of the news and, more directly, its anchor, cede the exclusive right to direct live address for the duration of reports to the field reporter. Thus, s/he presents and, at the same time, represents events as witness and enunciator, inside the news discourse vis-à-vis viewers. Field reporting is a mode of address in which, via field reporters, victims and witnesses are given voice, presence, and the possibility to "directly" address viewers; it is a privileged mode of communication in which television audience participation in an event is enabled, allowing for empathy with victims of natural and societal disasters, and identification with spatially distant social groups, causes, and movements.[31]

The usual mode for reporting about refugees since autumn 2015 differs considerably from the field reporting method described above. The screen is split vertically, and the left third is then split horizontally into upper and lower sections, one occupied by a close-up of the news presenter/anchor, the other by the reporter in the field. The right two-thirds are, for the duration of the dialogue, filled with documentary footage assumed to represent the report's topic. However, this mode is used in *Dnevnik* for live dialogue between the anchor and a field-reporter generally, not exclusively to cover refugees.

The most significant feature of this mode of reportage is the silencing of whoever is the news item's subject. Individuals are no longer given the opportunity by the field reporter to present themselves as either witness or victim, or to explain what is going on in their own words, much less to express their views on what is happening. Furthermore, in a typical field report, television images typically show live or recorded pictures of the events being reported along with images of those interviewed by reporters as persons articulating their experience and giving it its concrete, present human meaning. However, this is not the case for the split-screen reporting of a migrant on the *Dnevnik* daily television news bulletin.

The visual mode of reporting used to cover migration at *Dnevnik* is typical for a distancing compiled studio report of an event where voice-overs read an abstract of all the information gathered by various agencies during the day, while on the screen a compilation of snapshots is presented, not as an accurate visual complement of every sentence being spoken, but as samples of content somehow connected, but not necessarily conveying the exact content being described. Hectically edited highlights of old footage are customarily shown.

In such split-screen presentations of refugees, the meaning of what is shown in the larger sections of screen is thus invariably non-specific, general, bleak and repetitive, e.g. tired bodies and faces of unidentified, mute people in groups, very rarely individuals as targets of visual interest, usually moving, without viewers being able to focus on any identifiable cause of visual interest of television at any particular moment.

[31] See Vogrinc (1995).

The "reality" depicted in such a way is grim and it is impossible to grasp the numbingly repetitive illustrations of stereotypical "waves of migrants"[32] and "streams of refugees".[33] Migrants are never shown as autonomous subjects with something to tell us. On the contrary, this mode of presentation in a television discourse takes from migrants their speech and their individuality. In this mode, they are visually treated as a mass, physical matter—as a visual complement of conversation of others speaking about them.

6 Two Case Studies: "Illegal Border Crossing" and "Two Migrants Drowned in the Kolpa River[34]"

In this section, two cases from Slovenian public television's reporting that best evidence the absence of migrant on an auditive and visual level will be analysed.[35] Since we decided on a case study approach, it is impossible to make a detailed analysis of all reporting that have been made until now. Therefore, we have chosen two cases where Slovenian public television's reporting most clearly evidence how this particular way of reporting took form.[36]

The first case concerns a television news story entitled "Illegal Border Crossing" broadcasted by *Dnevnik* on 6 February 2018, between 22:16 and 24:26 min (see Table 1).

The summary of this report appears in the third place during the trailer at the beginning of *Dnevnik*, the host addressing viewers as follows: "In the villages near the Kolpa River, there isn't a day or night where migrants cannot be seen by villagers. The police have dealt with 120 illegal border crossings so far this year." A statement by a police officer follows: "The migrants are trying to cross the Kolpa River and, in some cases, they even swim across it. They have alienated boats from the Croatian

[32]E.g. TV programme *Dnevnik*, broadcast on 25 October 2015, TV programme *Dnevnik*, broadcast on 14 November 2015.

[33]E.g. TV programme *Dnevnik*, broadcast on 17 October 2015.

[34]The River Kolpa (Croatian: Kupa River) forms a natural border between northwest Croatia and southeast Slovenia.

[35]We use Laban's (2007) method of presenting transcriptions, as below, in a table with visual summaries in the first column and verbal expressions in the second. Furthermore, we cite her shot typology: the *establishing shots* are the widest and provide the broadest possible view of an event, nature, people, and so on; *long shots* usually show a person in their entirety; *medium shots* show people from the waist up; and, lastly, *close-ups* show people from the neck up, though such shots may include their shoulders (close-ups also imply details, e.g. footprints in the snow). It must be emphasised that the aforementioned shots are ideal types. Therefore, we cannot always precisely specify only one-shot type. However, they are being used to better imagine progression and continuity of television news.

[36]It must be pointed out that both of the following transcriptions of television news stories were not directly gained by the national Radio-Television of Slovenia. However, they were made by Rok Smrdelj. The original sources of the both evening news bulletin are available at links listed at the end of this chapter.

Table 1 Transcription of television report "*Illegal Border Crossing*", broadcast by *Dnevnik* on 6 February 2018, between 22:16 and 24:26 min

	Visualisation	Transcription of speech
Forecast/outlook	Medium shot of TV host; in the background, there is a photo of a woman with two children making her way through the razor wire.[a] A graphic with statistics also appears and is summarised by the host	The TV host I.K.: "The number of illegal border crossings in this area of our country has risen by a little less than 80% when compared to 2016. 1930 illegal crossings were dealt with by the police last year. Amongst these, there is an increasing number of Afghans, Turks and Kosovans. Last year, an increase in illegal border crossings at the Italian border was noted. There were 400 crossings on our western border[[b]] in 2016, and, last year, 631 people illegally entered Slovenia. This is the main reason for the increase in the number of illegal border crossings."
Reporting	Establishing shot of the Kolpa River followed by two close-ups: the first one shows a table with the inscription "BORDER CROSSING FOR ROAD TRAFFIC AT ŽUNIČI BORDER CROSSING"; the second shows the Kolpa River with three police officers in the background	Field reporter P.D.: "Today, by the Kolpa River in Bela Krajina[[c]] near the border with Croatia, at one of the smaller, fenced border crossings, the police reported."
Statement	Medium shot of police officer	Police officer A.Š.: "The migrants are trying to cross the Kolpa River and, in some cases, they even swim across it. They have alienated boats from the Croatian side of the border."
Reporting	Long shot of police officer giving a statement at a press conference; followed by a long shot of houses in the village of Žuniči	Field reporter P.D.: "It is no coincidence that a press conference was held in Žuniči. There is not a day when the villagers do not notice foreigners."
Statement	Medium shot of villager and the field reporter	Villager M.M.: "Look, they came through the forest, here, a few minutes after, the police came."

(continued)

Table 1 (continued)

	Visualisation	Transcription of speech
Reporting	Close up of footprints in the snow, followed by a close up of a board with the inscription "WARNING! NATIONAL BORDER!"	The field-reporter P.D.: "Algerians, Moroccans, Pakistanis. In this year already 120 people have crossed the border illegally."
Statement and reporting	Medium shot of villager and the field reporter	Villager M.M.: "Sunday, in the morning, they burned wood." Field reporter P.D. (with astonishment): "Were they burning wood?" Villager M.M.: "Yes, they were making a fire to keep warm, right?"
Reporting	Long shot of a villager and barking dog	Field reporter P.D.: "In the neighbouring village of Paunoviči, villagers say they are worried. The dogs are barking day and night. The houses are now securely locked."
Statement	Long shot of female villager	Female villager N.V.: "I think these are unfortunate people, and [it is unfortunate] that they have to travel on foot like this."
Reporting	Close-up of a fence	Field reporter P.D.: "How do the migrants get to Bela Krajina?"
Statement	Medium shot of police officer, a snowy landscape with footprints in the snow backgrounds him as he talks	Police officer A.Š.: "They have so-called smart phones and are using their GPS to find out where they are. And let's say, the starting point is Velika Kladuša[d], and these migrants mostly come by foot."
Reporting	Close up of the fence, followed by establishing shot of the Kolpa River	Field reporter P.D.: "They enter Slovenia where there is no fence. Will there, once again, be more razor wire on the Kolpa River?"
Statement	Medium shot of a police officer	Police officer A.Š.: "The security issue at the border demands this measure, and we must especially cover the shallows, dams and bridges."

(continued)

Table 1 (continued)

	Visualisation	Transcription of speech
Reporting	Close up of the River Kolpa	Field reporter P.D.: "When? The police say when weather conditions allow."

[a]Although the photo of a female migrant and two children appeared for a few seconds and could be regarded as a visual migrant representation, it is, however, a minor and solitary visual element that cannot be meant as representative for the programme in question. The focus is on prevailed audio and visual elements

[b]This is border between Slovenia and Italy

[c]Bela Krajina (English: White Carniola) is a region in south-eastern Slovenia on the border with Croatia. The area is surrounded by the Kolpa River in the south and east, which also forms part of the border between Slovenia and Croatia

[d]Velika Kladuša (English: Great Kladuša) is a town located in the far northwest of Bosnia and Herzegovina, near the border with Croatia

side of the border." During the police officer's statement, a few long shots are shown, one being an image of what appears to be animal footprints in the snow, and this is further analysed later in this chapter.

The second case concerns *Dnevnik*'s news story "Two migrants drowned in the River Kolpa" (see Table 2).

The summary of this report appears in the fifth place during the preview at the beginning of the show, the host addressing it as follows: "In Bela Krajina, two migrants have lost their lives while attempting to cross the border. While crossing the river, they both drowned".

Each person appearing as an interviewee, in this case, has a specific agent role. In the first case study, there are two roles: the police officer representing the state's repressive apparatus and the two villagers describing their experience with migrants; in other words, the police officer is a security agent, while the villagers seem like they are his clients, meaning the worried villagers are the fearful society the police officer is entrusted to protect. In the second case, only the reporter is present. Both case studies' common characteristic is that they do not include migrant voices, neither aurally nor visually. Migrants are not even shown; they are reported upon without being seen by the viewers. The attribution of traces in the snow to migrants turns even their audio-visual absence into a sign of their invisible discursive presence as a threat to "our" security.

In order to understand the effects of the type of reporting in which people speak about migrants while migrants are absent, we must first look at the specific way in which television reports on accidents. Besides those who professionally deal with these kinds of situations (such as paramedics, firefighters, experts, and local authorities), those traditionally given the opportunity to speak are event witnesses, even possibly the victims of accidents themselves.

The victim or witness statement is in its effect profoundly different to that elicited by authority statement. Authority statement defines and elaborates the nature of the problem, while witness and victim statement is seen as an active part of the event.

Table 2 Transcription of *Dnevnik*'s report "*Two Migrants Drowned in the Kolpa River*", broadcast on 10 April 2018, between 11:25 and 13:24 min

	Visualisation	Transcription of speech
Forecast/outlook	Medium shot of TV host. Some establishing shots of the Kolpa River follow. Two inscriptions appear on the television screen: "THE POLICE HAVE ALREADY STOPPED 200 MIGRANTS ON THE NEW MIGRANT PASSAGEWAY" and "MIGRANTS CROSS THE RIVER KOLPA WHERE THERE IS NO FENCE"	TV host E.B.Š.: "Two tragic incidents concerning the migrants have been reported from Bela Krajina. Two foreigners have drowned in the Kolpa River, one late afternoon yesterday, the other in the morning today, both while attempting to cross the border illegally. They were two young men; the identity of both is still unknown."
Reporting	First, split screen. On the right, medium shot of TV host; on the left, medium shot of field reporter standing by the River Kolpa. The second split screen follows. In the upper left corner, there is a medium shot of the field reporter; in the lower left corner, a medium shot of TV host; on the right, a long shot of the River Kolpa	TV host: "Hello, Petra Držaj, what have you found out?" TV field reporter P.D.: "I am reporting from the periphery of the village Žuniči. As you can see, the River Kolpa is not protected by a fence, and so the river has been crossed by many more migrants, the last group crossed it in the morning today. However, not all of them succeeded in their attempts to cross the border illegally. According to our information, one migrant drowned right here this morning. This is already the second such case in the last two days. A similar thing happened yesterday a few kilometres up the Kolpa River near the village Vukovci. Therefore, we have had two deaths in two days, the first two cases of drowning on the Slovenian side. Police statistics are deteriorating day by day. Namely, about 200 migrants have crossed the border here in Bela Krajina through this new passage going from Velika Kladuša towards Bela Krajina this year alone. Firstly, the police usually take care of migrants because they are cold and wet after swimming across the Kolpa; after that, migrants usually ask for asylum. The police say that they have called in reinforcements to control the border in the environs of these villages, but locals have told me, not only those from Žuniči, but also those from the villages of Preloka, Zilje, Čakovci, and Vukovci, that migrants are being seen daily. Previously, they only came at night or in the early morning hours, but now they have also been noticed in the middle of the day. The fact is that more favourable season of Summer is coming, when the Kolpa River is at its shallowest, so it can be expected that there will be more migrants." TV host: "Thank you."

Their statements can be emotionally moving and make viewer identification with their difficult situation easier. The visual absence of migrants in a situation where a reporter speaks about them as an invisible danger with villagers or police removes even their mute visual presence to which TV viewers had become accustomed during the previous regime of reporting.

During the second period of *Dnevnik*'s reporting on the refugee crisis, we argue that viewer identification with migrants was not fostered. In terms of our first television news bulletin, while presenting the state's repressive apparatus, *Dnevnik* also gives voice to two villagers who speak about the situation, the reporter is only focusing on their safety and the safety of their property. The villagers' statement is, at first, summarised by the field reporter with these words: "The villagers say that they are worried. Their dogs are barking day and night. Their houses are now securely locked." On the other hand, when the woman from the village is allowed to speak, she expresses her empathy with the migrants: "I think these are unfortunate people, and [it is unfortunate] that they have to travel by foot like this." Migrants are not even given a chance to illustrate a conversation about them, much less to be seen and to give voice to their own experiences, fears and hopes.

This type of reporting encourages viewers to identify with the villagers experiencing anxiety, not with the migrants who are, in the middle of winter, forced to swim over the Kolpa River. This kind of television news bulletin makes it possible for viewers to identify with those either afraid of the migrants seeing them as a threat, or the police officer as guardian of national safety.

In the first television news bulletin, migrant criminalisation discourse is normalised by means of reporting procedures focusing on the illegal border crossing. These procedures are evidenced in the bulletin's title of "Illegal Border Crossing"; the statistics provided and elaborated on by the host at the beginning of the bulletin; the reporter's questions of "Will razor wire be placed on the Kolpa again?" and "If yes, when?"; and villager interviews that mainly ask questions enhancing the normalisation of migrant criminalisation; for instance, when the field journalist is talking to a villager, it seems as if the villager were not upset by the migrants' arrival, but as soon as he mentions that the migrants burned some wood, implying that they wanted to keep themselves warm in the middle of winter, the field journalist is aghast and rhetorically asks again if they burnt wood. Her question, which merely repeats the villagers' own words, expresses astonishment, implying the action of people suffering in the cold in the middle of winter is deviant and outrageous. An interpretation enabling understanding and identification with the migrants' actions is not possible.

The schedule positioning of the first news bulletin is also significant. This piece of news was followed in the trailer by a story about livestock damage caused by wild animals, accompanied by a medium shot showing the bones of two farm animals. Later in the programme, it is preceded by a bulletin concerning military exercises in Vrhnika. As can be seen in the transcription, the critical visual effect are the animal-like footprints in the snow. The footprints facilitate the creation of a viewpoint where migrants are perceived as wild animals roaming the forest and causing damage. This damage is not only material but also "cultural". The visual signifiers contained in the

news bulletin enable the normalisation of discourse that legitimises the treatment of migrants as criminals.

The second news bulletin "Two Migrants Drowned in the River Kolpa" is placed in the programme's crime section and tells the story of the first two migrants drowned in the River Kolpa on the Slovenian side of the border. This tragedy was expected and a logical consequence of the measures (e.g. the placement of razor wire on the river Kolpa) discussed by the police officer in the first bulletin, broadcast a few months before this event. However, the two drowned migrants have been reduced to mere statistics. Despite being mentioned in the preview, they are only briefly mentioned in the report itself. Their deaths are not shown as a tragedy but as a failed attempt to act illegally, namely to cross the border. A part of the journalist's statement being: "But all of them did not succeed in their attempt to cross the border illegally". Besides, more than a half of her report is devoted to "unfavourable police statistics", meaning the growing number of illegal crossings of Slovenia's southern border. On the other hand, the state's political responsibility is not questioned during the bulletin.

In the second news bulletin, we see split-screen reporting, with the field reporter standing by the Kolpa River in the top-left corner, the studio-bound host in the bottom-left corner, and to the right, the Kolpa River that becomes the synonym for the refugee crisis in its second period of reporting.

The television reporting we analysed in this section is the diametric opposite of ethically responsible reporting. It not only legitimises repressive state apparatus measures, but it also completely fails to spread awareness of the horrific situation in which people are dying as they try to swim across a river in the middle of winter, across a river perceived by Slovenians as a summer holiday destination.

7 Final Thoughts: Enabling Migrants to Speak for Themselves

The media is a crucial dominant ideology reinforcer in contemporary capitalist societies and means of its reproduction.[37] As our findings imply, the media plays a vital role in the formation and perpetuation of Slovenian citizen attitude towards migrants. Furthermore, the majority of European citizens have never personally interacted with migrants, and the media is the only means by which many find out about individuals migrating across Europe.[38]

This is why the causes and consequences of migrant criminalisation must also be discussed on the level of the media's representation of the migrants, precisely, at the level of formal procedures of TV reporting or, in other words, at the level of *televisual discourse* as different in its cultural consequences from reporting "the same events" in print media, for instance. There is no such thing as neutral "media

[37] Hall et al. (1992).

[38] E.g. Kogovšek Šalamon and Bajt (2016, p. 9).

content" invariant across the range of old and new information and communication technologies (ICTs), across "old" and "new" media.

Our analysis is based on close tracking of *Dnevnik* and reveals two types of migrant objectification. Firstly, when migrants were arriving in their most substantial numbers in October and in November 2015, split-screen reporting prevailed, and they were represented only visually, rarely given a chance to speak. Secondly, the refugee crisis lost its intensity after January 2016 and reporting on migrants changed: now, television news bulletins mostly do not make them visible or let them speak at all.

Not allowing migrants the opportunity to speak enables a variety of discourses—for instance, the humanitarian discourse and the discourse concerning securitization—to speak in their name or refuse to let them speak at all—as if their having the opportunity to address the Slovenian TV public would itself represent a threat to national security. It is in this sense that they are treated as passive objects or objectified.

It has also been pointed out that discussing and reporting migration as humanitarian and security issues share a common characteristic: in both cases, migrants are unable to express themselves as political subjects demanding their rights. What is more, the fact that we do not hear migrants speak and, in some cases, do not even see them, while at the same time they are presented as deviants illegally crossing borders, normalises their criminalisation. Therefore, it is easier to legitimise criminal prosecution against them.

Moreover, this is why the above findings should be a topic of further research of other national public television broadcasts. This is also why this chapter can be understood not only as an addition to the existing research related to the media's co-creation of the refugee crisis, but also as an appeal to us and other preoccupied researchers and activists on this matter to demand changes in the way public televisions report on migrants and other social groups.

References

Althusser L (2014) On the reproduction of capitalism: ideology and ideological state apparatuses (trans: Goshgarian GM). Verso, London, New York

Bašić Hrvatin S (1996) Slovenia and Croatia. In: Gow J, Paterson R, Preston A (eds) Bosnia by television. British Film Institute, London, pp 158–165

Bruno M (2016) Media representations of immigrants in Italy: framing real and symbolic borders. Rev Interdiscip Da Mobilidade Humana (REMHU) 24(46):45–58

Chouliaraki L, Stolic T (2017) Rethinking media responsibility in the refugee 'crisis': a visual typology of European news. Media Cult Soc 39(8):1162–1177

Connell I (1980) Television news and the social contract. In: Hall S, Hobson D, Lowe A, Willis P (eds) Culture, media, language. Routledge, London, pp 139–156

Ellis J (1982) Visible fictions. Routledge, London

Fiske J (1987) Televison culture. Routledge, London

Fotopoulos S, Kaimaklioti M (2016) Media discourse on the refugee crisis: on what have the Greek, German and British press focused? Eur View 15(2):265–279

Georgiou M, Zaborowski R (2017) Media coverage of the "refugee crisis": a cross-European perspective. Council of Europe report DG1(2017)03
Gow J, Paterson R, Preston A (ed) (1996) Bosnia by Television. British Film Institute, London
Greussing E, Boomgaarden HG (2017) Shifting the refugee narrative? An automated frame analysis of Europe's 2015 refugee crisis. J Ethn Migr Stud 43(11):1749–1774
Hall S, Hobson D, Lowe A, Wills P (1992) Culture, media language. Routledge, London
Hartley J (2002) The infotainment debate. In: Creeber G (ed) The television genre book. British Film Institute, London, pp 118–120
Hellman M, Lerkkanen T (2017) Constructing oppositions, demarcating a we-ness: the dramaturgy of a live TV debate on the refugee crisis. Eur J Cult Stud 0(0):1–23
Holmes S, Castañeda H (2016) Representing the "European refugee crisis" in Germany and beyond: deservingness and difference, life and death. Am Ethnol 43(1):12–24
Kogovšek Šalamon N, Bajt V (2016) Introduction. In: Kogovšek Šalamon N, Bajt V (eds) Razor-wired: reflections on migration movements through Slovenia in 2015. Peace Institute, Ljubljana. http://www.mirovni-institut.si/wp-content/uploads/2016/03/Razor_wired_publikacija_web.pdf
Laban V (2007) Televizijsko novinarstvo: hibridizacija žanrov in stilov. Fakulteta za družbene vede, Ljubljana
Luthar B (2017) Begunci in odmevi: epistemologija konvencij. Two Homelands: migration studies 45:153–168
Malešič M (2017) The securitisation of migrations in Europe: the case of Slovenia. Teorija in praksa 54(6):947–968
Pajnik M (2016) Migration in the mirror of mediatized anti-politics. In: Kogovšek Šalamon N, Bajt V (eds) Razor-wired: reflections on migration movements through Slovenia in 2015. Peace Institute, Ljubljana. http://www.mirovni-institut.si/wp-content/uploads/2016/03/Razor_wired_publikacija_web.pdf
Palidda S (2008) Some considerations on the situation in the main European Countries. In: Palidda S (ed) Criminalisation and victimization of migrants in Europe. Universitá di Genova, Genova, pp 19–26
Preston A (1996a) Television news and the bosnian conflict: distance, proximity, impact. In: Gow J, Paterson R, Preston A (eds) Bosnia by television. British Film Institute, London, pp 112–116
Preston A (1996b) Introduction to part four. Comparing TV news coverage, 16–21 May 1994. In: Gow J, Paterson R, Preston A (eds) Bosnia by television. British Film Institute, London, pp 119–125
Slovenian government data [Vlada Republike Slovenije. *Migracije v številkah*]. http://www.vlada.si/fileadmin/dokumenti/si/projekti/2015/begunci/160202_migranti.pdf
Szczepanik M (2016) The 'Good' and 'Bad' Refugees? Imagined refugeehood(s) in the media coverage of the migration crisis. J Identity Migr Stud 10(2):23–33
Vezovnik A (2017a) Securitizing migration in Slovenia: a discourse analysis of the slovenian refugee situation. J Immigr Refug Stud 0(0):1–18
Vezovnik A (2017b) Otherness and victimhood in the tabloid press: the case of the refugee crisis in Slovenske novice. Two Homelands: migr Stud 45:121–135
Vogrinc J (1995) Televizijski gledalec [Television Viewer]. ŠKUC & Znanstveni inštitut Filozofske fakultete, Ljubljana
Vogrinc J (1996) Close Distance. Dilemmas in the presentation of the War in Bosnia on the daily news Bulletin of TV Slovenia. In: Gow J, Paterson R, Preston A (eds) Bosnia by television. British Film Institute, London, pp 11–18

Sources

TV programme *Dnevnik*, broadcast on 17 October, 2015. https://4d.rtvslo.si/arhiv/dnevnik/174365839

TV programme *Dnevnik*, broadcast on 25 October, 2015. https://4d.rtvslo.si/arhiv/dnevnik/174367224

TV programme *Dnevnik*, broadcast on 14 November 2015. https://4d.rtvslo.si/arhiv/dnevnik/174371344

TV programme *Dnevnik*, *Illegal Border Crossing* [*Nezakoniti prestop meje*], broadcast on 6 February 2018. Between 22:16 and 24:26 minutes. http://4d.rtvslo.si/arhiv/dnevnik/174518539

TV programme *Dnevnik*, *V reki Kolpi utonila dva migranta [Two Migrants Drowned in the River Kolpa]*, broadcast on 10 April 2018. Between 11:25 and 13:24 minutes. ttp://4d.rtvslo.si/arhiv/dnevnik/174531683