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Responsibility for Immigrants under International Law

1 Introduction

Responsibility for immigrants under international law is a vast topic. At the very outset, it should be signalled that the task assigned to the rapporteur is to present his considerations from a legal perspective. It is the rules of positive international law that will serve as the yardstick for this exercise. Obviously, it must be admitted that it is not easy to separate in a clear and unchallengeable manner the law from its underlying moral and political foundations. However, all of these additional criteria have been taken care of – or will be taken care of – by the other presentations within the framework of the present volume. Thus, the present rapporteur can without any hesitation engage in some kind of one-dimensional examination of the relevant issues.

2 The Concept of Responsibility

The term “responsibility” is not free from ambiguity, though. It can be taken in a strict legal sense as it appears in the concept of “State responsibility”, which is engaged when a State breaches an obligation under international law.¹ On the other hand, the UN General Assembly has also embraced a “softer” notion of “responsibility” when it created the concept of “responsibility to protect” in its resolution 60/1 of 16 September 2005² (paras. 138, 139). That resolution states that

[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Deliberately, when this text was drafted, its authors avoided the word “duty” in order to convey the idea that “responsibility” implies a certain political margin, lying at a short distance from a genuine legal obligation. This is largely a matter

¹ See the Articles on Responsibility of States for internationally wrongful acts, drawn up by the UN International Law Commission and taken note of by the UN General Assembly by resolution 56/83, 12 December 2001.

² 2005 World Summit Outcome.

of semantics. In any event, our intention is to remain within the province of law without transgressing its conceptual confines.

3 Immigrants Established in the Receiving State

A Introduction

It may seem boring to start immediately with distinctions and definitions. Yet such an attempt cannot be avoided inasmuch as the term “immigrants” comprises the most diverse groups of people. Immigrants may have been invited to their country of residence and have lived there for years and even decades. In such instances they enjoy all the rights granted to aliens, i.e. persons who do not have the nationality of their country of residence.³ Immigrants may arrive as individuals for personal motives, feeling attracted by the better living conditions beyond the borders of their home State or following a friend or spouse with whom they wish to establish a common household. In the fifties and sixties of the last century the Federal Republic of Germany concluded many times so-called “Recruitment Agreements” (*Anwerbeabkommen*) mainly with countries from the Mediterranean region. The first one of these was the agreement with Italy,⁴ the agreement with the greatest number of actual beneficiaries was with Turkey.⁵ At that time, half a century ago, Germany’s flourishing industry experienced a serious shortage of workers. The rationalization of the production processes had not yet reached today’s degree where in many instances a human worker can be substituted by a machine. Neither the German *Bundestag* nor the Federal Government reflected on the long-term consequences of the wave of immigrants thereby triggered. It was assumed that the “guest workers” would all return home after having spent a few years on German soil – an expectation which did not materialize. In fact, even people who have been hired for a limited period of time may acquire rights that tie them to the place where they are living, in particular through family relationships. Characterizing that situation in a few words, Max Frisch (1965, p. 7) famously wrote:

Wir riefen Arbeitskräfte, und es kamen Menschen.⁶

³ See, e.g., Tomuschat 2008.

⁴ Of 20 December 1955; for a comment see https://de.wikipedia.org/wiki/Anwerbeabkommen_zwischen_der_Bundesrepublik_Deutschland_und_Italien, accessed 16 January 2019.

⁵ Of 30 October 1961.

⁶ “We asked for workers, and human beings came.” These words are well-known in Germany.

Progressively, it was realized that the rotation system, according to which “guest workers” come and go according to a predetermined rhythm of fixed-term contracts, could not be implemented exactly as imagined by its inventors.

B The Legal Position of Aliens under General International Law

In Germany as in all other European countries, aliens enjoy most of the rights which the nationals of the country concerned enjoy. In Germany, almost all of the fundamental rights set forth in the Basic Law accrue to “everyone”, and the prohibitions enjoining governmental authorities to abstain from harmful interference provide that “no one” shall be subjected to such treatment. The modern regime of human rights law takes the same direction. It is based on the concept of equality and non-discrimination. The European Convention on Human Rights confers its rights on “everyone” or states that “no one” shall be negatively affected, and the same holds true for the International Covenant on Civil and Political Rights. Only a limited group of core rights closely related to the status of citizenship are reserved to nationals, essentially the political rights of participation in the running of the public affairs of the country concerned. Additionally, most national constitutions reserve the right to work to their own citizens, making the right to conduct an economic activity dependent on the conclusion of specific agreements on the basis of reciprocity.

C The Legal Position under the Law of European Integration

In this regard, the legal regime under the treaties of European integration has made a huge step forward. Since the inception of the European integration process, the relevant treaties have provided for freedom of movement of workers and freedom of establishment for self-employed persons, first of all in the narrow sector of coal and steel, as from 1958, date of the entry into force of the Treaty establishing the European Economic Community, in all sectors of economic activity. The principle of non-discrimination governs all gainful activities, with the exception of a small sector of professions that constitute the personal foundations of the concept of State sovereignty (military, judges, police). Additionally, according to the principle of European citizenship introduced by the Treaty of Maastricht, now enshrined in the Treaty of Lisbon (Article 20), the scope *ratione personae* has been considerably enlarged to comprise every national of an another EU Member State, irrespective of whether he/she seeks to pursue an economic

activity. Lastly, specific political rights have been conferred on nationals of an EU Member State residing in another Member State. Every citizen of the EU shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he lives (Art. 22(1) TFEU), and he/she shall moreover have the right to vote and to stand as a candidate in elections to the European Parliament in the country where he lives (Art. 22(2) TFEU). Thus, the distance from full enjoyment of all the rights in the country of residence is fairly short. However, there remains one major distinctive feature. Even EU citizens from another EU Member State remain aliens and are therefore subject to expulsion if they commit grave breaches of the legal order of the State of residence, constituting a serious threat to public security.⁷ Additionally, it must be noted that social welfare benefits cannot be claimed by EU citizens to the same extent as by nationals: in principle, they have to ensure their livelihood themselves.

D Particularized Treaty Regimes

For the benefit of other States and their nationals that do not belong to the European Union, a variety of treaties have been concluded in particular concerning the conduct of gainful activities. Thus, the Federal Republic of Germany concluded more than half a century ago a Treaty of Friendship, Commerce and Navigation with the United States of America.⁸ Pursuant to this Treaty, the citizens of both States have, on the basis of reciprocity, a right to engage in a broad variety of economic activities in the territory of the other State party. It is not known whether specific difficulties have arisen in the relationship between the two countries concerning the rights specifically guaranteed by that Treaty.

E Recognized Refugees

An important group of people residing lawfully abroad in a country other than their home State are refugees recognized as such. At the international level, in 1951 the Geneva Convention on the Status of Refugees was concluded.⁹ Originally, its scope *ratione territorii* was confined to Europe since its main objective was

⁷ Directive 2004/38/EC, 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, *Official Journal* 2004 L 158/77, Art. 27, 28.

⁸ Of 29 October 1954, *Bundesgesetzblatt* 1956 II, p. 488.

⁹ Of 28 July 1951, 189 *UNTS* 137.

to create firm and trustworthy structures after the chaotic consequences entailed by World War II. After the Convention had successfully stood the test of time, it was decided in 1967 to extend it to world-wide applicability.¹⁰ To date, it remains the main yardstick for the appropriateness of any domestic regulation regarding criteria of humanity and appropriateness. The main thrust of the Geneva Convention is epitomized by the requirement that the legal position of recognized refugees should, to the extent possible, be assimilated to that of nationals of the country concerned (standard of national treatment).

4 Persons Requesting Protection in a Foreign Country

A The Point of Departure: State Sovereignty and Self-Determination

Delicate problems emerge in respect of persons who wish to enter the territory of another State without having been authorized to do so. In this regard, basic notions of international law like State sovereignty and the right of self-determination come into play.

It stands to reason that State sovereignty is largely based on the power of a State to determine who may lawfully be present or reside in its territory.¹¹ Moreover, the abstract term of sovereignty does not sufficiently reflect the core of the issue. Every people has a right of self-determination, which since many years is recognized as one of the pillars of the architecture of international law.¹² Self-determination is furthermore recognized as a rule of *jus cogens*, a rule which may not be departed from under any circumstances.¹³ Obviously, in the exercise of its right of self-determination a people may invite persons of other nationalities to

¹⁰ Of 31 January 1967, 608 UNTS 267.

¹¹ See, e. g., Art. 2 of the Draft Declaration on Rights and Duties of States, prepared by the International Law Commission in 1949, reprinted in: UN 2007, p. 262: “Every State has the right to exercise jurisdiction over its territory and over all persons and things therein.”

¹² See UN General Assembly Resolution 2625 (XXV), 24 October 1970, principle 5; International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, ICJ Reports 2010, p. 403, 436, para. 79.

¹³ In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, 200, para. 159, the ICJ classifies the right of self-determination as an obligation *erga omnes*, which however, is hardly different as to its consequences from a norm of *jus cogens*.

take residence on its soil. Yet it cannot be obligated to receive aliens in its territory if such immigration would prejudice the unrestricted enjoyment of self-determination. Within the European Union, State sovereignty and the notion of self-determination have taken the form of “national identity” (Article 4(2) TEU).

Some may argue that States and State boundaries are artefacts of the past when the nation State still was the dominant actor in international relations; it should be abolished as soon as possible. We do not share the view that the outcome of such a process of deconstruction would be desirable. In any event, at the present stage the legal position does not permit of any doubt. State sovereignty and the right of self-determination constitute basic premises of today’s international legal order, entailing definite consequences for the free movement of people: national boundaries are generally legal barriers.¹⁴ States determine on grounds of political expediency who may enter their territory. International law limits their discretion only under specific circumstances, notably on grounds of family relationships.

Only a few obvious grounds should be adduced to show the justifiability of the existing legal regime restricting freedom of movement. Peoples are more than just the addition of all those who hold the same passport. A people is a community of persons who have a common history and have developed a sense of solidarity, being prepared to share collectively the burdens to which the continuous flow of events exposes them on a daily basis. Such feelings of commonality, of belonging together, of mutual responsibility, expressed in terms such as *Heimatliebe* or patriotism, should not be ridiculed or denounced as an expression of right-wing extremism or racism. Most human beings like firm foundations in their lives. If they manifest such desires they deserve respect, their views belong to the concert of voices that in a democratic society and can be uttered legitimately – and may of course be combatted by others who have embraced a more “modern” understanding of the national community.

Some more down-to-earth grounds may also be referred to. Completely open borders are likely to attract among ordinary law-abiding people also undesirable persons like drug dealers or other criminals. Anarchic conditions might consequently be the result of excessive generosity. In order to avert such deplorable consequences, States regulate by legislation who shall, apart from their own nationals, enjoy a right of abode within their territory. To make this regulatory power effective, some control mechanisms have to be established. Normally, there is no need to build walls or fences. On the one hand, persons who have grown up in a specific country do not normally leave that country lightly or cap-

14 See Tomuschat 2017.

riciously. Only dictatorships must be afraid of a hemorrhagic flight of their own people. All socialist countries were eventually forced to imprison their populations, preventing any unauthorized travelling and constraining them to stay at home. On the other hand, wealthier countries are under a constant pressure of immigration by people who in their home countries see no chances for a life in dignity. No explanations are needed for these fairly short observations since we are all observers, on a daily basis, of those cross-border movements where oppressed and destitute people in particular from developing countries are sometimes desperately trying to enhance their opportunities for a better life by migrating to countries with a better standard of living.

B Right to Enter Foreign Countries? In Particular: The Right to Asylum

a The Universal Declaration of Human Rights

Is there a general duty under international law to open the gates of the national territory to all those who are fleeing from a life that has become unbearable for them? The general answer is: no! But the picture requires some modifications here and there.

The starting point must be the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, 70 years ago, as a “common standard of achievement”, in the French version, which reflects the meaning of that phrase more precisely: “un idéal commun à atteindre”. It is clear from these words, but also as a necessary consequence of the provisions of the UN Charter on the powers of the General Assembly, that the Universal Declaration was – and is – no more than a recommendation which lacks any bindingness.¹⁵ Nonetheless the Universal Declaration, which has been confirmed and reconfirmed by the General Assembly time and again, has exerted a great influence on the entire human rights movement. It embodies the first catalogue of human rights destined to benefit everyone, without any distinction as to race, colour sex or other criteria susceptible of characterizing the essential features of a human being (Article 2(1)). Through its egalitarian approach to human rights, it has not only put its hallmark on the entire development of human rights within the United Nations, but has also given inspiration to constitution makers

¹⁵ Many elements of the UDHR have in the meantime crystallized as customary international law.

all over the world. Since 1948 hardly any new constitutional instrument has come into force without an extensive chapter on human rights.¹⁶

Among the rights set out by the UDHR, one finds two provisions that directly concern immigration. On the one hand, Article 13 guarantees freedom of movement and residence “within the borders of each State”, adding that everyone has the “right to leave any country, including his own”. No long reflection is needed to draw the conclusion that a right to immigration was deliberately denied. On the other hand, Article 14(1) proclaims “the right to seek and to enjoy in other countries asylum from persecution”. This latter provision must be read carefully. It does not say that asylum seekers must indeed be granted asylum. The text confines itself to stating the obvious, namely that a person in need of protection may “seek” asylum and that, after a positive decision on the application has been taken, the beneficiary should be able to benefit from the status conferred on him or her without any hindrance. It would therefore be misleading to refer to a right of asylum “established” in the UDHR. The proof that Article 14 UDHR is limited to enunciating a desirable goal is amply evidenced by the fact that the International Covenant on Civil and Political Rights, which includes almost all of the traditional civil and political rights of the UDHR, has refrained from listing a right of asylum among its guarantees. Nor does a right of asylum appear in the parallel instrument, the International Covenant on Economic, Social and Cultural Rights. This lacuna is not an oversight but rather the result of a deliberate political decision.

b The 1951 Geneva Convention Relating to the Status of Refugees

Indeed, the 1951 Geneva Convention relating to the Status of Refugees did not close the gap. It remains silent regarding the crucial issue as to whether an individual seeking such protection must obtain it. Yet it is many times misunderstood, not only by journalists, as an instrument setting forth a genuine right of asylum, i.e. the right of a non-citizen to lasting protection in the territory of a State, the opportunity to make a life and a living, and the possibility to enjoy fundamental human rights and freedoms. Even the Commission of the European Union made an outright erroneous statement when it stated in a note in the internet:

¹⁶ Curiously enough, the Constitution of the Vth French Republic of 1958 has contented itself with very sparse hints to human rights in its preamble. By a courageous jurisprudence, the *Conseil constitutionnel* has developed those fragments into an impressive human rights charter.

Asylum is a fundamental right; granting it is an international obligation, first recognized in the 1951 Geneva Convention on the protection of refugees.¹⁷

On the positive side it should be noted that for the first time the Convention gave a precise definition of the factual circumstances under which a person may be classified as a refugee entitled to claim asylum protection, describing him or her as a person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/[her] nationality and is unable or, owing to such fear, is unwilling to avail him/[her]self of the protection of that country.¹⁸

Essentially, the Geneva Convention regulates in a generous manner the status of a person having been recognized as a refugee, elevating that status more or less to a status of parity with the nationals of the receiving country, withholding, however, any political rights.

Departing slightly from its position of principle, the Refugee Convention contains the so-called “*non-refoulement* clause” (Article 33(1)), prohibiting States from expelling or returning a refugee

to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

We shall consider this clause and its repercussions in a short while in greater detail. It should be noted immediately, however, that *non-refoulement* constitutes no more than an emergency measure designed to prevent persons in an actual situation of distress to fall victim to barbaric acts of persecution.

c Further UN Efforts to Promote a Right of Asylum

Parallel to the work on the two International Covenants on human rights carried on in the Commission on Human Rights and the General Assembly, as from 1957 new initiatives were launched in the competent UN bodies to consolidate asylum as a true subjective right of persons requiring protection from persecution. How-

¹⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm. This statement, present on the internet in 2017, has meanwhile disappeared.

¹⁸ Article 1 (A.)(2).

ever, all of these efforts to translate Article 14 UDHR into the conventional form of an international agreement failed. The only concrete outcome at UN level is again a General Assembly resolution of 1967¹⁹ (Declaration on Territorial Asylum) that states two principles. On the one hand, the resolution makes clear that the granting of asylum constitutes a collective responsibility of the international community so that where a State “finds difficulty in granting or continuing to grant asylum” the other States shall “consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State” (Article 2(2)). Second, the resolution reiterates the non-refoulement clause of the Geneva Convention by adding, however, the specification that no one shall be rejected at the frontier (Article 3(1)).

The observer simply has to take note of the failure of all efforts undertaken at universal level to consolidate asylum as a genuine subjective right. As the outcome of a process that went on for almost an entire decade²⁰ shows, the frontiers of the solidarity which the international community is prepared to grant were definitely traced by the UN General Assembly half a century ago in 1967. At world level, States shy away from assuming the risk of having to receive unlimited numbers of persons seeking protection. Against that clear vote, general principles such as cooperation and solidarity cannot be validly invoked at the normative level.

d The UN Anti-Torture Convention 1984

A similar formula as that of the non-refoulement clause of the Geneva Convention can be found in the UN Anti-Torture Convention of 1984, of course confined to the threat of torture or other cruel, inhuman or degrading treatment. The great advantage of the Anti-Torture Convention is that its application is monitored by a specialized expert body, the Committee against Torture (CAT). In the jurisprudence of CAT, many of the general issues have come up that are generally relevant for the treatment of refugees. Mostly, it has to examine whether the allegations of an applicant that on his return to his home country he would be subjected to torture are verifiably credible.

¹⁹ Resolution 2312(XXII), 14 December 1967.

²⁰ See Goodwin-Gill 1967.

e Asylum in Africa

At the regional level, only the African Charter on Human and Peoples' Rights of 1981 seemingly makes provision for a genuine right of asylum. It provides (Article 12(3)):

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

However, the reference to the domestic law of the countries concerned relativizes that right considerably. This toning down of the legal significance of asylum corresponds also to the provisos contained in the Convention on the Specific Aspects of Refugee Problems in Africa, 1969. Article II(1) of that Convention states:

Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of these refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

In other words, the Convention accords a great deal of discretion to governments when dealing with an application for asylum. Moreover, it is not easy to make a clear statement about the practice of implementation.

C The Legal Position Concerning Asylum in Europe

In Europe, the refugee problem comes within the scope of two different treaties, on the one hand the European Convention on Human Rights, the instrument of the wider Europe of 47 members, and, on the other hand, the European Union, the narrower alliance of 28 members, since 2009 complemented by the Charter of Fundamental Rights.

a The European Convention on Human Rights (ECHR)

When going through the text of the ECHR, one does not find any direct reference to refugees or displaced persons. Of course, persons lawfully residing in the territory of a State party to the ECHR and even persons who have entered unlawfully the territory of such a State enjoy all the guarantees set forth therein. Yet problems arise regarding what kind of measures may be taken against someone who may face persecution when sent back home. The jurisprudence of the Strasbourg Court has evolved a theory according to which a State that rejects someone at its

borders or expels or returns a person to a foreign country, engages its own responsibility if it can be foreseen that the foreign State will mete out treatment below a standard of minimum humanity to the returnee. The basis for this rationale are Articles 2 (protection of life) and 3 ECHR (no one shall be subjected to torture or to inhuman or degrading treatment or punishment). More or less, the Strasbourg Court makes determinations that are identical to the jurisprudence concerning the non-refoulement clause under the Anti-Torture Convention.²¹ Of course, such assessment of the risk of injurious treatment (a “real” risk is required) is invariably difficult and may remain controversial even after a decision has been handed down.²²

While most cases concern persons present in the territory of the State intent on expelling them or having expelled them, a judgement of major importance relates to migrants who were on board a ship that wished to reach Italy unlawfully. In the case of *Hirsi Jamaa*,²³ a ship packed with migrants that had departed from a Libyan port was intercepted on the high seas by a unit of the Italian Navy that took all the people on board and brought them back to Libya.²⁴ According to the Strasbourg Court, even such occurrences outside the Italian territory came within the scope of application of the ECHR. Since the migrants allegedly had to fear harsh treatment on the part of the Libyan authorities, the action by the Italian navy was considered unlawful *in toto* under the ECHR, without any consideration of the individual case.²⁵ In other words, the Court prohibited any pushback operations. This means that under the current circumstances not a single boat operated by people smugglers may be sent back to the Libyan coast. The people rescued may be brought to any country where the rule of law is observed – but no third country will be prepared to receive the people found in the course of such a rescue operation – if not obligated by law to do so.²⁶ Obviously, *Hirsi Jamaa* has far-reaching consequences if the country from which the migrants

21 From the most recent case law see *F.G. v. Sweden*, application 43611/11, 23 March 2016; *J.K. and Others v. Sweden*, application 59166/12, 23 August 2016.

22 For the distribution of the burden of proof see *Saadi v. Italy*, application 37201/06, 28 February 2008, para. 129; *J.K. and Others v. Sweden*, *ibid.*, paras. 91–98.

23 Application 27765/09, 23 February 2012. For a comment see Moreno-Lax 2012.

24 For a parallel case involving Spanish authorities see CAT, Communication 323/20007, P.K. et al. v. Spain, 10 November 2008. The case was not decided on the merits because the applicants lacked *locus standi*.

25 The ECHR also condemned Italy for denying the people on the Libyan boat any procedural remedy (Article 13), see *Hirsi Jamaa*, *loc. cit.* (note 23), paras. 201–207.

26 Recent events have illustrated how difficult it is to find a third country prepared to receive migrants rescued on the Mediterranean Sea. See the case of the NGO ship “Aquarius”, June 2018, <https://en.wikipedia.org/wiki/Aquarius>, visited on 10 December 2018.

started their journey is known as a place of lawlessness and violence. Dozens of countries come within that category. With regard to Turkey the question is still open. Following the text of Article 3 ECHR, it must be concluded that a ban on forced return is only justified if a person would have to expect measures amounting to torture or other cruel or degrading treatment. A narrow interpretation should also be given to Article 33(2) of the 1951 Geneva Convention. The term “freedom” in that provision should in no way be understood as enjoyment of the entire range of human rights. Such a liberal interpretation would essentially amount to a quasi-total blockade of any forced return of migrants and asylum seekers and thereby to a general welcome-all clause.²⁷

b The Law of the European Union

The most sophisticated system regarding immigration and asylum has been established by the European Union. The Maastricht Treaty of 1992 did not yet provide for powers of the EU in the field of immigration and asylum. It was the Treaty of Amsterdam of 1997 which inserted a new Title IV on “Visas, Asylum, Immigration and other Policies related to Free Movement of Persons” into the body of the EC Treaty. This Chapter is now fully developed within the framework of Title V of the Treaty on the Functioning of the European Union: “Policies on Border Checks, Asylum and Immigration”. In accordance with Articles 77–80, the EU is specifically entitled to

develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement (Article 78(1)).

With a lot of happy optimism the European Parliament and the Council started legislating to provide hard substance to the new competences of the EU. Although Article 18 of the Charter of Fundamental Rights of the European Union fairly modestly provides that

[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951,

²⁷ It should be noted that the relevant observations of the ECHR in *Hirsi Jamaa* are extremely broad and visibly depart from the criteria set forth in Article 3 ECHR.

the legislative bodies did not want to remain on that low level. A complex network of regulations and directives came soon into force. Regarding substantive law, the most important legal act is the Qualification Directive of 2011,²⁸ which defines who is entitled to international protection by the European Union. On the one hand, the Qualification Directive continues the legal tradition of asylum by incorporating the refugee definition given in the 1951 Geneva Convention (Article 2(d)). The distinctive feature of this definition is that a person, in order to be able to claim refugee status, must be able to demonstrate that he/she as a specific individual is under a threat of persecution on grounds that relate to his or her physical or intellectual identity. The term of “persecution” is described in careful detail (Article 9). Generally speaking, what is meant by “persecution” is not just any kind of unfavourable treatment. The measures complained of must be of a considerable severity. The sole fact of belonging to a group that more often than not suffers discrimination is not sufficient to confer refugee status. In this regard, the Strasbourg Court has recently set out its assessment of both Iran and Iraq in two detailed judgements that also take into account whether there exist any internal flight alternatives.²⁹

Recognizing this difficulty, which in many proceedings for the recognition of asylum status represents a major obstacle, the EU legislative bodies added a new category of international protection where the applicant is relieved of the burden to show being an individualized victim or potential victim. This new category is called “subsidiary protection”. An accurate definition is also given in the Qualification Directive (Article 2(f)):

person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (...)

Article 15(c) makes clear that the new kind of international protection goes far beyond the requirements for asylum status in that the sole condition is that a civilian’s life “or person” (?) must be threatened by “indiscriminate violence in

28 Directive 2011/95/EU 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, Official Journal 2011, L 337/9.

29 See above note 21.

situations of international or internal armed conflict". In other words, everyone living within a zone of armed conflict where humanitarian law fails to be respected has a right to international protection by the EU – which means, because the EU itself is unable to receive anyone in its non-existing territory, by its Member States.

This amounts to a charitable act of unfathomable dimensions. Everyone in a country devastated by war is legally entitled to file an application for protection with the European Union – which means again that the Member States have to bear the burden of actual performance. If one looks at the date when the Qualification Directive was enacted, in 2011, one realizes immediately that it was adopted before the massive flights from Syria commenced. It must be recognized that the Qualification Directive sends a positive signal of international solidarity, but the events of 2015 have made clear that the enthusiastic spirit of charity and solidarity is not supported any longer by all of the Member States of the EU.

Refugee status and subsidiary status of protection are not identical. In principle, refugee status is a permanent status while subsidiary protection is meant to last only for a transitional period until the situation in the country of origin has consolidated itself. However, in real terms the two distinct situations do not differ considerably. Once a person has set his or her foot on German soil it becomes extremely difficult, on the most diverse grounds which cannot be detailed in the present context, to carry out a forced return.

In procedural terms, too, a Directive was enacted with a view to guaranteeing to applicants the same guarantees in each Member State of the Union. The relevant Directive of 2013³⁰ is fairly detailed. It seeks to ensure that indeed an independent and objective examination of each and every application takes place. Lastly, the Directive provides for a judicial remedy if an applicant is not satisfied with the rejection of his/her application. Hardly could one imagine a higher level of procedural guarantees. All the requirements of due process are met. The refugee crisis of 2015 has revealed, however, that the rule-producing institutions in Brussels have not been aware of the great number of practical difficulties that arise in the field when the authorities need to have recourse to improvised methods given the exceptional numbers of applications submitted to them. For many long months, Greece was unable to process the applications for international protection submitted by persons crossing the Aegean Sea.

³⁰ Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal 2013, L 180/60.

5 Conclusion

The legal regime applicable to migrants raises no significant problems in respect of persons who have been duly authorized to enter the country concerned. Generally, the Member States of the EU apply a national-treatment policy. Many other countries follow the same line.

As far as persons are concerned that seek access to the territory of another State without any prior authorization, the legal position has not changed significantly since World War II. States continue to maintain that it is their sovereign prerogative to decide on applications for access to their territories according to criteria of political expediency. The European Union, by contrast, has made deep inroads on the power of States to determine who may stay and reside in their territories. This departure from the classic concept of State sovereignty has been accepted by all Member States on the basis of reciprocity in respect of the nationals of the other Member States. Yet the EU has failed to establish a truly viable common asylum policy. Popular support for a wide opening of the entry gates is waning. Fears are rising that the national identity may be negatively affected in the long run.

It stands to reason that to receive and take care of large numbers of migrants fleeing from catastrophic conditions in their homelands mostly exceeds the capacities of a single country. The traditional vision of addressing mass movements of migrants by granting individual rights of protection has been largely overtaken by the rapid progress of globalization. The UN General Assembly was right when in 1967 it stated that this was a task incumbent on the entire international community, States having to act individually or jointly or through the United Nations. The correctness of this statement leads, however, into an obvious dilemma. No legal norms may be identified which enjoin States actively to participate in such rescue operations. States must act voluntarily in accordance with the dictates of their conscience. Systemic arrangements such as those found for the protection of the world climate³¹ should be established in a common effort of all those who are convinced that humanity is able to create an environment of peace and security. The New York Declaration for Refugees and Migrants, adopted unanimously by the UN General Assembly on 19 September 2016,³² constitutes a call for solidarity, humaneness and international cooperation, but could not

³¹ See Paris Agreement [on Climate Change], 12 December 2015, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf, visited on 10 December 2018.

³² Resolution 71/1.

establish any firm institutional structures. The Global Compact on Asylum, adopted by the UN General Assembly on 17 December 2018,³³ seeks to take the reinforcement of the status of refugees one more step further yet remains still a political instrument without any legally binding force. We cannot escape the harsh face of realities: to take care of the legitimate needs of refugees and migrants is a never-ending task that will accompany us during our lifetime.

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33 The United States and Hungary voted "no" while three States abstained (Dominican Republic, Eritrea, Libya). Seven States were absent.