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Modern Refugees as Challengers of Nation-State Sovereignty: From the Historical to the Contemporary

Edited by Gilad Ben-Nun and Frank Caestecker

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Modern Refugees as Challengers of Nation-State Sovereignty: From the Historical to the Contemporary

Gilad Ben-Nun / Frank Caestecker

The arrival of refugees at a country's border, especially under the circumstances of mass population influxes, has become one of the fundamental challenges faced by nation-states of both the northern and southern hemispheres. As the world's refugee numbers climb beyond the sixty million people threshold, and with a death toll of well over thirty thousand migrants in Mediterranean waters alone over the past five years, to claim that this is an acute problem of our time – would be an understatement. And nowhere is the problem more poignantly experienced, by the refugees, the state's law enforcement authorities, and the observing media, than at national border posts. The sight of stranded asylum seekers, whether caught between national border fences or intercepted at sea by naval patrol vessels, has become a disturbingly common feature of news bulletins. The imagery thrust of the sight of a refugeed family with children, as they cry out in their attempt to transgress a national border-fence, recently erected by the armed forces of a neighbouring country, lies in the inherent ontological clash between refugees and the state whose territory they are trying to enter.

The border crossing presents an Archimedes point where all three forces: the refugee, the recipient state, and international law collide. From the historian's vantagepoint, this Archimeden three-force conjunction is a novelty. To be sure, both refugees (as people fleeing persecution), and the nation-state (which is also coming of age) are not new entities. Yet the erection of quasi-impenetrable borders along many nation-states' frontiers, which *physically* restrict the movement of peoples, is probably unprecedented from a

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historical viewpoint.[1] Although rulers in the past could have cherished the ambition to obstruct the entry of unwanted migrants, they did not possess the administrative capacity to enforce such a decision.

The second novelty, concerns the rise of international law, especially since its global and all-encompassing phase, following the creation of the United Nations (UN) after World War II. In 1960, the eminent French intellectual Raymond Aron elaborated upon the novel aspects which the creation of the UN brought about, as it unified the field of diplomacy:

> *'What do I mean by Universal history? To begin with, I mean the unification of the field of diplomacy. China and Japan, the Soviet Union and the United States, France and Britain, Germany and Italy, India and Ghana - all these states now belong to a single unique system. What happens on the coasts of China is not without influence on relations between Europe and the United States, or between the United States and the Soviet Union. Never before have so many states recognized one another's right to exist; never before have Europe and Asia, Africa, and America felt so close. What the main countries once did in Europe and Asia, the main countries of today do across the five continents.*[2]

This unification of the diplomatic space was achieved in no small part by the rise and codification of international legal instruments which have asserted legal purviews far beyond domestic, or even bi-lateral engagements. As Aristide Zolberg and Gérard Noiriel have demonstrated, the rise of the refugee as a modern administrative category is intimately tied with the rising capacity and willingness of 20th-century-states to 'protect their nation' by controlling immigration. This nationalizing process dovetailed inter-state cooperation which codified legal instruments to exempt refugees from a strictly nationalist treatment.[3] The process of codification of refugee protections, and the corresponding responsibility of states was not linear. Yet with the coming into force of the 1951 Refugee Convention (1954), the 1954 Convention on Statelessness (came into force in 1960) and the final adoption of the Refugee Convention's Secondary Protocol (1967), the international legal reality of refugee protection had come full circle.[4]

The current clash between refugees and obstinate Nation-states who refuse entry at their border fences and territorial waters, is a clash between one age-old phenomenon (refugees), and two new global conditions (tightly controlled borders and international refugee law). The objective of the contributions in this COMPARATIV issue is to diachroni-

1 J. Torpey, The Invention of the Passport: Surveillance, Citizenship and The State, Cambridge 2000.

2 R. Aron "L'Aube de l'histoire universelle", Conférence donnée à Londres sous l'égide de la Société des amis de l'université hébraïque de Jérusalem, publiée dans *Dimensions de la conscience historique,* (Paris: Plon 1961), Rercherches en sciences humaines, p. 260-295 at 285. Trans. Barbara Bray, *The Dawn of Universal History: Selected Essays from a Witness of the Twentieth Century*, New York 2002, pp. 463-486 at 480.

3 G. Noiriel, La Tyrannie du national. Le droit d'asile en Europe 1793–1993, Paris 1991; A.e Zolberg , Matters of State: theorizing Immigration Policy, in: Hirschman Charles (Ed.), The handbook of international migration: the American experience, New York 1999, pp. 71-93.

4 Gilad Ben-Nun, 'The International Refugee Regime from Fragmentation to Unity' in *Refugee Survey Quarterly* 34 (2), pp: 23-44.

cally explore the development of this clash and its attempted legal regulation through the international refugee regime.

A rudimentary (and grossly oversimplified) periodization of the process of globalization, as seen through evolution of the international communities' organs could be broken down into three consecutive waves of development. The first wave, probably from the second half of the 19th century until after the creation of the UN, centred around the creation of all-encompassing international diplomatic platforms; fragmentary in their first instance (under the League of Nations), and which became global under the UN. The second wave (1945 – 1967) saw the birth (and subsequent rise in international importance), of regional organizations, as in the Council of Europe, the Organization of American States, the EEC (later – the EU), and the Organization of African Unity (later – the African Union). The creation of Regional Human Rights Courts, such as European Court for Human Rights, the Inter-American Court for Human Rights and the African Court of Justice and Human Rights, from the early 1960s to 2006, might well be counted as representatives of a third phase of this globalization process. The contributions in this volume broadly follow these institutional waves of globalization which brought about our so-called 'international community' and its organs.

The Contributions to this Volume: An Historical Account of Refugee Protection

The first two contributions of this volume explore the clash between refugees and nation-state sovereignty, during the *naissance* of international space under the establishment of the League of Nations – a period in which the parallel development of modern international law took place. In her chapter on Russian refugees, Elizabeth White explores the origins of our current international refugee regime, through a detailed examination of the actions of the League of Nation's first High Commissioner for Refugees – Fridtjof Nansen on their behalf. From the mid-1920s, as their options for repatriation diminished and they were rendered stateless, Russian refugees gradually triggered the creation of both the international community's technical apparatus for refugees ('the Nansen office'), along with their newly-acquired international legal identity as in the 'Nansen Passport' they subsequently received. This re-bestowing of a legal identity upon every individual refugee, who now had her or his name stamped on an international serially-numbered identification document, provided the possibility for host nation-states to begin processing sojourn requests by refugees, which hitherto had no way to be recognized by the receiving nation-states. White concludes her study with the creation of the first international refugee Convention of 1933, which safeguarded opportunities for Russian refugees to work and live in their country of asylum.

While other foreigners became in this era of rising national protectionism subservient to national citizens, the Russian refugees reconquered to a certain extent the status of denizens, common to all foreigners during the 19th century. While the state denied them

political rights, it did enable them and their offspring to build their lives on equitable terms with those of national citizens. The mostly Western European states who joined the international regime for Russian refugees as codified in 1933 came to accept their responsibility for these refugees, and thus instigated the non refoulement principle for the very first time. The protests within the state administration against this self-limitation of state power indicated that it was already seen back then as a clear limitation of state sovereignty.

In his contribution concerning the Jewish and political refugees who fled the Third Reich, Frank Caestecker explores how states reacted to an ongoing refugee crisis. In contrast to the Russian refugee crisis where states agreed to international obligations *after* the refugee crisis, in the case of the Reich's refugees, policy makers intervened *before and during* this crisis. As the arrival of these refugees coincided a deep recession, interstate cooperation was necessary to alleviate the economic burden they caused. The adoption of the principle of the first country of asylum aimed at interstate burden sharing. In contrast with Russian refugees who were first recognized *internationally* and only later received domestic recognition, the refugees from Nazi Germany were the first group of immigrants to be admitted *domestically* under the legal category of asylum seekers. States could now work within their bureaucratic machineries to make a distinction between refugees as defined by national and international law and other immigrants, in terms of the procedural processing of asylum requests, and in terms of international cooperation for burden-sharing.

From 1938 onwards the flight of Jewish refugees was perceived by authorities as a mass population displacement. As opposition to such a perception was too weak, also due to the sheer numbers of this mass population flow, and with the international community showing little solidarity with the Jewish victims, the Nazi state succeeded in torpedoing international pro-refugee efforts. Absence of interstate cooperation created an unseen chaos at the borders, which triggered the totally illiberal manner in which European states recreated themselves , so as to restore order at their borders, to the detriment of refugees. The few states who still granted protection to Jewish refugees did so solely due to domestic considerations as international refugee law had evaporated.

The adoption of the 1951 Convention represents a watershed moment in the history of refugee law, being the first instrument that truly universalized the rights of refugees versus nation states. These rights were considerably strengthened with the adoption of the non-refoulement principle, which entailed restrictions over border policy. In his contribution, Gilad Ben-Nun substantiates the argument that the drafters of the 1951 Refugee Convention understood the implications of their decision to endorse the non refoulement principle in its most stringent prohibitive form, as it imposed upon states the negative duty of not returning refugees back into the hands of their tormentors "in any manner whatsoever". The formulation of non refoulement by the drafters of the 1951 Refugee Convention *in hoc sensu*, established a fundamental structural limitation upon nation-state sovereignty, in that a state was from now on limited in exercising its unconditional right over its borders. This contribution also substantiates the view that

the drafters of the 1951 Refugee Convention indeed intended for the non refoulement protection to apply under conditions of mass population flows. The differences between the US Supreme Court's reading of non refoulement and that of the European Court for Human Rights stems mostly from methodological shortcomings when examining the *travaux préparatoires* of international treaties. These shortcomings are elaborated upon, and guidelines are subsequently provided so as to avoid them.

In its early days, UNHCR did not become the robust international agency which the refugee lobby had fought for, as it lacked both proper funding and a long-term mandate.[5] It however succeeded to become the international institution in the field of refugee management. At the very start it presented itself as the organization best qualified to determine the eligibility of asylum seekers and could conquer institutional space. From the early 1950s onwards European states were ready to yield more of their sovereignty to buttress UNHCR as the harbinger of the international refugee regime. Both the Netherlands and Belgium subcontracted their eligibility policy to UNHCR, while UNHCR became the junior partner in Italian eligibility decisions and in the French appeal procedure.[6] The ratification of the Refugee Convention and its incorporation into the domestic law of many European countries promoted greater accountability and oversight at the domestic level. Even the UK, who for decades refused to integrate the 1951 Convention into its domestic legal system, also finally came around and in 1993 finally domestically adopted the Asylum and Immigration Appeals Act.

Notwithstanding, many states have resisted any qualification to their national sovereignty when concerned with refugees. In Western Europe, national sovereignty was to be challenged even further by the European Convention of Human Right drafted in 1950 by the Council of Europe, the European Court of Human Rights, whose competence to enforce the treaty has often pursued an even more activist policy in this domain, has proven to be a restraint of sorts over national immigration policies.[7]

In his contribution, Irial Glynn comparatively examines the fundamentally-different responses of Italy and Australia to the incoming influx of boat-fairing refugees towards their shores in recent decades. The growing number of refugees on the high seas in recent years, in Mediterranean, Australian, and Caribbean waters is seen as one of the great humanitarian challenges of our time. In contrast to land-locked refugees, the perils at sea mean an immanent risk of almost sudden death to the people who board these derelict sea vessels in their desperate attempt to arrive at safer shores. The key determining factor responsible for the difference in conduct between Italy and Australia, as Italy admirably

5 G. Loescher, The UNHCR and World Politics: a Perilous Path, Oxford 2001, pp. 50-75.

6 Silvia Salvatici, "Between National and International Mandates. Displaced Persons and Refugees in Postwar Italy", Journal of Contemporary History, 49-3, 2014, p. 531; F. Caestecker, Vluchtelingenbeleid in de naoorlogse periode, Brussel 1992, pp. 78-80; J. ten Doesschaete, Asielbeleid en belangen: het Nederlandse toelatingsbeleid ten aanzien van vluchtelingen in de jaren 1968-1982, Hilversum 1993.

7 R. Plender and N. Mole; Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments" in: F. Nicholson & P. Twomey (eds.), Refugee rights and realities. Evolving international concepts and regimes, Cambridge, 1999, pp. 83-97; C. Joppke, Immigration and the nation-state: The United States, Germany and Great Britain, Oxford, 1999, pp. 88-101.

steps up to this humanitarian challenge while Australia succumbs to it, lies in the important moderating and standard-setting role played by the European Court for Human Rights (ECHR), whose regional legal competencies outweigh those of Italy's domestic courts, in favour of universalist legal standards for refugee protection. The absence of an Asian regional equivalent to the ECHR has enabled Australia to unabatingly continue its disregard for its legal obligations under the 1951 Refugee Convention, as it continues to override its international legal obligations in favour of its limitlessly unchecked sovereignty. In some cases, this Australian conduct even brings it to exercise its sovereignty exterritorialy (*beyond* its own national maritime boundaries), as its coast guard vessels intercept refugee sea fairing vessels in international waters. This is done with the overt intention of pre-empting refugees from having the right to petition Australian domestic courts, since their *refoulement* takes place far and beyond Australian geo-legal boundaries.

The debate as to whether non-refoulement is indeed a structural qualifier of nation-state sovereignty, especially when a state is faced with mass population flows, cannot be divorced from contemporary historical ironies. For if one observes the conduct of states today, one immediately notices similarities between the inhumane contemporary conduct of countries such as Australia and the US, with their parallel conduct during the drafting of the 1951 Refugee Convention, over sixty years ago.

State Sovereignty, and the Contemporary Pressures upon the International Refugee Regime

With the Syrian refugee crisis entering its seventh year as these lines are being written, it is worth noting that the countries in Syria's direct geographical proximity have accepted mass flows of Syrian refugees into their territories without exception.[8] And none – not Jordan, which has received 650,000 refugees into its own population of 6.5 million (a 10 per cent increase); or Lebanon, which has seen 1 million refugees swell its population of 4.5 million (22 per cent); or Turkey, with 2.8 million refugees in a population of 75 million (3.75 per cent) – has resorted to the refoulement of Syrian refugees.[9]

8 This includes Israel - Syria's primordial enemy for over six decades now. Since 2013, Israel has treated over 2500 Syrian civilians wounded, and has recently naturalized and granted Israeli citizenship to 100 Syrian war orphans. See: http://www.thetower.org/israel-to-take-in-100-syrian-orphans-give-them-path-to-citizenship/

9 For Syrian-refugee figures in Turkey, Jordan, and Lebanon, see UNHCR's dedicated webpage: https://data.unhcr.org/syrianrefugees/country.php?id=224 (accessed 16 January 2017). It is noteworthy that Neither Jordon nor Lebanon have signed the 1951 Convention, while Turkey has signed the Convention but still retains its geographical limitation concerning the protection of European refugees. Nevertheless, since the 1951 Refugee Convention has now been ratified by over 75 percent of the roster of UN member states, it has become binding upon them all, whether they have signed it or not. In addition, one should mention here that the 1951 Refugee Convention's bedrock principles (non-discrimination, non-penalization, non-expulsion and non refouelement) have since attained the legal status of jus cogens.

That Jordan's GDP per capita is less than half that of Hungary, or that Lebanon's is less than half of that of the Slovak Republic, has not caused them to enact any of the draconic administrative measures that these European countries have put in place to prevent Syrian refugees, recognized as such by UNHCR, from entering their territory.[10] If anything, the remarks of the Hungarian and Slovak premiers are starkly reminiscent of the Canadian Foreign Minister's reaction vis-à-vis Jewish refugees on board the St. Louis in 1939. Asked how many Jewish refugees Canada was prepared to accommodate, he emphatically replied that "none – were already too many ."

That it was easier for Canada to keep out Jewish refugees from Nazi Germany than for Belgium since the ocean separates Germany from the former but not the latter is platitude. Nevertheless, one must not underestimate that the allowance by any country for refugees to transgress its national borders as they flee for their lives – is a choicely act which that State undertakes. States can also choose to adhere to the morally-repulsive conduct of closing their borders and standing idle – as these refugees perish upon their border-fences. This in fact was the conduct which most European States exercised vis-à-vis Jewish refugees from the summer of 1938 onwards. It is currently the conduct of Southeast Asian nations who border Myanmar - such as Bangladesh who is currently blocking Rohingya Muslims from entering its territory, through active border refoulement and "push back" operations.[11] There can be little doubt that it is easier for Hungary or the Slovak republic to turn away Syrian refugees primarily because these refugees are not being turned away directly into a war-zone, but rather onto the shoulders of other refugee-accommodating states (Greece, Turkey, Macedonia, Serbia etc.).

Yet this should not in any way diminish the positive moral awe which must be accorded to countries such as Jordan and Turkey when these countries unequivocally accord their welcome to Syrian refugees. Both Jordan and Turkey have periodically been at war with Syria. Both are heavily centralized states with an extremely strong security apparatus, and both have impenetrable borders with Syria which are fenced, land-mined and under constant security-force surveillance. And both have not turned back a single Syrian fleeing for her or his life. Moreover, both countries 'cough up the cash' which is constantly missing from UNHCR contributions, which at virtually any given moment cover no more than 50-60 percent of the real humanitarian needs of this newly incoming population. The sociological question as to why certain countries (and their societies) opt for such feats of humanitarianism while others don't is of paramount importance, deserves far more research than we currently have, and is unfortunately beyond the scope of this volume. What is it about France that has driven it to accept half a million refugees who fled the Spanish civil war in February 1939? What is it about Great Britain who in the fall of 1914 accepts a large portion of the 1,5 million Belgian refugees, and repeated this

10 As of 2015, Jordan's GDP per capita stood at $10,000 while Hungary's was $25,000. Lebanon's stood at $14,000 while the Slovak Republic's GDP per capita was measured at $29,000. All data taken from the World Bank website, http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD (accessed 16 January 2017)..

11 'Refugees Flee Myanmar as UN Special Rapporteur Blocked from Rohingya Villages' in *Sputnik News 16 January 2017*. Available at: https://sputniknews.com/asia/201701161049622705-rohingya-other-displaced-myanmar/

conduct when it welcomed large groups of Austrian and German Jews in the late 1930s? What is it about Turkey which granted the exiled Jews from Spain asylum across the board in 1492, and five hundred years later does the same with Syrian refugees? Why do these states- who also have dark stains in their past (Turkey with the Armenians, Great Britain and Kenya, France and Algeria) react in this way repeatedly under these circumstances? These are pertinent questions which beg further research.

Nowadays, however, much of the hope in refugee protection comes from the Global South. The admirable German reaction towards Syrian refugees is dwarfed in terms of its humanitarian extent when compared with countries such as Ethiopia and South Africa. As of 2015, Ethiopia housed the largest population of refugees (650,000) on the African continent.[12] Yet contrary to Germany, which welcomed its Syrian refugees in 2015 in addition to those from the Yugoslavian civil war in the early 1990s, Ethiopia – which has been housing African refugees for more than a quarter of a century (ever since the first Somali refugee flows of 1991) is one hundred times poorer than Germany.[13] As for South Africa, it is the first country in the world to have officially recognized harsh economic conditions as a legitimate ground for the granting of asylum, hosting Zimbabwean refugees for a decade now. It has recently lengthened Zimbabwean residence visas under its extended Zimbabwean Dispensation Program.[14] Rather than locking up refugees in camps, the South African Minister of Home Affairs congratulated his own country for not administering an obligatory encampment policy for refugees.[15]

A View Forward

As the world observes what Ian Buruma has recently referred to as 'The end of the Anglo-American order' which was intuitively associated with the legislation of the 1951 Refugee Convention and other such international humanitarian instruments, human rights advocates should ponder to what extent the commonly-held image of the West as the harbinger of human rights really holds water.[16]

12 L.R. Dobbs (ed.), Ethiopia overtakes Kenya as Africa's biggest refugee-hosting country, UNHCR briefing paper available at: http://www.unhcr.org/news/latest/2014/8/53f31ebd9/ethiopia-overtakes-kenya-africas-biggest-refugee-hosting-country.html (accessed 16 January 2017). See also M. Anderson, Ethiopia hosts largest number of refugees in Africa, in: *Guardian*, 20 August 2014, https://www.theguardian.com/global-development/2014/aug/20/ethiopia-largest-number-refugees-africa (accessed 16 January 2017).

13 In 2016, the GDP per Capita of Ethiopia stood at 550 USD per annum, as opposed to Germany whose GDP per capita exceeded 45,000 USD per annum, over comparable national population sizes (Germany 80 million people and Ethiopia 88 million).

14 E.I. Wellman and L.B. Landau, South Africa's Tough Lessons on Migrant Policy, in: Foreign Policy, 13 October 2015, https://foreignpolicy.com/2015/10/13/south-africas-tough-lessons-on-migrant-policy (accessed 16 January 2017)..

15 Economic Migrants Abusing South African Asylum System, in: Zimbabwean Daily, 21 June 2016, http://www.thezimbabwedaily.com/news/62074-economic-migrants-abusing-sa-asylum-system.html (accessed 16 January 2017).

16 Ian Buruma, 'The End of the Anglo-American Order in The New York Times, 29 November 2016.

It is now almost a century since the world began to accommodate refugees as a special category of migrants, in terms of the legal tools designed to regulate their relations vis-à-vis host states, both at the international and the domestic spheres. The process of reciprocal domestic recognitions by individual states followed the lead of the international sphere, and not the other way around. France might have been the first country to grant the right of asylum back in its constitution of 1792, but as the late Aristide Zolberg demonstrated – France represented the exception in states' behaviour, rather than the norm.[17] It took most western countries several decades to step up to the human rights benchmarks acceptable at the international level. The intense political struggle, mainly during the interwar period, for a more generous immigration policy for refugees yielded the durable solution exemplified in the 1951 Refugee Convention.

In Western countries refugee protection became highly formalized which was concomitant with the strong state presence in society and economy. Industrial western societies with their organized capitalism aimed at reconciling the different interests of labour, middle classes and capital. Their immigration policy aimed to align immigration strictly with labour needs and a cultural status quo. Refugee policy, which became a side door, provided for admission of sensitive cases, so that stopping other people at the border or deporting them from the country itself would not be contested. Refugee policy was mainly directed at improving the efficiency of migration management of the highly-organized nation-states.

The infrastructural power of the state is much less developed in the global South.[18] Therefor the need for a formal refugee policy is much less felt in these more autonomous societies. A case in point is their largely informal economy which can easily absorb refugees. While the formal refugee policy in western countries was mainly developed for domestic reasons this offspring of the protectionist immigration policy became embedded in an international refugee regime, along with a system that secured burden sharing by adhering to the notion of first country of asylum. If necessary, the burden of first countries of asylum was alleviated by resettlement programs. The nearly two hundred thousand Hungarians who fled to Austria in 1956 had by 1958 nearly all been resettled elsewhere. In recent years, while formally still adhering to the international refugee regime, Western states have taken up a stringently legalistic approach towards refugee protection for domestic use only and largely withdrew from international commitments.

In contrast, regional developments – primarily in the Global South point to a much faster adoption of the human rights rationale enshrined in principles such as non-refoulement by the countries of decolonized Africa, The Arab World and even Southern Asia. When one considers the fact that the Organization of African Unity's Convention on refugees was only adopted in 1969, at a time when most African countries were not more than a decade old (and some had not yet been liberated from the yoke of colonial-

17 A. R. Zolberg, A. Suhrke, and S. Aguayo, Escape from Violence: Conflict and the Refugee Crisis in the Developing World, Oxford 1989, pp. 5-10.

18 M. Mann, The Sources of Social Power, Cambridge 2005–2013 (4 vol.).

ism such as Angola and Mozambique), the conduct of countries such as Ethiopia and South Africa becomes all the more laudable. The fact that the League of Arab States ('the Arab League') has never drafted an international legal instrument for refugees, yet that this has not prevented its members from rendering assistance to Palestinian refugees (now seven decades and four generations in the making), or to current Syrian refugees, sheds a new light on the comparative conduct of these states vis-à-vis some of their northern counterparts.[19]

The question as to why Ethiopia continues to welcome recurring waves of refugees from Somalia, South Sudan and Eritrea, or why Jordan continues to receive Syrian refugees notwithstanding the 1970 attempt by many Palestinian refugees to topple the regime of the very state that welcomed them, is well beyond the scope of this volume. Nevertheless, one is bound to consider the hypothesis that these recurring welcomes, in face of the appalling record of countries such as Hungary and Slovakia, has something to do with the high cultural - indeed the religious value which many African and Middle Eastern societies attribute to the accordance of hospitality and protection to the vulnerable migrant stranger.[20]

At the end of a century of contestation, between the international attempts to help refugees, and the nation-states' attempts to limit their unwanted entry, after both the international and the domestic refugee categories have been codified, the challenge posed before the state by a refugee who clandestinely attempts to transgress its national borderfence, in search of sanctuary – is alive and kicking. The conundrum faced by the state, of either receiving that refugee - thus accepting a limitation to its ultimate sovereign right to determine who comes within its boundary confines, or repelling that refugee thus guarding its sovereign exclusivity at the expense of its moral standing – is as acute as ever.

Acknowledgments

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19 On the regional developments in refugee protection see: A. Zimmermann, J. Dörschner, and F. Machts (eds.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford 2011, pp. 117- 224.

20 On the religious paralleled duty in the Abrahamic faiths to provide sanctuary and hospitality to the vulnerable persecuted stranger in both the Hebrew Bible (Genesis 18) and the Holy Quran (Surat Al Hud 11:69-83) see: Gilad Ben-Nun, Seeking Asylum in Israel: Refugees and the History of Migration Law, London 2017, pp. 193-199.

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The Legal Status of Russian Refugees, 1921–1936

Elizabeth White

ABSTRACT

Dieser Aufsatz untersucht die rechtlichen Lösungen, die die High Commission for Refugees in der Zwischenkriegszeit für den Verbleib von Hundertausenden von Flüchtlingen, die aus dem früheren Russischen und dem Osmanischen Reich nach Europa gekommen waren. Diese Flüchtlinge galten als Staatenlose in einer Welt, in der Rechte davon abhingen, dass ein Staat Individuen schützt. Russische Flüchtlingsanwälte und Rechtsexperten beteiligten sich in dieser Phase an einer juristischen Definition der Kategorie Flüchtling und versuchten ihm Rechte wie das der freien Bewegung, des Verbotes der Reziprozität von Vertreibung und das Recht auf Arbeit zu sichern. Sie überzeugten europäische Staaten Grenzen ihrer staatlichen Souveränität zu akzeptieren, so dass Staaten in den 1920er und 1930er Jahren ihr Einverständnis zu Arrangements und Konventionen gaben, die einen speziellen Schutz für Flüchtlinge in ihrer Gesetzgebung vorsahen. Damit wurden die Grundlagen für den Rechtsschutz der Flüchtlinge im 20. Jahrhundert geschaffen.

1. Introduction

During 1919–1920, thousands of Russian refugees crossed the Black Sea from Southern Russia to Constantinople. These were military evacuations of the anti-Bolshevik armies, though each included thousands of civilians. Simultaneously, Russian subjects left across all the borders of the former Russian Empire as it was engulfed in class war and imperial collapse. Constantinople claimed the attention of the new post-war international community. Constantinople was under Allied occupation and the Allies had responsibility for the Russians they supported during the Russian Civil War. The arrival of these refugees proved to be a financial, logistical and political burden to them. Transnational relief or-

Comparativ | Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 27 (2017) Heft 1, S. 18–38.

ganisations such as the International Committee of the Red Cross (ICRC) and the Save the Children Union were concerned with the humanitarian crisis in Constantinople. Such organisations and interested states put pressure on the new League of Nations to take up the problem of the refugees, as it could only be resolved on an international level. In June 1921, the League of Nations created a High Commission for Russian Refugees (HCR), the precursor to the UNHCR. The remit of this new body was to 'liquidate' the refugee problem through repatriation or naturalisation; to help coordinate relief efforts, to find work for the refugees and to examine legal solutions.

This article will examine the measures developed within the HCR for the legal status of the refugees. From the beginning legal status was discussed, although the HCR gave it lower priority as its preferred solutions were repatriation, colonisation or naturalization. The dominating legal issue for the refugees was their statelessness in a world from which meaningful rights were derived from state protection. Russian refugee legal experts positioned the solution to the refugee issue as a social and juridical one, where refugees would adapt and absorb into their new states and be gradually treated as 'nationals' in so far as that was compatible with their status as aliens.[1] Their legal solutions would involve the creation of the refugee as a legal category and securing certain rights and protection, including that of movement and exemption from reciprocity. This involved states agreeing to accept limits on state sovereignty, as through the 1920s and 1930s they agreed to adhere to Arrangements and Conventions which gave special protection to the refugees in their jurisdictions. This incremental work laid the foundations of legal protection for refugees in the twentieth century.

2. The High Commission for Russian Refugees and Repatriation

Fritdjof Nansen, the Norwegian diplomat, scientist and explorer was chosen as the High Commissioner for Russian Refugees. It was hoped that the League of Nations would arrange their repatriation, which was seen as the most viable solution. In 1920 Nansen had helped organise the repatriation of the Central Powers' POWs from Russia and had established working relations with Moscow. Like others, Nansen believed that contact with the West would moderate the Bolshevik regime, that Russia's main problem was its economic backwardness and that Russia's economic reconstruction was essential for international peace. The Bolsheviks were willing to contemplate the return of certain sections of the emigration that could help with economic reconstruction, chiefly Cossacks who had often been skilled farmers in their wealthy agricultural regions of Southern Russia and Ukraine. They also expressed an interest in the return of medical students and doctors.[2]

1 J.L. Rubinstein, 'The Refugee Problem', International Affairs 15 (September-October 1936) p. 727.
2 United Nations Office in Geneva, Nansen Fonds (NF), Mixed Refugees Archive, R.715, doc. 27914, p.9.

The Soviet Union was not a member of the League, so Nansen and his personal representatives, John Gorvin, a British civil servant from the Ministry of Agriculture and the Norwegian Vidkun Quisling, negotiated with representatives of the Soviet government over the repatriation of Cossacks in 1922-24. [3] The Soviet government issued wide Amnesty Decrees in November 1922 to soldiers and officers of the White Armies who could demonstrate that they had fought against the Bolsheviks due to 'deception and force'. A Soviet Red Cross mission was established in Bulgaria – the only state willing to host it – to organise the repatriation across the Black Sea to Russia in 1923. The repatriation programme, in which so many (non-Russian) hopes were invested, never solved the Russian refugee 'problem'. The HCR estimated that only some 6,000 refugees, chiefly Cossacks, returned on these official schemes.[4] The majority of Russian refugees did not want to return while the Bolsheviks were in power. Optimistic claims about numbers wishing to return by Nansen and those who had a vested interest in the success of the scheme were wishful thinking. Russian refugee lawyers argued that under the Soviet state returnees would have no legal protection despite claims to the contrary. Russian refugee organisations across the political spectrum opposed it, partly as they felt that voluntary repatriation could jeopardise the right to asylum in Europe. The mass famine in the Volga region in 1921 acted as a check to return. Political intrigue and a coup in Bulgaria led to the closing of the Soviet Red Cross mission. By 1924, the Soviet government had entered a period of relative political stability and economic development and seems to have felt that the HCR's involvement in checking up on the repatriated was an unacceptable limit to state sovereignty. They withdrew consent for repatriation.[5] HCR negotiations with the Soviet regime ended in May 1924.[6]

There was some limited legal movement to and from the Soviet Union in the 1920s under the relatively liberal policy of the New Economic Policy, as well as illegal movement across the borders. Legal movement largely ended with the general tightening of security after Stalin assumed power in 1928 when restrictions on the internal and external movement of Soviet citizens were put into place. In the interwar period, Russians in Europe fell into two categories; Russian refugees who had left during the Civil War and Russian minorities in the new states arising from the end of the Russian Empire and out of the Treaty of Versailles. The first group were only the concern of the HCR. Russian refugees initially arrived in all the states bordering or close to Russia, particularly Finland, the Baltic states, Poland, Germany, Romania, Turkey, Greece and China. These were quickly joined as places of first asylum by the Slav states of Czechoslovakia, Bulgaria and Yugoslavia, as thousands of refugees were moved there with the consent of the governments

3 For the repatriation programmes from the viewpoint of the HCR see M. Housden, 'White Russians crossing the Black Sea: Fritdjof Nansen, Constantinople and the first Modern Repatriation of Refugees Displaced by Civil Conflict, 1922-1923', The Slavonic and East European Review, Vol. 88, No. 3, July 2010, pp. 495-524; K. Long, 'Early Repatriation Policy: Russian Refugee Return 1922–1924'. Journal of Refugee Studies 2009;22(2), pp. 133-54.

4 League of Nations, Rapport du Haut-Commissariat, Document A. 23. 1929. 7.

5 Long, 'Early Repatriation Policy' p. 147.

6 UNOG, NF, R1716, 36138.

in the early 1920s. These states, and then France and Belgium, would form the core of the international refugee regime. The second group, that of settled Russian minorities in Poland, the Baltic States and Romania were protected under the minorities' legislation of the League of Nations.

3. Determining the Legal Status of Refugees

The HCR's responsibility was to define the refugees' legal status. Belgium, France, Czechoslovakia and Switzerland had already asked the League to clarify this in spring 1921. [7] This issue was raised by Russian refugee lawyers and ex-diplomats; as shall be seen, they were intimately involved in the work behind the scenes of developing refugee law.

A series of Soviet decrees in late 1921 deprived Russians abroad of their citizenship, rendering them stateless.[8] They usually lacked identity certificates or passports, and without a state's protection behind them could not travel across borders. However, alongside repatriation, the HCR policy was to transfer the refugee males out of Constantinople to other states on work contracts. The arrival of large groups of skilled males of working age on the fringes of Europe in 1920 was both a threat and an opportunity. France was desperate for male labour to work on economic reconstruction after the war. The new Czechoslovak state and its industrialists (at that time Russophile) welcomed Russian labour for agricultural reconstruction or the Škoda works. The new states of Yugoslavia and Bulgaria wished for groups of labour to work on large infrastructure projects as well as also having Russophile elites. In 1922 for example, Nansen arranged for the transfer of five thousand refugees to Bulgaria to work on railroad construction. [9] Zolberg comments, as far as international migration regimes are concerned, 'statecraft and humanitarianism went hand in hand.'[10] In the early 1920s the HCR and the International Labour Organisation (ILO), to whom refugee work was transferred in 1924, moved tens of thousands of Russian refugees around Europe to work. Passports were also important to move the refugees on if states wished. In 1925, for example, the Refugee Service of the ILO in Belgrade arranged for the emigration of around 2,000 Russian refugees out of Bulgaria, mainly to France, after the Bulgarian government complained that Russian and Armenian refugees were a 'source of danger to production and social peace.'[11]

As John Torpey has written, states successfully monopolised the right to control movement in the modern period, 'particularly though by no means exclusively across international boundaries.'[12] State sovereignty became uniquely embedded in this control

7 C. Gousseff, L'exil Russe. La Fabrique de réfugié apatride 1920–1928, Paris 2011, p. 218.
8 S.S. Ippolitov, Rossiskaya emigratsiya i Evropa: nesostoyavshiisya al'yans, Moscow 2004, p. 40.
9 NF, Memorandum 22 November 1922. Report of a conversation which Dr Nansen had with Mr Goulkevitch, November 14, 1922. 45/24653/x
10 A. Zolberg, 'Matters of State. Theorising Migration Policy' in C. Hirschman (ed), The Handbook of international migration. The American experience, New York 1999, p. 85.
11 A. Tixier, The Refugee Problem in Bulgaria, International Labour Organisation, Geneva 1925, p. 25.
12 J. Torpey, The Invention of the Passport. Surveillance, Citizenship and the State, Cambridge 2000, p. 4.

and 'sovereignty is nowhere more absolute than in matters of emigration, naturalisation, nationality, and expulsion'.[13] At the same time, the identification revolution made it easier to distinguish through files and documentation who was a national and who was an alien. In France for example the category of 'immigrant worker', which eventually became synonymous with 'foreigner', was created in the late nineteenth century.[14] The Great War saw states introduce even tighter restrictions on immigration, migration, passport control and residency rights. The Aliens Restriction Act was passed in Britain in 1914, followed by an Aliens Order in 1920. Passport controls were reintroduced in France during the war, and in 1917 an individual identity card became mandatory for all foreigners above age fifteen.[15] Italy and Germany also saw new restrictions on foreigners entering and these continued into the interwar era. As the state became more 'national' and rights were connected with citizenship, those who were no longer citizens of a state became a legal anomaly and had no rights. The main principle which governed the status of aliens in individual states, particularly under the Napoleonic Code, was the principle of reciprocity which clearly could not be applied to Russian refugees. The passport and identity issue was seen as most urgent. Without these, the refugees would remain unprotected and potentially ineligible for social welfare, such as access to education for their children. At first therefore, there was considerable variation in what laws states applied to Russian refugees. Indeed in August 1921 Nansen held an Inter-governmental Conference in Geneva where it was agreed that each state should deal with the legal status of refugees individually.[16]

While Constantinople was under Allied control, Russians were treated under the Ottoman capitulation laws. The French state applied Imperial Russian civil law to Russians within its border, so the principle of reciprocity held, until 1924 when it recognised the Soviet Union. Some of the confusion can be seen from the statement of the HCR representative in Vienna in 1922:

> *The Austrian government has decided that for the future Russian refugees may obtain* 'Staatenlosenpässe' *from the police authorities, which will be regarded abroad as Austrian passports. This will regularise the position of Russian refugees in Austria, who, until the recognition by Austria of the Soviet government in March last, received papers from the Spanish Legation in Vienna.*[17]

The need though for a consistent and internationalised approach was recognised from the beginning and at all meetings the need for Russian refugees to have identity papers was discussed. The issue was passed to the Legal Section of the League, with the involvement of Russian refugee lawyers. It was suggested that Nansen, under the authority of the League, could issue them with an identity certificate, although it was acknowledged

13 H. Arendt, The Origins of Totalitarianism, p. 265.
14 Gouseff, L'Exil Russe, p. 219.
15 Ibid, p. 219.
16 Gousseff, p. 223.
17 UNOG, NF, R. 1719/45/19522, HCR Liaison Report, 4th August 1922.

that this would give refugees no legal protection. Another suggestion was that states accepting the refugees should issue them provisional passports for a period of twelve months, renewed on good behaviour. Another was to regularise the status of the Russians by continuing to recognise the Tsarist Russian embassies and consulates abroad as legal representative of the refugees and for Russian Imperial law to be applied to them under the principle of reciprocity (this was the preferred solution of many Russian organisations). Another was to have one of the Allied powers issue protective passports. Another option apparently emanating from the HCR was to internationalise a 'controversial territory' (Constantinople) and place it under the control of the League of Nations. This could become a territory to which refugees could be 'repatriated' by states who no longer wanted them or refused to accept them; it was considered states would be more likely to allow refugees in if they could send them away again.[18] In the end the decision was made that the HCR should develop an internationally accepted identity certificate.

4. The Nansen Passport and the 1922 Arrangement: the right to a legal identity

The solution for the problem of providing an internationally recognised identity document was the so-called Nansen Passport, formalised on 5 July 1922 in the Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees. This was approved at an Inter-Governmental Conference attended by representatives of sixteen governments. The Nansen Passport was not a proper passport, but an identity certificate for an individual refugee, valid for one year. The HCR and the states concerned also defined who was eligible for a Nansen passport. Russian representatives did not want the word 'refugee' on the certificate and insisted that the term 'Russian' be used to cover all the nationalities of the former Russian Empire. Konstantin Gul'kevich, the ex-Tsarist diplomat who was based in Geneva and advised the HCR on refugee issues, apparently suggested the phrase 'person of Russian origin who has not acquired another nationality.'[19]
This became the kernel of the legal definition of a refugee in the interwar period, which would become finalised in 1928 and used in the 1933 Convention. It was a group definition based on nationality and the deprivation of the protection by the state of origin or its successor. This was different to the 1936 International Agreement for refugees from Nazi Germany, which defined refugees as persons who were deprived of the protection of the German state, but crucially left it to the responsibility of the individual state where asylum was being requested to determine who was eligible for this refugee status. Nor was it an individual designation based on fear of political persecution, as it would become after the Second World War. Later on, the HCR protection was expanded to other

18 F. Johnson, International Tramps, London 1936, pp. 259-260.
19 Gul'kevitch had been the Russian Ambassador in Norway and had good relations with Nansen. Other Russian lawyers described this definition as legally senseless.

groups of refugees of Christian minorities from the Ottoman Empire, who had been subject to violent forced displacement in this period. The largest group of these, the Armenians became eligible for Nansen passports in 1924 under the definition 'any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Turkish Republic and who has not acquired any other nationality.' In 1928, the right to hold a Nansen passport was given to Assyrians and Assyro-Chaldeans who had been displaced largely to Syria and Iraq during the Turkish War of Independence. The Nansen passport was also given to several hundred Turks who had earlier worked for the Allied occupation of Turkey. In 1935 it was extended to several thousand Saar refugees after the region voted to reunite with Germany.

The Nansen Passport was a watered down version of a draft by the League's Legal Section and Russian lawyers which would have given the refugee some of the same rights as citizens, including the right of free movement and the right to work. This was considered too great an infringement of state sovereignty and was changed by France.[20] The Nansen Passport facilitated moving on from the first country of arrival to find employment. One of its major drawbacks was that it did not give the refugee the automatic right to return to the state in which it had been issued. This made some states reluctant to accept refugees even with Nansen passports, as they were not deportable.

The Nansen Passport is considered a major achievement of the interwar refugee regime. Apart from the refugees themselves, the only states it benefitted were the states of first arrival who could hope their 'burden' of refugees might move on. Yet thirty-two states had recognised it by 1923 and it was eventually recognised by over fifty. The HCR persuaded states to adhere to the Arrangements by arguing that the Nansen passport would facilitate employment, help ascertain how many refugees they had and facilitate their departure elsewhere. For those who had recognised the Soviet Union, it helped politically that the state could recognise the refugees through the intermediary of the League. It did very little to limit state sovereignty, and states continued to treat refugees in line with their own interests, which probably accounts for its wide adoption. States were willing to recognise it as it had little impact on their right to regulate entry and gave no rights to the individual refugee, apart from the right to be recognised.

5. The Problems of the Nansen Passport and the 1926 Arrangement

After the end of the repatriation scheme in 1924 technical and administrative responsibilities for refugee work were transferred to the Refugee Service of the International Labour Office (ILO), while Nansen retained responsibility for the political, legal and financial aspects. Major Frank Johnson was both Chief of the Refugee Section of the ILO and Assistant High Commissioner for the HCR. He was the key figure in refugee

20 Russkie Bezhentsy. Problemy rasseleniya, vozvrashchenie v rodinu, uregulirovaniya pravovo polozheniya. 1920-1930-e gody. Moscow 2004, p. 15.

work throughout the period. Russian refugee lawyers and activists were not satisfied with the Nansen Passport and continued working towards further improvements in the legal status of the refugees. The émigré Central Juridical Committee in Paris sent Johnson a memorandum in late 1925 with suggested changes to the Nansen passport system and the legal rights of the refugees, many of which were would be incorporated in a new Arrangement of 1926. Russian refugee lawyers saw freedom of movement as a human right that was still being denied by states to refugees.[21] Their memorandum listed ways in which states were still avoiding or moderating the Arrangement of 1922. Nansen passports were being denied to certain categories of refugee; those who had arrived in the state after a fixed date (usually connected with the state's recognition of the Soviet Union) or those coming from areas of the former Russian Empire not currently within the border of the Soviet Union or even the Russian Federative Socialist Republic. Some states would only give Nansen passports to those who had promised to leave the state. Others were demanding expensive notarised documents or even statements from the Soviet embassy that the refugee was not a citizen of the USSR. Some states were threatening those without Nansen passports with forced repatriation[22] Lithuania was strictly limiting the number of Nansen passports it was handing out and Estonia was refusing to accept the Nansen passport at all.[23] All state interactions with the HCR were voluntary: in February 1923, the Yugoslav government told the HCR that it was dealing with the Russian refugee issue on its own and had no need to work with it.[24]

The Russian lawyers reiterated their original resolutions to the problem of legal status and identification; that local émigré committees, recognised by individual states, should be allowed to approve identity claims. They wanted the Nansen passport to be eligible for a three year period (instead of one) and family members to be included. Further, they claimed that the strict visa regime imposed during the Great War was loosening in Europe from 1922, but not for Russian refugees. The lawyers wanted the refugees to have the same general rights to visas as other citizens of the state and also the automatic right of return as well as free movement within states. They also suggested that The League of Nations or the ILO should manage the Nansen passport system itself and not leave it to individual states, though they accepted this was unlikely to happen yet as it would be a step too far.

A major stumbling block to the resolution of the refugee problem was that the traditional migration states which had absorbed Europe's surplus populations were closing their doors. The US and Canada refused to recognise the Nansen passport. In 1921, the Canadian government passed Order-in-Council P.C. 2669, which stipulated that only immigrants from the British Isles and the US could arrive without passports. All others

21 Memorandum of members of the Central Legal Commission with attached recommendations in connection with the Geneva Arrangement. 27 February 1926, in Russkie bezhentsy, p. 234.

22 Russkie bezhentsy, p. 236.

23 NF, R 1730, Report of HCR 1923.

24 NF, R 1730, 17000/3. The Yugoslav government was opposed to the HCR's repatriation policy; the HCR blamed 'White Russian' intrigues.

had to have a valid passport less than a year old and had to obtain visas in their country of origin.[25] The Minister of Immigration and Colonization declared in the House of Commons that in order to 'hold back the flood' of refugees desperate to leave Europe they were introducing a $250 financial requirement for all refugees apart from agricultural workers and domestics and a 'through passage' requirement that all refugees must arrive in Canada directly from their country of birth or citizenship. This put insurmountable obstacles in the way of Russian refugees.[26]

Canada would not recognise the Nansen passport as it gave no guaranteed right that they could return un-naturalised immigrants who turned out to be undesirable. Churchill argues that this was a cover for the fact that the Canadian authorities did not want to accept Russian and Armenian refugees per se, as they still refused to accept refugees even when some states, keen to move their refugees on, did start to guarantee a five year return period.[27] The Canadian government took the position that the Russian refugees should be repatriated or assimilated into European states. They were unwilling to take the burden and responsibility for refugees and kept them out through non-recognition of the Nansen passport and high financial requirements. The HCR worked tirelessly and futilely to break down the resistance of Canada and the United States to the admission of Russian refugees, who they presented as excellent agricultural workers.

On 10 May 1926 there was another Inter-Governmental Conference in Geneva on refugee identity documents, with the participation of twenty-four states. The Conference was to again define who was entitled to receive a Nansen passport; to make further changes to the passport system; to determine the numbers of refugees in various countries; and to create a revolving fund to provide for the cost of the transportation and settlement of refugees abroad. The Russian lawyers did not get what they ultimately wanted, which was for the Nansen Passport to become a real passport. This was rejected by states.[28] Nonetheless, the legal status of refugees was improved incrementally. Provision 3 recommended that the Nansen passport holder should have the general right to a return visa for up to a year, 'on the understanding that Governments shall be free to make exceptions to this principle in special cases.' They should also have greater rights to entry, exit and transit visas. Children should be included on their parents' passports. A Nansen stamp was also introduced, in which refugees paid a small sum which went into a fund for loans to refugees to set up businesses and facilitate their emigration to South America.[29]

25 I. Churchill-Kaprelian, 'Rejecting "misfits": Canada and the Nansen Passport', The International Migration Review, 28 (2), p. 281.

26 Churchill-Kaprelian, p. 23. A small number of specific groups of Russian refugees who had sponsorship were permitted to come to Canada.

27 Churchill-Kaprelian, p. 7. Czechoslovakia, Romania, Poland and Greece all eventually agreed to a five year return period.

28 Russkie bezhentsy, p. 27.

29 This was very unpopular with refugee groups, who resented refugees' money being spent on unviable emigration schemes.

The definition for the Russians was also expanded to 'any person of Russian origin, who does not enjoy, or has ceased to enjoy, the protection of the government of the Union of Soviet Socialist Republics and has not taken any other nationality.'[30] The Arrangement of 12 May 1926 clarified that 'Russian' referred to an old legal national identity and country of origin and not ethnicity, and also meant from the entire territory of the former Russian Empire.[31] This stopped the use of cut-off dates for who could be eligible for a Nansen passport and also stopped states refusing to issue Nansen passports to Russians originally from the formed *limitrophe* states or from non-Russian areas of the USSR. This was a juridical and non-political definition. This new Arrangement was endorsed by twenty-three states; Belgium, Bulgaria, Cuba, Estonia, Finland, France, Germany, UK, Greece, Hungary, India, Latvia, Norway, Poland, Romania, Sweden, Switzerland, Denmark, and Yugoslavia.

5. The 1928 Arrangement

A Central Commission for the Study of the Condition of Russian and Armenian Refugees was founded within the Nansen Office in 1926 which included Konstantin Gulkevitch, Jacques Rubinstein, Baron Boris Nolde and Andre Mandelstam, all key figures in the development of refugee law. They continued to push for more protection for refugees, particularly in terms of the rights of the most favoured foreigners (exemption from reciprocity) and the rights to return or restraints on expulsion. They argued that a formal Convention between states defining the international status of refugees was needed to guarantee this protection.

Stateless refugees were *a priori* excluded from the category of most favoured foreigner, whose social rights (employment and social welfare) were facilitated by bilateral agreements between the home state and state of immigration. Rights dependent on being a foreigner became much more important due to the increasingly restrictive policy towards aliens. By the late 1920s states, including Poland, Czechoslovakia and France, were introducing restrictive labour legislation to protect national labour markets. In 1928 for example, Czechoslovakia passed a law that anyone who had arrived in the state after January 1923 was not allowed to get employment without a special permit.[32] A law of 10 August 1932 would restrict the number of foreign employees in certain enterprises and businesses in France. This had a negative impact on Russian refugee employment.[33] There also was a growth in popular xenophobia and 'anti-foreigner' campaigns. Russian refugees had no particular rights of asylum or protection and as stateless had no chance

30 Russkie bezhentsy, p. 28.

31 League of Nations Report, HCR, 1930.

32 M. Frankl, 'Prejudiced Asylum: Czechoslovak Refugee Policy, 1918-60', Journal of Contemporary History, 2014, Vol. 49 (3), p. 543.

33 M. Dewhurst Lewis, The Boundaries of the Republic. Migrant Rights and the Limits of Universalism in France, 1918–1940, Stanford 2007, p. 171.

of being in the category of most favoured foreigner. In 1925, the Russian Red Cross (Old Organisation) complained to the chief Russian refugee representative to the French state, Vasily Maklakov, that Russians in France were being denied their rights of asylum. Maklakov replied that 'the right to asylum has no juridical significance and does not grant any specific rights...you are mistaken when you claim that all the Russian refugees are here as emigrants with asylum rights granted by France...the overwhelming majority are here as not as emigrants, but as labour forces and therefore subject to special control and reglementation.'[34] As well as being subjected to protective labour laws, Russian refugees did not always automatically qualify for social welfare protection such as unemployment and sickness benefits. Another major issue was that of expulsion. Records from Marseille and Lyon indicate that the local French authorities often tried to expel refugees and imprisoned those who refused to go, usually because they had nowhere to go.[35] Driven underground and forced into crime and illegal living, some refugees were reduced to a life of trial and imprisonment.

A further Inter-Governmental Conference was held 28-30 June 1928 in the hope of resolving these issues. The Russian lawyers met with Johnson before the conference and it was agreed that the League of Nations should have the power to perform consular functions for Russian refugees in different states; that Russian and Armenian refugees should not suffer in general because of any lack of reciprocity; that they should not be penalised in the labour market, or expelled from the state; that they should have tax and visa equality with nationals or citizens of other states; that they should also enjoy freedom of movement and have an automatic right of return unless specifically forbidden.[36] A new Arrangement of 30 June 1928 gave the Nansen Office the authority to perform consular functions in individual countries for refugees, such as certifying their identity and civil status; their former family position and status based on documents issued in their country of origin; the regularity, validity and conformity of their documents with the previous law of their country of origin issued in that country; the signature of refugees; attesting to their character, and recommending them to government and educational authorities. France and Belgium concluded an Agreement adhering to this, and Bulgaria and Yugoslavia informally adopted this system. This provided for direct protection by the League of Nations. Refugees should enjoy certain rights usually granted to aliens, subject to reciprocity. It was agreed that their personal status should be determined by the laws of domicile or residence, that they should be entitled to free legal advice and that they should be treated more sympathetically than foreigners in terms of restrictions on labour. Their travel should be also facilitated, with the 'return clause' that certificate holders had the right to return to the issuing state. This was a voluntary non-binding arrangement,

34 Ippolitov, p. 67.

35 Dewhurt Lewis, pp. 159, 168.

36 Report of the Special Technical Commission on the Legal Situation of Russian and Armenian Refugees in the Session of the Advisory Committee, 22 May 1928, in Russkie bezhensty, p. 255.

but many of these points would be codified into international law in the 1933 Convention Relating to International Status of Refugees.

This was a genuine step forward in refugee protection and has been described as promoting a kind of 'supranational citizenship'.[37] In the absence of diplomatic protection, the refugees could benefit from actions taken on their behalf by the League of Nations. It highlighted the inadequacy of the reciprocity principle in regard to refugees and signified the first attempt to standardize the rights given to refugees. The 1928 Convention went some ways to according refugees the same rights as national citizens as well as special rights not given to ordinary foreigners. Rubinstein states that the HCR had become a juridical person playing an important role in moderating agreements and international normative acts.[38]Yet the recommendations remained just that, and it was clear that a Convention was needed, where all states agreed to a legal definition.

This Arrangement had less appeal and only thirteen states signed this. Germany, Austria, Belgium, Bulgaria, France and Lithuania signed it in full. Poland, Romania, Yugoslavia and Switzerland did not accept the role of the HCR. Greece and Estonia accepted it with considerable reservations. Egypt, Finland and Czechoslovakia refused to sign it. According to Rubinstein, the 'majority of states were unwilling to contract formal obligations on behalf of the refugees.'[39] Governments also believed that only states where refugees had gone should have an 'interest' in refugees, and that other states had no obligations to them.[40] Undaunted, the Russian lawyers decided to work towards a Convention. The 1928 Arrangement had opened the door just enough.

In 1928 an Intergovernmental Advisory Commission on Refugees was formed within the HCR, consisting of representatives of 14 states where Russian refugees were based and eight advisors nominated by the Advisory Committee for Private Organisations of the HCR. This included Gul'kevitch, Rubinstein and Nolde. The League decided to call an international conference, and questionnaires on the legal status of refugees were sent out to all interested governments. Jacques Rubinstein headed a committee looking at the responses and wrote a series of recommendations then discussed at the Inter-Governmental Conference on the Legal Status of Refugees in June 1928. This recommended transferring all refugee work back to Nansen. After Nansen's death in 1930, an autonomous Nansen International Office for Refugees was formed to look after the labour settlement and humanitarian aspects of refugee work. It was to be wound up at the end of 1938.

37 Torpey, p. 129.
38 Russkie bezhentsy, p.260.
39 Rubinstein, 'The Refugee Problem', p. 727.
40 R. J. Beck, 'Britain and the 1933 Refugee Convention. National or State Sovereignty?", International Journal of Refugee Law, Vol. 11, No 4, 1999, p. 602.

6. The 1933 Refugee Convention

In 1930, it was estimated that there were around 400–500,000 Russian refugees in Europe, with the largest single concentration in France, around 150–200,000.[41] As noted above, their living conditions were deteriorating and their vulnerability was heightened with the onset of the Depression in Europe. The Russian lawyers kept up the pressure for a Convention to protect these refugees, particularly as the Nansen Office was destined for closure in 1938. The Nansen Office argued that statelessness was still the greatest barrier to the improvement of the conditions of the refugees.[42] Refugees as a social group were least favoured in the 'struggle for existence', as states became more nationalistic and protective of their own citizens. As foreigners, they had fewer rights than citizens or those with most favoured foreigner status. Being stateless, they found it hard to get visas to move on if they lost employment and thus were at risk of falling into vagrancy or expulsion even though they had nowhere to go. As Rubinstein commented 'the expulsion of a stateless person is a shameful thing...to the expelled refugee all frontiers are closed, all territories forbidden; he is confronted by two sovereign wills, that of the State that says "go" and that of the State that says "stay out".'[43] Dewhurst-Lewis cites the case of one Russian in Marseille, Boris M. who was imprisoned nine times between 1932-36 for vagrancy and failing to honour his expulsion order.[44]

The Advisory Committee for Refugees held a second meeting in September 1930 to look at the future organisation of refugee work. [45] A 'radical solution' for the refugees still needed to be found. Neither repatriation nor mass naturalisation was an option. In 1929 the Tenth Assembly of the League suggested the wholesale naturalisation of refugees and the HCR carried an inquiry as to whether states would consider this. This proposal was decisively rejected by states. Naturalisation was seen as an individual act 'gifted' by the state.[46] Naturalisation data was not easy to come by, but the Nansen Office estimated that only about seven per cent of refugees had been naturalised.[47] Few refugees seemed to actively seek out naturalisation. The majority of Russian refugees even by 1930 had not given up hope of the Soviet regime collapsing, a hope that may have seemed realistic at this point as the Soviet Union was convulsed by peasant uprisings during forced collectivization.

41 League of Nations Report by the Inter-Governmental Advisory Committee attached the High Commissioner for Refugees, September 5 1930. A.34. 1930.XII

42 League of Nations Report by the Inter-Governmental Advisory Committee attached the High Commissioner for Refugees, September 5 1930. A.34. 1930.XII

43 Rubinstein, p. 723.

44 Dewhurst Lewis, p. 172.

45 League of Nations Report by the Inter-Governmental Advisory Committee attached the High Commissioner for Refugees, September 5 1930. A.34. 1930.XII

46 League of Nations, Document G.A.C. – 11.1929. There had earlier been a mass naturalisation organised by Nansen and the HCR; the granting of Greek citizenship to Greek refugees arriving as a result of the population exchanges with Turkey in 1922.

47 League of Nations Report by the Inter-Governmental Advisory Committee attached the High Commissioner for Refugees, September 5 1930. A.34. 1930.XII

In August 1931 the Inter-governmental Advisory Commission on Refugees met in Geneva for its Fourth Session and endorsed the establishment of a Convention to stabilise the legal situation of the refugees. This was supported by the Twelfth League Assembly. A Committee of Experts was set up and more information was gathered about the legal status of refugees in individual states. Initial preparations were not auspicious. Thirteen states did not respond to the drafting of the Convention passed to them in late 1931.[48] This lack of interest allowed the Russian lawyers more freedom to push forward their own ideas. On 26 October 1933 the Inter-governmental Conference on Refugees was convened in Geneva, with the participation of Austria, Belgium, Bulgaria, China, Czechoslovakia, Egypt, Estonia, Finland, France, Greece, Latvia, Poland, Romania, Switzerland and Yugoslavia. Britain, Germany and Lithuania were invited but did not attend. On 28 October 1933, The Convention Relating to the International Legal Status of Russian and Armenian Refugees was announced. The Russian lawyers had achieved some of what they hoped for. As Rubinstein later explained in a speech in London

> *It [the Convention] betters the Nansen certificate system, it restricts abuses in the practice of expulsion, and it regulates certain points of private international law. Furthermore, it secures for refugees freedom of access to the law courts, and the most favourable treatment in respect of social life and assurance and of taxation; it exempts them from the rule of reciprocity, it provides for the optional institution of refugee committees in every country and it secures certain modifications of the measures restricting employment.*[49]

Yet he also pointed out its main flaw; that it did not give all refugees the same rights as nationals in employment, only four privileged categories, and states had made the largest number of reservations around employment.

The Convention has been described as a landmark in human rights legislation and the protection of refugees. It was the first binding multilateral instrument to offer refugees legal protection and guarantee their political and civil rights. It was also one of the first contributions to establishing a voluntary system of international supervision of human rights.[50] The 1933 Convention limited state's rights to expulsion through the principle of *non-refoulement*. Stated in article 3, this declared that the state should guarantee 'not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refouler*) refugees who have been authorised to reside their regularly, unless (for reasons of) national security or public order.' This restricted the sovereign right of states to expel aliens, one of the key elements of state sovereignty, although it did not actually guarantee an individual's right to asylum or admission to the state, as it was to apply to those already resident in the state.[51] The Convention gave

48 Beck, p. 605.

49 Rubinstein, p. 171

50 P. Fitzmaurice, 'Between the wars – the Refugee Convention of 1933: a contemporary analysis', in The Challenge of Human Rights. Past, Present, Future, (eds), D. Keane and Y. McDermott, Edward Elgar 2012, pp. 235-255.

51 C. Skran, 'The Historical Development of International Refugee Law' in A. Zimmerman (ed), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol : a Commentary, p. 19.

the Nansen Office the ability to intervene in cases of expulsion. In 1934-35, the Nansen Office interceded in France on behalf of 1,596 Russians subject to expulsion orders, and as many as 4,000 had expulsion orders against them. Expulsion orders rose again in 1939.[52]

Refugees were particularly impacted as they could not move back to their own state (or easily to another) if their employment was terminated. One important element of the Convention was that laws restricting foreign labour should not be applied to specific groups of refugees; those who had lived in the state for at least three years; who were married to a national; who had children who were nationals, or who had been a combatant in the Great War. Czechoslovakia rejected this outright and a number of other states made reservations. In terms of the right to social welfare and education, the Convention stated that refugees should be given the most favourable treatment the state gives to nationals of a foreign country. These were broadly accepted. The Convention has been seen as most successful in this area, as states made more effort to provide social provisions for refugees.[53] Article 14 of the Convention stated that 'the enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity.' As noted above, the Napoleonic Code was based on reciprocity and thus stateless refugees could be deprived of various rights, such as the right to inherit, to appear in court, to be a trustee, to acquire a patent or to receive employment accident compensation. Only France accepted this without reservation.[54]

7. Reasons for Accepting Limits to State Sovereignty

Why did some states agree (and others refuse) to the Convention and other instruments of the refugee regime in the 1920s which put limits on their sovereignty? Some states had close relations with Russian émigré groups dating back to the Civil War, or even before. Although life for the refugees became harder in Czechoslovakia in the 1930s, the government there resisted Soviet pressure to cut official ties with Russian refugee groups despite their increasing need for a rapprochement with the Soviet Union. Czechoslovak elites constructed an idea of new national identity that was caught up with exile and flight, from religious refugees fleeing Catholic restoration in the early seventeenth century, to the exile experiences of Masaryk and Beneš and others fighting for an independent Czechoslovak state.[55] They also wanted to play a leading role in the new international order and to be seen as a leading liberal democratic state at the heart of the new world order. Similarly Bulgaria and Yugoslavia may have been influenced by pan-Slavism and personal links with the pre-revolutionary Russian elites, as well as a desire to be seen to

52 J.E. Hassell, Russian Refugees in France and the US between the World Wars, Transactions of the American Philosophical Society 1999, p. 20.

53 Skran, p. 25.

54 Skran, p. 23.

55 See Frankl, 'Prejudiced Asylum: Czechoslovak Refugee Policy, 1918-60', pp. 537-555.

be part of the new international community. France had a large and relatively stable Russian refugee population who it may have wanted to support so as to be seen as adhering to French traditional liberal principles of offering asylum at not too much risk. Other times, granting refugee rights was done in the hope they may move on; this was a source of support for the Nansen passport in all its forms. Granting a five year extension to right to return, as did some states, was a way of making it more likely other states would then accept them. Robert Beck has analysed why Britain adhered to the Convention. Britain did not contribute to preliminary discussions or attend the Conference. One of Britain's main concerns with the Russian refugees had always been their fear that not only Great Britain itself, but also the Dominions would be forced to accept them, particularly when the refugee issue was managed by the ILO. The Foreign Office wrote to Geneva in 1933 that 'The Home Office, Colonial Office, Dominions Office and the Ministry of Labour are especially anxious to avoid being placed in the position of having to turn down, or to act upon any immigration or settlement recommendations coming from such a source [the League].[56] Their attitude was also that they had very few refugees in Great Britain, so the issue of refugees was nothing to do with them. This was a refusal to see refugees as an international responsibility as well as a refusal to make other states accept general obligations to refugees, which they saw as an encroachment on other states' sovereignty. The British state wished to retain the right to deal with stateless refugees as aliens under the Aliens Order of 1920. However, Britain signed an Instrument of Accession to the 1933 Convention in October 1936, after it was established that refugees from Germany would not be included in it. They agreed to sign it for stateless refugees only, and rejected the non-refoulement clause. The statelessness was important as by only protecting this group, they were not impacting on the state sovereignty of the refugees' country of origin. British policy makers defined sovereignty in territorial terms and would only offer protection to refugees without a state. Additionally, it cost little for Britain to adhere to the Convention as it had very few Nansen passport holders but it made it look like a reasonable player. By this decision the British acknowledged refugees as an international responsibility. The Dutch also adhered to the 1922 and 1924 arrangements to preserve their image as a hospitable and liberal state, though they had accepted very few refugees and their motivation for issuing Nansen passports was the traditional one of ensuring the refugees could move on.[57]

8. The Impact of the 1933 Convention

The Convention was only ratified by eight countries; Belgium, Bulgaria, Czechoslovakia, Denmark, France, Italy, Norway and the UK. Italy, Czechoslovakia and the UK

56 Beck, p. 612.

57 M. Kuitenbrower and H.C.H Leenders ‚Nederland en het Nansen-paspoort. De houding van de Nederlandse regering tegenover statenloze vluchtelingen, in: Kuitenbrouwer M. en M. H. C. H. Leenders (eds.), Geschiedenis van de mensenrechten, Hilversum 1996, pp. 108-119.

made reservations about the principle of admission at the frontier. Estonia, Finland, Iraq, Greece, Latvia, Sweden, Switzerland and the United States did not sign it, but applied it in practice. Egypt signed it but did not ratify it.[58]

The Convention came into force in 1935 and the standard was set that refugees should have the same treatment as most favoured foreigners. The legal situation of Russian refugees remained very varied and the reservations of the states acceding to the Convention restricted in particular the right to work. Russian legal experts stated that the legal situation for refugees was considered positive in France, Czechoslovakia, Bulgaria and Switzerland, all of whom adhered to the Convention. In other states with substantial Russian refugee populations such as China, Poland and Romania, which had not signed the Convention, their situation was precarious and arbitrary. In France, the Popular Front government under Leon Blum ratified the Convention and adopted a non-restrictive policy towards refugees. The right to asylum was identified with the right to work and social service provision was widened in general in this period. This was ended by the Daladier government which came to power in 1938, though the Nansen passport holders remained protected. Local authorities could try to avoid their responsibilities; Hassell writes that in 1938 the Paris region of Billancourt, the home of the Renault works, gave no unemployment benefit to Russians who tried to move elsewhere. [59] The Marseille municipal government tried to argue that it could not afford to give unemployment benefits to stateless persons, but this was rejected by the centre.[60] Even if local authorities had varying attitudes to refugees they had to accept centrally taken decisions. Belgium signed the Convention in 1933 with the reservations that Russian refugees were not to benefit from the advantages given to Dutch, French and Luxembourg immigrants and they could still be expelled. This was later criticized in the Belgian Parliament as 'national egoism'. Yet even before the Convention was ratified in 1937, following the French example Russian refugee workers were exempted from dismissal under the Decree of 1935 which declared ceilings on the employment of foreign labour in the mining industry.[61] They also benefitted from the Convention in other ways, for example they gained the unqualified right to work in Belgium after five years residency, whereas the time limit was ten years for other foreigners. The proviso allowing for expulsion was also dropped by the Belgian authorities, although they could have their movements limited if they were considered a danger to national security.

9. Russian Refugee Lawyers and the HCR

Many scholars have noted how individuals and non-State actors challenged State sovereignty in the interwar period. The Russian lawyers formed an epistemic community

58 Fitzmaurice, 'Between the wars', p. 39.
59 Hassell, 38.
60 Dewhurst Lewis, p. 183.
61 See F. Caestecker, Alien Policy in Belgium, 1840–1940.

and the final achievement of their work was the 1933 Convention. The sources for the Convention have been identified as international aliens' law and the protection of national minorities. These were areas of expertise for the Russian lawyers abroad, and many formed organisations and pressure groups to push for new rights. In 1926 in Germany, for example, the *Verband der Staatenlosen*, was set up, which was formed of many nationalities, but chiefly Russians. They also wanted stateless people to have the same rights as either nationals or most favoured foreigners.[62] Most of the impetus for the development of refugee protection therefore in the interwar period came from refugees themselves. Possibly HCR interests in repatriation and colonisation acted as a brake. In 1936 Johnson wrote that the mass settlement of refugees abroad was still in his view the solution to the refugee problem. He resented the involvement of Russian refugee representatives ('enterprising jurists') on the Governing Body and Managing Committee of the Nansen Organisation.[63] He stated that he and Nansen had always been opposed to refugees forming a 'permanent institution, a kind of new nationality' in Europe with their own rights of representation.[64] Even as late as 1936, when terror was beginning on a mass scale in the Soviet Union, Johnson insisted that repatriation had been the correct policy and expressed resentment and frustration at refugee groups for 'sabotaging' it.[65] In the interwar period both the HCR and the ILO invested hope and resources in colonisation schemes in Brazil, Argentina and Paraguay. Johnson claimed that Albert Thomas, the Director of the ILO, wanted the refugee work to form the nucleus of transforming the ILO into an 'international employment agency.'[66] As noted above, this was particularly resisted by the British and the Dominions who feared an 'immigration dictatorship' by the ILO and an attack on their sovereignty.[67] The colonisation schemes in South America were unrealistic and unpopular with Russians.[68]

The Russian lawyers on their other hand wished for Russian consulates abroad to be recognised by states as legal representatives of the refugees, preserving the sovereignty of the pre-Bolshevik Russian state abroad. The Russian legal experts had similar backgrounds. Several (Mandelstam, Rubinstein, Vishnyak) were Russian Jews from the Russian Empire, who had an understanding of multiple overlapping identities and issues of minority protection. Many had also worked for the Tsarist Ministry of Foreign Affairs in Constantinople. The Ottoman Empire was the testing ground for ideas of minority protection, limits on state sovereignty and international humanitarian intervention. One of the key Russian lawyers in the interwar period advising on refugee law was Andrei

62 Ippolitov, p. 60.

63 Johnson, International Tramps, pp. 200, 268. This polemic is very critical of Russian refugee individuals and organisations, who he blamed for sabotaging his repatriation and resettlement schemes.

64 International Tramps, p. 238.

65 International Tramps. Major Frank Johnson was the key figure in the HCR in its various inceptions from 1921 to 1934, when he was asked to resign partly due to his clashes with the Russian lawyers.

66 International Tramps, p. 183.

67 International Tramps, p. 291; p. 175. The British Ministry of Labour was also against this.

68 See S. Lawford Childs, Youth Uncharted, 1935 for a description of these schemes. Lawford Childs was a British Foreign Ministry representative who worked for the HCR in the 1920s.

Mandelstam (1869–1949). Mandelstam worked for the Russian Ministry of Foreign Affairs and had been a Dragoman at the Russian Embassy in Constantinople before the Great War and had developed a proposal for the international territorial administration for an Armenian province in 1913.[69] Throughout his legal career Mandelstam argued against an absolutist concept of sovereignty in favour of a liberal one which emphasised the relativity of sovereignty and therefore a role for international human rights legislation.[70] Interwar legal ideas about the limits on state sovereignty were influenced by earlier Russian interventions in the Ottoman Empire and the capitulations policies. After 1930, Russian refugee lawyers gained official positions within the Nansen Office and drove their projects through to the 1933 Convention. Johnson complained in his memoir, that once there, they started 'putting into effect their old policy of establishing the refugees as some kind of permanent nationality with themselves as their diplomatic and consular agents.'[71] He continued to insist that this was the wrong approach, but in many ways it was how refugee protection law was developed. The Russian (and others) refugees became a protected nationality in Europe. Their representatives envisaged that they would keep this protected status, and not be sent abroad or naturalised en masse, but that they would still adapt to, and be absorbed in their new states. They hoped that this would be a single generational status, as more states like France adopted enlightened citizenship laws allowing all children born in the state to claim citizenship.

10. Conclusion

In 1934 the Nansen International Office for Refugees estimated there were about one million Russian, Armenian, Assyrian, Assryo-Chaldean and Turkish refugees in Europe. In some countries about fifty per cent were unemployed, while twenty five per cent were unable to work.[72] They noted that 'Practically every one of the refugees represents a problem of some kind for the Office.'[73] Governments were still restricting the rights of foreigners to work and expelling refugees. They called for the proper application of the 1933 Convention, which had provided for an international status for refugees and asked again that measures taken against foreigners should not be applied rigorously to refugees. They asked states:

69 H. Aust, 'From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights', The European Journal of International Law, Vol 25, No 4, 2015, pp. 1105-1121. Aust describes how Mandelstam was the driving force behind attempts to codify human rights at the international level, ending absolute state sovereignty, culminating in the 1929 Declaration of the Universal Rights of Man by the *Institut*.

70 Aust, p. 1110.

71 International Tramps, p. 188.

72 League of Nations C L 32, 1935, XII.

73 League of Nations, A.12. 1934. Nansen International Office for Refugees, Report of the Governing Body for year ending June 30th 1934

> *to establish conditions which would enable the decision already taken by various States... to become fully effective; that the refugees should be ensured the enjoyment of civil rights, free and ready access to the courts, security and stability as regards establishment and work, facilities in the exercise of professions, of industry and of commerce; and in regard to the movement of persons, admissions to schools and universities.*[74]

Europe saw many more refugees in the late 1930s from Nazi Germany and Spain. In 1939, Joseph Roth compared the fate of these new refugees with that of the earlier Russians. In his reportage 'Old Cossacks', he writes of a Russian Cossack troupe of experienced musicians who he first came across in the early 1920s, 'the earliest victims of a world which was just beginning to make people stateless, and things hadn't yet gotten really tough'. Seeing them again in 1939 older and more tired, after twenty years of travelling ('It wasn't really travelling, it was more that they had themselves forwarded'), he reflects on the fates of stateless Jews in Paris:

> *A new wave of refugees has arrived in the city. You and I for instance with a pain that's twenty years fresher. And our destinies will be haggled over in ministries rather than in concert agencies. But we too will be going on a lot of 'tours' that one would have to be a real Cossack to survive*.[75]

The Russian refugee was a common figure in the inter-war cultural imaginary, depicted for example in the reportage of George Orwell and Joseph Roth and the fiction of inter-war thriller writers such as Eric Ambler and Leo Perutz. Typically featuring as ex-Tsarist Officers, resourceful, philosophical, rather dashing, tenacious, entrepreneurial, and positioned in a flexible boundary between legality and illegality. Not for the Russian was the internment camp which was to be the fate of refugees in the 1930s and 1940s; instead they were seen as travelling along a mobile trajectory to and from such cities as Constantinople, Belgrade, Marseille, Sofia, Prague and Paris. Even Hannah Arendt, who understood that as stateless people, Russian refugees were also 'the scum of the earth', expelled from humanity and living under conditions of absolute lawlessness, she still described them as 'the aristocracy, in every sense, of the stateless persons.'[76] The League of Nations and the Nansen passport did offer them some protection and the ability to make life choices by limiting state sovereignty. The attempts at resolving the legal status of refugees took some time as the HCR hoped that other solutions – repatriation, colonisation and naturalisation – would work.

74 League of Nations, A.12. 1934. Nansen International Office for Refugees, Report of the Governing Body for year ending June 30th 1934

75 'Old Cossacks', Pariser Tageszeitung, January 20 1939, in Joseph Roth, The White Cities. Reports from France, 1925–39, Granta, London, 2005, p. 252.

76 H. Arendt, The Origins of Totalitarianism, New York 1973, p. 267; p.281, f.30. As for the 1930s, she wrote that 'The Second World War and the DP camps were not necessary to show that the only practical substitute for a non-existent homeland was an internment camp.' p. 284. Apparently though the HCR did suggest in the 1920s finding a territory to which all unwanted refugees could be deported.

The 1933 Convention did not institute equality of treatment between refugees and nationals. However, it was an incremental improvement in the legal status of refugees and legitimised the idea that national human rights standards should be subject to international supervision, as well as the principle of *non-refoulement*. The notion of waiving reciprocity, usually the basis for international relations, was key to formulating modern notions of human rights. In terms of continuity, the connections with the 1951 Refugee Convention lay in the principles that refugees are a distinct category of migrants deserving special protection and should not be sent back to a country of persecution. A further connection was the involvement of international organizations.[77] Claudena Skran describes refugee law in the interwar period as a success, and a mixture of optimism that legal norms could have positive political effects and pragmatism in dealing with the crisis.[78]

The interwar refugee regime which emerged in the 1920s tried to account for the anomaly of statelessness in a system where protection was tied to the sovereignty of states. Culminating in the Convention of 1933, liberal states such as Czechoslovakia, Belgium, France and the United Kingdom agreed to limit their own sovereignty for those refugees already residing in their states. This loss of sovereignty meant amongst other policies, that they agreed to protect refugees' right to work, grant them social benefits and protect them from expulsion. All this came at a financial cost and also a political cost to these states, as various groups (trade unions for example) advocated national protectionism. The Convention led to an increasing awareness among policy makers that 'refugees' are an exceptional category of immigrants. One of the main reasons, in particular for countries with few refugees, of signing the Convention was the desire to be seen as liberal, which emphasises the importance of the protection of liberal values overall as the best way to protect the rights of refugees, particularly in the current political climate.

77 Skran, p. 6.
78 Skran, p. 6.

How the Refugees Crisis from Nazi Germany got (partly) solved through International Concertation

Frank Caestecker

ABSTRACT

Dieser Überblick zum historischen Forschungsstand beschreibt die Dynamiken der Flüchtlingspolitik während der Krise, die die Verfolgungen und Vertreibungen in Nazi-Deutschland auslöste. Die Historiographie zu diesem Gegenstand ist noch immer stark von nationalen Perspektiven geprägt, wobei jedes Land seine eigenen Narrative und Analysen produziert. Eine vergleichende Studie durch Experten nationaler Fälle hat die Ähnlichkeiten und Unterschiede in den Politiken verschiedener Staaten herausgearbeitet und gleichzeitig gezeigt, dass diese sich in starkem Maße an den Entscheidungen ihrer Nachbarn ausgerichtet haben. Der Artikel liefert eine Synthese dieser Untersuchung, integriert neue Forschungsresultate und bewertet die Verdienste des internationalen Flüchtlingsregimes dieser Zeit neu, das bislang nur ungenügende Aufmerksamkeit in der historischen Forschung gefunden hat.

In this article we provide an overview of the historical insights in the dynamics of refugee policy at the time of the refugee crisis due to persecution in Nazi Germany. Historiography on this topic is still largely based on a national perspective, with each country producing its own narratives and analyses. A comparative study has been undertaken by a group of national experts in this field which has highlighted the comparisons and contrasts in the responses of the various states and has also shown that individual states' policies had been strongly influenced by the decisions of their neighbours.[1] In this article we provide a synthesis of these findings, integrate new research findings and re-evaluate

1 F. Caestecker and B. Moore (eds.), Refugees from Nazi Germany and the Liberal European States, New York 2010.

Comparativ | Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 27 (2017) Heft 1, S. 39–59.

the merits of the international refugee regime of that time which has received until now only dismal attention in historical research.

1. Fleeing Nazi Germany at the worst possible time, 1933–1934

Those fleeing Germany immediately after the Nazis took power found themselves abroad- some with regular papers, others with no papers- in a time when immigration was being banned in all countries bordering Germany. While in the nineteenth century international immigration within Europe had been largely unregulated, during the First World War most European states had a controlled economy in which the state had created institutions to regulate immigration. The post-war democratization of the polity had given the labor movement in some countries a say in the regulation of international labor migration. The state's capacity to control international migration, in agreement with organized interest groups, was tested during the economic crisis of the 1930s. Given the economic hardship for labor, the trade unions insisted that the authorities stop all immigration: jobs endangered by the economic crisis should not be further jeopardized by newcomers. The authorities agreed to stop immigration also in order to save on social expenses. The authorities were even eager to export unemployment by pressuring employers to dismiss foreign workers first, which the authorities then would deport as public charges. States indeed expelled foreign immigrants from their territory in order to alleviate the lot of national citizens. The timing of the mass arrival of refugees in 1933 was thus not conductive to an easy solution of the refugees' plight. The economic crisis lasted through the 1930s, notwithstanding a temporary relief in the mid 1930s. The Russian refugees, in contrast to those fleeing Nazi Germany, had at least the advantage of important labor shortages when they arrived in Western Europe at the end of the 1920s, which smoothened their acceptance.

The departure from Nazi Germany of 10,000 political opponents of the Nazi regime and 25,000 Jews immediately after the electoral victory of the Nazi party and the chaotic violence perpetrated at that time was a refugee movement.[2] Indeed, political opponents of the Nazi regime, be they part of the Jewish community, were compelled to become refugees as they had to flee a very brutal persecution. Dachau and other camps were created as prisons for the political opposition, and it was immediately filled with inmates. Numerous other activists, in particular communists, were murdered by Nazi squads, murders condoned by the new regime. The severe persecution of all opposition to the new regime meant that these people did not have a real choice but to flee. Their flight could be labelled an acute refugee movement, to use the label minted by Kunz in distinction to 'anticipatory' refugee movements. The latter did not have to leave at the spur of the moment, but had some time to plan their departure. Still 'anticipatory' refugee movements are also qualified as an involuntary departure or flight in response to 'push'

2 Ibid., p. 218.

factors, while (voluntary) migrants as Kunz outlined are responding to 'pull' factors. The flight of non politically active Jews from Germany in 1933 was much less a response to an acute threat. Some fled as they had been targeted by the chaotic violence in the wake of Nazi victory, others did not thrust the new rulers, and still others hoped to increase their opportunities by leaving Germany. In the first years of Nazi rule few overt official attacks on Jews were being made, largely because the Nazi regime regarded economic recovery as paramount. At the local level acts of violence took place and Jewish businesses were boycotted, but Jews were still largely protected against arbitrary measures and an internal migration enabled Jews to avoid local harassment. However, between 1933 and 1937 the situation of Jews slowly deteriorated. The first preparatory steps were taken for the removal of all Jews from German society. Of the half million Jews in Germany, most were German nationals, but a few ten thousand were stateless or became stateless as the Nazi regime denaturalized first generation immigration and their children who had acquired German citizenship in the 1920s. These stateless immigrants were holders of a German *Fremdenpass,* which implied they were under the protection of the German authorities. The new regime wanted to retreat from this commitment to these individuals by not extending the validity of these German *Fremdenpasses.*[3] From 1935 onwards, Jews, even those with German citizenship who had fled abroad, were upon return downgraded to unwanted guests who were to be arrested and only liberated if they left again. Crucial in the preparatory steps was that the Nuremburg Law of 1935 gave a legal definition of the racial divide in Germany and qualified who were the 'Jews'. The Nuremburg Law considered "Jew" and "Aryan" as mutually exclusionary categories. Those who did not accept this strict separation between these so-called 'races' by crossing that line in their private life were liable to persecution. Intimate relations between "Aryans" and "Jews" were prosecuted on the basis of the crime of *Rassenschande* (race defilement). These court cases were one of the instruments in a campaign to stigmatize and isolate the 'Jewish' Germans in German society, a preparation for the violent persecution that would be unleashed by 1938 and end in the Endlosung.

2. Unsolicited immigrants from Germany in 1933 considered a different kind of immigrant

During the Depression newcomers were considered unwanted competition for scarce resources. Thousands of East and South European migrants had left their homes in the 1920s to find a place of abode in Western Europe, which they hoped would improve their material lot. They were the first to be fired when the Depression hit these economies hard, and many of these unemployed foreigners who did not yet have residency rights were expelled from the territory of these states. The pressure on the borders mounted as

3 H. Berschel, Bürokratie und Terror. Das Judenreferat der Gestapo Düsseldorf, 1935–1945. Essen 2001, pp. 260-274.

some of these migrants did not return to the periphery of the European economy and hoped to regain access to the territory of the still more prosperous Western societies. Besides these migrants in orbit there were also new would-be immigrants as the flows from the periphery of the European economy continued. These East and South European migrants hoped for a modicum of protection in Western Europe against the harsh conditions of the Depression. Adding to this flow of unsolicited migrants were political activists and Jews fleeing Nazi Germany. At the border posts all would-be immigrants without the appropriate documents and/or too few means were not admitted. Although it had been decided to halt all immigration, thousands of emigrants from Nazi Germany managed, mostly in a regular manner, to enter Western European countries. The Nazi regime had not yet started the attrition of the economic position of the Jewish middle class, and Jewish refugees could easily pose as tourists. Others entered in an irregular manner, in particular the political activists who mostly had to leave on the spur of the moment. All these immigrants from Nazi Germany could quickly attract attention to the specificity of their migration decision. Refugee aid organizations mushroomed, which catered to the needs of these emigrants and put pressure on the authorities to grant their protégées protection. The solidarity within civil society with like-minded activists or fellow believers among these uninvited immigrants insured that attention was directed to the reasons why they had left Germany.

Whether the refugee aid organizations had easy access to policy makers or not, all liberal countries in Western Europe adhered to the principle of *non-refoulement* avant la lettre. Policymakers considered returning them to the persecuting state reprehensible. Norms constrained the actions of the executive authorities. Excluding repatriation did not imply that policy makers were ready to grant the emigrants from Germany. The Belgian authorities urged refugees to move on to France, which soured diplomatic relations. In pursuing this intransigent policy, the Belgian government showed clearly that it was not prepared to share the burden when it came to refugees. However, this policy soon reached a stalemate as these refugees adamantly refused to return to Nazi Germany or move on to France. Additionally, the Netherlands took steps to close their borders for refugees for whom Belgium had been the first country of asylum. Concerned about the potential for diplomatic repercussions, by the end of 1933 Belgium conceded to accommodate emigrants from Nazi Germany for whom Belgium was the first country of asylum.

The most vocal and effective advocates of the refugees were the socialist refugee aid organizations defending their comrades in exile. They could muster enough political power to exempt their refugees from the protectionist immigration policy. The authorities agreed that these activists could not return home and therefor deserved a privileged treatment. The straightjacket in which all immigrants were forced was thus quickly ripped open and the authorities yielded to the political allies of these immigrants from Germany. A side door was opened for refugees. Communist refugees rarely tried to use this opportunity as the German Communist Party took the view that their stay in Western Europe was only a temporary pause in the struggle against Nazism. Refugees should return as soon as possible because the communist victory in Germany was imminent.

Given the harsh repression of communists in Nazi Germany, returning to the country turned out to be a suicidal strategy. Most German communists, after being send back ended up in concentration camps.

As mentioned before, prior to 1938 the persecution of Jewish and political refugees were two worlds apart. The policy in the Western European countries towards the mass arrival in 1933 took to a certain extent this difference into account. While political activists were granted a leave to remain, the authorities protected German Jews only temporarily. Jews from Germany recommended by a refugee committee because of anti-semitic persecution were only tolerated for a limited time to allow them to find a final destination, mostly overseas. This more conditional protection was legitimized by the less harsh persecution Jews were confronted with in Germany in 1933. It was also in sync with a Jewish tradition to assist transitmigrants. Already at the end of the 19th century at the time of the great transatlantic migration, the Jewish communities in Western Europe had set up charitable organizations to assist Jewish emigrants from Russia and Galicia stranded in the European ports on their way to America. In tandem with Jewish organizations that built up expertise in organizing intercontinental migration, this assistance was very effective in making these transitmigrants move on. These structures were still present in the charitable networks of the Jewish communities and were reactivated when the emigrants from Germany arrived. These organizations were quickly confronted with the difficult task of finding a country overseas willing to take in the stateless. These refugees were the undocumented par excellence, and it turned out that these paper walls were extremely difficult to overcome. For German Jews the departure from the first country of asylum was less of a difficulty.

The refugee aid organizations held the key to refugee protection. Their support granted political activists a leave to remain and temporary protection for Jewish refugees pending their travel to a final country of abode overseas. The authorities had not yielded to the tenet of their policy. Persecuted political activists were protected, but they were strictly prohibited from engaging in any economic activity. The protectionist policy, largely under pressure from the trade unions was premised on the belief that the economic hardship of the local population should in no way be perceived as being aggravated by this refugee influx. The unions agreed that any newcomer, even a prosecuted trade unionist, should be kept out of the national labor market. Tolerating an exemption for refugees would be a breach in the newly constructed dam. Independent economic pursuits of those newcomers were also contested by small businesses and shop owners. These groups compensated their weak professional organization by the shrillness of their protests.

That refugees were kept out of the national economy implied that the refugee relief committees were very selective in recommending to the authorities immigrants who needed protection. By recommending an immigrant, the committee underwrote the financial risks of admitting him/her. If the immigrant had no (more) independent means to live on the aid committee had to shoulder the financial responsibilities for 'their' refugee. The Jewish aid organizations therefore had only demanded a temporary stay for their protégées as further migration was a cost saving device. The Jewish communities were

also anxious that enabling the Jewish refugees to settle would give fuel to political entrepreneurs exploiting anti-semitic and xenophobic sentiments. Protection for German refugees in Western Europe was a private-public mix. Eligibility policy was largely outsourced to the private sector, and these aid organizations undertook the management of the refugee influx and underwrote its costs.

Norms of conduct of policy makers, strengthened by political allies of refugees in the country, bilateral pressure, and the determination of refugees not to return explains the development of a refugee policy in 1933. The authorities hoped that tolerating politically sensitive cases who adamantly refused to return would increase the efficiency of their management of migration. Public policy aimed at crediting the authorities for protecting their citizens against competition by immigrants for those resources such as jobs, welfare and customers that had become scarce due to the Depression. This public policy also did not entail any costs for the Treasury, as the refugee aid organization bore the brunt of the (financial) costs. Advocates of a hard line policy pointed out, however, that notwithstanding a halt in immigration, emigrants from Germany continued to force themselves upon the neighboring countries while the authorities acquiesced. This perception of a loss of migration control was aggravated by a deep seated feeling that foreigners, although refugees, were stealing jobs and competing with local entrepreneurs in a dishonest manner. The political costs of this experiment would strongly increase when the Nazi regime would decide by 1938 to force those considered its internal enemies out.[4].

3. Bringing the issue of refugee management to an International level, 1936–1937

The chaotic start of the management of the German refugee crisis in which each state developed its own policy made the need for some international coordination obvious, but more important for policy makers in their endeavor to internationalize the refugee issue was the interest of the frontline states to improve the emigration possibilities for their (Jewish) refugees. The frontline states wanted the burden of refugee protection to be shared by the community of states. Also, the very annoying administrative cases of refugees in orbit, which no state considered as their refugees, needed a solution. The British MP Lord Cecil strongly supported the international coordination of refugee policy as absolutely necessary to the proper functioning of refugee policy: "It was a great mistake to treat the problem of the refugees as though it was a mere matter of charity. It is a question of humanity, but it is also a political question because unless solved, the refugees everywhere constitute foci of irritation. A major purpose of government is to remove such irritation …and to maintain peace".[5]

4 Caestecker and Moore, Refugees from Nazi Germany, pp. 193-243.

5 Lord Cecil to the British Foreign Foreign quoted in: R. Breitman et al. (ed.), Advocate for the Damned: the Diaries and Papers of James G. McDonald, 1932–1935, Bloomington 2007, p. 617.

To bring the refugee issue to an international level, a forum in which states could meet was needed. The most likely institution was the Nansen Office, an international organisation within the Leagues of Nations' whose mandate was not refugees as such, but specific groups of refugees. The League of Nations, already crippled by the American refusal to support it in the early 1920s, saw its authority weakened in the 1930s. An official extension of the Nansen's office mandate to cover also the German refugees would have needed a decision of the League of Nations, which the Germans surely would have vetoed and which would have undermined the League's overture to the USSR. The Dutch government took the initiative to suggest the foundation of a High Commissioner for the refugees from Germany which in order to appease the Germans was not answerable to the League itself, received no public monies, and was subsidized mostly by private funds.

The High Commissioner for the refugees from Germany worked hard to broker an international agreement in 1936 that guaranteed the refugees from Germany some basic rights. The agreement was modelled on the Convention for the Russian refugees in 1933. It was, however, a watered-down version due to the intransigence of representatives of European states who wanted to yield the least possible national sovereignty while still insisting on having an international response to the refugee crisis.

The international cooperation that the Arrangement of 1936 aimed at was based on the commitment of the first country of asylum to protect refugees. The international Agreement fully preserved state sovereignty by a national determined, individual eligibility procedure for refugee status, rather than the clear-cut collective definition of a (Russian) refugee in 1933. The state's right to expel refugees was preserved, but this was considered warranted only for reasons of national security or public order. The Agreement further stated that 'refugees shall not be sent back across the frontier of the Reich unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object'. This principle of *non-refoulement* as an incursion on the states' right to deport refugees to the persecuting state was the crux of this international refuge regime. Sweden and Czechoslovakia, although their delegates were present at the conference, refused to adhere to this Arrangement**.** The decision makers in both countries considered it unacceptable that they were bound to a treaty that restricted their national sovereignty. In Czechoslovakia, which from 1936 onwards retreated from liberalism, the authorities insisted they did not want to be stuck down to a definition of refugee that would limit their possibilities to get rid of these aliens if they turned out to be troublesome.[6]

Less than two years later, at an international refugee conference that took place in Geneva from 7 to 10 February 1938, the agreement got more binding force in the juridical form of a Convention. The Convention repeated the above mentioned principle of

6 K. Čapková and M. Frankl, Unsichere Zuflucht: die Tschechoslowakei und ihre Flüchtlinge aus NS-Deutschland und Österreich 1933–1938, Cologne 2012, pp. 79-83; H. Lindberg, Svensk flyktingpolitik under internationellt tryck 1936–1941, Stockholm 1973, p. 27 and 78-81.

non-refoulement but made the exception to this principle even more exceptional by only tolerating repatriation if the refugee had refused, *without just cause*, to make the necessary arrangements to proceed to another country. By further qualifying when *refoulement* of refugees was possible, the Convention implicitly referred to the norm of appropriate state behaviour not to repatriate refugees. This declaration of intent restrained at least symbolically the sovereignty of the undersigning states, as states could only in exceptional cases have recourse to deportation of refugees.

Also in contrast to the 1936 Arrangement, the Convention of 1938 included a chapter on labour conditions that had been copied from the 1933 convention concerning the Russian refugees. The restrictions for the protection of the labour market were not to be applied in all their severity on refugees from Germany and even waived after three years of stay in the country of asylum. This chapter had been crucial in the Convention of 1933 for Russian refugees, as at that time states were constructing barriers that hindered the economic integration of foreigners within their population. The Convention of 1933 had safeguarded the opportunities for Russian refugees to integrate economically in their country of asylum. In the Arrangement of 1936 that chapter was however left out as at that time national protectionism still held full sway and newcomers, including newly arrived refugees from Nazi Germany were still to be excluded economically. The economic upswing since 1935 explains the change of course, together with a slowdown in the flight from Germany. The new state of affairs opened up the minds of policy makers for the stabilization of those who had fled Nazi Germany in 1933. Refugees who had not yet moved on could stay and they, similar to the Russian refugees, needed to be provided with economic opportunities to be able to integrate in the host country.

That the international agreements for the refugees from Nazi Germany imposed weaker obligations on the states than the convention of 1933 for the Russian refugees was due to the very different challenge the new refugee flow posed. First the Soviets had denaturalized all refugees and repatriation was no longer a viable option. Secondly the USSR had closed its border and no new influx was to be feared. By 1933 the Soviet refugee crisis had long since ended and the international efforts were aimed at stabilizing this population. The Convention of 1933 provided incentives to fully integrate Russian refugees who had long been present on the territory of the undersigning states. The situation of the refugees from Nazi Germany on the other hand was still very volatile. The states did not want to sign a blank cheque and therefor they limited their commitments to only those refugees from Germany who were already 'lawfully residing' in their country. The German refugee crisis was an ongoing crisis. The states made sure that they maintained a free hand in dealing with future refugee flows. Still, only seven states, mostly frontline states (Belgium, U.K., France, Denmark, Norway, Spain and the Netherlands) signed the agreement of 1936 and the convention of 1938. Switzerland adhered to the agreement of 1936, but by 1938 Switzerland no longer wanted to be a first country of asylum. It saw itself only as a transit country within an international redistribution of refugees

and therefore refused to be a party in the international Convention of 1938.[7] All countries that signed the Convention of 1938 expressed reservations about individual articles. The Netherlands even refused to sign the paragraph restricting the expulsion of refugees to Germany.[8]

Both international agreements reaffirmed the view of the refugee from Germany as an immigrant who due to the involuntary nature of his/her immigration might deserve preferential treatment, but had no right to claim it. The contracting parties agreed to limit their administrative discretion in dealing with refugees for whom they were the first country of asylum. Susanne Heim assesses these agreements as "declarations of intent with no obligation. It could be used as a general guideline for dealing with the refugees, but left sufficient scope of interpretation or even evasion."[9] Still these arrangements turned out to be adequate instruments to address the refugee problem as it posed itself that very year. This internationalization, rather Europeanization of refugee policy insured that a benevolent attitude towards refugees did not run the risk of acting as a magnet on refugees elsewhere, as all European states party to the international refugee regime were committed to stabilizing their refugee population. Although this arrangement had no teeth, its soft power expressed an international entente for closing off what later turned out to be the first wave of flight from Nazi Germany. The second wave of refugees, starting in the spring of 1938, was even more a panic flight and would cause a radical change of heart among policymakers. Susanne Heim in her critical assessment refers to this later period when indeed evading the international refugee regime was the catch-word. The fortune of the convention of 1938 is telling: although it was signed by seven states, only Belgium and the U.K. actually ratified it before the outbreak of war in September 1939. The international refugee regime turned out to be too weak to function as a platform for international cooperation when in 1938 the refugee influx was suddenly perceived as threatening frontally national sovereignty.

4. The implementation of the 1933 design of refugee policy, 1934–1937

All liberal countries in Europe from 1933 onwards granted political activists a leave to remain, while Jewish refugees were temporarily protected pending their travel to a final country of abode overseas. These refugees had to be recommended by an aid organization, which undertook to guarantee the maintenance of their refugees. After the mass arrival in 1933, the flight of political refugees was only a trickle of what it had been in 1933. Jewish emigration, on the other hand continued in the following years, but also at a much lower rate. According to Jewish organizations in Germany, by the end of 1937

7 Unabhängige Expertenkommission Schweiz-Zweiter Weltkrieg, Die Schweiz und die Flüchtlinge zur Zeit des Nationalsozialismus, Bern 1999, pp. 52-56.

8 C. Skran, Refugees in inter-war Europe: the emergence of a regime, Oxford 1995.

9 Heim, 'International refugee policy, p. 34.

150,000 Jews had left and 350,000 Jews still remained in Germany. Most of these Jewish refugees in Western Europe had moved on overseas. The most common refuge was Palestine. Argentina, Brazil, and Uruguay in South America also became important destinations. The Latin American states assessed these applications on their economic potential. In Germany, many Jews had been successful entrepreneurs and traders, and therefore, particularly if they had been able to take some capital with them, they were considered interesting immigrants. It was of no relevance to the decisions of the Latin American states to welcome the German Jews who had been forced to leave Germany.

In Europe the authorities remained the final arbiters of who was to be considered a refugee covered by the pledge of a refugee aid committee. However, in the day to day administrative routine it was a system of effectively subcontracting the selection process to the private sector. As the authorities had no independent means to control the eligibility decisions, this implied that if a refugee for any reason was not recommended by a refugee aid organisation he or she had very little opportunity to qualify for protection.

That state sovereignty was upheld was obvious in the treatment of communist refugees. Before 1935 communist refugees had been only a marginal issue in migration management. Most countries had denied asylum to refugees from Germany recommended by the communist aid organization, while those few countries (Switzerland, Denmark, France) who did offer communist refugees protection still expelled them when they remained politically active. When German communists were denied asylum their aid organization denounced the hypocrisy of liberal democracies. However, for communists asylum was hinged to defeatism. The struggle for the communist victory in Germany was according to the communist movement very close. Therefore, asylum was only intended to offer a short pause to enable the German communist activists to recover strength and subsequently to resume the combat in Germany. For German communists for whom it was too dangerous to return to Germany –those who had been condemned to a prison sentence for more than half a year- the communist refugee aid organization recommended them to the authorities for protection. If protection was granted this was on the condition that they refrained from political activities. Foreigners supporting the communist cause were considered a threat to public order and to be expelled. However financial support by the communist aid committee was dependent on full time political work, these refugees were thus in a catch-22. The communist movement hardly contested the expulsion of communist refugees as these expellees were sent to the Saar, a region administrated by the French authorities under the control of the League of Nations. The concentration of hardened communist refugees in the Saar was part of the strategy of the German Communist Party to mobilize the local population against returning the Saar to German sovereignty during the plebiscite of January 13, 1935. Notwithstanding the communist mobilization, the Saar inhabitants decided nearly unanimously during the plebiscite in favor of a return to Germany. The several hundred hardened communists in the Saar had a hard time finding a new place of asylum. Asylum became a more important objective of the communist struggle in Western European countries when in 1935 the communist movement changed course with the Popular Front policy. The suicidal

strategy of the German Communist Party was aborted: the communists acknowledged that the Nazi regime was there to last. The relentless baffling of human rights by the Nazi regime meant that communists also needed asylum. The Popular Front policy meant that the liberal democracies had to be trusted. Merely denouncing these regimes was not enough; the communist parties had to find political allies so that communist refugees would be protected effectively. Communist parties unleashed a political struggle for asylum for their comrades in danger. By bringing the issue in Parliament and on the streets the protection of German communists improved considerably. The issue lost some of its salience when the demand of liberal democracies for refugees to restrain politically was to a certain extent met by the communist movement. The decision to sacrifice the political activism of German communist refugees in Western Europe had its internal logic: German refugees should integrate (economically) in the countries of asylum which enabled the French and Danish communist movements to liberate funds allocated to the German refugees to subsidize their Popular Front initiatives in these countries. The Spanish civil war provide the communist movement the opportunity to kill two birds with one stone: cutting financial support for German refugees and providing soldiers for the International Brigades. When German communists wanted to fight Hitler they had to leave for Spain. In total about 3,000 Germans, mostly communists, enlisted to defend the Spanish republic.[10]

The only country that kept firm for long in denying communist refugees protection was the Netherlands. The Dutch ruling coalitions succeeded in keeping out the moderate left from government until 1939, and all these years their alien policy was obsessed with keeping out the Reds. Even for the Dutch authorities, repatriating communists to Germany was a bridge too far; therefore, these subversive refugees were forced over the Belgian border. Shoving off refugees created diplomatic frictions. Under Belgian protests evoking the principle of first country of asylum, part of the international agreement of 1936 the Dutch authorities agreed to protect those German communists for whom the Netherlands was the first country of asylum. In 1937 a bilateral agreement was concluded between the two countries which enabled Belgium to send back to the Netherlands all (communist) refugees for whom the Netherlands had been the first country of asylum. It turned out, however that for hardened communists at least the only Dutch place of asylum was the prison.

This bilateral agreement was an example of the period of grace in the European management of refugees from Nazi Germany made possible by the international refugee regime.

Authorities all over Europe were willing to adapt their immigration policy and thus yield some national sovereignty in order to integrate the remaining refugees from Nazi Germany into the social fabric. The mass arrivals of 1933 was a one time eruption, and the

10 A. Hilberg Berg, Die Internationalen Brigaden im Spanischen Bürgerkrieg 1936–1939, Essen 2005; P. van zur Mühlen, Spanien war ihre Hoffnung. Die deutsche Linke im Spanischen Bürgerkrieg 1936 bis 1939, Bonn 1983; M. Uhl, Mythos Spanien. Das Erbe der internationalen Brigaden in der DDR, Bonn 2004.

refugee policy developed in that year, heavily subsidized by the private sector had been an adequate response. By 1936 the consensus among the liberal states in Europe was formalized that each country had to stabilize the refugees, even communists and Jews for whom they were the first country of asylum. In particular, stateless Jewish refugees who had great difficulties in finding a final country of abode were singled out for a benevolent policy. This decision highlights the pragmatic nature of police making in migration management. Herman Bekaert, the second in command of the Belgian alien police, explained to the civil servants in his administration the decision to grant stateless Jews the permission to stay with the following words: "It seems to be preferable to authorize their stay …rather than to "tire out" a foreigner by a procedure which is the playing field for the intervenants[11] and which finally tires the alien police out".[12]

Those refugees had also to be offered opportunities to start a new life. As mentioned before, the beneficiaries of the 1933 refugee policy were strictly prohibited from engaging in any economic activity, but by 1937, thanks to the economic revival, this economic exclusion was no longer strictly adhered to. Refugee relief organizations had been arguing that they could not be permanently financially liable for their protégés. Refugees' economic exclusion also entailed a loss of human capital. Even the institutions in charge of public order advocated opening up opportunities for the economic integration of (political) refugees as this would restrain their unwanted political activism.

The arrangement of 1936 had important repercussions for those refugees already on the territory of those states party to this effort at international coordination, but it was not an open-ended commitment; future arrivals were not covered under this agreement. The arrangement only referred to persons 'lawfully residing' in the country of asylum, but in 1936 several countries provided as a transitional measure an amnesty for refugees who were living illegally in the country. For France, this amnesty would entail by the summer of 1938 the legalization of the stay of 5,333 refugees and their families who had mostly emigrated, in an illegal manner to France in 1933 and 1934.[13] By the end of 1937, most political and Jewish refugees who had arrived since 1933 in West-European countries and had not moved overseas were authorized to remain in the first country of asylum and to build a new life.

11 Intervenants in the parlance of the alien police referred to refugee aid organizations, but most importantly to politicians and other public figures who intervened to support a for them deserving individual case

12 Il me paraît préférable d'autoriser le séjour si l'on se sent incapable de la refuser plutôt que de "fatiguer" l'étranger par une procédure qui fait le jeu des intervenants et qui en définitive "fatigue" la Sûreté Publique" Herman Bekaert to Bodart, 1.1939. Belgian State Archives, alien police, individual files, A79910 (Eliasberg).

13 Rapport sur l'activité du comité consultative, 6.1938. Archives Nationales Paris, F7 16073; L. Dewhurst. The Boundaries of the Republic. Migrants Rights and the Limits of Universalism in France, 1918–1940, Stanford 2007, pp. 173-184.

5. Radicalized Nazi anti-semitic policy prompts refugee policy to evaporate, 3-10.1938

In 1938 the number of refugees exploded as geopolitical changes brought more Jews under Nazi rule, and at the same time anti-semitic policies were radicalized. The first expansion of Hitler's Germany was the incorporation of Austria into Germany in March 1938, by which process the number of Jews under Nazi rule increased by 200,000. The incorporation of Sudetenland in October 1938 led to the flight of another 30,000 people. Czechoslovakia became victim of Nazi aggression in March 1939 what created even more refugees.

The Nazi annexation of Austria had provoked a flight of political activists, but the vast majority of refugees from Austria were 'Jews' as the *Anschluss* prompted an almost immediate and unprecedented wave of violence against the 'Jews'. Terror, together with a high degree of administrative collusion to make Jews leave, caused nearly 50,000 'Jews' to leave Austria by the fall of 1938.[14] German police and border authorities even worked together to dump 'Jews' across the frontiers of neighboring countries. A brutal public brutality against the Jews in Germany proper started with the orgy of violence of Crystal Night (9–10 November 1938), followed by the incarceration of some 30,000 Jewish men in concentration camps. The plundering of refugees was part of this radicalization of Nazi policy. The Jewish inmates of the concentration camps were only liberated in order to leave the country stripped of their belongings. Similar to the flight of political opponents of the Nazi regime in 1933, the flight of Jews became an acute refugee movement in response to a life threatening persecution.

The authorities of all European countries increased their border controls and imposed visa requirements as a way of stopping the intrusion of desperate Jewish refugees. In some countries, transport companies had, by the threat of sanctions to scrutinise their passengers' passports and visas for their validity to enter the country.[15]

The arrival of uninvited and destitute Jews in countries bordering Nazi Germany caused the authorities in these countries to question the (temporary) protection they had granted to Jewish newcomers from Germany since 1933. Every country was fending for itself. No international consultation took place. The authorities felt themselves being encircled by countries that had stepped up their border control much more effectively so that the refugee flow seemed to be directed only to their territory.[16] The flight from Nazi Germany in 1933, although at a comparable scale, had had much less of an organized character and had flouted immigration regulations less blatantly. The German dumping

14 J. Moser, Österreich, in: W. Benz, Dimension des Völkermords: Die zahl der Jüdischen Opfer des Nationalsozialismus, München 1991, p. 68. See also Zentralstelle für jüdische Auswanderung to SD-Hauptamt, 21.10.1938. Bundesarchiv Berlin, R 58 (Reichssicherheitshauptamt), 486.

15 Caestecker, Ongewenste gasten, p. 182; Pholien to Spaak, 14.10.1938. Brussels, Belgian Ministry of Justice, Aliens' Department, 785 (transferred to State Archives Brussels).

16 F. Caestecker and D. Scuto, The Benelux and the flight of refugees from Nazi Germany, the Luxemburg specificity in: Hémecht 69 (2017),1, pp. 389-410.

policy placed great strains on a humanitarian policy. The authorities had the perception of being overwhelmed with destitute refugees, dumped in batches by the German authorities. Denying refugees protection was even couched in anti-Nazi rhetoric as not submitting to a German dictate.[17] Burden sharing was not on the agenda; on the contrary, countries started pressuring neighboring countries to be stricter. Every country considered itself a victim of 'lax' neighbours whose borders were too porous. Some states were castigated because they let refugees enter who just passed through their territory *en route* elsewhere.[18] The European states pressured each other to impose ever-tighter immigration restrictions-- a trend that built up a momentum of its own that went beyond domestic considerations.

In the course of 1938, German Jews who had circumvented border control or overstayed their visa were increasingly treated as illegal immigrants, not refugees, by most "liberal" governments in Europe. They were, as any other undesirable alien, increasingly put in prison. In May 1938 in France an internal crackdown of unprecedented severity started and many refugees ended up in prisons. In other countries the Jewish refugees were even repatriated to Germany. The resolve to stop the dumping had become the trigger for a full-blown attack on the protection of 'Jewish' refugees. The Netherlands started hesitantly in the spring of 1938, but Luxemburg, and Switzerland went radically for it in the late summer, and the Scandinavian countries and Belgium jumped on the bandwagon in the fall of 1938.

This repressive policy was legitimized by a public discourse that presented Jewish refugees as troublemakers, undesirable competitors, and intruders. In May 1938 a Dutch circular letter stated explicitly that "refugees, foreigners who had to leave their country 'under the pressure of circumstance', were to be considered as unwanted guests."[19] The Jewish communities in these liberal countries bordering Nazi Germany, fully aware of the danger Jews were exposed to in Germany, were lobbying to uphold protection. Local Jewish communities, with the help of American Jewry, did their utmost to provide material assistance to these refugees. However, the authorities lamented the loss of control over their borders and questioned the solvency of these committees overburdened with demands for assistance. The aid committees were in many countries sidelined in the decision making process. The Jewish aid committees who remained solely responsible for assistance had no more say in who was protected by the state. They had to limit their assistance to cases the authorities approved of.[20]

17 Procurator-General Amsterdam to Jewish refugee committee, 6.1938, City archives Amsterdam, city police, arch. 5225, volume 16.

18 For example Belgium, in the summer of 1938 and the Netherlands, in early 1939 asked Luxemburg to impose a visa obligation on Germans and Austrians and to stop the smuggling of refugees from Luxemburg. Luxemburg State Archives, Ministère de la Justice, J 73/48.

19 B. Moore, Refugees from nazi Germany in the Netherlands, 1933–1940, Dordrecht 1986, pp. 77ff.

20 S. Mächler, Hilfe und Ohnmacht. Der Schweizerische Israelitische Gemeindebund und die nationalsozialistische Verfolgung, 1933–1945, Zürich 2005; F. Caestecker, Jewish Refugee Aid Organizations in Belgium and the Netherlands and the Flight from Nazi Germany, 1938–1940, in S. Heim/B. Meyer/F. Nicosia (eds.), "Wer bleibt, opfert

Policy makers countered domestic opposition to the deportation and imprisonment of Jewish refugees by underlining that refugees- but only genuine refugees- were still protected. Protection policy was largely limited to political refugees, whereas Jews fleeing Germany were considered another sort.[21] Even the Netherlands granted communists asylum. That persecuted political activists were given a full entitlement to asylum was the counterweight to the attack on temporary protection for Jewish refugees. Notwithstanding the fact that from 1938 onward the brutality of the persecution of Jews equaled that of political opponents, their persecution was minimalized. Even social-democratic circles took up the defense of their political refugees, at the detriment of the Jewish refugees.[22] The authorities even stated that they had caused the persecution upon themselves by among other things, illegally smuggling currency. That they were persecuted was even denied altogether by pointing out that these 'Jews' left Germany with the agreement of the German authorities, while (political) refugees had to flee surreptitiously.[23]

6. The first countries of asylum in disarray: hard line policy prevails, 10.1938–9.1939

The majority of refugees fleeing Nazi Germany had to enter a neighboring country in an illegal manner. The border guards in countries such as Switzerland, the Netherlands, Denmark, and Sweden, which had a free travel regime with Germany, had great difficulty in distinguishing between bona fide German travelers and German Jews seeking entry with the intention to stay. The latter they had to exclude. The Swiss and Swedish authorities insisted that the Nazi authorities provide them with a technical means to identify (and exclude) German Jews. Although the Nazis realized this would make getting rid of the Jews more difficult, they conceded, since it was the only way "Aryan" Germans would remain free from the requirement to obtain a visa to enter Sweden or Switzerland. In the fall of 1938, new passports for German Jews were introduced that included a red letter "J," 3 cm high on the left-hand side of the first page, indicating their "non-Aryan" status. By issuing official instructions to discriminate on the basis of the

seine Jahre, vielleicht sein Leben". Deutsche Juden 1938–1941, Göttingen, 2010, pp. 45-65; P. Rudberg, The Swedish Jews and the victims of Nazi terror, 1933–1945. Uppsala 2015.

21 L.Rünitz, Af hensyn til konsekvenserne, Danmark og flygtningesporgsmalet 1933–1939, Odense 2005, pp. 246-274, 410- 415 and 426.

22 Willem Vanderveken, the secretary of the Belgian Matteotti committee, publicly stated that "Belgium has reasons to defend itself against a systematic immigration directed against the vital interests of the country. Not a few Austrians, whose departure was wanted by Hitler, have lent themselves to an expatriation deal and this with the complaisance if not the complicity of the bosses of the Reich… Such an illegal immigration brings discredit on the edifice of protection which we have painstakingly constructed to the advantage of the real political refugees" in the Belgian Socialist paper Le Peuple, 29.8.1938; Circular letter of the Secretary of the SAI, 10.1938. International Institute for Social History, Labour and Socialist International, 842; B. Lupp, Von der Klassensolidarität zur humanitären Hilfe. Die Flüchtlingspolitik der politischen Linken 1930–1950, Zürich 2006, pp. 150-153.

23 C. Berghuis, Joodse vluchtelingen in Nederland 1938–1940, Kampen 1990, p.113, 160; Caestecker, Ongewenste gasten, p. 190.

kind of German passport shown at the border, the Swiss and Swedish authorities introduced a clear-cut racial bias into their immigration policy. Domestic opposition to these arrangements was absent as this kind of control was largely invisible to the public and anyhow border and remote control were considered part of the privileges of the executive branch of government.[24]

In spite of ever more restrictive border policies, refugees were still arriving in all frontline states. Borders remained permeable and people were still able to slip through. Refugees from Nazi Germany were highly motivated and ready to make almost any sacrifice in order to be safe. They were increasingly forced to rely on human smugglers in order to enter Germany's neighboring countries. Human traffickers motivated by the high profits involved, were well informed and assisted the refugees effectively.

Resettlement overseas became much more difficult. In July 1938, in the midst of the new refugee crisis, an international conference was convened in Evian, France by President Roosevelt to discuss solutions to this refugee crisis. This American initiative to internationalize the refugee issue could have stimulated the European countries to return to the liberal refugee policies of 1933, but the conference brought no solace to the refugees. The US was not willing to publicly state her willingness to resettle more refugees. Roosevelt refrained from such a move as he did not want to alienate the electorate captured by nativist and anti-semitic sentiment.[25] Brazil and San Domenico made token gestures in Evian, but only to please the US, and very few refugees were finally resettled in these countries.[26] Overall in Latin America the authorities gave in to local protectionist and nationalistic forces, which were in particular opposed to the immigration of Jews and leftists. Mexico was the only country in Latin American to provide asylum to (political) refugees from Germany. Three thousand political refugees from Nazi Germany who had been engaged in defending the Spanish republic were resettled in Mexico. Notwithstanding their tropical climate, poverty, and political instability countries such as Colombia, Ecuador, Bolivia, and Paraguay became countries of asylum. These states allowed refugees to settle, not because they wanted to offer protection but because the authorities considered these immigrants useful, sometimes solely because of the bribes they gave immigration officials.[27] Jews even went the whole way to China: The extraterritorial enclave Shanghai in China was the only place on the earth you could enter without having

24 D. Bourgeois, La porte se ferme: la Suisse et le problème de l'immigration juive en 1938, in: Relations Internationales, 54 (1988), pp. 181-204; P. Levine, From indifference to activism: Swedish diplomacy and the Holocaust (1938–1944), Uppsala 1996.

25 R. Breitman and J. Lichtman, FDR and the Jews, Harvard 2013.

26 J. Lesser. Welcoming the undesirables: Brazil and the Jewish question, Berkeley 1995, pp. 60-166; M. Carneiro, Weltbürger. Brasilien und die Flüchtlinge des Nationalsozialismus, 1933–1948, Berlin 2014; M. Kaplan, Dominican Haven: The Jewish Refugee Settlement in Sosúa, 1940–1945. New York 2008, pp. 1-103; H. Dillmann and S. Heim, Fluchtpunkt Karibik. Jüdische Emigranten in der Dominikanischen Republik. Berlin 2009, pp. 52-55.

27 See C. Krohn et al.(eds.), Handbuch der deutschsprachigen Emigration 1933–1945, Darmstadt 1998.

to confront border guards and for that reason alone it attracted about 15,000 refugees from Germany.[28]

Many more would have gone to Shanghai if they had had the means to pay for the passage. Those with less means tried to cross the green border by circumventing the border patrols of Germany's neighboring countries. However, even if people smugglers helped them to enter the territory of a neighboring country, they still could be repatriated. The brutality of the persecution of Jews became obvious to all with the heavily publicized atrocities of Cristal Night. The Netherlands reinstated the protection for Jewish refugees immediately after November 10, 1938.

When by the end of December 1938 the Dutch authorities had accepted 7,000 refugees, they considered that they reached the saturation point and decided to reintroduce the exclusionary policy for German Jews. The border became again a place of heartbreaking scenes. Even visa holders, single women and unaccompanied children were turned away. Refugees were shoved back and forth across the border. The Dutch rejoined again the hard line policy and expelled even those who had succeeded to enter its territory.

The hardline policy attacked the Jewish refugees head on. It was legitimized by a brutal anti-refugee rhetoric that was part of a larger xenophobic, if not anti-semitic discourse attacking immigration and diversity. The dangers of economic competition and the need to curtail unemployment, which had been central in bolstering a protectionist alien policy in the first half of the 1930s, remained part of this restrictionist discourse. By 1938 the economy went into another downturn and political entrepreneurs singled out the newly arriving Jewish refugees as competitors for scarce resources. Criticism went beyond the material interests as there was also the oft-expressed fear that the inflow of Jewish refugees would create a 'Jewish problem' as these new arrivals aroused anti-semitic feeling among the population.[29]

The only country bordering Nazi Germany where the political authorities returned to the policy adopted in 1933 was Belgium. At the border Belgian policy was as brutal as all other countries, but Belgium granted temporary protection to those Jewish refugees who had intruded on its territory. Jewish refugees knew that it was worth paying a smuggler to get them into Belgium. Once they had passed the Belgian-German border zone, they were safe. This turnaround was the result of an assertive humanitarian lobby, expressing itself most virulently at the moment of the *Reichskristallnacht* and galvanized by a Minister in charge of immigration policy who had provocatively defended his inhumane '*realpolitik*'. This coincidence of factors meant that internal migration control moved out of the closed forums of Belgian policy making and into the public arena. The policy makers had to take a watchful public into account.

28 S. Hochstadt, Shanghai: a Last Resort for Desperate Jews, in: Caestecker and Moore (eds.), Refugees from Nazi Germany, pp. 109-121.

29 Caestecker and Moore, Refugees from Nazi Germany, pp. 244-294; C. Zalc, Melting Shops, Une histoire des commerçants étrangers en France, Paris 2010, pp. 196-232.

The Belgian policymakers, who had embarked on a policy of deporting Jewish refugees had reluctantly restored the refugee policy of 1933. At the same time they intensified border control and even pressured the German authorities to keep their 'Jewish' persecutees 'at home'. These diplomatic initiatives underline the Janus-faced attitude of the Belgian authorities towards those fleeing Nazi Germany. Publicly, all refugees who succeeded in entering Belgian territory were granted asylum, but at the same time the Belgian (but also (less surprisingly) the Swiss) authorities tried to convince the Germans to stop unauthorized immigration into their territory. From November 1938 onwards German border guards arrested Jews in the German border zone who did not have the required authorization to enter the countries at German's western borders. From March 1939 onwards even 'Aryan' Germans who were caught red handed assisting Jews crossing the West-German border were, upon implicit demand of the Belgian diplomatic representatives, also incarcerated in concentration camps.[30]

The emigration over the western borders was slightly slowed down, while at the same time the Nazi's strongly promoted the emigration of Jews to Eastern Europe and overseas. [31] Notwithstanding the German collaboration in preventing Jews from fleeing to Belgium, refugees knew that in order to be in safety they had to head to Belgium. While in 1939 very few Jewish refugees still fled to Luxemburg, Scandinavia, Switzerland or the Netherlands, Belgium took in nearly 20,000 refugees, a figure close to the French record. Both countries had difficulties to control their border with Germany, but more importantly they refrained from deporting refugees. France was less welcoming as the authorities still treated all those who illegally immigrated as illegal residents. The judges balked in particular at having to sentence refugees to long prison term, although they were much less threatening to public order than their habitual clientele. According to estimates from the Jewish refugee committee, about 9,000 refugees were sentenced to prison terms between May 1938 and July 1939.[32] After serving their sentence the refugees in France were not deported back home. This measure of deterrence was expensive and not very effective: for refugees even the French prisons were preferable to German concentration camps. The political costs could be high as the French authorities were perceived as having lost all control over their borders. Also in Belgium that was the case and law enforcement officials insisted strongly that Belgium had to withdraw from the Refugee Convention of 1938 in order to reaffirm control over its border. The head of the alien police Robert de Foy pointed out that Belgium was the only frontline state that had ratified the Convention and that the large influx disorganized the national economy.

30 Berschel, Bürokratie und Terror, pp. 280-285.

31 J. Toury, From Forced Emigration to Expulsion-the Jewish Exodus over the non-Slavic Borders of the Reich as a Prelude to the Final Solution, in:Yad Vashem studies, 17 (1987), pp. 51-92.

32 Minutes of Conference of various committees held on 23.3.1939 at the offices of the Joint, Paris. American Jewish Joint Distribution Committee archives (further JDC), 405. Migration Conference JDC/HICEM 22-23.8.1939. JDC, 367; V.Caron, Uneasy Asylum: France and the Jewish Refugee Crisis, 1933–1942, Stanford 1999, pp. 176-210.

Robert de Foy exclaimed desperately "a nation which wants to live has to defend itself."[33] However by then liberal elements who had supported the turnaround were at the helm of the state and the Minister of Justice retorted that the Refugee Convention of Geneva of 1938 did not restrain state sovereignty. For political and humanitarian reasons political and Jewish refugees who had succeeded to enter Belgian territory, even illegally were tolerated, but the authorities used the national discretion to determine individually eligibility for refugee status in the Refugee Convention of 1938 to deny Jewish refugees collective access to the official procedure for refugee status. In line with the policy design of 1933 these made Jewish refugees to be only in transit in Belgium and with no need for permanent Belgian protection as they were, in theory on their way overseas. While (political) refugees who were considered eligible for refugee status acquired some legal protection against administrative discretion, the Jewish refugees were refused this favor. When national interests would be at stake the Belgian authorities could always decide to deport these transit migrants as the executive authorities were not bound for those refugees to international (and domestic) law.[34] The Belgian executive authorities retained in this manner quasi full command over their immigration policy towards Jewish refugees. They had decided to respect the human rights of all those on its territory, notwithstanding the very limited international support for doing so. However they were not willing to be bound to legal norms which could threaten their political survival. International instruments need international oversight to be effective. When World War II broke out in September 1939, 300,000 of the half million Jews in Germany in 1933 had left; of those who remained, half were above 50 years old. Soon the radicalization of the antisemitic policy would arrive at its final solution.

Conclusion

In this decade the sovereign right of the state to refuse an individual entry to its territory, even if he or she claimed to be a refugee, was not contested. Once refugees crossed the frontier they were no longer merely emigrants, but became asylum applicants to whom national norms could be applied. In 1933, the authorities baulked at expelling 'Jewish' and political refugees who had entered the countries illegally or whose visas or residence permits had expired. For humanitarian reasons deporting them to Germany was considered unacceptable, while passing them on to other states created diplomatic problems. The very restrictive immigration policy of these years of economic crisis was amended. The policy of 1933 created the 'refugee' as an administrative category within immigration policy. This refugee designation was not internationally coordinated, but the

33 Correspondence between Mahieu and de Foy of the alien police and the Minister of Justice, 5.1939. Brussels, Belgian Ministry of Justice, Aliens' Department, 37C1 (transferred to State Archives Brussels).

34 F. Caestecker, Prémices de l'institutionnalisation de la politique des réfugiés dans l'après-guerre, expérimentations en matière de protection des réfugiés dans l'Europe des années 1930 in: A. Angoustures, D. Kevonian and C. Mouradian (eds.) L'invention de l'OFPRA. Rennes 2017.

liberal European states agreed to a common norm of *non-refoulement*. The obstinate refusal of refugees to return "home" and their support by political allies in the country of asylum caused that these refugees could not be treated as any other unwanted immigrants. While the main gate remained closed, a side-door for refugees was opened. This side-door was relatively easy to open as private aid organizations agreed to subsidize the protection of these refugees. These agencies stepped in to assure that "their" refugees would not aggravate the economic difficulties of the local population. Refugees were protected but still denied access to the country's economy. The agreement of the authorities to protect refugees reflected not only the humanitarian concerns of the authorities, but also their desire to prevent refugees from endangering diplomatic relations or the domestic order. Refugee policy made the protectionist immigration policy more effective by making an exception to the most recalcitrant cases. It also legitimized a brutal exclusionary policy towards all other unwanted immigrants.

The Arrangement of 1936 and the Convention of 1938 could be considered as the international coordination of the refugee policy of 1933. It, however, went beyond mere coordination as it partly institutionalized and even liberalized refugee policy of the European states that adhered to this international refugee regime. This international agreement created common standards for handling asylum seekers. Bilateral pressure not to shove off refugees became much more effective as these international agreements showed a common willingness not to treat refugees as any immigrant. It enabled the states to put the irritation that these uninvited guests had caused behind and close off the refugee crisis that had erupted in 1933 in an efficient and humane manner. By 1937 the refugees who had fled Germany in the first years of Nazi rule could start rebuilding their lives in exile.

In 1938 all countries had to confront the reality of large numbers of destitute Jews arriving at the border or inside the country, sometimes dumped in batches by the German authorities. Notwithstanding genuine evidence that their lives might be in danger if they returned to Germany, 'Jewish' refugees encountered outright hostility; from consular authorities, at the border, even inside the countries of refuge themselves. That liberal states started to deport refugees from within the country was the most conspicuous departure from previous policies. That refugees who had succeeded in entering the territory of a liberal state and were recommended by the local refugee committee for protection were removed by force amounted to a challenge of the moral codes of behaviour of these states. The reasons for this rupture was that Jewish flight after the *Anschluss* was perceived as raging out of control. The arrival of ever more refugees, dumped and stripped of their possessions by the German authorities, convinced the authorities of the countries bordering Germany that they should halt further Jewish immigration, notwithstanding the guarantee of the Jewish committees. The lack of positive action from the Evian Conference in the summer of 1938 demonstrated a complete lack of international political will in addressing the refugees' plight. The frontline states felt they had to fend for themselves as the rest of the world was not willing to share the burden.

International coordination between 1936 and early 1938 had been the lever to finally put an end to the plight of the first wave of refugees, but by the summer of 1938 this was already a thing of the past. Each European government looked suspiciously to the other states, and each of them was afraid to become the magnet, implying that the policy of the most restrictive state set the tone. The fear of being out of step or too generous triggered pre-emptive actions and produced an upward spiral of restriction. The just recently erected international edifice of refugee protection crumbled. In contrast to 1933, when a consensus had reigned that the first country of asylum was responsible, such arguments did no longer cut ice. Refugee protection evaporated in a process of tightened immigration policy. Asylum turned out not to be dictated by the merit of the refugees' claims, but determined by the terms established by the state. By 1938, the small group of political refugees, albeit by times very troublesome were proclaimed in all European countries as the only genuine refugees to be protected. The domestically decided solution to the plight of the Jewish refugees was an extremely brutal migration management. Even within the borders of most western European states the refugees were treated in an inhumane manner. Only Belgium and to a lesser extent also France retained protection for the Jewish refugees on their territory. The efficiency of their migration management was very weak, as their unique position made them into a magnet. However it was very effective as it assured minimum humanitarian standards in internal immigration policy and protected a considerable number of people until the war started. Efficiency could have been improved if these policy goals would have been internationally agreed upon.

Non-Refoulement as a Qualifier of Nation-State Sovereignty: The Case of Mass Population Flows

Gilad Ben-Nun

ABSTRACT

Dieser Aufsatz prüft, ob das Rückführungsverbot, das Staaten daran hindert Asylsuchende an die Plätze zurückzuführen, an denen ihr Leben oder ihre Freiheit in Gefahr sind, auch dafür gedacht war Anwendung in Fällen von Massenflucht aus Konfliktgebieten zu finden, wie dies aktuell in Syrien oder im Südsudan der Fall ist. Durch eine detaillierte Prüfung der vorbereitenden Studien und Verhandlungen zur Flüchtlingskonvention aus dem Jahr 1951 sowie weiterer Archivmaterialien wird belegt, dass – entgegen der unzutreffenden Interpretation des US-Supreme Court – Nichtrückführung war für ausnahmslos alle Fälle vorgesehen, einschließlich solcher Massenbewegungen. Im Folgenden wird untersucht, warum der Europäische Gerichtshof für Menschenrechte das Rückführungsverbot im Unterschied zum US-Gericht korrekt deuten konnte. Hieran schließen sich methodologische Betrachtungen an, welche Regeln bei der Benutzung historisch-juristischen Materials und von Verträgen aus der Vergangenheit anzuwenden sind.

1. Foreword

As the total of the world's refugees, displaced persons, and asylum seekers continues to grow – having crossed the 60 million mark for the first time since World War II – nation states are faced with a seemingly unprecedented challenge, confronted as they are with uncontrollable mass population flows.[1] Between Australian "off-shoring" policies,

1 For a comprehensive overview of the European perspective on its current refugee crisis, see the official website

European regimes veering towards the extreme right and blocking refugees from crossing their borders, and Israel's ensuing constitutional crisis due to governmental anti-migrant policies, few issues are nowadays more hotly contested than adherence to the universal tents of non-refoulement.[2] This unequivocal "negative" duty upon states *not* to turn asylum seekers back into the hands of their tormentors has always been amongst the hardest international legal obligations for states to accommodate.[3]

The non-refoulement of refugees (also known as the "Prohibition on Expulsion or Return") forms the bedrock of all international refugee protections. It prohibits states from returning refugees to places where their lives or freedoms would be endangered on the grounds of their ethnicity, race, gender, or religion. This "seemingly simple moral imperative, of not returning refugees into the hands of their tormentors merely because of who they are" actually poses the greatest challenge to nation states, as they cease under these circumstances to be the sole determinants as to who shall enter their territory.[4] While the original drafting of non-refoulement legislation took almost three years to accomplish (1949–1951), the clause finally adopted into the 1951 Refugee Convention's Final Act of contains some of the strongest prohibitive language of any modern treaty:

> *Art. 33: No Contracting State shall expel or return ("refouler") a refugee in* any manner whatsoever *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.*[5]

At the heart of all the debates regarding non-refoulment's applicability lies one fundamental question: at its core, does non-refoulement *ipso facto* entail a limit to nation-state sovereignty?

of the European Commission dedicated to the issue: http://ec.europa.eu/echo/refugee-crisis_en (accessed 16 January 2017). For a good comparative study of the challenges posed by boat people to Europe and Australia, see I. Glynn, Asylum Policy, Boat People and Political Discourse: Boats, Votes and Asylum in Australia and Italy, Basingstoke 2016. For a good general overview, see I. Mann, Humanity at Sea: Maritime Migration and the Foundations of International Law, Cambridge Studies in International and Comparative Law, Cambridge 2016..

2 On the origins and true meaning of non-refoulement as it was envisaged by the drafters of the 1951 Refugee Convention, see G. Ben-Nun, The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention, in: Journal of Refugee Studies 28 (1), pp. 93–118. On Israel's constitutional crisis and the direct confrontation between its legislator (the Knesset) and its Supreme Court, see G. Ben-Nun, Seeking Asylum in Israel: Refugees and the History of Migration Law, London 2017, pp. 165–219.

3 The term "negative duty" was used by one of the key figures in the drafting of the 1951 Refugee Convention – UNHCR's first director of protection, Paul Weis. For a comprehensive overview of the legal tenants of non-refoulement, see A. Zimmermann and P. Wennholz, Article 33 para 2 (prohibition of Expulsion or Return ('Refoulement'), in: A. Zimmermann, J. Dörschner, and F. Machts (eds.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford 2011, pp. 1,397–1,423. For biographical details of Weis and his experience, as both a Holocaust survivor (Dachau) and a refugee, for the drafting of the 1951 Refugee Convention, see G. Ben-Nun, The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention, in Journal of Refugee Studies 27 (1), pp. 101–125, at 107.

4 Ben-Nun, British-Jewish Roots, p. 93.

5 See the official text of the 1951 Refugee Convention on the UNHCR website, Art. 33 p. 30. Available at http://www.unhcr.org/3b66c2aa10 (accessed 16 January 2017). Italics added

A case in point is provided by the deep rift in legal interpretation between the European Court of Human Rights and the US Supreme Court as to whether non-refoulement protection applies ex-territorially on the high seas. From the late 1980s, following the overthrow of Haitian dictator Jean-Claude "Baby Doc" Duvalier, more and more boats of migrants began arriving clandestinely on the shores of Florida. Many of these migrants were political dissidents who had been persecuted by the Haitian security forces and were, therefore, eligible for refugee status on the grounds of political persecution. From 1992 onwards, the Republican Bush administration instructed the US Coast Guard to conduct "push back" operations of these vessels, away from American – and even international – territorial waters, back to the Haitian capital, Port-au-Prince. Following the successful appeal of pro-refugee non-governmental organizations (NGOs) to the US Court of Appeals for the Second Circuit, the Bush administration appealed to the US Supreme Court against the Appeals' Court decision to apply the non-refoulement principle on the high seas, between Florida and Haiti. In its decision, the US Supreme Court, headed by Chief Justice William Rehnquist, reversed the plea and sided with the US government's "push back" operations, providing them with a mantle of legality.
Reading Article 33 textually, the US Court ruled that the high seas were not "a territory" and hence, the non-refoulement principle did not apply in them. In his powerful dissenting opinion, Justice Harry Blackmun, who was appalled by the intellectual dishonesty of his peers in interpreting Article 33 of the 1951 Refugee Convention, wrote:

> *What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors – and that the Court would strain to sanction that conduct.*[6]

However, the most stringent criticism of the US Supreme Court's decision came in 2012 from none other than the European Court of Human Rights, in its own ruling against Italy (one of the executives under its purview), which, like the US over Haiti, had undertaken "push back" operations against boat-going refugees on the Mediterranean Sea, who had left the coast of Libya in order to seek refuge on Italian shores. The European Court adopted a diametrically opposed interpretation of Article 33 to that of the US Supreme Court. In his concurring opinion, Judge Paulo Pinto de Albuquerque referred to the American position in *Sale* v. *Haitian Centers Council* as follows:

> *With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Con-*

6 For the full quote and a detailed explanation of the entire case, see T.D. Jones, Sale v. Haitian Centers Council: U.S. Supreme Court, June 21, 1993, in: American Journal of International Law Vol. 88 (1994), pp. 114–126, at 126. Not long after this judgment, the decision attracted the scorn of other well-respected high courts. In 1997, the Inter-American Court for Human Rights heavily criticized Sale v. Haitian Centers Council, and Judge Brown of the British High Court ("Queens Bench") remarked that this decision by the US Supreme Court "certainly offends one's sense of fairness" (W. Kälin, M. Caroni and L. Heim, Article 33, para 1 (Prohibition of Expulsion or Return ("Refoulement"), in: Zimmermann, Dörschner and Machts, 1951 Convention, p. 1,363.

vention relating to the Status of Refugees and departs from the common rules of treaty interpretation.[7]

In contrast to legal commentaries in academic journals, this is an unusually strong statement from a high court judge towards his peers across the Atlantic. It is noteworthy to recall here that Judge Albuquerque was not merely writing on his own behalf but rather in the name of the entire European Court's Grand Chamber, given the unanimousness of the verdict and the lack of any European judicial dissent.
This paper will demonstrate that non-refoulement does indeed entail a limit to nation-state sovereignty – and does so without qualification, despite the efforts of some powerful 1951 Refugee Convention delegates - who insisted otherwise.

2. Non Refoulement Overrides National Sovereignty at the Outset of the 1951 Refugee Convention's Drafting

The idea that there is indeed a fundamental contradiction between the non-refoulement obligations of states and their own sovereignty, in the sense of their ability to exercise full control over who enters their territory, is certainly not new. In fact, it was strikingly evident to the drafters of the 1951 Refugee Convention, and it proved to be one of the most contested issues in the three-year drafting process (*travaux préparatoires*) of that treaty.
The dilemma is a basic one. If states assert full control over their borders, and are entitled to "push back" refugees and asylum seekers who throng to their frontiers for protection, then universalist legal refugee protections are rendered meaningless. If on the other hand, states are stripped of their unbridled ability to control who crosses their frontiers, being *bound* to accept refugees who enter their territory, even clandestinely, and are prohibited from blocking their entry or forcefully turning them back *in any manner whatsoever* (as Art. 33 stipulates), then one must concede that their sovereignty has indeed been qualified in favour of a higher, universalist legal principle. As Jacob Robinson – the Holocaust-surviving Israeli representative – told the delegates to the Refugee Convention's very first drafting session of the UN-ECOSOC's (the UN Economic and Social Council's) Ad Hoc Committee on Statelessness in February 1950:

The principal factor lies in the exceptional limitation of the sovereign right of States to turn back refugees to the frontiers of their country of origin.[8]

That no reservation could be tabled to Article 33 of the 1951 Refugee Convention, and that a refugee who indeed clandestinely crossed into a signatory state's territory was not

7 Judge Paulo Pinto de Albuquerque, Concurring Opinion to the Ruling of the European Court of Human Rights, Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. 23 February 2012), pp. 62–82, at 67. Available at: http://hudoc.echr.coe.int/eng# (accessed 16 January 2017).

8 UN Doc. E/AC.32/SR.20, Statement of Robinson (Israel), Morning session – 10 FEB 1950- Lake Success- NY. For the biographical details of Jacob Robinson, his experiences as a leading international jurist of his era, and his work as a refugee on the drafting of the 1951 Refugee Convention, see Ben-Nun, Israeli Roots, pp. 105–106.

to be penalized for this action (Art. 31 – Non-Penalization) are rightfully seen as further strengthening elements of this breach of nation-state sovereignty.
This conundrum was all too clear to the drafters of the Refugee Convention, and from its earliest stages the Convention's text was subject to continuous debates concerning this very point. The Ad Hoc Committee's chairman – Ambassador Chance of Canada – framed the debate in distinctly clear terms:

> *The Committee was confronted with a dilemma. If it wished to grant the greatest possible number of guarantees to refugees, it met with resistance from delegations which had the greater good of their Governments at heart. If, on the other hand, it tried to safeguard the sovereign rights of States to the greatest possible extent, it was liable to draw up a convention which would be unfavourable to refugees. The solution obviously lay in finding the lowest common denominator in those opposing interests.*[9]

In a clear preference for the universalist "horn" of this dilemma, the renowned international jurist Louis Henkin, who represented the United States on the Ad Hoc Committee, proclaimed his country's preference for the supremacy of a refugee's rights over and above nation-state sovereignty considerations:

> *Whatever the case might be* […] *he* [i.e. the refugee – GBN] *must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee*.[10]

It was not until the end of the Ad Hoc Committee's second session, in August 1950, once a full-blown and comprehensive draft for the entire Refugee Convention text was put forward, that most of the diplomatic delegations began seriously considering its text with their respective headquarters in the various national capitals. The UK's approach is worth mentioning in this regard. The British Inter-ministerial Committee, which was to oversee the consecutive developments of the UK's drafting notes for the Refugee Convention, was only established after the positive conclusion of ECOSOC's Ad Hoc Committee's second round of talks. In his top-secret report to the British Cabinet, issued one month after this session, the British delegate (and former home secretary) Samuel Hoare explained the problems that faced governments as they came to discuss the non-refoulement clause:[11]

> *The United Kingdom representative invited the other representatives present to say whether their governments were prepared to take the serious step of surrendering their powers completely, with no reservations for exceptional cases. Switzerland (an observer- not a*

9 UN Doc. E/AC.32/SR.20, Statement of Chance (Canada- Chair), Morning session – 10 FEB 1950- Lake Success- NY.

10 UN Doc. E/AC.32/SR.20, Statement of Henkin (US.), Morning session – 10 FEB 1950- Lake Success- NY.

11 For biographical details of Samuel Hoare, his experience as Nansen's deputy high commissioner for refugees under the League of Nations, and his role in saving Austrian Jews during his Home Office tenure, see Ben-Nun, Israeli Roots, pp. 107–108.

member of the Ad Hoc committee) was the only country which said straight out that it could not accept the Article.[12]

Hoare's report to Cabinet should be seen in its correct context in and around the drafting stage of the 1951 Refugee Convention text, as it stood after the Ad Hoc Committee's second session in August 1950. While advocates of universalism rightly point to the fact that already, by this early drafting stage, a comprehensive articulation of non-refoulement was at hand (and was then still known as Article 28 of the draft Convention text), it would be a mistake to infer that this text was indeed endorsed by the majority of governments. The Ad Hoc Committee was certainly *not* representative of most governments, having had merely 12 member states present as delegates. Nor did the text of the Refugee Convention as it stood in 1950 fully represent governments' views. If anything, it was a nuanced representation of the views of the UN and IRO (International Refugee Organization) secretariats, given that the office of the United Nations High Commissioner for Refugees (UNHCR) was still in the making (the UNHCR's creation was only fully secured in December 1950). In the end, both the UN and IRO secretariats and the participating governments knew full well that the most important diplomatic hurdles would inevitably arise at the Conference of Plenipotentiaries, where, ultimately, the UN secretariats would lose much of their grip over the Convention texts being drawn up.

3. The Political Camps and their Attitude towards Non Refoulement at the 1951 Refugee Convention

The literature concerning non-refoulement is exhaustive, and the deliberations regarding the different stages that the text underwent until its final endorsement have been well researched.[13] Nevertheless, one important point worth mentioning in this regard concerns the strengthening of the legal text on non-refoulement (now known in its final numbering as Article 33) at the Conference of Plenipotentiaries. It was during this conference that the words "in any manner whatsoever" were added to the prohibition of refoulement, so as to strengthen the treaty by further limiting the ability of states to interpret its text with ill intent and *mauvaise foi*. This textual strengthening, specifically within the article most associated with the qualification and limitation of nation-state sovereignty, is one of the unique features of the 1951 Refugee Convention – its like has seldom been observed in the treaty-making processes of other international humanitarian law instruments.

It is against this backdrop, and the very specific example set by the drafters of the non-refoulement article, that one must ponder how exactly the US Supreme Court arrived at its ill-advised conclusion that this principle did not apply on the high seas – in this case,

12 UK National Archives London – Kew, BT 271/349, Inter-ministerial Oversight Committee for the drafting of a Convention for Refugees, 25 September 1950, p. 28.

13 See the literature mentioned in notes 3, 4, and 5 above.

vis-à-vis Haitian asylum seekers off the coast of Florida. To be sure, for the drafters of the 1951 document, it would be safe to say that for the Convention's president – Danish representative, Knud Larsen – no article in the entire text was more important and in greater need of securing.[14] That this article was certainly intended to specifically cover refugees on the high seas is was made absolutely clear to the Venezuelan delegate by his Belgian and French peers, as early as 1950.[15]

This is the point to recall the proclamation by Henkin – the US delegate to the 1951 Refugee Convention, in favour of non-refoulement's legal superiority over sovereignty considerations, back in 1950.[16] A close reading of the US Supreme Court's *Sale* v. *Haitian Centers Council* is revealing, given the cardinal methodological error in the historical reading of the 1951 Refugee Convention's *travaux préparatoires* undertaken by the judges of the majority opinion in reaching that verdict. Any court that engages (or, perhaps we should say, indulges) in the intricacies of a treaty's *travaux* invariably accepts their validity for the interpretation of the treaty in question. In fact, one would be hard pressed to find instances in which either of the usual textual or intentionalist approaches is totally disregarded by a court. In most cases, courts will consider both approaches before applying what suits them best for that given case. The example of non-refoulement is no different. Both the US Supreme Court and the European Court of Human Rights based their verdicts (at least partially) on quotations from the 1951 Refugee Convention's *travaux*. The difference, however, lies in the manner in which each court delved into these historical materials. In order to explain this difference, and the resulting divergence in interpretation, a brief survey of the drafting process of the 1951 Convention, and the compilation of its *travaux*, is merited.

The drafting history of the 1951 Refugee Convention can be broken down into three periods, roughly according with the compilation of its drafting materials. The first period – between the 1949 memorandum of the UN Secretary-General, requesting work to begin towards a UN Refugee Convention, and its accompanying letters – is mainly declarative, and encompasses materials from the UN secretariat that do not, as such, consist of binding legal materials since they do not represent the ideas of treaty-member states. The second period (1950) comprises the deliberations of UN-ECOSOC's two sessions of the Ad Hoc Committee on Statelessness and related problems. It was here that the first "blueprints" of the Refugee Convention text were articulated. The third period consists of the deliberations during the diplomatic Conference of Plenipotentiaries (2–28 July 1951), when the final text was worked over and endorsed by vote, article by article, by the state-parties' plenary. Full accounts of the second and third periods are available in bound format, as these deliberations were edited and then published by ECOSOC's secretariat. These records comprise transcripts of every single meeting (two meetings a

14 Ben-Nun, British-Jewish Roots, p. 95.
15 Ibid., pp. 100-101
16 See note 10 above.

day, morning and afternoon), on UN-letterheaded paper, with the full names of all participants and a protocol-based account of the speaker and his main points.[17]

At its outset, the 1951 Refugee Convention was intended to solve the refugee problems primarily of Europe. The countries represented at the drafting table were broadly divided into what commonly became known as the 'Europianists vs. Universalists' political camps. Concerning non refoulement, the 'Europeanists' advocated for a broad scope of protection for refugees, yet within the limited geographical area of Europe. The 'Universalists' (also known as 'the countries of immigration: the US, Australia, Canada and New Zealand), advocated for a single Convention to be applied the world over. Yet in contrast to the 'Europianists', the protections they were prepared to afford refugees were much more limited in scope, and certainly *did not* include non refoulement protection for refugees at sea.[18]

The fact that the 'Europeanists' were prepared to afford more protections to post World War II refugees they were hosting, also had to do with the experiences of that war, which affected several of the key drafters who were holocaust-surviving Jews. This group included Robinson from Israel, Lewin (the NGO representative who first drafted non-refoulement) and UNHCR's own Paul Weis. To them one must add the diplomats who actively helped rescue Jews from the Nazis during that war such as Hoare from the UK, President Larsen from Denmark, and Vice President Herment from Belgium.[19]

The question here was one of moral high ground. The immigration countries (The US, Canada, Australia) on the other side of the Atlantic and Pacific oceans did not have to bear the brunt of the European refugee crisis.[20] When it came to non refoulement, these countries, already during early drafting stages announced that they would not see the conduct of "push back" operations at sea – as refoulement.[21] As we shall see – little has changed over the past six odd decades in the diametrically opposed positions advocated by the US and Australia versus those adhered to by many European nations.[22] One area where this cardinal difference is most apparent is in the very different interpretations of Supreme Courts on both sides of these oceans concerning the geographical reach which ought to be applied with regard to non refoulement. And at the heart of this difference

17 The second period's deliberations (August 1950) are all marked as U.N. Doc. E/…, while the Conference of Plenipotentiaries' (third-period – July 1951) documents are all marked UN. Doc. A/...

18 Ben-Nun, Israeli Roots, pp. 109-112.

19 Ben-Nun, Seeking asylum in Israel, pp. 21-50, 52-69.

20 It is worth mentioning here that the US never signed the 1951 Refugee Convention and only became a State party to the accompanying 1967 Protocol to that treaty. Australia's current harsh anti-refugee attitudes are certainly consistent with its openly hostile attitudes during the different drafting stages of the 1951 Refugee Convention. On the Australian open hostility to accord refugees adequate protections, which in turn brought to the drafting and insertion of Article 6 into the 1951 Refugee Convention see: Ben-Nun, Israeli Roots, pp. 117-119. On the harsh confrontations between the European countries (Belgium and France) and Australia, with regard to its openly-offensive attitudes towards instilling extra refugee protections into the 1951 Refugee Convention see: Ben-Nun, British-Jewish Roots, pp. 97-99.

21 Ben-Nun, British-Jewish Roots, pp. 95-104.

22 On the stark comparative difference between Anglo-Saxon and Continental European attitudes towards refugees, see also Glynn's contribution in this volume.

in interpretation lies the methodological differences through which both Courts chose to examine the same historical drafting sources.

4. Mass Population Flows and Non-Refoulement's Deliberate Misinterpretation in the 1951 Refugee Convention's Travaux Préparatoires

A glance at both opinions, of the US Supreme Court and of the European Court, reveals one simple fact. In both cases, the 1951 Refugee Convention's *Travaux Préparatoires* were invoked. However, in the US Supreme Court's opinion, delivered by Justice John Paul Stevens, the right honourable judge in fact "cherry-picked" statements by the Swiss and Dutch delegates from three single sessions (3, 11, and 25 July 1951) of the Conference of Plenipotentiaries so as to suit the predetermined and premeditated conclusion that he wished to convey. Stevens' approach was not in fact about interpreting the treaty, but rather about finding statements within the *travaux* that would suit the textual reading he wished to apply. In contrast, the European Court's opinion includes a lengthy deliberation on the entire *travaux* – starting from the second period (1950), when the non-refoulement principle came into being (2 February 1950). Its concurring opinion only then follows through the entire development of Article 33's drafting, until its final version in the Final Act. Consequently, Judge Albuquerque took time to expose the inconsistencies in the very passages quoted by Judge Stevens of the US Supreme Court vis-à-vis the full development of the Article over its three-year drafting process.

The entire issue turns on three statements made by Zutter, the Swiss delegate to the July 1951 Conference of Plenipotentiaries in Geneva, prior to the endorsement of the Convention's Final Act. These statements were followed up by the Dutch representative, Baron Von Boetzler, during the very last reading of the entire Convention text, prior to its signature and its becoming the known Final Act. All three statements revolved around the issue of whether states were still bound to uphold non-refoulement in the event of mass population flows, when sizeable waves of refugees undertake an exodus from their native lands across national borders. On the second day of the Conference of Plenipotentiaries, the Swiss delegate declared:

> *The Swiss delegation considered, however, that it went without saying that the Contracting States must also undertake to help each other and to assist a country invaded by a mass-influx of refugees because of its geographical position, by relieving it of the some of the refugees it had admitted. It was obvious that a small country could not accept an unlimited number of refugees without endangering its very existence*.[23]

The context here is quite clear. During the very early deliberations, the Swiss delegate was calling for an official mechanism of burden-sharing once mass population flows arose.

23 UN Doc. A/CONF.2/SR3, pp. 9–10, Statement of Zutter (Delegate of Switzerland). Conference of Plenipotentiaries, 3rd July 1951.

It is important to stress here that the delegate *was not* in any way qualifying the non-refoulement principle, but rather wished to press for a structured mechanism for refugee burden-sharing between the Convention's High Contracting Parties.

The second instance in which the non-refoulement principle and the situation of mass population flows collided took place in the midst of the Conference of Plenipotentiaries, during the very contentious discussions concerning Article 3 (Non-Discrimination). The central question here was whether states were entitled to discriminate between refugees who had entered their territory lawfully under their immigration laws and those who had clandestinely transgressed national borders in their flight from torment – the latter being the "classic" case in which non-refoulement's utmost humanitarian necessities would come into play. Against the opinions of the majority of the representatives present, the Swiss delegate now proclaimed his *minority opinion* – certainly *not* accepted by the majority of the delegates present – for the qualification of non-refoulement in the case of a mass population flow. In the course of a heated discussion regarding the exact meaning of "refoulement" (that is, the "turning away" of a refugee), the Swiss delegate outlined for the first time the stark distinction that he saw between refugees who had already entered a country's territory and those who had now been stranded once the borders had been sealed by that country:

> *The Swiss Government considered that in the present instance the word* [i.e. "refoulement" – GBN] *applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross its frontiers.*[24]

The Swiss delegate's conflation of terms here, of non-expulsion with non-refoulement, is quite clear. He stated that the Swiss government would graciously not *expel* a refugee who had already entered its territory, but would not adhere to the non-refoulement principle at its border. This conflation of terms, between non-expulsion (of refugees already in country) and non-refoulement (of refugees actually attempting to cross over into a state) is very indicative of the fundamental difference in the legal meaning of terms which the 1951 Refugee Convention brought about.

As both White and Caestecker demonstrate in their contributions to this volume, in the 1930s non refoulement was in fact tantamount to non-expulsion, as states kept absolute sovereignty over their border policies. The states who did join international refugee instruments during the interwar period, be it the Convention of 1933 for the Russian refugees, or the Convention of 1938 for the Jewish refugees from Nazi Germany, limited their international commitments only to those refugees who had already resided lawfully within their territories. Non refoulement in both Conventions (1933 and 1938) restricted the expulsion of those refugees who already had been granted asylum, or who

24 UN Doc. A/CONF.2/SR16, Statement of Zutter (Delegate of Switzerland), Conference of Plenipotentiaries, 11th July 1951.

were merely authorized to reside in the country, while border policy remained a sole national competence.

The majority of the delegates at the 1951 Plenipotentiaries' Conference accepted a much further commitment for their states under their newly-formulated universal international refugee regime. This was the interpretation of non refoulement which was accepted by the majority of the delegates at the Plenipotentiaries' Conference, which came now to include refugees who were actively seeking to transgress a state's border so as to save their life. With this view in mind, one can understand why both acts (non-expulsion *and* non-refoulement), to which the Swiss delegate referred in his statement, later became the substantive legal bedrocks (along with non-penalization) upon which the entire international refugee regime was founded, as enshrined in Articles 31, 32, and 33 of the 1951 Refugee Convention.

The third reference to the Swiss delegate's reading of non-refoulement – as if it might not apply under conditions of mass population flows – was made by the Dutch delegate to the Conference of Plenipotentiaries on 25 July 1951, during the second (afternoon) session of that day. In what was, in fact, the very last statement of the entire Refugee Convention's drafting process, during the final session of the Conference of Plenipotentiaries – which had involved three years of drafting debates and several thousand pages of protocols. In his statement from this very last session, the Dutch delegate stated:

> *Article 28* [i.e. Non-Refoulement, which finally was renumbered to become Article 33 – GBN] *would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory. At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation* […] *he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33*.
>
> *There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record* […] *He then declared the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons closed, except for the signing ceremony.*[25]

It was to this statement that Justice Stevens of the US Supreme Court referred in his majority opinion in *Sale* v. *Haitian Centers Council*, and it is here that the grave methodological errors of statement "cherry-picking" come to light in their most overt and harmful manner.

What was at stake in this statement, and why was it made?

25 UN Doc. A/CONF.2/SR.35, Statement of Baron Von Boetzler (Netherlands), 25th July 1951, Afternoon Session 2:30 PM.

What was the exact purpose and meaning of this statement as it was placed on record, for protocol's sake, upon the explicit demand of the Dutch delegate?

The correct answer to these questions is inextricably intertwined with the context within which the statement was uttered. The entire drafting process of the Refugee Convention had been plagued, from its outset, by a conflict between states who wished to limit refugee protections, and those who wished to expand them. Time and again, as some countries attempted to limit the scope of the Convention to deal with conditions like those recently experienced by European refugees from Nazi Germany or post-war refugees, they were rebutted by other nations who refused to adhere to clauses which would harm refugees and reduce their protection threshold. This was precisely the case concerning Article 1 (Definition of the Term "Refugee"), which India and Pakistan for example, took to ECOSOC's session at the 5th General Assembly, where they simply outvoted certain European countries, adopting a universalist rather than a limited "European" definition of *ratione personae* and the scope of who qualified for recognition as a refugee.[26] The countries who wanted to limit refugee protections could neither outvote them nor twist the Refugee Convention's text in favour of their limited readings – and no article was more explicit and indicative of their failure to dominate the drafting of the Convention text as the non-refoulement clause (Art. 33). At the end of the day Von Boetzler simply failed to convince the majority of nation states present at the drafting table, to qualify non-refoulement when faced with mass population flows.

The three points that unequivocally prove this failure concern the very nature of the strengthening of the non-refoulement clause in the face of the challenges mounted against it at this very last drafting stage of the Conference of Plenipotentiaries.

The first proof has to do with the strengthening of the language of the non-refoulement clause, as the words "in any manner whatsoever" were deliberately inserted into its text at the Conference of Plenipotentiaries. These words came to deliberately disqualify any contingent argument that might be made to qualify the applicability of non-refoulement in certain circumstances. The insertion of these words, in the teeth of the attempt by Western states to qualify non-refoulement in the case of mass population flows, should be read for what it is – namely, a *rejection* of the notion that non-refoulement was to be limited in such circumstances.

The second proof concerns the stipulation as to the inadmissibility of reservations by the High Contracting Parties to Article 33. According to Article 46, no contracting state can make a reservation vis-à-vis the non-refoulement clause. This idea was reinforced once non-refoulement had attained the status of *jus cogens* (supreme legal principle). If indeed Von Boetzler was convinced that the majority of states accepted his interpretation of non-refoulement as *not* applying in conditions of mass population flows, why did he not table an amendment to officially qualify its applicability under those conditions?

26 Gilad Ben-Nun, From Ad Hoc to Universal: The International refugee regime from Fragmentation to Unity, in: Refugee Survey Quarterly 34 (2), pp. 23–44, at 37 n. 55.

Surely, if most states agreed with him, would they not have accepted that qualification? After all, that is precisely what took place with the issue of national security when it was to be put at risk by non-refoulement. And indeed, with regard to national security needs, the UK succeed in persuading most states to accept this qualification, which is present in the Convention to this day as Paragraph 2 to Article 33.[27] Yet most states were *not* in accord with the view of limiting the scope and applicability of non-refoulement concerning mass-population flows, which is precisely why no amendment to qualify its applicability under such conditions was never tabled.

The third, and perhaps most convincing, proof as to the failure to convince most nation states to qualify non-refoulement - when faced with mass population flows, concerns the demand by the Dutch delegate to place his words *on record*. While being a point of proof of a *procedural* nature, this situation holds a strong *methodological* lesson for diplomatic historians and legal scholars engaged in the interpretation of international legal treaties; When do delegates demand that their words be put on record?

In most cases, it is due to them thinking that their position is the correct one, while being outvoted or blocked by a majority of the representatives at that particular assembly. This is *not* to say that that delegate did not have a point, nor does it hold any bearing towards any ontological truth that his claim might have had. History is full of examples of venerable minoritarian voices who demanded that their words be put on record, only to be subsequently (and tragically) confirmed in their views and warnings. Edmund Burke's call for concessions to the British colonies in North America during the early 1770s and Beneš' outcry at the 1938 Munich conference, when the world succumbed to Hitler's demands for the Sudetenland, are but two examples.

These examples, however, prove the point. In these two latter instances, irrespective of their ontological truth and prophetic foresight, Burke's and Beneš' were strictly minoritarian voices. This was all the more relevant with regard to the statement made by the Dutch delegate during the final session of the 1951 Refugee Convention's Conference of Plenipotentiaries. To most delegates present – and most probably to the president, Knud Larsen, who had championed non-refoulement as his own personal cause – Von Boetzler's declaration would have sounded like no more than a diplomatic statement of "sour grapes," and an affirmation of the non-attainability of his efforts to limit and qualify non-refoulement in the cases of mass population flows.[28]

To be sure, Von Boetzler was not the only delegate at the Conference of Plenipotentiaries to demand that his words be put on the record when his opinion had not been endorsed by the majority of the other delegates present. Three days earlier, Jacob Robinson had attempted for his part to persuade the delegates not to accept Germany's amendment to Article 1 F, which was intended to strike out of the Convention's text any reference to the Nuremberg trials (known in international law language as "The London Charter").[29]

27 Gilad Ben-Nun, British-Jewish Roots, pp. 108–112.

28 On President Larsen making non-refoulement his own humanitarian cause, see Ibid., p. 95.

29 Article 1 F removes refugee protections from those who have committed war crimes or crimes against human-

Robinson saw this action on Germany's behalf, at the very first international conference that it had attended since Hitler had resigned from the League of Nations, as part of "the process of 'forgive and forget' which was taking place in Germany" with regard to the Jewish Holocaust.[30] Upon his failure to convince the other delegates of his point of view, Robinson requested that his speech concerning the Nazi past and the responsibility of Germany for the Holocaust be entered into the record as his statement *in extenso*.[31] In both cases, that of Robinson and that of Von Boetzler, the statements entered the records for protocol's sake – nothing more.

President Larsen was not going to oppose the Dutch delegate over his abstrusely false claim that "the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33." Both Larsen and Von Boetzler, and most of the other delegates present, knew full well that the Dutch delegate was placing on record his personal view in a shrewd diplomatic manoeuvre so as to place into the Refugee Convention's protocol minutes his false misinterpretation of (if not an outright misrepresentation about) the meaning of non-refoulement. Larsen's ruling in favour of recording Von Boetzler's words should under no circumstances be seen as an acceptance of his view, let alone of his claim that most states agreed with his interpretation of non-refoulement. For Larsen, what mattered was what was entered into the Final Act, and here non-refoulement was expounded in the strongest form: "in any manner whatsoever." Little did Larsen know just how far the intellectual dishonesty of supreme courts wishing to support their own executives would go.

4. Conclusion

That the US Supreme Court based its false judgment in *Sale* v. *Haitian Centers Council* on a statement that one of its presiding judges (Justice Stevens) selected from well over 3,000 pages of statements in the 1951 Refugee Convention's *travaux préparatoires* is alarming in more than one respect. One wonders what was worse: that the judges of one of the most respected high courts the world over failed to contextualize a false statement by a defeated delegate, and read it wrongly – or, alternatively, that the bench had already reached its judgment and only looked to the *travaux* to provide a crooked justification for its unacceptable decision. The minority dissenting opinion of Justice Blackmun certainly points to the latter option. That said, one should not be surprised if this were to prove a

ity, and who, after they have committed those crimes, press forward with a request for asylum and the granting of refugee status. The German amendment was tabled under the reference UN Doc. A/CONF.2/76 (1951), and was intended to replace the reference to the London Charter with references to the Fourth Geneva Convention for the Protection of Civilians (Art. 147), and the Genocide Convention (1948) (A. Zimmermann and P. Wennholz, Article 1 F, in: Zimmermann, Dörschner and Machts, 1951 Convention, pp. 579–610, at 587.

30 UN Doc. A/CONF.2/SR.29, p. 10, Statement of Robinson (Israel), Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Ninth Meeting (Friday 20 July 1951).

31 Ibid. "He requested that his statement should be reproduced verbatim in the summary record of the meeting."

mistake in good faith by Justice Stevens, given the tendency of international lawyers to haphazardly cherry-pick statements from various Conventions' *travaux préparatoires*.
This tendency, however, becomes especially alarming when one is engaged in the interpretation of treaties of international humanitarian law, in which a change in interpretation of the scope or meaning of terms could directly affect human lives – as in the case of the reversal of European refugee policy on Mediterranean waters thanks to the European Court of Human Rights' 2012 ruling in *Hirsii Jam'aa* v. *Italy*.[32]
From the earliest drafting stages of the 1951 Refugee Convention, the clash between the universalist tenets of non-refoulement on the one hand and the requirements of national sovereignty, in the form of total control upon the entry of persons into a state's sovereign territory, on the other was absolutely clear to the drafting delegates. That they chose to strengthen the wording of the non-refoulement clause by inserting the words "in any manner whatsoever" at its final drafting stage during the Conference of Plenipotentiaries demonstrates their deliberate and clear rejection of any limitation upon its application. The obstacles to non-refoulement – in the form of challenges to a state's national security, or the case of mass population flows – were well known and heatedly debated during the Convention's three-year drafting process. In the case of the needs of national security, the drafters indeed chose to limit non-refoulement through the insertion of Paragraph 2 of Article 33. In the case of mass population flows, they chose *not* to qualify it despite recurrent calls to this end by certain delegates.
And rightly so, for in many cases it is precisely *in and during* humanitarian catastrophes – ones which trigger mass-refugee flows, that the non-refoulement principle is most needed. As Holocaust survivors or those who had attempted to help Jewish refugees as much as they could, several of the key drafters of the 1951 Refugee Convention were

32 Much the same can be said of the Fourth Geneva Convention for the Protection of Civilians – the treaty that underpins all our laws concerning war and armed conflict, whose interpretation has also suffered its share of misinterpretations thanks to the "cherry-picking" of statements from its *travaux* by international lawyers looking to substantiate premeditated and partial legal claims. Methodologically, I have tried to argue for the need to engage in deep archival-historical research if one wants to understand the legal meanings of treaties to their full extent. The importance of this methodological observation comes across starkly when one observes a recently published, erudite study concerning the Fourth Geneva Convention's cardinally important Common Article 3, which extends humanitarian protections to all combatants – regular and irregular (Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, Cambridge 2010, p. 29). Cullen mistakenly attributes a strong étatist and anti-universalist view to France and its delegate, Albert Lamarle – the very person who drafted this Convention's entire first blueprint, and who was personally responsible for the first drafting version of Common Article 3, which was later adopted by the ICRC (International Committee of the Red Cross). In fact, Lamarle's positions and those of the French establishment were both diametrically opposed to any such étatist views. A scrutiny of the footnotes confirms the sources of this misjudgement. Not only did the author rely entirely on a selective reading of statements from the Plenipotentiaries Conference' Final Record, he also overlooked vitally significant published literature. That such a high-quality study (whose conclusions, it should be reiterated, are generally spot on!) should incur such a mistake speaks loudly of interdisciplinary problematics. Just as historians do not use legal sources sufficiently, so do legal experts often avoid searching for the relevant historical publications, which are outside their legal bibliographical sphere. On Lamarle's vital role in the 4th Geneva Convention's drafting, and his responsibility for the articulation of its very first blueprint see: Gilad Ben-Nun, The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law (London: I.B. Tauris 2018, forthcoming), Ch. 3

very well acquainted with conditions of mass populations flows – some of which had taken place only a few years prior to the Convention's drafting, during World War II. It is within this context that one must understand their insertion of the words "in any manner whatsoever" into the text – in direct reference to the ample cases of refoulement that had indeed taken place during that conflict – be these of Jews aboard the MS *St. Louis* off the coast of Cuba, of Gypsy and Roma communities fleeing Nazi persecution in the Balkans, or of native Czech communities driven out of the Sudetenland by the armed forces of the Third Reich. Thus, when the US Supreme Court decides to falsely utilize the 1951 Refugee Convention's *travaux préparatoires* so as to justify an intellectually dishonest and deliberate misinterpretation of this international treaty, it not only renders an insult to the layperson's intelligence (as its own Justice Blackmun so eloquently remarked) but it also does *methodological* harm, by sanctioning the conduct of "cherry picking" of statements from the drafting records of international treaties. After all – if Supreme Court judges behave this way, what claim can one forward against individual international lawyers or academics, who merely repeat the same methodologically-flawed practice. Fortunately, though - and for all its faults, Europe still has its Court of Human Rights where judges such as Pinto de Albuquerque still take the time and effort to scrutinize the entire record of a treaty – before they render their judgment on its meaning.

Beyond the specificities of non-refoulement's application in cases of mass-population flows, there lies the more general methodological principle of how Supreme Courts ought to work with *travaux préparatoires*, which at the end of the day – are in their nature historical source materials in the 'classical' sense. If and when Supreme Courts do turn to *travaux préparatoires* in search for help in interpreting a treaty, they must do so in the same manner as a good and thorough historian would treat his source materials. They must first read the entire *travaux préparatoires* available to them, and not merely focus on the substantive provisions. This means for example, paying attention to the legally non-binding resolutions which we usually find at the end of many treaties, and to which Courts seldom turn precisely due to their non-bindingness.[33] A good knowledge of the historical circumstances and a reaching-out to standard historical works so

33 A salient example of this tendency to disregard significant portions of a treaty's official *travaux préparatoires* can be observed in the conduct of even the highest Court in the world – the International Court of Justice (ICJ) in The Hague. In 1996, the ICJ was requested to render its legal opinion as to whether the usage of nuclear arms was legal. In its final legal opinion, the ICJ was split down the line (seven judges against seven with the president of the Court casting the definitive vote as primus inter pares) concerning the legality of the usage of nuclear arms, due to their indiscriminate nature and the inability to distinguish between civilians and combatants within their usage, as per the stipulations of the 4th Geneva Convention for the Protection of Civilians (GC-IV). In over 1000 pages of the opinions of its 14 judges, not one single judge on the ICJ bench had taken the time to consult GC-IV' t*ravaux préparatoires*. Nor did the ICJ judges care to consult cardinal historical works such as that of Geoffrey Best's 1995 War and Law since 1945 (Oxford) which were already available during their deliberations Had the ICJ judges cared to examine these materials they would have discovered that this very question of the legality of nuclear arms' usage was one of the most contested issues at the 1949 Geneva Conference of Plenipotentiaries, and that humanitarian positions advocated for by the Soviet delegations, would have significantly helped the holders of the ICJ majority opinion in 1996. See Gilad Ben-Nun, The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law (London: I.B. Tauris 2018, forthcoming), Ch. 2.

as to understand the psychological and *zeitgeist* context under which the drafters were operating – would also be of good sense. If there is one thing they ought *not* to do – it is to resort to the practice of "cherry picking" statements which is methodologically and factually indefensible.

The drafters of non refoulenment in the 1951 Refugee Convention understood full-well the inherent sovereignty-limiting qualities which the adoption of this principle, in its current wording ("in any manner whatsoever"), would *ipso facto* entail. Six decades on, the fundamental rift between the continental European understanding of non-refoulement - as adopted by the European Court for Human Rights in 2012, and that of the countries across the oceans (as expressed by the Supreme Courts of the US and Australia) is still very much alive and kicking.

A Gradual Relinquishment of National Sovereignty? A Comparative Analysis of Europe's Response to Boat Migrants in Search of Asylum

Irial Glynn

ABSTRACT

Die zentrale Forschungsfrage dieses Aufsatzes ist, warum Europäische Staaten im Unterschied zu Staaten in Südostasien, den USA, und Australien die Festlegungen zum Rückführungsverbot aus der Flüchtlingskonvention fortzusetzen versuchten, als Bootsflüchtlinge in den 200er Jahren Zuflucht in ihren Territorien suchten. Zunächst gebe ich einen Überblick, wie Staaten in anderen Weltregionen auf Bootsflüchtlinge, die nach Asyl suchten, seit den 1970er Jahren geantwortet haben und betone ihre Nichtbeachtung der Flüchtlingskonvention. Danach wende ich mich Europa zu und zeige, dass es eine ähnliche Reaktion in den 1990er Jahren gegeben hat. Dies veränderte sich jedoch nach 2000. Dieser Entwicklung widmet sich der übrige Aufsatz, wobei ich den wachsenden Einfluss des Europäischen Gerichtshofes für Menschenrechte (ECtHR) betone. Da Italien eine besonders große Zahl solcher Asyl suchender Bootsflüchtlinge aufgenommen hat, wird es besonders prominent behandelt.

Introduction

Boat migrants in search of asylum in Europe have dominated debates about immigration and asylum in recent years because of their notable increase in volume. Over one million people sailed across the Mediterranean to Europe in 2015.[1] Prominent member

1 International Organization for Migration (IOM), Fatal Journeys, Vol. 2, Geneva 2016, p. 6.

Comparativ | Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 27 (2017) Heft 1, S. 77–96.

states of the EU reacted by reaching a deal with Turkey that led to a considerable decline in arrivals in 2016, but approximately 360,000 still came ashore that year.[2] Europe is not the only continent that has had to deal with boat migrants arriving so sporadically. Southeast Asian states in the 1970s and 1980s received hundreds of thousands of 'boat people' escaping Indochina, particularly Vietnam. Similarly, the United States has had to deal with hundreds of thousands of Cubans and Haitians attempting to reach its shores, especially since 1980. Australia, despite its isolated location, has also had to play host to tens of thousands of boat migrants attempting to reach its territory since the 1990s. Migrants used boats because it was often the only way to access states that were otherwise closed off to them because of migration restrictions. Unlike other migrants and refugees travelling by plane, train, car, bus and regular shipping lines, the arrival of boat refugees was often covered extensively by various sections of the media and provoked public and political debates that touched on illegality, security and sovereignty on the one hand but also morality, compassion and humanitarianism on the other. As a result of this and the fact that the journey boat migrants made was fraught with real danger, as evidenced by the deaths of tens of thousands of boat migrants on the South China Sea in the late 1970s and the Mediterranean more recently, the issue of boat migrants often garners attention in public discourse disproportionate to its size.[3] The response to boat migrants can take the form of a 'border spectacle'.[4] This resembles a drama in many respects that is performed before millions on television, in the press and, more recently, on social media.

Southeast Asian states, the US, and Australia deterred these boat migrants using methods that called into question their interpretation of the Refugee Convention, especially the *non-refoulement* stipulation, which holds that migrants seeking asylum cannot be returned to a state where their 'life or freedom would be threatened' on account of their 'race, religion, nationality, membership of a particular social group or political opinion'.[5] Certain European states where boat migrants landed in the 1990s used similarly contentious methods to deter future arrivals, most notably Italy against boat migrants from Albania. Yet during the 2000s, European states appeared to make significant efforts to uphold international refugee law when introducing policies to respond to the increasing number of boat migrants seeking asylum. In doing so, they appeared to relinquish their national sovereignty. This paper seeks to discover why, in contrast to their counterparts in Southeast Asia, the United States and Australia, European states attempted to abide

2 IOM press release, 'Mediterranean Migrant Arrivals Reach 358,403; Official Deaths at Sea: 4,913', 23 December 2016. Available at https://www.iom.int/news/mediterranean-migrant-arrivals-reach-358403-official-deaths-sea-4913 (last consulted on 5 January 2017).

3 For more details about the estimated numbers of people who died at sea, see B. Wain, The Refused: The Agony of the Indochina Refugees, Hong Kong 1981, p. 83 and IOM, Fatal Journeys (Vol. 2), p. 6.

4 See R. Andersson, Illegality Inc.: Clandestine Migration and the Business of Bordering Europe, Oakland 2014, p. 138 and N. De Genova, Spectacles of migrant 'illegality': the scene of exclusion, the obscene of inclusion, Ethnic and Racial Studies 36.7 (2013), pp. 1180-1198 for more discussion about the 'border drama'.

5 Article 33.1, UN Convention Relating to the Status of Refugees (1951).

by the Refugee Convention's *non-refoulement* stipulation when reacting to the attempt by considerable numbers of boat migrants to seek refuge in their territory.

In seeking to satisfactorily answer such a research question, this paper will reference and interact with discussions about the difference that exists between the goals and results of immigration policies. The so-called 'gap hypothesis' put forward by Cornelius, Hollifield and Martin highlights the disparity 'between the *goals* of national immigration policy … and the actual results of policies in this area'.[6] Soysal contends that the increasing importance of global human rights partly explains the limitations placed on states' restrictiveness.[7] Joppke argues instead that the gap between the policy objectives of governments and the policy outcomes is due to internal rather than external constraints, most notably the imposition of liberal constitutions.[8] Most studies testing the 'gap hypothesis' have centred on migrants already in situ in liberal democratic states. Since boat migrants seeking asylum can be intercepted at sea, thereby potentially thwarting national and international law, the assumption is that less of a gap exists between governments' policy aspirations and policy outcomes with regard to boat migrants in search of asylum.

Section 1 provides a short overview of how states have reacted to boat migrants seeking to apply for asylum in their territory since the 1970s. Section 2 focuses on the reaction of European states, particularly Italy, to boat migrants since the early 1990s. Section 3 tries to explain why, especially in more recent years, European states have adopted an approach that pays significant attention to international refugee law by focusing especially on the growing influence of the European Court of Human Rights (ECtHR) on national asylum policies. The paper draws occasionally on primary government documents, largely in the form of bilateral agreements between states relating to the management of boat migrants. Contemporary newspapers are sometimes referred to throughout, particularly when discussing the Italian case since the 1990s because of the absence of official archives for this period. Due to the emphasis on legal interpretations of the Refugee Convention, particularly relating to the governing of *non-refoulement* of boat migrants, various court cases will be discussed throughout.

1. The Global Response to Boat Migrants in search of asylum since the 1970s

The Cold War produced significant numbers of refugees at particular times, such as during the Hungarian crisis in 1956 and the Prague Spring in 1968. What occurred in Indochina in the late 1970s involved much greater numbers than previously witnessed. After two decades of conflict, North Vietnam overcame its southern counterparts and reunited the country in 1975. Approximately 130,000 escaped from Southern Vietnam by

6 W. Cornelius, P. Martin and J. Hollifield, Controlling Immigration: The Limits of Government Intervention, in: W. Cornelius, P. Martin and J. Hollifield (eds.), Controlling Immigration. A Global Perspective, Stanford 1994, p. 3.

7 Y. Soysal, Limits of Citizenship, Chicago 1994, pp. 151-2.

8 C. Joppke, Asylum and state sovereignty: a comparison of the United States, Germany, and Britain, Comparative Political Studies 30.3 (1997), p. 293.

boat in early 1975 due to its impending invasion by northern forces and the withdrawal of American troops.[9] The United States fleet, positioned outside Vietnamese territorial water, picked up half those fleeing and the remainder managed to sail to Malaysia or the Philippines. All were rapidly transported to the US for resettlement. More boat people began to leave Vietnam soon after but numbers remained relatively low at first. By the late 1970s, however, the amount of people involved rose substantially due to increasing tension and subsequent war between Vietnam and China. Chinese-Vietnamese made up a significant proportion of this later exodus of so-called 'boat people'. In total, 277,000 people arrived by boat in other South East Asian countries by the middle of 1979.[10] Tens of thousands died en route as many of the smaller boats were not designed for the open seas although large trawlers, such as the *Hai Hong*, also transported boat people.[11] Starvation and disease accounted for many deaths on the overcrowded boats. Additionally, pirates murdered, robbed and raped large numbers on the high seas.[12] Malaysia received the most, followed by Hong Kong. Boat migrants in search of asylum also arrived in Thailand, Indonesia, the Philippines, Singapore, Japan, Macau, Korea and Australia.[13]

The swelling of Indochinese boat migrants throughout 1979 prompted several South East Asia countries to announce plans to expel existing refugees and push back any further arrivals. Malaysia, most prominently, proclaimed in June 1979 that it would ship more than 70,000 Vietnamese boat people back into international waters from the country's refugee camps and shoot on sight any further attempts to enter its waters, with the Deputy Prime Minister claiming that 'being humane has not paid off for us at all'.[14] Although the Malaysian Prime Minister several days later stated that the country would not shoot on site or remove those already in refugee camps in the country, he did assert that the navy would push-back any boat containing migrants to international waters.[15] By late July 1979, the *New York Times* reported that Malaysia had expelled approximately 35,000 boat migrants from the country's territorial waters.[16]

No state in South East Asia had signed international instruments such as the UN Refugee Convention (1951) or the protocol that followed in 1967 that globalised the instrument (the convention had applied only to Europe before the protocol, as discussed elsewhere in this special issue). Furthermore, governments did not face strong, independent domestic judiciaries. Hence there theoretically was no noticeable gap between what these

9 N. Vo, The Vietnamese boat people, 1954 and 1975-1992, Jefferson, NC 2006, pp. 2-3.

10 UN General Assembly, 'Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General', 7 November 1979, A/34/627.

11 UNHCR, The state of the world's refugees 2000: Fifty years of humanitarian action, Oxford 2000, p. 82.

12 For first-hand accounts of Vietnamese boat people's harrowing experiences, see C. Hoang (ed.), Boat People: Personal Stories from the Vietnamese Exodus 1975-1992. Cloverdale 2010.

13 Y. Chan, Revisiting the Vietnamese refugee era: an Asian perspective from Hong Kong, in: Y. Chan (ed.), The Chinese/Vietnamese diaspora: revisiting the boat people, London 2011, p. 5.

14 Reuter press report, 14 June 1979, contained in UK National Archives Prem 19/129.

15 H. Kamm, Malaysia Cancels Threats to Refugees, in: New York Times, 19 June 1979, p. 3.

16 'U.S. Is Collecting Refugee Reports on Mistreatment by Malaysia's Navy', in: New York Times, 26 July 1979.

states pledged to do – force boat migrants in search of asylum out of their territory – and what they could do. It was only due to American guilt about the fallout from the Vietnam War, Britain's need for assistance with its overcrowded refugee camps in Hong Kong (it did not push back boat migrants because of the potential international outcry that it could create), and international attention for the plight of boat migrants in search of asylum that a solution emerged.

To further deter people from leaving Vietnam in such a disorganised and dangerous manner, the UNHCR, with US prompting, formed an agreement with the Vietnamese government to establish an immigration scheme that would allow people to leave in a more orderly fashion in 1979.[17] In an attempt to dissuade South East Asian states from pushing back boat people, western states, encouraged by the UN following a British initiative, came together on 20-21 July 1979 in Geneva to pledge that they would help resettle the boat people then stranded in various makeshift camps across the region and host Vietnamese leaving under the Orderly Departure Programme. Shortly thereafter, states commenced taking in an annual quota of refugees and migrants in need of humanitarian help. In return for major international assistance and a promise to resettle the majority of those stranded in camps throughout South East Asia, countries of first asylum in the area agreed to desist from pushing back future boat arrivals.

Just as the international conference dedicated to the Indochinese refugee crisis began to alleviate some of the problems encountered by host Southeast Asian states, another episode involving boat migrants in search of refuge began to receive much more prominence. Boat migrants from Cuba and Haiti had arrived in the United States throughout the 1970s but the scale of arrival remained relatively low until 1980.[18] The American response to the different movements in the 1980s and 1990s demonstrated the political nature of the reaction of some states to boat migrants during and after the Cold War. Whereas the United States took in hundreds of thousands of Vietnamese 'boat people' in the 1970s and 1980s and 125,000 Cubans in the 1980 Mariel boatlift when Cuba allowed people to leave the island for the United States for several months, Haitians received a much more hostile reception because Haiti remained an American ally.[19] From 1981 onward, the US instigated a policy to intercept and return Haitians on the high seas – but not Cubans. Under the US-Haiti bilateral interdiction policy, US Coast Guard vessels were instructed to:

> *[S]top and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons* […]. *To make inquiries of those on board, examine documents* […]. *To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed*

17 See J. Kumin, Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?, Refugee Survey Quarterly 27.1 (2008), pp. 104-117 for details.

18 C. Mitchell, US policy toward Haitian boat people, 1972-93, The Annals of the American Academy of Political and Social Science 534 (1994), pp. 69-80 and C. DeMichele, Boat People (1975–2000), in: P. J. Hayes (ed.), The Making of Modern Immigration: An Encyclopedia of People and Ideas, Vol. 1, Santa Barbara 2012, pp. 121-142.

19 A.A. Shemak, Asylum Speakers: Caribbean refugees and testimonial discourse, Fordham 2011, p. 52.

> *against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent.*[20]

This policy controversially continued throughout the 1980s, notwithstanding a succession of military coups affecting the country's already unsteady stability. The main difference between the groups was that the Vietnamese and Cubans fled from communist regimes at loggerheads with the United States whereas the Haitians escaped from non-communist dictatorships allied to the United States. In a significant finding, the US District Court rejected the Haitian Refugee Center's assertion in 1985 that the US Coastguard had 'deprived Haitian refugees on interdicted vessels of their liberty and rights afforded them by the Refugee Act' because 'those acts only establish procedures guaranteed to aliens within the United States'.[21] The plaintiffs also alleged that interdiction violated *non-refoulement*. The judge responded by acknowledging that the US Congress had implemented the *non-refoulement* as part of the 1980 Refugee Act but that this 'does not provide any rights to aliens outside of the United States'.[22]

After the overthrow of democratically elected Jean Bertrand Aristide in 1991, growing opposition from human rights groups in the US still led to Haitians being interdicted at sea, but instead of being returned to Haiti, the Coast Guard took them to detention camps based in the US military base at Guantanamo to process their applications for asylum. By May 1992, President Bush allowed the Coast Guard to intercept Haitian boat migrants on the high seas and return them immediately without screening them for asylum.[23] Non-profit organizations representing Haitian boat migrants proceeded to take several legal cases against the interdiction policy, which resulted in the American Supreme Court confirming that article 33 of the Refugee Convention relating to *non-refoulement* or domestic American law did not place any limit on the president's authority to repatriate aliens interdicted, as long as this occurred beyond the territorial seas of the United States.[24]

Following the collapse of the Soviet Union in 1991, Cuba suffered a number of economic crises. As a result, a notable increase in the amount of Cuban boat migrants sailing to the United States occurred. In 1994, Castro announced that Cubans who wanted to leave could do so to ease social tension. Fearing a repeat of the Mariel Boatlift in 1980 in August 1994, when Castro began quietly letting Cubans leave on rafts and small boats,

20 R. Reagan, Executive Order 12324 – Interdiction of Illegal Aliens, September 29, 1981. Available online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=44317.

21 Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), U.S. District Court for the District of Columbia – 600 F. Supp. 1396 (D.D.C. 1985), January 10, 1985.

22 Ibid.

23 A small number of the Haitians taken to Guantanamo did eventually receive asylum in the United States but the majority were deported following US military intervention in Haiti in 1994, which resulted in the return of President Aristide. See A.A. Shemak, Asylum Speakers, pp. 53-4 for more details.

24 Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

the United States announced a new policy to intercept Cuban boat migrants on the high seas and detain them alongside the Haitians at Guantanamo.[25] As part of an eventual deal struck between the two countries, Cuba agreed to stop boat migrants leaving and allow for the return of those interdicted on the high seas en route to the US. In return, the US agreed to receive at least 20,000 Cubans immigrants per year as part of an official programme. The US government transferred the vast majority of the 30,000 held at Guantanamo to the American mainland after the deal's establishment but repatriated those intercepted from then onwards on the Caribbean Sea.[26] In an appeasement of sorts, Cubans who made it to the US mainland were not returned under the so-called 'wet foot, dry foot' policy – a practice that did not apply to Haitians who had to go through the asylum process, which often led to the issuance of deportation orders.[27]

It appeared that no real gap existed when it came to the United States' policy towards boat migrants seeking to reach the country. Those deemed undesirable, such as the Haitians since the 1980s, were stopped on the high seas and returned. Domestic and international law could not protect the Haitians because their interdiction took place outside the United States. Due to the ongoing political tension between Cuba and the United States, Cubans received a remarkably different reception. Nevertheless, when the Cold War ended, the United States successfully adopted a new strategy that led to an enormous drop in boat migrants and the return of those found at sea to Cuba.

Another country that amassed significant experience of receiving boat migrants in search of asylum was Australia. A small number of Vietnamese 'boat people' had made it to the state in the late 1970s but this stopped after the aforementioned 1979 international agreement. During the 1990s, more boat migrants arrived from Cambodia and China. Authorities placed them in increasingly isolated detention centres to deter future arrivals but by the late 1990s numbers had increased significantly. This time, the majority came from Iraq, Iran and Afghanistan. They flew first to Indonesia – no visa requirements were necessary for nationals of those countries at the time to enter – and later boarded boats organised by smugglers that attempted to reach Christmas Island, an Australian external territory located closer to Indonesia than Australia. When the number of boat migrants swelled further throughout 2001, the issue of boat migrants became a topic of major political debate. In response to growing opposition to their arrival, the government of the day promised to put a stop to the trend. The appearance of the Norwegian *Tampa* off the coast of Christmas Island in late August 2001, containing over 400 Afghan boat migrants it had rescued at sea, placed the issue centre stage. The Australian government categorically denied the *Tampa* permission to land. The government took this move, ac-

25 E. Campisi, Escape to Miami: An Oral History of the Cuban Rafter Crisis, New York 2016, pp. 13-15.

26 F. Masud-Piloto, From Welcome Exiles to Illegal Immigrants. Cuban Migration to the U.S., 1959–1995, Maryland 1996, p. 143.

27 A. J. Perez, Wet Foot, Dry Foot, No Foot: The Recurring Controversy between Cubans, Haitians, and the United States Immigration Policy, Nova Law Review 28.2 (2004), p. 445.

cording to the Prime Minister, 'in the national interest' because it 'prevent[ed] beyond argument people infringing the sovereignty of this country'.[28]

An international standoff developed between Indonesia, Australia and Norway, where the ship that rescued the migrants was registered. Australia's decision to prohibit the *Tampa* from landing on Christmas Island incurred the wrath of the UNHCR and provoked widespread international condemnation, but the government stood firm and introduced its Pacific Solution. The 'Pacific Solution' involved the transfer of the majority of the rescued migrants and future boat migrants found en route to Australia to two small Pacific islands by Australian forces. Nauru, the smallest republic in the world, with a population of approximately 10,000, became the first island to accept Australia's offer of substantial compensation in exchange for housing the boat migrants in detention centres built with Australian money. Papua New Guinea's Manus Island later became the second. East Timor, Tuvalu, Fiji and Kiribati had refused Australia's requests during the *Tampa* affair.[29] This represented a clear form of what Guiraudon terms venue-shopping, whereby political actors 'seek policy venues where the balance of forces is tipped in their favour'.[30] By exporting the processing of boat migrants' asylum applications to two other countries, the Australian government did not face the same scrutiny from domestic judges, political opponents or organisations supporting the boat migrants. Australia's practices bore close resemblance to the transfer of Haitians and Cubans to Guantanamo Bay in the early 1990s.[31]

One civil liberties organisation immediately challenged the government's detention of boat migrants aboard the *Tampa* through the Australian Federal Court. The single judge in charge of the case agreed that Australian forces had detained the boat migrants without lawful authority and consequently ordered their release to the Australian mainland.[32] The Australian government appealed to the full court of the Federal Court. A majority ruled that the government had acted within its executive power under the Australian Constitution to stop the boat migrants from entering into the country.[33] The Australian Constitution does not contain any Bill of Rights or the equivalent. Instead, it focuses on the structure of government. This means that most appeals brought to Australian courts act as the battleground for disputes between the Australian parliament and the courts over jurisdiction rather than any attempt to ensure the rights of boat migrants.[34] Austral-

28 Quoted in the Australian, 30 August 2001.

29 S. Kneebone, The Pacific Plan: The Provision of 'Effective Protection'?, International Journal of Refugee Law 18.3-4 (2006), p. 708.

30 V. Guiraudon, European integration and migration policy: Vertical policy making as venue shopping, Journal of Common Market Studies 38.2 (2000): p. 253.

31 J. McAdam, Migrating laws? The 'plagiaristic dialogue' between Europe and Australia, in H. Lambert, J. McAdam and M. Fullerton (eds.), The Global Reach of European Refugee Law, Cambridge 2013, p. 36; A. Dastyari, Refugees on Guantanamo Bay: A Blue Print for Australia's' Pacific Solution'?, AQ: Australian Quarterly 40 (2007), pp. 4-9.

32 Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs (& Summary) („Tampa Decision"), [2001] FCA 1297, Australia: Federal Court, 11 September 2001.

33 Ruddock v. Vadarlis [2001] FCA 1329, Australia: Federal Court, 18 September 2001.

34 R. Hamlin, Let Me be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia, New York 2014, p. 116.

ian governments frequently attempted to overturn unfavourable judgements, demonstrating how 'politics intrudes into the legal system' in Australia.[35]

In late September 2001, the Australian parliament approved several new acts to counter the arrival of boat people and legislate, retroactively, for its actions during the *Tampa* affair.[36] The 9-11 terrorist attacks in the United States ensured widespread public support for the new regulations. One act excised certain Australian islands from the country's territorial waters for boat people.[37] This meant that any boat people who arrived on Christmas Island had not technically landed on national soil. Another privative clause ensured that a decision to reject an asylum seeker's application for refugee status made in Nauru, Manus Island or Christmas Island could not 'be challenged, appealed against, reviewed, quashed or called in question in any court'.[38] In the Australian minister for immigration's words, this response ensured that: 'unauthorised arrivals do not achieve their goal of reaching Australian soil; there is no automatic access to Australian residency; [and,] there is no access to the judicial system'.[39] One of the other legal changes allowed the Australian navy to intercept any vessel attempting to reach Australia and return it to international waters.[40]

The majority of boat migrants transferred to Nauru and Manus Island received refugee status and were eventually resettled in Australia.[41] Nevertheless, the long periods spent in harsh conditions on the islands and the uncertainty surrounding their future caused the number of arrivals to plummet. Between 1999 and 2001, over 12,000 had sought asylum in the country after arriving by boat. Between 2002 and 2005, less than 100 boat migrants reached the country.[42] The Australian navy transferred the limited number of boat migrants who did arrive during this time period to Nauru and Manus Island. Boat migrants in Nauru challenged their placement in detention centres on the Pacific island through the Australian courts but the High Court ruled that their confinement did not infringe the Nauru Constitution.[43] In other words, Australian law did not apply: only the law of the countries in which the boat migrants were detained. It appeared, therefore, that no notable gap existed between Australia's policy goals – to reduce the number of boat migrants claiming asylum in the country – and what occurred after their introduction in September 2001. By outsourcing its asylum system for boat migrants, Australia did not encounter any major constraints. Migrants could not reach Australia and those

35 S. Kneebone, The Australian Story: Asylum Seekers outside the Law, in: S. Kneebone (ed.), Refugees, Asylum Seekers and the Rule of Law Comparative Perspectives, Cambridge 2009, p. 226.
36 The Border Protection (Validation and Enforcement Powers) Act 2001.
37 Migration Amendment [Excision from Migration Zone] (Consequential Provisions) Act 2001.
38 Part 8, Division 1.1, The Migration Legislation Amendment (Judicial Review) Act 2001.
39 P. Ruddock, in: Australian Financial Review, 6-7 Oct 2001.
40 The Border Protection (Validation and Enforcement Powers) Act 2001.
41 B. Ryan, Extraterritorial Immigration Control: What Role For Legal Guarantees?, in: B. Ryan and V. Mitsilegas (eds.), Extraterritorial Immigration Control: Legal Challenges, Leiden 2010, p. 29.
42 Numbers taken from J. Phillips and H. Spinks, 'Boat arrivals in Australia since 1976', Background note prepared for the Australian Parliamentary Library, Canberra 2009, p. 17.
43 S. Kneebone, The Pacific Plan: The Provision of 'Effective Protection'?, p. 711.

transferred to Nauru and Manus Island could not appeal to Australian courts if authorities denied their applications for asylum.

2. The Changing European Reaction to Boat Migrants

Europe also experienced the arrival of boat migrants. North Africans attempted to reach Spain via the Straits of Gibraltar from the 1980s onwards, Albanians crossed the Adriatic to Italy throughout the 1990s and Kosovars followed at the end of the decade. Kurds from Turkey and Iraq, Somalis and Eritreans from the Horn of Africa followed across the Mediterranean in the late 1990s and 2000s and landed in Italy, Malta and Greece. Sub-Saharan Africans attempted to reach the Canary Islands in the early 2000s. Most recently, refugees fleeing the fallout from the Arab Spring, civil wars in Libya and especially Syria, and the rise of Islamic State have come through Turkey, Egypt, Tunisia and Libya to traverse the Mediterranean to enter the EU, predominantly via Greece and Italy.

In the 1990s, European states reacted to boat migrants in a similar way to their American and Australian counterparts. When close to 50,000 Albanians sailed across the Adriatic in 1991 following the end of the communist regime in the state and the troublesome transition to democracy, Italy had no structures in place to cope with such a mass influx because it had not experienced anything similar before. The Italian government welcomed the first contingent of Albanians who arrived in spring 1991 but the second group of boat migrants who arrived in August that same year met with a very different official response. The police and army placed the Albanians inside a stadium in the southern Italian city of Bari for several days before transporting them back across the Adriatic without allowing them to apply for asylum. Italy then took the precaution of placing its armed forces in Albanian waters – with the acquiescence of the Albanian government – to prevent any other 'invasion' from taking place; a move that the Italian minister for justice at the time admitted was 'at the limit of international law'.[44] Despite the Italian Constitution's assertion that foreigners had the right to attain asylum in the country, the Italian courts played only a very minor role in dictating asylum policy during this period and subsequently, thereby contradicting somewhat the assumption that European states' liberal constitutions constrained policy initiatives to restrict unwanted migration. The absence of any law implementing the constitution's article on asylum has meant that asylum seekers have to appeal through the civil procedure. Since a standard civil trial in Italy can last up to ten years, asylum seekers have rarely taken this option.[45]

Opposition politicians in Albania disputed the landslide victory of the reigning president's party in 1996 and subsequently boycotted parliament. Towards the end of that same year, the state pyramid scheme in Albania, to which citizens had contributed sub-

44 See 'Cordone sanitario' in acque albanesi : le forze armate e un satellite per evitare altre 'invasioni', in L'Unità, 11 Aug 1991 and Scatta l'operazione: 'blocco dei porti', in: La Repubblica, 11 Aug 1991.

45 H. Lambert, F. Messineo, P. Tiedemann, Comparative perspectives of constitutional asylum in France, Italy, and Germany: requiescat in pace?, Refugee Survey Quarterly 27.3 (2008), p. 21.

stantially, began to collapse, eventually wiping half the country's GDP for that year as a result.[46] Unrest followed and by March 1997, the president had removed the prime minster and placed the head of the army under house arrest. Anarchy descended as gangs attacked and sacked police stations, army barracks, prisons, banks and public offices, leading to the widespread availability of firearms amongst the public.[47] The enforcement of Emergency law gave police the right to shoot on sight at stone-throwers. In response, Albanians began to leave by boat for Italy. Approximately 16,000 sailed to southern Italy in the spring of 1997.[48] The Italian government originally voiced its intentions to advance an asylum policy resembling its EU neighbours but shortly afterwards vowed that its navy would return any Albanian boats approaching Italy back across the Adriatic.[49] Italy had already presented a plan to its EU colleagues in mid-March 1997 to lead a military intervention in Albania to stem the movement, but the EU had rejected the arrangement, preferring instead some kind of civil solution.[50] Italy then pressed the UN for international backing, with Albanian support. In late March, the UN approved Italy's repeated requests and the country accepted responsibility to lead an international military-humanitarian mission in Albania, which included policing the country's coastline from potential migrants.[51] The reason for the Italian government's desire to lead such an intervention, according to Perlmutter, related to two factors. First, the negative reaction of Italians to Albanian boat migrants in 1991 meant that the public's support for a generous reception remained minimal. Second, Italy attempted to display to its EU partners that it too had an effective and trustworthy foreign policy in the run-up to a decision concerning its European Monetary Union application and, by extension, the Schengen agreement.[52]

In the 1990s, Italy appeared to react to boat migrants in a similar way to their counterparts in South East Asia, the United States and Australia. When Italy wanted to lower the number of boat migrants arriving, it put in place deterrent policies that generally appeared to succeed in stifling further arrivals. No salient internal or external constraints stopped successive governments intercepting boats heading towards its coast, and returned thousands to Albania. Yet in the 2000s, Italy and other European states dealing with boat migrants sailing to their shores without permission began to face growing domestic and international scrutiny.

The boat migrants who came to Italy in the 1990s originated primarily from the Balkans, but by the early 2000s a shift had occurred, as those coming from Africa and the Middle

46 R. King and N. Mai, 'Of Myths and Mirrors: Interpretations of Albanian Migration to Italy', Studi Emigrazione 39.145 (2002): pp. 167-8.

47 L. Einaudi, Le politiche dell'immigrazione in Italia dall'Unità a oggi, Bari 2007, p. 228.

48 'Profugi', in: La Stampa, 20 May 1997.

49 'Il governo vara misure eccezionale', in: La Repubblica, 20 March 1997.

50 M. Bull and M. Rhodes, Italy-A contested polity, London 2013, p. 253; 'Allarme profughi: 5 mila in arrivo', in: La Stampa, 17 March 1997.

51 Security Council resolution 1101 (1997) on the situation in Albania, U.N. Doc. S/RES/1101 (1997).

52 T. Perlmutter, The Politics of Proximity: The Italian Response to the Albanian Crisis, International Migration Review 32. 1 (1998), p. 204 and p. 208.

East began to dominate. Many still ventured further north after reaching Italy, helped by the country's participation in Schengen, but not all succeeded due to improved international monitoring of asylum seekers under the Dublin Convention, which stipulated that asylum seekers must submit their applications in the first EU state in which they arrived. Frustrated at the arrival of growing numbers of boat migrants from North Africa and Turkey, Italy instigated agreements bilateral agreements with Turkey, Tunisia, Egypt, and Libya to enable it to repatriate migrants coming from these countries who had no grounds for protection. The agreement with Libya, in exchange for Italian help ending the EU blockade of Libya – in place since the 1986 Lockerbie air disaster – and other unspecified rewards proved the most controversial because of the alleged mistreatment of migrants in the country, the abhorrent state of basic human rights in the country, and its failure to sign the Refugee Convention. As part of the deal, Libya agreed to accept all boat people who had disembarked from its shores, most of whom came from elsewhere in Africa or the Middle East.[53]

The initiation of the Italy-Libya deal took place in autumn 2004, when Italian authorities transported over 1,400 recently-arrived boat migrants from Lampedusa, a small Italian island located in-between Sicily and Tunisia, by air to Libya days after their arrival on Italian soil. This caused consternation amongst NGOs, international organisations and opposition political parties. Much of the resistance centred on Libya's continuing failure to sign the Refugee Convention and Italy's repatriation of boat people who had no clear access to proper asylum procedures. The UNHCR vehemently criticised the measure, citing the Libyan state's treatment of 75 Eritrean asylum seekers repatriated from the country at the end of August 2004 to support its stance.[54] The Italian government countered these criticisms by maintaining that its actions did not violate any national or international rules.[55] Crucially, the EU mutely supported the Italian government's measures.[56] Brussels only changed its attitude six months later after sustained and renewed appeals from Amnesty International and the UNHCR relating to Italy's policies of mass expulsions. The EU Commissioner for Justice, Freedom and Security, Franco Frattini, then warned that Italy must 'guarantee to all the right to present an asylum application and cannot expel these people if a decision has not yet been taken'.[57] Several weeks later, Italy came in for further criticism following a resolution from the European Parliament that called on Italy to 'refrain from collective expulsions of asylum seekers and 'irregular migrants' to Libya as well as to other countries and to guarantee that requests for asylum are examined individually and the principle of *non-refoulement* adhered to'. It also chided

53 Human Rights Watch, Stemming the flow: Abuses Against Migrants, Asylum Seekers and Refugees, Human Rights Watch 18.5 (2006), pp. 106-118.

54 „Salvaguardare il diritto d'asilo" Boldrini: va rispettata la convenzione di Ginevra Gran parte dei Paesi nordafricani non lo fanno, in: La Stampa, 19 October 2004.

55 L' Onu contro i rimpatri lampo. Ma il centro si svuota, in: Corriere della Sera, 8 October 2004.

56 A Bruxelles un documento sui flussi migratori. Il commissario Ue: l'Italia ha fatto sforzi eroici «Sì ai centri d'accoglienza nei Paesi del Nord Africa, serve una strategia comune», in: La Stampa, 5 October 2004.

57 Clandestini espulsi, interviene l' Ue Frattini richiama all' ordine Pisanu, in: La Repubblica, 23 March 2005.

the Italians for their failure 'to meet their international obligations by not ensuring that the lives of the people expelled by them are not threatened in their countries of origin'.[58] Despite this criticism, the return of migrants to Libya continued until 2006, when a new left-wing government led by Romano Prodi stopped the return flights established by a right-wing coalition led Berlusconi, although it never announced this departure publicly.[59] It is important to point out that governments with varying political persuasions in Italy in the 2000s took markedly diverging approaches to boat migrants.

During the 2000s, other southern European countries, such as Malta and Spain, also encountered increasing numbers of boat migrants arriving at their shores.[60] The amount of boat migrants arriving on Spanish soil more than quadrupled between 1999 and 2000 to over 15,000. The most popular route until then consisted of people crossing the narrow but dangerous Strait of Gibraltar from Morocco to the south of Spain. Due to improved Spanish surveillance techniques, potential migrants turned to other routes in the 2000s, with boat migrants increasingly sailing from Western Africa to the Canary Islands or from northeastern Morocco to southeastern Spain.[61] In 2006, almost 40,000 boat migrants successfully made the journey. Three-quarters of those landed on the Canaries. Spain reacted by signing secretive patrolling and readmission agreements with Mauritania, Cape Verde and Senegal.[62] Significantly, it also sought EU support from Frontex, an agency set up in 2004 to manage cooperation at the EU's external borders. In response, Frontex established Operation Hera that involved EU members and West African countries. Thereafter, the amount of boat people arriving dropped dramatically. Ruben Andersson has noted that despite all the technological innovations introduced, the 'key to the success of Frontex's Joint Operation Hera in West African waters was providing incentives to local forces. Essentially, you had to outbid the people smugglers'.[63] Most of the boat migrants travelling to Spain came from West Africa and Central African countries not associated with refugee flows. Furthermore, they usually left from Senegal, Mauritania and Morocco, which had all signed the UN Convention on Refugees – unlike Libya. This meant that the efforts of Spanish forces and the EU's border agency, Frontex, did not create the same controversy as Italy's agreement with Libya. Nevertheless some authors did question the legality of Spain and Frontex's actions in third states.[64]

Italy had for many years attempted to bring Libya back into the international fold; in part, to reduce migration flows from the North African state. As discussed above, the two

58 European Parliament, Resolution by the European Parliament on Lampedusa, 14 April 2005.

59 See E. Paoletti, The Migration of Power and North-South Inequalities: The Case of Italy and Libya, Basingstoke 2010, pp. 147-152.

60 D. Lutterbeck, Small frontier island: Malta and the challenge of irregular immigration, Mediterranean Quarterly 20.1 (2009), p. 121.

61 J. Carling, Unauthorized migration from Africa to Spain, International Migration 45.4 (2007), pp. 16-17.

62 R. Andersson, Illegality, Inc., p. 69.

63 R. Andersson, 'Hunter and prey: patrolling clandestine migration in the Euro-African borderlands, Anthropological Quarterly 87.1 (2014). Ibid, p. 123.

64 S. Carrera, The EU border management strategy: FRONTEX and the challenges of irregular immigration in the Canary Islands, CEPS Working Documents 261 (2007), p. 28.

countries agreed to various measures in 2004 but Libya's enforcement of such arrangements remained erratic and unreliable. The Italian prime minister, Silvio Berlusconi, made the country the destination for his first diplomatic trip abroad on his return to power in 2008. He publicly apologized for Italy's colonial occupation of the country and pledged to provide US$5 billion over twenty-five years in reparations as part of the conditions of a 'Friendship Treaty' struck between the two countries. In exchange, Libya agreed in February 2009 to help Italy stop the boats by signing an additional protocol intended to strengthen bilateral cooperation between the two. The agreement stipulated that:

> *The two countries undertake to organise maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills. The patrols shall be conducted in Libyan and international waters under the supervision of Libyan personnel and with participation by Italian crew members, and in Italian and international waters under the supervision of Italian personnel and with participation by the Libyan crew members*.[65]

The number of boat people arriving declined significantly as a result of the joint Italy-Libya operations. Whereas almost 37,000 boat migrants arrived in Italy in 2008, less than 10,000 managed to make it in 2009 and numbers continued to decline into 2010.[66]
When Mohamed Bouzizi set himself alight in protest at his treatment at the hands of officials within the Tunisian regime in mid-December 2010, it set in motion a series of momentous international events that had enormous consequences for the flow of boat migrants coming to Italy. Ben Ali's dictatorial regime in Tunisia was the first government to fall as a result of the 'Arab Spring'. The amount of boats leaving Tunisia to sail the short distance to Lampedusa soared. By early April 2011, over 22,000 migrants had arrived.[67] To reflect the circumstances from which they left, Italy bestowed the Tunisians with temporary residential permits. The number of Tunisians arriving dropped significantly thereafter due to the signing of a new agreement between Berlusconi and the caretaker coalition Tunisian government that allowed for the repatriation of new arrivals.[68] This did not stop Italy's problems, however, as the Arab Spring spread across North Africa and the Middle East. Huge demonstrations in Egypt began in January 2011 and ultimately led to the resignation of President Hosni Mubarak in mid-February. Days later, protests started in Libya. Unlike Mubarak, Gaddafi stood firm and a bloody civil war began. In March, a NATO-led military intervention in Libya attempted to help oust Gaddafi. The conflict sparked largescale movement from the country.[69] Almost 26,000 mostly non-

65 Quoted in Hirsi Jamaa and Others v. Italy, Application no. 27765/09, European Court of Human Rights, 23 Feb 2012, p. 5.
66 P. De Bruycker, A. Di Bartolomeo, P. Fargues, Migrants smuggled by sea to the EU, Migration Policy Centre Research Report 2013/09, Florence 2013.
67 C. Heller, L. Pezzani and S. Studio, Report on the "Left-To-Die Boat", London 2012, p. 14.
68 Ibid.
69 IOM, 'IOM response to the Libyan crisis', External Situation Report, October 2011.

Libyans left by boat for Italy, seemingly with the blessing of Gadaffi who wanted to punish the Italians for their support of the NATO operation.[70] Under such circumstances, no pushbacks took place. Nevertheless, Italy signed a new agreement in June 2011 with the National Transitional Council in Libya in which previous arrangements between the two countries were referenced, which presumably meant that pushbacks could restart in the future.[71]

The number of boat migrants arriving in Italy remained low throughout 2012 (less than 9,000) but increased substantially the following year because of deteriorating conditions in Syria and continuing problems in the Horn of Africa. In early October 2013, over 350 boat migrants, the vast majority from Eritrea, drowned en route from Libya to Lampedusa. It provoked an international appeal for action from the Secretary General of the UN, the Council of Europe, and Pope Francis, amongst others.[72] Italy reacted by establishing a military and humanitarian operation labelled 'Mare Nostrum'. Frigates, patrol boats, helicopters, drones and radars were deployed to help rescue boat migrants found in difficulty in international and Italian waters and bring them to Italy. The number of boat migrants in 2014 surged to over 170,000. More than 75,000 originally came from Syria and Eritrea.[73]

Boats have continued to arrive in Italy in huge numbers since then (over half a million from 2014 to 2016). Despite the cessation of Mare Nostrum in October 2014, Italy continued to welcome boat migrants rescued at sea to their territory in 2015 and 2016. This represented a remarkable turnaround from Italy's capture and return of boat migrants to their origin country from 1991 to 2009. The disparity between Italy and the international examples already cited represents an even more remarkable distinction. What caused Italy to act in such a humanitarian way? One difference between the United States and Australia, on the one hand, and Italy on the other, is that the former did not have to contend with the fallout from the Arab Spring, especially the outbreak of civil war and instability in Libya, which meant that Italy would be returning boat migrants into chaos if pushed back. Another factor is that a coalition government led by the centre-left – but containing members of the centre-right – that came to power in early 2013 adopted a more humanitarian approach than those right-wing coalitions led by Silvio Berlusconi between 2001 and 2006, and again from 2008 to 2011. Nevertheless, I argue that one salient reason for such a change was the increasing impact of the European Court of Human Rights (ECtHR) on European asylum policymaking.

70 Libya accused of exploiting boat people, Guardian, 12 May 2011.

71 Memorandum of Understanding between the Italian government and the National Transitional Council for Libya, 17 June 2011.

72 Lampedusa boat tragedy is‚slaughter of innocents' says Italian president, in: Guardian, 3 October 2013; Lampedusa, centinaia le vittime. I soccorsi: "Tante donne e bambini", in: La Repubblica, 3 October 2013.

73 Calculated from data produced by the *Iniziative e studi sulla multietnicità* (ISMU) based on Italian Minister of the Interior statistics. Available online at http://www.ismu.org/irregolari-e-sbarchi-presenze/ (last accessed on 2 January 2017).

3. The Growing Influence of Strasbourg

Founding states of the Council of Europe established its court in Strasbourg in 1959 to oversee the appliance of the European Convention of Human Rights (1950). In 1983, amended rules for the ECtHR allowed individuals to take cases before the court if they had exhausted all domestic avenues for appeal. Crucially, the bestowal of rights on 'persons' rather than 'citizens' in the European Convention of Human Rights allowed it to hear cases concerning Europeans and non-Europeans alike.[74] Unlike the Court of Justice of the European Union, the majority of cases before the ECtHR came from individuals rather than states or institutional actors. Following an extensive rise in applications to the court – applications registered increased from 404 in 1981 to 2,037 in 1993 – further reform followed. [75] Originally, the court comprised of a two-tier structure, comprising a Commission that filtered applications and the Court on Human Rights, which only sat a few days per month. In 1998, this was replaced by a single full-time Court. In 2000, Noll predicted that the ECtHR would become the battleground for individuals appealing against failure to attain asylum in Europe.[76] And so it proved, with Labayle and De Bruycker arguing that the ECtHR's case law has become 'the backbone of EU law on asylum' and that the court has played 'a decisive role in protecting the fundamental rights of aliens facing expulsion from the territory'.[77] Today the court receives tens of thousands of applications per year. In 2015, for instance, 40,650 were lodged.[78]

In the judgments delivered by the court in 2015, nearly a quarter of the violations found concerned Article 3, which related to the prohibition of torture and inhuman or degrading treatment. This is often the article under which asylum seekers appeal to the court when facing extradition, expulsion or deportation to third countries due to the reinforcement of the *non-refoulement* principle contained in the Refugee Convention by the ECtHR in the 1990s.[79] ECtHR case law now potentially protects those fleeing general situations of conflict and, in extreme cases, material deprivation and poverty.[80] The UNHCR reviews how states comply with their commitments to abide by the Refugee Convention, but it has no formal revision procedure to review a case.[81] By contrast, the ECtHR does have the power to challenge states' decision to expel rejected asylum seekers.

74 D. Jacobson, Rights across Borders: Immigration and the Decline of Citizenship, Baltimore 1996, p. 83.

75 Council of Europe, Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994.

76 G. Noll, Negotiating Asylum, Leiden 2000, 454. Referred to in Costello, The Human Rights of Migrants and Refugees in European Law, p. 171.

77 H. Labayle and P. De Bruycker, The influence of ECJ and ECtHR case law on asylum and immigration, Report requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2012, p. 5 and p. 11.

78 European Court of Human Rights, Analysis of Statistics 2015, Strasbourg 2016, p. 4.

79 H. Lambert, Protection against refoulement from Europe: Human Rights Law comes to the rescue, International and Comparative Law Quarterly 48.3 (1999), p. 518 for more details.

80 C. Costello, The Human Rights of Migrants and Refugees in European Law, p. 172.

81 N. Mole and C. Meredith, Asylum and the European Convention on Human Rights, Strasbourg 2010, p. 17.

The increasing influence of the ECtHR can be seen in relation to Italy's response to boat migrants throughout the 2000s. In 2005, the ECtHR received an application from a group of boat migrants who Italy had returned by plane to Libya. They complained about the risk the expulsion exposed them to in Libya, the lack of any effective remedy against their deportation orders, their collective expulsion as aliens, and their denial of any right to apply to a court.[82] The ECtHR, in response, requested that Italy suspend the repatriation of several individuals because of the inadequate reply of Italian authorities to its queries regarding the identification, treatment and grounds under which Italy wanted to repatriate these migrants to Libya.[83] Italy vowed to improve its asylum and reception system in response to the court's requests but maintained that the repatriation of boat people to Libya broke no national or international law.[84] The court eventually struck the case out because the lawyers representing the migrants had lost contact, thereby showing how difficult it could sometimes be to mobilize the law in favour of migrants on the move; yet it marked a warning for Italy.

When Italy began returning boat migrants to Libya in early 2009, it did so without screening them first for asylum despite previous criticism from various European institutions. This provoked the wrath of several international organisations, most notably the UNHCR.With the assistance of humanitarian groups operating in Libyan detention centres, which put them in contact with lawyers based in Rome (and kept them in contact with the applicants, in contrast to the earlier case just mentioned), eleven returned Somalis and thirteen Eritreans filed a case at the ECtHR against Italy in late May 2009 in a famous case that would later be referred to as *Hirsi Jamaa v. Italy*.[85] The applicants alleged that Italy had violated article 3 and protocol 4 (prohibition of collective expulsion of aliens) of the European Convention on Human Rights by returning them to Libya. They also alleged that they did not have the right to 'an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity' (article 13 of the same convention).[86] Despite this, Italy continued its '*respingimenti*' of boats and in June 2009, Frontex controversially contributed to one such push-back.[87]

Frontex's involvement triggered increased EU interest. In July 2009, the European Commissioner for Justice, Freedom and Security, Jacque Barrot, responded to a request from the European Parliament for a legal opinion on the pushbacks by asking Italy to provide it with more information about the circumstances of the returns and 'the provisions put

82 Hussun and Others v Italy 10171/05, 10601/05, 11593/05 and 17165/05 (19 January 2010). See also M. Giuffré, Watered-down Rights on the High Seas: Hirsi Jamaa and Others V Italy (2012), International and Comparative Law Quarterly 61.03 (2012).

83 No alle espulsioni verso la Libia, in: La Repubblica, 12 May 2005.

84 Le rapport du Commissaire aux droits de l'homme du Conseil de l'Europe (CommDH (2005)9, du 14 décembre 2005).

85 Hirsi Jamaa and Others v. Italy, p. 21.

86 Ibid, p. 1.

87 Human Rights Watch, Pushed Back, Pushed Around. Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers, New York 2009, p. 37.

in place to ensure compliance with the principle of *non-refoulement* when implementing the bilateral agreement between the two countries'.[88] The European Parliament had acted as a thorn in the operations of Frontex by continually challenging it to abide by the EU's human rights commitments.[89] In his communication, Barrot reminded Italy that the ECtHR's interpretation of the principle of *non-refoulement*, as set out in the Refugee Convention, meant that states could not return anyone to 'a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment', which meant that:

> *… [An] obligation must be fulfilled when carrying out any border control in accordance with the SBC [Schengen Borders Code], including border surveillance activities on the high seas. The case-law of the European Court of Human Rights provides that acts carried out on the high seas by a State vessel constitute cases of extraterritorial jurisdiction and may engage the responsibility of the State concerned.*[90]

In February 2012, the Grand Chamber of the ECtHR released its unanimous judgement on Italy's previous treatment of boat people in the Mediterranean. The court ruled that by pushing back the applicants to Libya in May 2009, Italy had contravened the European Convention on Human Rights.[91] In contrast to the US case referred to earlier concerning Haitian boat migrants, which argued that the court could not decide on whether interdiction amounted to *non-refoulement* because it took place outside the United States, the ECtHR asserted that 'Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas' since 'the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel'. As a result, the court found that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[92] In his concurring judgement, Judge Pinto de Albuquerque wrote:

> *If there were ever a case where concrete measures for execution should be set by the Court, this is one. The Court considers that the Italian Government must take steps to obtain assurances from the Libyan government that the applicants will not be subjected to treatment incompatible with the Convention, including indirect* refoulement. *This is not enough. The Italian Government also have a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.*[93]

88 Quoted in Hirsi Jamaa and Others v. Italy, p. 15.
89 See European Parliament D-G for External Policies, Migrants in the Mediterranean: Protecting Human Rights, Brussels 2015.
90 Ibid. This case law relating to extraterritorial jurisdiction dates back to Amuur v. France 19776/92, 25 June 1996.
91 Ibid, p. 56.
92 Ibid, p. 26.
93 Concurring opinion of Judge Pinto de Albuquerque, Hirsi Jamaa and Others v. Italy, p. 78.

The European institutions moved quickly to ensure that new legislative measures relating to Frontex's operations, whose actions had also come in for considerable criticism previously by human rights advocates, adopted a more humanitarian approach than previously as a result of the *Hirsi Jamaa* judgement.[94] The Italian technocratic government in place at the time announced that the judgement would be respected and that Italy would rethink its policies on migration as a result. In the summer of 2012, the government assured the Council of Europe that Italy had suspended pushing back boats since trouble began in Libya in 2011 – linked to the fallout from the Arab Spring and the overthrow of Gaddafi.[95] The Italian government that came to power after elections in February 2013 adopted a similar approach.[96] Domestic factors, of course, influenced Italy's reaction to the Lampedusa tragedy in October 2013 and the establishment of the Mare Nostrum policy discussed thereafter. Due to Italy's marked political divide over immigration, it was much more likely that a government led by a centre-left party quite favourable towards boat migrants would adopt a humanitarian policy than an administration led by a right-wing party.[97] Nevertheless, a right-wing led government would have found it extremely difficult to impose a policy akin to Australia's. This was not because of EU institutions restraining member states, such as Italy. Indeed, the EU's border agency, Frontex, had helped rather than hindered Italy push-back boat people in the past. Instead, it was the ECtHR that acted as a liberal external constraint to such actions.

Conclusion

To underline Italy's uniqueness compared to the non-European case studies mentioned, one need only look at what occurred in Australia in 2013. The disappearance of boat migrants attempting to reach Australian shores in the years following the instigation of the previously discussed Pacific Solution in 2001 caused a new government to suspend the policy in 2008. When boat migrant numbers began to rise once again in the 2010s, Australia introduced an updated and even harsher version of its Pacific Solution in 2013 that enabled it to intercept boat migrants and either return them to Indonesia or transport them to Manus Island in Papua New Guinea or Nauru where they could not access the Australian legal system, thereby successfully addressing the issue. The UN Human

94 See B. Stanford and S. Borelli, Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights, Uluslararasý Hukuk ve Politika–Review of International Law and Politics 9 (2014); S. Carrera and L. den Hertog, Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean, CEPS Liberty and Security in Europe No. 79 (2015), p. 10.

95 'Plan d'action du Gouvernement italien dans l'affaire Hirsi Jamaa et autres c. Italie', 26 July 2012.

96 I. Glynn, Asylum Policy, Boat People and Political Discourse: Boats, Votes and Asylum in Australia and Italy. London 2016, p. 175.

97 For more information about the right-left divide on immigration in Italy, see T. Perlmutter, A narrowing gyre? The Lega Nord and the shifting balance of Italian immigration policy, Ethnic and Racial Studies 38.8 (2015), pp. 1339–1346.

Rights Council, among others, criticized Australia for its treatment of asylum seekers on the high seas and the conditions facing detainees in Manus Island, but this did not cause Australia to make any major changes to its approach to boat migrants.[98] US courts continually supported successive governments' efforts to interdict Haitian, and later Cuban, boat migrants in international waters and return them to their country of origin since US and international refugee law did not apply on the high seas. The Inter-American Human Rights Commission called for the United States to desist from interdicting Haitian boat migrants on the high seas in the 1990s but to no avail as the country never ratified the American Convention on Human Rights. In stark contrast, Italy went from pushing back boat migrants intercepted at sea to actively searching for boat migrants in trouble in Italian and international waters, rescuing them and then bringing them to Italy so they could apply for asylum. I have argued that a critical part of the explanation for such a turnaround relates to the findings of the ECtHR's *Hirsi Jamaa* case, which found that Italy bore responsibility for boat migrants intercepted at sea, even if this occurred in international waters. The ECtHR ruling that Italy's policy of expelling and pushing back boat people to Libya on the high seas without providing them with access to asylum procedures contravened the European Convention on Human Rights led to repercussions unimaginable for Southeast Asian countries, the United States or Australia.

98 See UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 6 March 2015, pp. 7-8. For Australia's response, or lack thereof, see J. McAdam, Australia and asylum seekers, International Journal of Refugee Law 25.3 (2013), p. 444.

FORUM

Africa in the Globalizing World – A Research Agenda

Ulf Engel, Matthias Middell, David Simo, and Katja Werthmann

ABSTRACT

Area Studies waren lange Zeit vorwiegend im globalen Norden institutionalisiert und fundierten die dortigen Weltbilder durch empirische Forschungen über andere Teile des Globus. Am Beispiel Afrikas diskutiert dieser Beitrag die Neuausrichtung einer Forschungsagenda unter der Bedingung eines anwachsenden Interesses an anderen Weltregionen in Afrika (ebenso wie in Asien und Lateinamerika). Afrika war lange Zeit eher das Objekt von global dominanten Kräften, denn ein Subjekt, dessen eigene Beobachtungen und Beziehungen wichtig gewesen wären. Dieser in der globalen Wissensproduktion nach wie vor anzutreffende Euro- oder Westzentrische Blick hat seine Grundlage seit langem verloren, aber er prägt nach wie vor in vielerlei Hinsicht die Position afrikanischer Intellektueller in der globalen Wissensproduktion. Afrika ist in den Datenbanken des sozialwissenschaftlichen Wissens der am stärksten unterrepräsentierte Kontinent. Afrikanische Autoren interessieren oft noch immer vorrangig als Auskunftspersonen für Afrikawissenschaften, die ihre Diskurszentren andernorts haben.

Dabei haben Intellektuelle in Afrika im Zuge der post-kolonialen Wende in den Geistes- und Sozialwissenschaften längst alternative Perspektiven auf die Welt und Afrikas Rolle in derselben formuliert – etwa unter Stichworten wie „Southern theory" oder „theory from the South". Erst mit der Gründung afrikanischer Forschungszentren, die sich mit Weltregionen außerhalb Afrikas befassen, wird allerdings deutlicher, wie sich Afrika intellektuell längst *in der Welt* verortet.

For a long time, Africa has been the object, rather than a subject, of globally dominant forces that considered their own observations and relations to be paramount. African studies ranked prominently among the so-called area studies, which emerged in various steps

Comparativ | Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 27 (2017) Heft 1, S. 97–110.

during the eighteenth-century Enlightenment; during the period of high imperialism at the turn of the nineteenth to the twentieth century, when colonialism required further information about the colonized regions of the world; and during the Cold War, when the dominating superpowers organized knowledge in order to establish or maintain hegemony over the globe.[1] These various layers have not simply followed one after another; they have instead differed according to national variants of knowledge production about non-Western areas. Such a periodiziation suggests that area studies primarily follows a political agenda, and there is indeed some serious reasoning to bring this interpretation to the fore. However, more detailed analysis also demonstrates the tensions between political and scholarly intentions in the development of area studies; such analysis provides a much more nuanced picture, as Torsten Loschke has shown in his analysis of US-Latin America studies and the impact of the notorious Title VI programme.[2] Notwithstanding that the concept of Eurocentrism (or Western-centrism) – which can still be found in global knowledge production – lost its standing long ago, it still determines the position of non-Western intellectuals in such global knowledge production.

This is particularly true for African scholars. In social science databases, Africa is the least represented continent.[3] African authors are often only of interest as resources for African studies, whose hegemonic centres of discourse are situated elsewhere. This occurs despite the fact that in the context of the post-colonial turn in the humanities and social sciences African intellectuals for many years have already formulated alternative perspectives on the world and Africa's place within it – for instance under the catchword "Southern theory" or "theories from the South". However, this knowledge order does not receive the necessary attention in the centres of knowledge production in the Global North. It is only with the recent establishment of African research centres that deal with other non-African world regions that it becomes clearer for non-Africans how Africans intellectuals are defining the continent's place in the world. The question now is whether the emergence of area studies outside the traditional West has an impact on the development of both area studies and social sciences or not, and how to make this challenge fruitful for a global community of scholars.

In the following short description of a possible research agenda, we are interested, firstly, in the "discovery of the world" from an African perspective by incorporating knowledge produced by area studies in Africa. Clearly, this endeavour has to go beyond the traditional subject of African studies, which in the beginning prioritized the investigation of languages, arts, culture, and literature, and later adding history and social sciences. What

1 J. D. Sidaway et al., Area studies and geography. Trajectories and manifesto, in: Environment and Planning D: Society and Space 34 (2016) 5, pp. 777–790; and D.C. Engerman, American Knowledge and Global Power, in: Diplomatic History 31 (2007) 4, pp. 599–622.

2 T. Loschke, Area Studies Revisited. Die Geschichte der Lateinamerikastudien in den USA, 1940 bis 1970, Göttingen 2017.

3 This was the not very surprising outcome of the first World Social Science Report, which was launched in 2010: "Kowledge divides" (http://www.worldsocialscience.org/activities/world-social-science-report/the-2010-report/)

is still lacking is the combination of classical linguistic and anthropological approaches (which remain important and fruitful) as well as the widening of perspectives with the newly developing practices emerging since the 1990s in history and the social sciences concerning the aims of going global. This includes the integration of African history into global history,[4] which reaches far beyond the colonial period.

Secondly is the search for a new conjunction of theories about global processes as well as empirically as well as theoretically ambitious studies of the role African societies, people, and institutions play in these processes.[5] To this end, the interwoven nature between African discourses and European, Asian, and North and South American discourses should be addressed, together with the reactions from Africa towards its increasing co-presence in an ever more integrating world. To be clear, this integration is not free of conflict; it is quite to the contrary.

For us, the term co-presence addresses the experience created through an ever-increasing proportion of the world's population living closely together from other world regions as a result of migration processes, of stronger integration of production and value chains, and of a more integrated media system that brings news from faraway places almost in real time to our screens and the devices through which people communicate via social media. Co-presence draws attention to the fact that more and more people in their daily lives are becoming aware of something that has already existed for many decades, but often in a rather abstract understanding: the global condition.[6] In contrast to previous historical epochs where global entanglements were also at work, this global condition means that for more than 150 years or so individual societies have been no longer able to opt out of global interaction. Under such a condition, a new space of regulation – international space – has emerged that has become the arena for societies and world regions to negotiate their place in the world. Co-presence results in an intensification of negotiating values and norms. This intensification, furthermore, not only leads to "friendly" hybridizations and expressions of cross-cultural solidarity and friendship, but also to harsh debates, xenophobic reactions, and all kinds of stress with the "other" – perceived or real.

Area studies can be seen as one form among many others for organizing such collective reactions and for mobilizing the necessary knowledge production for such reactions. Interestingly, in some world regions the global condition has immediately led to massive

4 For overviews on the development of global history, see, e.g., J.H. Bentley (ed.), The Oxford Handbook of World History, Oxford, New York 2011; D. Sachsenmaier, Global Perspectives on Global History. Theories and Approaches in a Connected World, Cambridge, New York 2011; M. Middell and L. Roura, Transnational Challenges to National History Writing, Houndmills, Basingstoke, Hampshire, New York 2013.

5 "Globalization" has become a buzzword since the early 1990s and insofar it is difficult to identify the limits and borders of globalization theories. What becomes more and more clear is a confusion between serious research on global processes and a public discourse – if not an ideology – of an alternative-less telos in current world affairs. Both are using the same wording but give it a completely different meaning. No doubt, knowledge from area studies has enriched empirical studies in global process, but the majority of studies remains focused on the centres of the current world economy in North America, Western Europe, and East Asia.

6 C. Bright and M. Geyer, The Global Condition 1850–2010, in: D. Northrop (ed.), A Companion to World History, Malden, Mass., Oxford, Chichester 2012, pp. 285–302.

investment into the development of area studies, while other world regions – among them Africa – have been rather "defined" and "interpreted" by African studies located outside the continent. This does not mean that there has been no intellectual productivity or a lack of institutionalization in Africa. Quite to the contrary, research on African knowledge production demonstrates very well that knowledge addressing the challenges of the continent or its individual societies has been produced in Africa with great success, that is to say it successfully competes with less informed analysis produced outside of Africa. The point we would like to make here is not so much concerning the knowledge production itself, but the role this knowledge played, and still plays today, in the international space for the negotiation of norms and rules of global processes. Because things are changing, our proposal for a new research agenda tries to take these transformations as the point of departure for future rewarding research and reflection.

It increasingly becomes evident that African countries are not alone in developing their own area studies. Nevertheless, developments on the African continent are part of a broader trend that thrives at emancipating the very nature of area studies from its Western origins. It is no longer a privilege of the Western academe to have an institutionalized form of looking at the world and, step by step, "discovering" it. Area studies – or its equivalents – are recognized worldwide as a prerequisite to order to be prepared for confronting transregional and global entanglements. In this preparation, it does not matter whether this is an intentional dialogical process between the Global North and the Global South or whether it simply is imposed on traditional Western area studies.

1 Surveying the World from Africa

These days, African academes are characterized by at least one existing development: The establishment of knowledge orders based on area studies about other world regions. First, and in very general terms, the changing world order after the end of the Cold War[7] has paved the way for a wider reception of perspectives coming from post-colonial studies concerning the production of knowledge about world regions. Due to these changes as well as the spatial turn and its critique of methodological nationalism,[8] dominant epistemes have been challenged.[9] This has laid the foundations for the development of

7 J. Agnew, Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics, in: Annals of American Geographers 95 (2005) 2, pp. 437-461; G. Sørensen, What Kind of World Order? The International System in the New Millennium, in: Cooperation and Conflict 41 (2006) 2, pp. 343-363; S. Chaturvedi and J. Painter, Whose World, Whose Order? Spatiality, Geopolitics and the Limits of the World Order Concept, in: Cooperation and Conflict 42 (2007) 2, pp. 375-395; M. Middell and U. Engel (eds.), World Orders revisited, Leipzig 2010; and U. Engel, F. Hadler and M. Middell (eds.), 1989 in a Global Perspective. Leipzig 2015.

8 See J. Agnew, The territorial trap: the geographical assumptions of inter-national relations theory, in: Review of International Political Economy 1 (1994) 1, pp. 53-80; Agnew, Sovereignty Regimes; and N. Brenner, Beyond state-centrism? Space, territoriality, and geographical scale in globalization studies, in: Theory and Society 28 (1999) 1, pp. 39-78.

9 A. Appadurai, Globalization and Area Studies: The Future of a False Opposition (= The Wertheim Lecture 2000), Amsterdam 2000; H.D. Harootunian, Postcoloniality's Unconsciousness/Area Studies' Desire, in: M. Miyoshi and

"critical area studies",[10] in the form of dialogical and cooperative knowledge production as well as the questioning of some dominant epistemes. In Africa, existing traditions of self-narration in different scientific fields in the continent are now taken up in order to create African centres of area studies.

Second – and in response to the growing importance of relations between African countries and the emerging powers such as Brazil, Russia, India, and China (i.e. the original BRICs), as well as the "Next Eleven"[11] – African systems of higher education have started constructing knowledge of the world, namely other world regions such as Europe, Asia, and Latin America. It is only fairly recently, and outside of the humanities, that the various segments of area studies have been employed to respond to these themes. During the past decade, more or less, institutions have been set up in African countries to study Africa or other world regions more systematically. In this process, some regional hubs have emerged, such as Addis Ababa in Ethiopia, Accra in Ghana, and a series of places in South Africa such as Pretoria, Johannesburg, Cape Town, and Stellenbosch.

A pioneer in this field has been the Centre for Chinese Studies, established in 1982 at Stellenbosch University.[12] This was followed by the Centre for Indian Studies in Africa, founded in 2007 at the University of the Witwatersrand in Johannesburg.[13] Academics from various African universities are working with the collaborative research group on the Indian Ocean of AEGIS, the network of European African studies centres.[14] In addition, South African think tanks, such as the Johannesburg-based South African Institute of International Affairs or the Pretoria-based Institute for Security Studies, are increasingly looking at the BRICS (now also including South Africa) and other "emerging" countries.[15] Moreover, existing metanarratives are being reassessed by looking at African societies through the lenses of other regions.[16]

H.D. Harootunian (eds.), Learning Places. The Afterlives of Area Studies, Durham NC and London 2002, pp. 150-174; and N.L. Waters, Beyond the Area Studies Wars: Toward a New International Studies, Dartmouth 2000. These processes are analysed by the Collaborative Research Centre (SFB) 980: "Transfer of knowledge from the ancient world to the early modern period" at FU Berlin. ULR: <http://www.sfb-episteme.de/konzept/index.html> (accessed 16 June 2017).

10 This concept emerges in parallel to the arguments by Jie-Hyun Lim from Sogang University in Seoul on the necessity of critical global studies, which are different from mainstream global studies developed at North American universities: J-H Lim, What is Critical in Critical Global Studies, in: global-e 10 (20167) 16 (http://www.21global.ucsb.edu/global-e/march-2017/what-critical-critical-global-studies)

11 See D. Wilson and R. Purushothaman, Dreaming With BRICs: The Path to 2050, New York etc. 2003, p. 4. Just as the BRICs, the "Next Eleven" was also coined by Goldman Sachs' chief economist J. O'Neill.

12 This had political reasons as the apartheid government diplomatically recognized Taiwan. It was only in 1996 that South Africa changed its allegiance towards the People's Republic of China. See Stellenbosch University, Centre for Chinese Studies, http://www.ccs.org.za (accessed 16 June 2017).

13 See University of the Witwatersrand, Centre for Indian Studies in Africa, http://cisa-wits.org.za (accessed 16 June 2017).

14 See AEGIS Collaborative Research Group "Indian Ocean", http://www.aegis-eu.org/crg-indian-ocean-members (accessed 16 June 2017).

15 See South African Institute of International Affairs (Johannesburg), http://www.saiia.org.za (accessed 16 June 2017). Either framed as the "Next Eleven" or the MINT countries (Malaysia, Indonesia, Nigeria, and Turkey).

16 On Durban and Cape Town seen through the Indian Ocean perspective, see U. Dhupelia-Mesthrie et al. (eds.), Durban and Cape Town as port cities – reconsidering Southern African Studies from the Indian Ocean, special issue of the Journal of Southern African Studies 42 (2016) 3.

In addition, there is a European Studies Association of Sub-Saharan Africa, based at the Centre for the Study of Governance Innovation at the University of Pretoria, which is essentially financed with European money.[17] In May 2016, it was reported that the University of Ghana's Centre for Social Policy Studies is planning to establish centres for European studies, Latin American studies, and Asian studies.[18] Since the 1970s, philology departments dedicated to the study of European and American languages and cultures have been established in many African, especially francophone, countries, where they have been working to elaborate epistemological perspectives on these areas. This has led, for example, to the establishment of pan-African academic organizations in the field of German studies, such as the Südafrikanische Germanisten Vereinigung (South African Association of Germanists) and the Germanistik in Afrika Südlich der Sahara (German Studies South of the Sahara). Working together over the last ten years, these organizations have organized joint conferences in countries throughout Africa as well as in Germany.

In contrast, however, very few African universities maintain African studies programmes. Those few existing are often linked to politics or ideological claims to pan-Africanism. Thus, already in 1961 an Institute of African Studies was founded at the University of Ghana, which offered a master's programme.[19] At Addis Ababa University, in the city where the African Union, as well as its predecessor the Organisation of African Unity, is based, a master's programme in African studies was launched in 2007, followed by a PhD programme in 2016.[20] In South Africa, there are a number of recent African studies programmes, for example the Centre for Africa Studies (CAS) at the University of the Free State that was founded in 2007. The Centre for African Studies at the University of Cape Town was relaunched in 2012 after being inactive for ten years.[21] And, finally, there are academic journals focusing on Africa as a region – for instance, *African Studies*, which is edited by a group of people based at the University of the Witwatersrand and in 2016 celebrated 76 years of publishing.

2 A Research Programme – "Africa in the Globalizing World"

These dynamic developments are raising the question of how to engage with these newly established centres for the study of Africa and other world regions. On which scienti-

17 See University of Pretoria, Centre for the Study of Governance Innovation, http://governanceinnovation.org/esa-ssa/ (accessed 16 June 2017).

18 See Citifmonline, http://citifmonline.com/2016/05/28/university-of-ghana-to-establish-centre-for-european-studies/. See also Centre for European Studies, http://coh.ug.edu.gh/centre-european-studies (both accessed 16 June 2017).

19 See University of Ghana, Institute of African Studies, http://ias.ug.edu.gh/about-us (accessed 16 June 2017).

20 See Addis Ababa University College of Social Sciences, programmes in African Studies, http://www.aau.edu.et/css/academics/african-studies/programs-in-african-studies/ (accessed 16 June 2017).

21 See see T. Nhlapo and H. Garuba (eds.), African Studies in the Post-Colonial University, Cape Town 2012. See also University of Cape Town, Centre for African Studies, http://www.africanstudies.uct.ac.za (accessed 16 June 2017).

fic terms can, or should, Western academics and institutions of higher education work together with these new forms of knowledge production in Africa? We call for a radical departure from traditional, Western-dominated approaches towards the study of Africa by systematically bringing Africa back into the world, and by looking at the world through Africa.[22]

Rather than continuing conceptual Eurocentrism in seemingly new disguises, we want to take up post-colonial, Southern theory–inspired African scholarship, which has already fundamentally rethought the continent's place in the world, and bring this kind of scholarship into a dialogue with Western knowledge production. So far, knowledge about world regions and Africa's place in the world has been produced in the Global North, being mainly developed through a set of practices that have been labelled "area studies". By and large, present-day scientific knowledge and conventions are the result of the European Enlightenment.[23] Historically, today's dominant epistemes and knowledge orders[24] were institutionalized in many European universities around 1900 in newly established disciplines, such as anthropology, ethnology, and geography, with US universities following at the end of World War I.[25] These disciplines proved to be extremely powerful and long-lasting mechanisms for framing world views since they distinguished between disciplines specializing in the analysis of the West and those looking at the world beyond the West:

> *Socially and conceptually, we are disciplined by our disciplines. First, they help produce our world. They specify the objects we can study (genes, deviant persons, classic texts) and the relations that obtain among them (mutation, criminality, canonicity). They provide criteria for our knowledge (truth, significance, impact) and methods (quantification, interpretation, analysis) that regulate our access to it.*[26]

Disciplines therefore territorialized knowledge production as they analysed different world "civilizations". In a division of labour between area studies and the rest of the humanities and social sciences (often called the "systematic" disciplines),[27] the role of area studies was to generate empirical knowledge based on Northern epistemes about non-

22 See R. Abrahamsen, Rita, Africa and international relations: assembling Africa, studying the world, in: African Affairs 116 (2017) 462, pp. 125-139.

23 See K. Sloan (with A. Burnett) (eds.), Enlightenment: Discovering the World in the Eighteenth Century, London 2003; P. Burke, A Social History of Knowledge. Vol II. From the Encyclopédie to Wikipedia, Cambridge 2012; and H.F. Vermeulen, Before Boas. The Genesis of Ethnography and Ethnology in the German Enlightenment, Lincoln, NE, 2016.

24 M. Foucault, The Order of Things. An Archaeology of the Human Sciences, New York 1970 [1966].

25 See K. Naumann, Laboratorien der Weltgeschichtsschreibung. Lehre und Forschung an den Universitäten Chicago, Columbia und Harvard von 1918 bis 1968, Göttingen 2017.

26 See E. Messer-Davidow, D.R. Shumway and D.J. Sylvan, Preface, in E. Messer-Davidow, D.R. Shumway and D.J. Sylvan (eds.), Knowledges: Historical and critical studies in disciplinarity, Charlottesville VA, London 1993, pp. vii-viii.

27 In general, see H. Kuijper, Area Studies vs. the Disciplines. Towards an Interdisciplinary, Systematic Country Approach, in: The International Journal of Interdisciplinary Sciences 3 (2008) 7, pp. 205-216.; and on African studies see R.H. Bates, V.Y. Mudimbe and Jean O'Barr (eds.), Africa and the Disciplines. The Contribution of Research in Africa to the Social Sciences and Humanities, Chicago, IL 1993.

Western world regions.[28] This knowledge was – and still is – then interpreted through analytical concepts and theories that are firmly based on conceptual Eurocentrism. Contingent historical observations in Europe were used for theory-building, which in turn was universalized and exported from Europe and North America as dominant knowledge production sites to the rest of the world, even when and where analytical concepts did not make sense and hid or distorted the study of social dynamics.[29]

Post-colonial studies have demonstrated the intellectual and political dilemmas and obstacles introduced by this tradition.[30] These insights led to a critical debate concerning the terms in which intellectual engagement with Africa makes sense.[31] First and foremost, Western science created a "fictitious universalism" through "othering".[32] As shown by the post-colonial icon Edward Said,[33] amongst others, this particular scholarship has to be seen in the context of power relations that go far beyond academic representations: The way the West has framed Africa has always been part of creating, justifying, and upholding unequal political, economic, and cultural relations between the West and Africa. While the West looked beyond its own borders and "appropriated" the world in a reductionist universalism, at the same time this knowledge order produced the impression that non-Western academic cultures were not concerned with what was happening outside their own countries.

As a dominant academic practice until very recently, African studies in Germany, Europe, and the United States have "analysed" and "explained" Africa in more or less subconscious modes of paternalism. The dominant form of knowledge production about Africa is still practiced this way. These paternalistic practices have imposed a specific form of reasoning that is based on "writing history by analogy" and imposing universalisms that have established relations and attitudes of superiority and inferiority that continue to bind Africa and the Global North together in an unequal relationship.[34] It is evident that official development cooperation, which is based upon such practices and concepts,

28 D.L. Szanton (ed.), The Politics of Knowledge: Area Studies and the Disciplines, Berkeley, CA 2014.

29 S. Amin, Eurocentrism, London 1988.

30 Iconic authors are E. Said, Orientalism, New York 1978; G.C. Spivak, Can the Subaltern Speak?, in C. Nelson and L. Grossberg (eds.), Marxism and the Interpretation of Culture, Chicago IL 1988, pp. 271-313; H.K. Bhaba, The Location of Culture, London, New York 1994; and D. Chakrabarty, Provincializing Europe: Post-colonial Thought and Historical Difference, Princeton, NJ 2000.

31 See K.A. Appiah, In My Father's House: Africa in the Philosophy of Culture, New York 1992; R. Abrahamsen, African Studies and the Postcolonial Challenge, in: African Affairs 102 (2003) 407, pp. 189-210; and G.R. Lewis, What Fanon Said. A Philosophical Introduction to his Life and Thought, New York 2015.

32 P. Bourdieu, Pascalian Mediations, Cambridge 2000, p. 65. With regard to African studies and traditional human geography, see also H. Melber, What is African in Africa(n) Studies? Confronting the (Mystifying) Power of Ideology and Identity, in: Africa Bibliography 2013, pp. vii-xvii; and M.W. Lewis and K.E. Wigen, The Myth of Continents. A Critique of Metageography, Berkeley, CA etc. 1997; on political science, see P. Chabal, The End of Conceit. Western Rationality after Post-colonialism, London 2012; on international relations theory, see J.M. Hobson, The Eurocentric Conception of World Politics. Western International Theory, 1760-2010. Cambridge 2012; on anthropology see J.-L. Amselle, Globalization and the Future of Anthropology, in: African Affairs 101 (2002) 403, pp. 213-229; and F.B. Nyamnjoh, Blinded by sight: divining the future of anthropology in Africa, in: Africa Spectrum 4 (2012) 2-3, pp. 63-92; and on history see J.M. Blaut, Eight Eurocentric Historians, New York, London 2000.

33 Said, Orientalism.

34 On the status quo in German African studies, see Wissenschaftsrat, Empfehlungen zu den Regionalstudien,

between countries of the Global North and their counterparts in the Global South risks failing not only due to a lack of appropriate analysis, but also because it is rejected by a new self-consciousness of African intellectuals and elites.

Within this context, African academic systems and intellectuals reacted early on to Western narratives about Africa's place in the world[35] – often outside traditional area studies. Scholars mainly from the humanities – that is to say the study of language and literature, philosophy, and history – contributed to this rich and often overlooked debate on Africa's place.[36] Defining Africa's place in the world, and that of the world in Africa, has been most vividly tested and exhibited in contemporary art.[37] This research and reasoning has translated into rich debates about pan-Africanism and Africa's place in world or global history,[38] post-colonial identities,[39] as well as a general critique of conceptual Eurocentrism.[40]

In the wake of post-modernist and post-colonial critiques of Northern theory-building, scholars inside and outside of the Africa continent have called for alternative perspectives based on "Southern theory" or "theory from the South".[41] They employ concepts such as "provincializing", "worlding", "decentring", or "reimagining" in order to disupt established ways of "Northern" knowledge production.[42] The Australian sociologist Raewyn Connell,[43] for instance, criticizes mainstream sociology, including other disciplines, for ignoring or marginalizing indigenous knowledge and the African renaissance. Amongst

Bonn, 7 Juli 2006; and S. Weiss, Wissenschaft und Wirtschaft in der Globalisierung. Regionalstudien in Deutschland, Berlin 2007.

35 See P.T. Zeleza (ed.), The Study of Africa. Volume I: Disciplinary and interdisciplinary encounters, Dakar 2007; and P.T. Zeleza (ed.), The Study of Africa. Volume II: Global and transnational engagements, Dakar 2008.

36 For English and Commonwealth studies, see N. wa Thiong'o, Decolonizing the Mind. The Politics of Language in African Literature, Nairobi 1986; and W. Soyinka, Of Africa, New Haven, CT, London 2012; for German studies see C. von Maltzan, Editorial zum 50-jährigen Jubiläum / Editorial on the 50th Anniversary, in: Acta Germanica 44 (2016) 1, pp. 9-17; for philosophy see V.Y. Mudimbe, The Invention of Africa: Gnosis, philosophy and the order of knowledge, Bloomington IN, London 1988; V.Y. Mudimbe, On African Fault Lines. Mediations on Alterity Politics, Scottsville 2013; and A. Mbembe, On the Postcolony. Berkeley LA, London 2001.

37 For two recent examples, see Africans in America as well as AKAA: Also Known As Africa, in: ArtAfrica. What Really Matters? (2016) 6, pp. 20–35 and 80–87, respectively.

38 See A. Cesaire, Discourse on Colonialism, New York 1955; K. Nkrumah, Conscienscim: Philosophy and Ideology for Decolonization, London 1964; W.E.B. Du Bois, The World in Africa. An Inquiry into the Part which Africa has played in World History, New York 1965; J.K. Nyerere, Freedom and Socialism, New York 1968; and A. Cabral, Resistance and Decolonization, New York 2016.

39 See F. Fanon, Black Skin, White Masks, New York 2008 [1952]; and F. Fanon The Wretched of the Earth, New York 2004 [1961]; Lewis, What Fanon Said; W.D. Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options, Durham NC, London: 2011; and S.J. Ndlovu-Gathseni, Coloniality of Power in Postcolonial Africa. Myths of decolonization, Dakar 2013; S.J. Ndlovu-Gathseni, Empire, Global Coloniality and African Subjectivity, New York, Oxford 2013; and S.J. Ndlovu-Gathseni, The Decolonial Mandela. Peace, Justice and the Politics of Life, New York, Oxford 2016. See also L. Gordon, What Fanon Said, New York 2015.

40 C. Aké, Social Science as Imperialism. The Theory of Political Development, Ibadan 1979; and Amin, Eurocentrism.

41 See, for instance, R. Connell, Southern Theory: The Global Dynamics of Knowledge in Social Science, Cambridge 2007; and J. Comaroff and J.L. Comaroff, Theory from the South: Or How Euro-America is Evolving Toward Africa, London, New York 2016 (2012).

42 D. Simo, Postkoloniale Perspektiven auf Europa, in: M. Borgolte et al. (eds), Europa im Geflecht der Welt, Berlin, Boston 2012, pp. 247–258.

43 Connell, Southern Theory, pp. 89–110.

others, she discusses African philosophers, such as the Beninese Paulin Hountondji, and states that Solomon Thekisho ("Sol") Plaatje's *Native Life in South Africa*, written in 1916, should be included in "classics of world sociology".[44] The Basel-based, Mozambican sociologist Elísio Macamo asks why there has never been a genuine African sociology.[45] He explains that sociology as the study of modern Europe is implicitly predicated on an "other" – "traditional" societies – which by definition cannot be the object of sociological analysis. As a consequence, "African intellectual discourse has been, in fact, one long bitter, frustrated and pedantic monologue on European perceptions of Africa", resulting in "the inability and failure of African intellectuals to develop conceptual and analytical tools to describe the experience of modernity by Africans".[46]

While Connell and Macamo take issue with epistemology and canon-building in sociological theory, the South African anthropologists Jean and John Comaroff offer another angle with their book *Theory from the South* and its provocative subtitle "Or, how Euro-America is Evolving toward Africa". They argue for a reversal of dominant perspectives on modernity and processes of globalization in the social sciences: "What if we posit that, in the present moment, it is the global south that affords privileged insights into the workings of the world at large?"[47] Exercising this thought experiment, they claim that "it is the south that often is the first to feel the effects of world-historical forces, the south in which radically new assemblages of capital and labor are taking shape, thus to prefigure the future of the global north".[48] From such a perspective, many social and political phenomena in present-day "Afromodernity", for example notions of subjecthood or of the political, are not ethnographic exotica but anticipations of what could also happen in the North, such as a rejection of a purely procedural democracy that is based on a different cultural model of governance, legitimacy, and accountability.[49]

In such approaches, "North" and "South" are sites (e.g. hegemonic centres of theory-building), intellectual positions (e.g. alternative epistemologies), or relations in a global pattern of power. One problem of these constructs lies in the fact that "the North", by extending a relational definition, reifies "the South". Moreover, the categories and concepts employed in these texts still originate in Northern centres of knowledge production, even though its authors may be termed "global intellectuals".[50] Therefore, all "Southern" theory remains a reaction to "Northern" theory, or, as Macamo notes, a monologue.[51]

44 Connell, Southern Theory, pp. 110.

45 E. Macamo, Social Theory and Making Sense of Africa, in: M. Diawara, B. Lategan and J. Rüsen (eds.), Historical Memory in Africa – Dealing with the Past, Reaching for the Future in an Intercultural Context, New York 2010, pp. 13-26.

46 Macamo, Social Theory, pp. 19, 20.

47 Comaroff and Comaroff, Theory from the South, p. 1.

48 Ibid., p. 12.

49 Ibid., chap. 5.

50 J. Ferguson, Theory from the Comaroffs, or How to know the world up, down, backwards and forwards. The Johannesburg Salon 5, 2012. http://jwtc.org.za/resources/docs/salon-volume-5/Ferguson.pdf (accessed 12 June 2017).

51 Macamo, Social Theory.

And, undoubtedly, there is also a danger of assuming that Southern theory is morally superior and politically correct.[52]

In combination, post-colonial approaches, the Southern theory debate, and the repositioning of Africa in the world after the end of the Cold War by Africans make us very interested in African traditions of self-narration and the production of knowledge of the world and related academic observations of the self and the "other". In our opinion, it is therefore necessary to develop an approach that explicitly goes beyond disciplines as well as traditional notions of interdisciplinarity.[53] We are looking at a newly emerging field of studies that is linked to the way that the spectrum of area studies in Germany has been enlarged after the end of the Cold War by establishing the fields of global studies[54] or international studies,[55] or by defining new forms of transregional or transnational studies.[56] This approach could be built on a disciplinary alliance within the humanities and social sciences that involves cultural studies, area studies, new political geography, and global history. Methodologically, we favour the systematic investigation of connections between world regions – and their comparison across time – and utilize the perspective of reciprocal comparison in order to not take Europe as the benchmark as well as and recognize the "other" at both ends of the comparison in its own right.[57] We have a strong interest in historicity with regard to the social construction of knowledge and the establishment of competing and unequal knowledge orders (e.g. African studies, European studies, etc.). Furthermore, would like to promote a culture of academic reflexivity concerning the positionalities involved in the construction of knowledge on Africa.[58]

These problems of knowledge production concerning the world at large highlight the need for the investigation of times and spaces outside of established academic cultures,

52 M.C. Rosa 2014. "Theories of the South: Limits and perspectives of an emergent movement in social sciences", in: Current Sociological Review 62 (2014) 6, pp. 851-867, at 862. Rosa's claim about the "internal colonialism within the social sciences" can easily be substantiated by examples such as the group of Ivorian academics who formed the group Cellule universitaire de recherche et de diffusion des idées et des actions du président Henri Konan Bédié (CURDIPHE) and thought up the concept of Ivoirité, which became an integral ideological element of the xenophobic politics that culminated in pogrom-like killings of "foreigners" and civil war. See K. Werthmann, Wer sind die Dyula? Ethnizität und Bürgerkrieg in der Côte d'Ivoire, in: Afrika Spectrum 40 (2005) 2, pp. 221-240.

53 D.F. Brysecon, Discovery and Denial. Social Science theory and Interdisciplinarity in African Studies, in: African Affairs 111 (2012) 443, pp. 281-302.

54 See T. Dedering, Reflections on World History and African Studies, in: South African Historical Journal 50 (2004) 1, pp. 249-267; J.N. Pieterse, What is Global Studies?, in: Globalizations 10 (2013) 4, pp. 499-514 and M. Middell, What is Global Studies About, in: M. Herren et al. (eds.), Potentials and Challenges of Global Studies for the 21st Century, Basel 2014, pp. 38-49.

55 See A. Acharya, Global International Relations (IR) and Regional Worlds. A New Agenda for International Studies, in: International Studies Quarterly 58 (2014) 4, pp. 647-659; and U. Engel, International Studies, in: K. Loeke and M. Middell (eds.), Global Studies. A Reader, London 2017 (forthcoming).

56 K. Mielke and A.-K. Hornidge, Area Studies at the Crossroads. Knowledge Production after the Mobility Turn, Basingstoke, New York 2016.

57 See K. Pomeranz, The Great Divergence. China, Europe, and the Making of the Modern World Economy, Princeton NJ, Oxford 2000; and G. Austin, Reciprocal Comparison and African History: Tackling Conceptual Eurocentrism in the Study of Africa's Past, in: African Studies Review 50 (2007) 3, pp. 1-28.

58 See, for instance, P. Chabal and J.-P. Daloz, Culture Troubles. Politics and the Interpretation of Meaning, London 2005; and Chabal, The End of Conceit.

infrastructures, and epistemologies in order to devise more inclusive and innovative ways of theory-building. In our view, the following topics merit particular attention:

"**The presence of Africa in world literature**": We begin our enquiry into this issue by looking at literature since the roots of the underestimation of African perspectives on the world can be found in literary and historical studies during the long nineteenth century, which reflected the separation of a "high culture" in Western societies (including their own contributions to world literature) from exotic folklore produced outside the West.[59] Mainly drawing on English and Commonwealth studies, as well as on German, Portuguese, and French studies, it is important to reflect upon these respective fields in regard to the mapping of how Africa has been inscribed on the world, both in past and in contemporary literature. This includes a new emphasis on Africa's multilingualism and the resulting connections with literature in many languages. At times of co-presence, as defined above, these multilingual situations more and more become the rule than the exception.

"**From post-colony to Southern theory**": The new look at the world has taken its departure not simply from empirical observations of other world regions but also from a conceptual debate within which critical anthropologists, philosophers, and sociologists as well as other scholars enquire into current debates on the chances and limits of developing non-Western epistemologies.

"**The development of area studies in Africa – comparative perspectives**": A third step that is important for our agenda is to map out how African Higher Education Institutions (HEIs) and other sites of knowledge production have institutionalized, or are currently institutionalizing, their own versions of area studies and related epistemologies. Based on the conceptual conflicts stemming from African area studies, one can assume that foreign models can only play a marginal role in promoting fruitful cultural transfer. At the same time, a comparison with regions such as East-Central Europe may be of intriguing to analyse since such regions developed less under the impact of a colonial past and they see their own submission under former empires – such as the Habsburg, the Romanov, the Prussian, or the Ottoman empire – as part of a global post-colony.[60]

"**Beyond conceptual Eurocentrism**": Evidently the critical turn of area studies in Africa against mainstream intellectual knowledge production from what is called "systematic disciplines" by necessity not only represents a controversial engagement with Eurocentrism as expressed by Western scholars, but also a sort of self-criticism vis-à-vis the dominant paradigms at social science or humanities departments of African universities, which have been heavily influenced by what is often perceived as universal standards of scientific nature.

59 For an alternative interpretation of world literature referring back to concepts of the late eighteenth century: D. Simo, Die Erfahrungen des Imperiums kehren zurück. Inszenierungen des Fremden in der deutschen Literatur, Leipzig 2002.

60 S. Marung & K. Naumann (eds), Vergessene Vielfalt. Territorialität und Internationalisierung in Ostmitteleuropa seit der Mitte des 19. Jahrhunderts, Göttingen 2014.

"**Africa and international organizations**": As already argued, the emergence of an international space is the consequence of the global condition, which without a doubt has not bypassed Africa. However, the originality of African participation in the United Nations (e.g. the Africa Group and the A3 in the UN Security Council), the interests of African Union member states, and the changing terrain of "international partnerships" between the African Union, on the one hand, and the United Nations or regional organization such as the European Union, on the other, has so far been rather neglected, though it directly corresponds with the need for more knowledge about other parts of the world and issues such as trade and development, peace and security, and climate and environmental change.

"**Africa and emerging economies**": What has turned the people of Africa away from the long – both positive and negative – fascination with the West has been the discovery that emerging economic powers such as China and Brazil are exploring opportunities for enhanced cooperation with African countries, often with a view to exploit the continent's immense resources. The question now is how do economic African stakeholders in academia, the corporate world, and rating agencies position Africa vis-à-vis countries that are described as emerging economies, that is to say countries of the Global South that Western observers consider to have become strong competitors, such as the BRICS as well as the "Next Eleven", which includes Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, the Philippines, Turkey, South Korea, and Vietnam.

"**Africa and digitalization**": As public and academic notions of globalization processes are undergoing change – currently with an emphasis on digitalization and the role of the Internet and other technologies[61] – this issue will not only contextualize African positions in the emerging economic and social landscapes of digitalization but will also address the conditions under which African area studies work and gain access to the knowledge production elsewhere.

"**Africa and human mobility**": In the West, African migration has become a major issue since the mass exodus to Europe in 2015. However, the majority of migration movements are still within and between African countries, commonly connected to violent conflict and the consequences of climate change. There is as well the migration of African people to destinations outside the continent but other than the West. This might be particularly effective as a mirror to look at area studies knowledge production, which is, at the same time, inspired by the demand for more specific information about such regions and enriched by knowledge migrants, who in turn contribute to the stock of information available in Africa.[62]

"**Pan-Africanism and its futures**": Africa has already been connected to many parts of the world and global processes for a very long time. This has been channelled by different organizations, cultural movements, as well as diasporic communities such as pan-African

61 See McKinsey & Company, Digital Globalization. The New Era of Global Flows, London, San Francisco, Shanghai 2016.

62 D. Simo (ed.), Constructions identitaires en Afrique. Enjeux, stratégies et conséquences, Yaoundé 2006.

movements, which have many historical layers in the Americas and Western Europe, as well as Commonwealth countries, La Francophonie[63] or Lusophony. Evidently, the different directions of such entanglements inspire different foci in the development of area studies. What is striking, however, is whether this leads to a sort of regionalization of pan-Africanism or to the reintegration of such contacts and connections by mechanisms of a pan-African synthesis not only in literature and philosophy, but also in the politics of, for instance, the African Union.

These are important but certainly by far not all dimensions of the new trend towards growing interest in area studies recently launched in Africa. We are convinced that this process will not happen just in Africa; it merits comparison with similar developments in other parts of the world as well. And while we have insisted throughout this brief introduction on the emancipation of African area studies from Western interest in world regions, it is also evident that this emancipation will not happen in isolation. On the contrary, area studies in the West are changing themselves and may be inspired with regard to their own transformation by related processes in Africa and elsewhere.[64]

63 A. Mbembe, Provincializing France?, in: Public Culture 23 (2011) 1, pp. 85-119.

64 M. Middell, Area Studies Under the Global Condition. Debates on Where to Go with Regional or Area Studies in Germany, in: ibid. (ed.), Self-Reflexive Area Studies, Leipzig 2013, pp. 7–57.

BUCHBESPRECHUNGEN

Felicitas Hillmann: Migration. Eine Einführung aus sozialgeographischer Perspektive (= Sozialgeographie kompakt, Bd. 4), Stuttgart: Franz Steiner Verlag 2016, 245 S.

Rezensiert von
Ulrich van der Heyden, Berlin

Es gibt wohl heutigentags in Deutschland kein aktuelleres Thema – wie angesichts der Flüchtlingsströme, die sich nach Europa bewegen, deutlich wird – als das der Migration. Dies stellt Anforderungen nicht nur an die Politik, sondern auch an die Wissenschaft. Die einschlägige Wissenschaftsdisziplin hat in den letzten Jahren Entwicklungen durchlaufen.

Die Migrationsforschung wird nämlich nicht nur mehr von der Politikwissenschaft, der Soziologie und der Geschichtswissenschaft betrieben, sondern stellt auch zunehmend ein zentrales Thema in der Geographie dar. Dies ist weithin weniger bekannt und um dies zu ändern, führt das vorzustellende Lehrbuch der Sozialgeographie in die grundlegenden thematischen Konzepte der Migration vom Beginn der Frühgeschichte bis zur Herausbildung einer „neuen Geographie der Migration" ein.

Um hieraus theoretische Schlussfolgerungen ableiten zu können, wird von Felicitas Hillmann eine Reihe von historischen und aktuellen regionalen Beispiele angeführt und analysiert, die aufzeigen, wie Migration jeweils in bestimmten Zeiten und Räumen als Ausdruck und Triebkraft eines sozialen und räumlichen Wandels verstanden werden kann und warum die Migrationsprozesse heute einen elementaren Bestandteil der globalisierten Welt bilden. Dazu ist es notwendig, wie die Verfasserin überzeugend nachweist, Migration nicht nur als Teil der Bevölkerungsgeographie zu betrachten, sondern auch angesichts der zunehmend intensiver diskutierten Konzepte der Migrationsforschung als Bestandteil der Sozialgeographie.

Das vorliegende Lehrbuch greift diese neuen Entwicklungen exemplarisch auf und stellt die unterschiedlichen Forschungsfelder und Forschungsansätze vor. Einige empirische Beispiele belegen, wie Migration mit globalen Dynamiken, so beispielsweise gegenwärtig mit Klimawandel und Urbanisierung, interagiert. Das geschieht überzeugend und ist wegen der didaktische Aufbereitung besonders gut für Studierende geeignet.

Für ein in eine bislang vernachlässigte Thematik einführendes Grundlagenwerk

sind ein breiter Ansatz, theoretische Kompetenz und eine große Literaturkenntnis unabdingbar. Über diese Voraussetzungen verfügt die Verfasserin ohne Zweifel, die ihre Ausführungen in sechs Komplexe gegliedert hat.

Zunächst klärt sie die von ihr verwendeten Begrifflichkeiten und befasst sich dann recht ausführlich mit theoretischen Ansätzen der Migrationsforschung.

In zwei Komplexen stehen explizit die historischen Migrationsprozesse in Deutschland im Mittelpunkt. Leider lassen hier die Ausführungen zur Migration in der DDR viele Fragen offen oder es werden Ergebnisse bislang vorliegender Studien ungeprüft kolportiert. Dadurch entsteht, trotz aller Verdienste, den Osten Deutschlands in der Zeit nach dem Zweiten Weltkrieg in die Betrachtung einzubeziehen, was ein großer Verdienst der Verfasserin ist, ein schiefes Bild. So ist die Behauptung unzutreffend, dass die vietnamesischen Vertragsarbeiter, die zu Tausenden in den ostdeutschen Staat kamen und in dessen Wirtschaft eine Ausbildung erhielten und dann in die Produktionsprozesse integriert wurden, anfangs einen „Elite-Hintergrund" gehabt hätten. Vielmehr waren es vor den US-amerikanischen Bombardements einen sicheren Zufluchtsort suchende junge Menschen aus verschiedenen Regionen zunächst aus Nordvietnam mit ganz unterschiedlichem sozialem Hintergrund. Die „ausländischen Werktätigen" (Bezeichnung bis 1989/90) oder „Vertragsarbeiter" (nach der deutschen Vereinigung) wurden niemals als „Werkvertragsarbeitnehmer" bezeichnet. Diese standen auch nicht „unter Generalverdacht" (warum? von wem? weshalb? wofür?), denn es waren ja keine illegalen Migranten. Völlig die Situation in der DDR verkennend, lautet eine Behauptung der Verfasserin, dass vietnamesische Vertragsarbeiter in ihren Betrieben „auf eigenes Risiko heimlich eigene Jeanskreationen zum lokalen Verkauf" produzierten (S. 125). Das war schlechterdings in einer Diktatur, wo alles einer Kontrolle unterlag (auch Ressourcen wie Jeansstoff), nicht möglich. Weitere die Realität im untergegangenen deutschen Staat verkennende Feststellungen, die an dieser Stelle nicht alle aufgeführt sein sollen, wird man jedoch nicht der Verfasserin allein ankreiden können, sie sind Autoren der bisher erschienenen Publikationen zum Einsatz ausländischer Vertragsarbeiter in der DDR-Wirtschaft geschuldet, auf die sich die Verfasserin stützt. Denn in den meisten der vorliegenden Studien sind die in Archiven lagernden Dokumente verantwortungslos missachtet worden, was nichts anderes heißt, als in vielen Fällen Fiktionen zu Realitäten zu machen. Diese lassen sich rasch durch Überprüfung der sehr wohl vorhandenen historischen Quellen überprüfen und korrigieren. Dies hat Felicitas Hillmann nicht getan. So werden leider auch die unsinnigsten Behauptungen in akademische Ansprüche einfordernden Publikationen, ohne die geringsten Belege dafür anführen zu können, weitergereicht und vor allem hat kaum jemand die Betroffenen selbst – also die Vertragsarbeiter – selbst befragt. So verwundert es also nicht, wenn solche Darstellungen in seriöse wissenschaftliche Abhandlungen gelangen.

Interessanter und zutreffender sind die Ausführungen von Felicitas Hillmann in den letzten beiden Komplexen, die die Migration als globale Perspektive sowie

aktuelle Fragen zur Urbanisierung zum Inhalt haben.
Hier wird ausgeführt, dass die beschleunigte Globalisierung seit den 1990er Jahren die weltweite Gewichtung von Zentren und Peripherien ins Wanken brachte. Insbesondere China und Indien werden mit Recht als die dafür Verantwortlichen ausgemacht. Denn die beiden asiatischen Mächte veränderten nicht nur die weltweiten Ströme des Kapital- und Warenverkehrs, sondern sie investieren zunehmend als Direktinvestoren in vielen Entwicklungsländern. Verhindern kann dieses Engagement Migration nicht, eher ist das Gegenteil der Fall. Denn das Hauptproblem kann nicht gelöst werden, nämlich die fehlenden Arbeits- und somit angemessene Existenzmöglichkeiten.
Die Verfasserin referiert insbesondere die verschiedenen in der Wissenschaft debattierten Meinungen und Theorien. Leider vermisst der Leser eigene Stellungnahmen oder zumindest Zusammenfassungen mit entsprechenden Begründungen.
In dem abschließenden Komplex zum Thema Stadt und Migration stellt Hillmann fest, was eigentlich auch studentischen Erstsemestern geläufig sein müsste: „Ohne Migration gibt es keine Städte und Migranten wandern meistens in Städte" (S. 187). Nachdem Fragen kommunaler Probleme durch die Migration angesprochen wurden, geht die Verfasserin auf einige konkrete sehr aktuelle Beispiele ein, so auf die Probleme mit den Flüchtlingscamps am Berliner Oranienplatz im Jahr 2013 oder auf die PEGIDA-Demonstrationen 2014/2015.
Die Ausführungen bestechen durch gelegentliche Vergleiche mit zwar zeitlich versetzten, aber inhaltlich ähnlichen Phänomenen in „klassischen" Einwanderungsländern, vornehmlich auf dem amerikanischen Kontinent.
Dem Charakter eines Lehrbuches dienen nicht nur die detaillierten Register und das Literaturverzeichnis, sondern auch die Illustrationen, also Bilder, Statistiken, Grafiken, farblich abgehobene Erläuterungen, etwa von Definitionen. Es handelt sich um ein Buch, welches einen Einstieg in die Problematik Migration auf breiter Basis gewährt.

Olaf Stieglitz; Jürgen Martschukat (Hrsg.), race & sex. Eine Geschichte der Neuzeit. 49 Schlüsseltexte aus vier Jahrhunderten neu gelesen, Berlin: Neofelis Verlag 2016, 422 S.

Rezensiert von
Maria Bühner, Leipzig

Neben einer pointierten Einleitung der Herausgeber Matschukat und Stieglitz umfasst der Band 49 Essays, die sich jeweils einem ‚Schlüsseltext' widmen und dabei das Verhältnis von Grenzüberschreitungen und Grenzziehungen neuzeitlicher, ‚westlicher' Gesellschaften mit einem Fokus auf das Dispositiv um ‚race' und ‚sex' untersuchen. Die Wahl von ‚race' und ‚sex' als zentrale und interdependente Analysekategorien nimmt Bezug auf gegenwärtige postkoloniale, poststrukturalistische, queere und feministische Theoriebildung. ‚Race' verweist auf die soziale Konstruktion vermeintlicher ‚rassischer' Unter-

schiede. Sex ist zu verstehen als Referenz auf eine Geschichte der Sexualitäten, welche der wechselseitigen Bedingtheit von Sexualität und Geschlecht nachgeht und deren Geworden-Sein herausarbeitet.

Ein Anliegen des Buches ist es, mögliche Verbindungen zwischen der Globalgeschichte und der Geschichte der Sexualitäten herauszustellen. Globalgeschichte mit ihrem zentralen Ziel der „Überwindung des Nationalen" (S. 14) und die Geschichte der Sexualitäten, welche versucht, „Operationen von Grenzziehung und -überschreitung und die damit verbundenen Ein- und Ausschlüsse sichtbar zu machen, diese historisch zu erklären und so auch zu überwinden" (S. 14), werden in der Einleitung als potentielle Bündnispartnerinnen ausgemacht. Wenig überraschend, ist doch, wie die Herausgeber mit Bezug auf Foucault betonen, die Entstehung von Nationen auf das Engste verknüpft mit der Entfaltung des modernen Sexualitätsdispositivs. Dieses wiederum ist untrennbar verbunden mit Rassismus und der (Regulation von) Sexualität in den Kolonialgebieten.

Diesen Zusammenhängen widmen sich die Autor_innen des Bandes, die jeweils einen ‚Schlüsseltext' diskutieren. Als solche werden definiert: „vielfältige Texte, die zwischen dem frühen 17. und dem späten 20. Jahrhundert erschienen sind und um race & sex kreisen" (S. 18), wobei jedoch letztlich unklar bleibt, anhand welcher weiterer Kriterien diese Kanonisierung vorgenommen wurde. Die ‚Schlüsseltexte' sind sehr divers: Wissenschaftliche Werke wie Frantz Fanons „Schwarze Haut, Weiße Masken" (Andreas Eckert) und Eva Kosofsky Sedgwicks „Epistemology of the Closet" (Christina König), Filme wie „Jungle Fever" (Uta Fenske) und „The Birth of a Nation" (Gudrun Löhrer), Fotografien, Zeitschriftenartikel wie „Urlaub – Liebe inbegriffen" aus dem *stern* über deutsche (Sex-)touristinnen in Italien (Maren Möhring), literarische und soziologische Texte wie W. E. B. Du Bois „The Souls of Black Folk" (Elisabeth Engel), Gesetzestexte wie der „Chinese Exclusion Act" (Björn A. Schmidt), Kunstwerke wie die mexikanischen *Pinturas de Castas* aus dem 18. Jh. (Robert Fischer) und anderes wie die Werbefigur Sarotti-N**** (Silke Hackenesch) und *Manifest Destiny* (Dominik Ohrem) werden einer (kritischen) Relektüre unterzogen. Ergänzt wird das Buch durch ein Personen- und Sachregister. Diese sind mehrheitlich im deutschsprachigen Forschungsraum aktive Historiker_innen, es sind aber auch einige Amerikanist_innen, Kulturwissenschaftler_innen und andere Geisteswissenschaftler_innen vertreten.

Die Essays sind als rückwärts laufende Zeitleiste je nach Entstehungsjahr des diskutierten ‚Schlüsseltextes' angeordnet. Der aktuellste ist „Bringing Them Home" (1997), ein Bericht der *Human Rights and Equal Opportunity Commission* über die schmerzvollen Auswirkungen der Praxis, gemeinsamen Kindern von _weißen_ und indigenen Australier_innen aus indigenen Communities zu entfernen. Die an den Bericht anschließende, letztlich gescheiterte ‚Versöhnungspolitik' wird kritisch von Kay Schaffer diskutiert. Der älteste ‚Schlüsseltext' sind Auszüge aus John Smiths „Gernerall Historie of Virginia" (1624), die Bezug nehmen auf Pocahontas. Die chronologische Ordnung lädt dazu ein, die Entfaltung von „race & sex" rückwärts zu verfolgen, wobei sich jedoch keinesfalls ein abgeschlossenes Narrativ ergibt, denn

dafür sind die Themen und Beispiele zu plural. Gleichzeitig sind die Essays damit in bewusster Unordnung, und es wurden keine Themenschwerpunkte gebildet. Hilfreich beim Verfolgen der größeren Linien, welche die Essays zeichnen, sind die Querverweise auf jeweils andere Essays des Bandes am Ende eines jeden Textes. Sie regen auch zum Weiter- und vor allem Querlesen an. Themenschwerpunkte entfalten sich oft erst in der Lektüre mehrerer Essays, welche dabei gleichsam in den Dialog miteinander treten.

Die Mehrzahl der Beiträge widmet sich den USA und Europa. Auch der bundesdeutsche Kontext wird stark gemacht. Die DDR, ebenso wie Osteuropa, fehlen jedoch vollständig. Daneben gibt es einzelne Beiträge zu Mexiko, Australien, Kanada, Haiti, Indonesien und anderen Ländern. Der zeitliche Schwerpunkt liegt deutlich auf dem 20. Jh. Die Essays sind auch stilistisch divers; es finden sich persönliche Zugänge, *close readings*, Quellenanalysen, kritische Diskussionen von Klassikern und thematische Überblicke.

Der Band bietet verschiedene Anregungen für eine transnationale Geschichtsschreibung, welche Bezug nimmt auf Geschlecht, Sexualität und ‚race' als Grundkategorien der gesellschaftlichen Wirklichkeit. Nina Mackerts Relektüre von Kimberlé Creshaws Aufsatz „Mapping the Margins" erinnert an das große Potential des Konzepts Intersektionalität, um besser greifen zu können, was an den Kreuzungen von Ungleichheitskategorien passiert. Die Komplexität von Identität als „narrative Konstitution" (S. 38) diskutieren Vera und Ansgar Nünning mit Blick auf Stuart Halls Theorien. Körper und Körperpraktiken sind einer der Kristallisationspunkte für die Entfaltung von „race & sex". So stehen sie von Beginn an im Fokus der kolonialen Regulation. Sebastian Jobs zeigt beispielsweise auf, wie mit Hilfe der nordamerikanischen *slave codes* im 18. Jh. die Sklaverei zu einem festen Bestandteil der Ökonomie und des Selbstverständnisses der nordamerikanischen Kolonien wurde. Ihre Kontinuität wurde abgesichert über die Institutionalisierung des Zugriffs auf die Körper der Sklav_innen, etwa indem Kinder von Sklavinnen, unabhängig vom Status des Vaters, automatisch Sklav_innen wurden. Aber Körper markieren auch die Eindringtiefe der Macht, wie besonders an Beispielen von sexuellen und intimen Beziehungen zwischen Personen, die unterschiedlichen sozialen Gruppen zugezählt wurden, deutlich wird. Das zeigt sich beispielsweise in Anke Ortlepps Essay über das Ehepaar Loving, welches auch auf dem Titelbild zu sehen ist. Die 1958 geschlossene Ehe zwischen der Afroamerikanerin Mildred und dem _weißen_ Arbeiter Richard verstieß im Bundesstaat Virginia gegen das Verbot der Eheschließung zwischen _Weißen_ und Schwarzen. Mit Hilfe einer afroamerikanischen Bürgerrechtsorganisation klagten sie gegen dieses der _weißen_ Vorherrschaft dienende Gesetz, welches schließlich mit dem Urteil des U.S. Supreme Court von 1967 für rechtswidrig erklärt wurde.

Wissen als Machtstrategie und die Problematisierung von Wissenschaft und Wahrheiten sind ein immer wieder aufscheinendes Thema des Bandes. Claudia Bruns zeichnet beispielsweise nach, welche Rolle rassistische Ideen aus den Kolonien in Zentralamerika für die Genese des modernen Antisemitismus im Deutschen Reich gespielt haben. Der Transfer von Ideen

und Konzepten wird in verschiedenen Essays aufgegriffen. Rassismus manifestierte sich nicht nur in Form wissenschaftlicher Publikationen und rassistischer Gesetzgebung, sondern auch in der Populärkultur. Felix Axster zeigt auf, wie die Sexualitätsordnung des deutschen Kolonialismus sich auch in der Zeitschrift „Kolonie und Heimat" artikulierte. Pablo Dominguez Andersen geht anhand des Spiefilms „Geheimnisse einer Seele" dem „postkolonialen Unterbewussten der Weimarer Republik" (S. 210) nach.

Es wird in den Analysen immer wieder auf Foucaultsche Denkfiguren und theoretische Konzepte Bezug genommen wie Biomacht und Dispositiv, damit wird deutlich, dass, wie Martschukat in der Relektüre von „Der Wille zum Wissen" diskutiert, ‚race' in Foucaults Werk eine sehr produktive Leerstelle bildet. Gleichzeitig stellt sich jedoch mit Blick auf Gayatri Chakravorty Spivaks Kritik an Foucault die Frage, wer eine solche Leerstelle füllen kann und ob sich Marginalisierung nicht fortschreibt, wenn ‚westliche', _weiße_ Wissenschaftler_innen über Subalterne sprechen.[1]

Diese Frage stellt sich auch mit Blick auf die Autor_innen des Bandes, welche mehrheitlich _weiß_ und im deutschsprachigen Forschungsraum aktiv sind. Es fehlen etwa die Stimmen und Schlüsselwerke deutschsprachiger Theoretiker_innen of Colour wie „Farbe bekennen. Afro-deutsche Frauen auf den Spuren ihrer Geschichte", welches zuerst 1986 von Katharina Oguntoye, May Ayim und Dagmar Schultz herausgegeben wurde.

Der vorliegende Band zeigt das Potential kritischer Relektüren auf – und ebenso des Essays als einer Textart, die einen Raum öffnet für das Erproben von Ideen und dabei weniger festgelegt und normiert ist als andere Formen des wissenschaftlichen Schreibens. Der Band fungiert zugleich als Bestandsaufnahme und Ausblick. Die Essays verdeutlichen, dass für ein besseres Verständnis von Geschlecht, Sexualität und ‚race' empirische Arbeiten unbedingt notwendig sind und besonders die Geschichtswissenschaft dabei eine Schlüsselrolle einnehmen kann.

In diesem Sinne ist das Buch auch ein Plädoyer für eine „kritische Geschichtswissenschaft" (S. 13), welche sich den Grenzziehungen neuzeitlicher Gesellschaften und deren Geworden-Sein widmet. An der großen Vielfalt von Beispielen in den Essays, wird mehr als deutlich: „Wir leben alle in einer postkolonialen Welt, nicht nur jene Menschen in und aus ehemals kolonialisierten Gebieten."[2] Ausgehend davon erscheint auch ein weiteres kritisches Befragen der ‚westlichen' Gesellschaften als unerlässliches Projekt. Ebenso steht aber auch die Notwendigkeit, Globalgeschichte und Sexualitätsgeschichte aus postkolonialer Perspektive zu denken und zu schreiben, außer Frage. In diesem Zusammenhang stellen sich weiterführende Fragen wie beispielsweise: Wie können wir globale Verflechtungen und Epochalisierung neu denken, indem wir Sexualität, Geschlecht und ‚race' als zentrale interdependente Analysekategorien miteinbeziehen? Welches Wissen, welche Grenzziehungen und -überschreitungen in Bezug auf diese Kategorien strukturieren die Globalgeschichte der Neuzeit? Wie können auch marginalisierte Gruppen in ein solches Projekt miteinbezogen werden – sowohl als historische Akteur_innen als auch als Forschende?

Anmerkungen:
1 G. C. Spivak, Can the Subaltern Speak? Postkolonialität und subalterne Artikulation, Wien 2008 [1985].
2 A. Eckert, S. Randeria, Geteilte Globalisierung, in: dies. (Hrsg.), Vom Imperialismus zum Empire. Frankfurt am Main 2009, S. 9-33, hier S. 11.

Bekim Agai / Mehdi Sajid Umar Ryad (eds.): Muslims in Interwar Europe. A Trans-cultural Historical Perspective, Leiden: Brill 2015, 242 S.; Götz Nordbruch / Mehdi Sajid Umar Ryad (eds.), Transnational Islam in Interwar Europe. Muslim Activists and Thinkers, New York: Palgrave Macmillan 2014, 250 S.

Reviewed by
Wolfgang G. Schwanitz,
Philadelphia, PA

It would be daring to review in usual detail the 19 chapters of the two books. Instead, I will offer a focused look on chosen academic trends, name the books' authors and contents, and end with an outlook on research. Thankfully, the authors each put in their texts conclusions with endnotes and tables of literature. Both books, which resulted from conferences, are also available in e-versions. Thus, I shall not equip this overview with more bibliographic data, but pick only a few works for marking older and newer trends.

Unlike today, early studies about Muslims in Europe embraced the global era in a more conducive climate. During the 1990s, many scholars were driven by a bold consciousness of coming and belonging together. So, works started also inspiring trends on: Arabs and other Muslims in Berlin and Europe; Colonialism; Asians and Africans in German lands; German-Arab, German-Indian and German-Iranian clubs; Arabs, Jews and Germans; vice versa Germans in the Mideast; and Mideast and Europe bridging both the regions also by highlights of global and regional comparative studies such as 125 years of Sues Canal.[1]

Swiftly, positive attitudes dried almost out with endless wars and terror not only in the Mideast. After 9/11, and similar attacks all over the globe, the storm of hostilities got worse and turned academia upside down. Political Correctness reached bad levels. Higher education looks like split battlegrounds. Driving against the powerful trends, both books keep high standards.

However, after the German unification, the finally reorganized archival centers of Berlin gained more attraction. So did the pioneering works on Muslims in Germany by the late Gerhard Höpp who connected to centers in America, Arabia, Israel, the Netherlands, Russia, Great Britain, France and Poland. He engaged as spiritus rector of many ensuing projects, and some of them are still resonating also in the two books under review.[2]

Above all, there grew a need for research on how Muslim concerns and conflicts were settled, or not, from 1919 to 1939, and from 1914 to 1946 as in the second book. In light of multinational parts of Europe, the studies are designed in a transcultural fashion. This Muslim life in interwar Europe quickly unfolded into a wider

field of research. Partially also driven by discoveries in Berlin's and Istanbul's Islam policies that attracted then and now more Muslim and Islamist residents to Europe, and enhanced by a unique 2015 mass immigration from Mideastern lands, which traces back to the waves after 1900, the focus shifted from the parallel interwar Mideast to ties within the Islamic Europe in that era.[3]

Inevitably, now studies serve as historical background between then, including ensuing hot and cold wars, and today's global war. Besides an all-time topic such as the European empires and the Middle East, in 2008 the theme of Islam in interwar Europe emerged as a swallow on an ever widening sky along with the topic of Islam and Muslims in Germany that contains also articles on Muslims in interwar Europe.[4]

Other works tried to bridge Europe and the Mideast by specific periods, as for instance Nazis, Islamists and the Making of the Modern Middle East, or Islam in Europe, Revolts in the Middle East which are continued in a variety of books that combine transregional histories in the triangle of comparative studies – Regionalhistorische Komparatistik – in America, the Mideast and Europe. Lately appeared more regionally oriented studies like Muslims in Poland and Eastern Europe.[5]

Since 2013 boomed topical books which included as a major trend a focus on Islam and Nazi Germany, the German-Ottoman jihad in World War One, the Nazi-Islamist jihad in World War Two, the Cold War Islam policies of the divided Germany and plots against Christian and Jewish minorities within the European states, Islamic lands, the Ottoman Empire and Mideastern successor states. In another trend books focus on the immediate aftermath of wars or further also German circles in those lands and ideological points of Islamism and jihadism, mixes of minority and Jew hatreds such as anti-Armenianism.[6]

Thus, both „interwar books" were written on recent parallel tracks without being able to take the other same-time studies into account, mostly for one reason: they belong to an obvious 2013 to 2016 publishing boom on similar subjects about ties between America, Germany, Europe, the Mideast and Islamic communities therein. A debate goes on about Euro-Islam or Europeanized Islam as reform Islam in relation to many kinds of Islamism.

How Muslims settled in Europe as minorities of newcomers from 1919 to 1939, or up to 1946, is also the key focus of those two books by known authors. In the first book, Bekim Agai, Umar Ryad and Mehdi Sajid present an introduction to a transcultural history of Muslims in interwar Europe – which is the era of all following contents. The scholars raise guiding questions, for example, how Muslims interacted in new lands of residence, what impacted ties to co-religionists in states of origin and their views on life in Europe or what kind of challenges their stay in Europe had on the societies there. Other questions might have been the German-Ottoman origin of ideas and organizations in the European exile or how Muslims coped with recent atheistic streams like Nazism and Communism.

Those Muslims kept strains of Islamism. As they discovered Europe from within, their Islamists displayed an inclination to Nazis. But the claim of a „continent as colonizer" is questionable. Not all Europeans

were of that kind, certainly not Germany in the Mideast, for it had no colonies there and lost in 1919 all the others. Historically, colonialism emerged as a two way lane between the Mideast and the West with the never ending colonialism of Islamization in a longer duration as the recent „caliphate" indicates. Yet, the British, French and Dutch colonialisms were discussed, though less often recognized by Muslims of interwar Europe as an integral part of the Euro-American enlightenments. But they knew the old colonialism and compared its Islamist and Western brands.

That much on chosen older and newer trends. Now a few words about the books' contents.

Gerdien Jonker tackles religious modernity and conversion to Islam in Berlin. Umar Ryad deals with the Salafiyya, Ahmadiyya and European converts to Islam. Likewise Pieter Sjoerd van Koningsveld discusses the conversion of European intellectuals and the case of Christiaan Snouck Hurgronje. Naomi Davidson researches social assistance and „religious" practice in Paris. Klaas Stutje unpacks Indonesian Islam in Europe with a focus on Muslim organizations in the Netherlands and beyond.

Ali Al Tuma writes about Moros and Cristianos under religious aspects of the participation of Moroccan Soldiers in the Spanish Civil War. Egdūnas Račius explores Muslims of Lithuania and the predicament of a torn autochthonous ethno-confessional community. Zaur Gasimov and Wiebke Bachmann reflect transnational life in multicultural space in the light of Azerbaijani and Tatar discourses in Europe.

The second book on transnational Islam, on the other hand, enlarges the scope. Not only does one text include World War One and reaches until the end of 1939. But some of the articles go further. David Motadel shows the making of Muslim communities in Western Europe. Nathalie Clayer investigates the transnational ties of the Albanian and European Islam in Albania. Richard van Leeuwen explores two Ulama traveling to Europe at the beginning of the 20th century: Muhmmad al-Wartatani and Muhammad al-Sa'ih. Götz Nordbruch analyzes Arab scholars at the Institut de Droit Comparé in Lyon, a rereading in the history of Arab-European intellectual encounters.

Umar Ryad writes about a Salafi student, orientalist scholarship, and Radio Berlin in Nazi Germany: Taqi al-Din al-Hilali and his experiences in the West. Mohammed Alsulami examines Iranian journals in Berlin. Humayun Ansari debates Maulana Barkatullah Bhopali's Transnationalism: Pan-Islamism, Colonialism, and radical politics. Ali Al Tuma surveys victims, wives, and concubines in the light of the Spanish Civil War and relations between Moroccan troops and Spanish women.

Those cases and topics call for new comparative ways and biographies. The conversion of Germans to Islam for instance, which then still rarely occurred, found its contemporary continuation in „Being German, Becoming Muslim" with some East German touches.[7] Comparable are also interwar calls to jihad from Europe to the Mideast with parallel or recent examples of similar appeals, though from the Middle East to „within" the West.

Lacunas lie in theoretical frameworks deducted from this fresh richness. Also, two times German detachments of soldiers served in the Mideast, 1914 as partners and even leaders of Ottoman troops in

Europe and Asia, including Arabia and the Caucasus, and in 1941 with Italian troops in North Africa. Returning home, profound spin-off effects ensued, often with former comrades in arms like (the German Chancellor to be) Franz von Papen or the ex-general Erich Ludendorff. Both aided Islamists, the 1927 Berlin Islam Institute and 1931 calls to boycott Jews in Germany and Palestine. Clubs like the Orient Club and friendship societies came about on multiple sides based on shared war experiences too. Future research may turn to those war beginnings and the under-reflected economic, cultural and academic facets of interwar Muslims and their European counterparts.[8]

Often authorities tried to accommodate the needs of the new arrivals, just later to be blamed that their „segregational work" did cement the lives of the „others as the eternal outsiders." To study many aspects of a former „learning by doing," adds a practical value to both books. In the art of presentation some texts set examples. Others, in the second book, appear to be fetched out of another work and dumped in with almost more endnotes than text pages which does not exactly further the readers lust of knowing.

If and when a „Euro-Islam" emerged in Weimar and Nazi eras is an open point for the differences among Muslims and Islamists, their sects, aspirations and agendas, partial integration or often isolation, more embedded in transnational webs than in host lands. How did early generations of national and global Islamists like Alim Idris fit into this phase? Sooner rather than later inclusive histories of Muslims in Europe are due, then synoptical works on them and other world regions. Next steps may include a closer look into the second half of the past century and more cross-comparisons of Muslim minorities in Europe with minorities in Islamic lands, with Christians and Jews in the Mideast and India. Two books on „Muslims in interwar Europe" are treasure troves of individual fates and group attitudes. Both fill academic gaps and will surely advance to the core of books.

Notes:

1 Ausländerbeauftragte des Senats (ed.), Araber in Berlin, Berlin 1992; J. Heidrich (ed.), Changing Identities, Berlin 1994; G. Höpp (ed.), Fremde Erfahrungen. Asiaten und Afrikaner in Deutschland, Österreich und in der Schweiz bis 1945, Berlin 1996. Drawn also of conferences on European-Mideastern ties and some books I edited with related articles therein like "Berlin-Kairo. Damals und heute" (1991), "Jenseits der Legenden. Araber, Juden, Deutsche" (1994); "125 Jahre Sues Canal" (1998); "August Bebel, Die Muhamedanisch-Arabische Kulturperiode (1884/89)" (1999); with Wajih A.S. Atiq, "Ägypten und Deutschland im 19. und 20. Jahrhundert im Spiegel von Archivalien" (1998).

2 An overview is in my obituary "In memoriam Gerhard Höpp (1942-2003)", in Orient 44 (2003) 3, pp. 339-347 http://www.trafoberlin.de/pdf-dateien/GerhardHoeppPDF300104OrientHamburg.pdf (28.06.2017).

3 L. Schatkowski-Schilcher; C. Scharf (eds.), Der Nahe Osten in der Zwischenkriegszeit, 1919-1939, Stuttgart 1989; I. Friedman, British Miscalculations. The Rise of Muslim Nationalism, 1918-1925, New Brunswick 2012, E.-J. Zürcher (ed.), Jihad and Islam in World War I, Leiden 2016.

4 N. Clayer; E. Germain (eds.), Islam in interwar Europe, New York 2008; A. Al-Hamarneh; J. Thielmann, Islam and Muslims in Germany, Leiden 2008.

5 W. G. Schwanitz (ed.), Germany and the Middle East 1871-1945, Princeton 2004; idem with Barry M. Rubin, Nazis, Islamists and the Making of the Modern Middle East, New Haven 2014; D. Motadel (ed.), Islam and the European Empires, Oxford 2014; K. Górak-Sosnowska (ed.), Muslims in Poland and Eastern Europe, Warsaw 2011.

6 W. G. Schwanitz, Islam in Europa, Revolten in Mittelost, Berlin 2013; idem, Mittelost Mosaik 2013, Berlin 2015; idem, Mittelost Mosaik 2014, Berlin 2016; D. Motadel, Islam and Nazi Germany's War, Cambridge 2014; A. D. W. O'Sullivan, Nazi secret warfare in occupied Persia (Iran), New York 2014; L. Gossman, The passion of Max von Oppenheim, Cambridge 2013; St. Ihrig, Atatürk in the Nazi imagination, Cambridge 2014; idem, Justifying Genocide, Cambridge 2016, see also my review in H-Soz-Kult http://www.hsozkult.de/publicationreview/id/rezbuecher-25762 (19.01.2017).

7 E. Özyürek, Being German, becoming Muslim, Princeton 2015, see also my review in Middle East Quarterly, XXII(09/15/2015)4 (19.12.2016).

8 Economics in my articles: Changing or unknown identities? The example of the Deutsche Orientbank AG in Cairo and Alexandria (1906-1931), in: J. Heidrich, Changing Identities, Berlin 1994, pp. 401-413 http://www.trafoberlin.de/pdf-dateien/German%20Orient%20Bank%201994%20WGS.pdf (17.12.2016); Aziz Cotta Bey, Deutsche und ägyptische Handelskammern und der Bund Ägypter Deutscher Bildung (1919–1939), in: G. Höpp, Fremde Erfahrungen, Berlin 1996, pp. 359-384 http://www.trafoberlin.de/pdf-dateien/Aziz %20Cotta%20Bey%201996%20WGS.pdf (17.12.2016).

Patrick Chabal / Toby Green (eds.): Guinea-Bissau. Micro-State to 'Narco-State', London: Hurst Publisher 2016, 290 S.

Reviewed by
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Over the last 20 years or so, the general situation in "tiny" Guinea-Bissau[1] has gained considerable attention by academics, politicians, and professional officers of various countries, international agencies and organizations. At the centre of this attention: continuous "political instability", characterized by heavy infighting among political and military elites as well as a series of coups, accompanied by "state failure", incapacitated institutions, and an allegedly outstanding role in the illegal trafficking of drugs from Latin America, through West Africa, to Europe. Thus, a small country, ranking among the poorest in Africa and the world with extremely low human development indicators, very quickly assumed key importance, triggering various interventions by a multitude of different actors (both state and non-state). Against this background, the present volume edited by Patrick Chabal[2] and Toby Green seeks to offer a collective effort to keep up with developments and "consolidate reflection" (p. 2). To this end, it draws on the intimate knowledge of a set of authors of different academic fields most of which have worked and published on different dynamics in Guinea-Bissau for a long time. Comprising ten individual chapters, as well as an introduction and a conclusion, it is organised into three parts that deal with Guinea-Bissau's "historical fragilities", "manifestations of the crisis", and its "political consequences". In those, the volume touches upon different aspects relating to ethnicity, political institutions, rural economy and society, religion, gender, as well as to geopolitics and transnational organized crime. Thus, the book sets out to provide a multi-faceted, up-to-date and rather comprehensive overview.

The book is framed by the introduction and conclusion provided by Toby Green. Preparing the stage, Green places Guinea-Bissau at the intersection of different global and local dynamics, including in particular transnational organized crime and

terrorism, an emerging global security infrastructure, as well as both the crises and the remarkable persistence of postcolonial states (in Africa and beyond). It is this context, Green argues, that makes Guinea-Bissau "a paradigmatic case study in the early twenty-first century for the analysis of Africa's recent past, and of the potential for peaceful and representative states in Africa's future" (p. 1). Consequently, starting from the observation that, despite all challenges, Guinea-Bissau seems to somehow "work" as a country, the different contributions in this edited volume ask "how, why, and what that actually means" (p. 7). More specifically, Green introduces a couple of particularities, problems in analytical approaches, and questions aiming to provoke more debate and reflection on the situation in Guinea-Bissau. In particular, he challenges received ideas about the labelling and singling out of the country as a 'narco-state' and the assumed negative role of the politicised armed forces. Emphasising the need for historicising current crises, Green especially points to the ambiguous role and effect of drug trafficking as well as the armed forces. In fact, when compared to the wider regional context, both may actually have prevented the situation in Guinea-Bissau from deteriorating into full-blown war (see also Forrest's chapter). What is more, he also directs attention to structural issues that recurring interventions have not addressed (e.g. state illegitimacy, powerful transnational flows and sub-regional interlinkages, rising global inequality) (pp. 10, 14). Drawing on the work of Chabal and Daloz[3], Green poses the questions of whom the state in Guinea-Bissau is to work for (p. 12); how its instability links to issues of wider regional and global security (p. 2); and what a stable, successful state would look like (pp. 2, 12).

Following this introduction, a common thread indeed running through all chapters is the historical interlinkage of "external" and "internal" factors. Thus, they all point in one way or another to, on the one hand, a firm embeddedness of Guinea-Bissau in different transnational regional as well as trans-regional (or global) dynamics, with strong "external" influences, and on the other hand to local agency and often remarkable resilience. For example, tensions have emerged around ethnicised identities aiming to mobilise resources especially from "external sources" linked to post-colonial state institutions (chapters by Green and Kohl; see also Temudo/Abrantes' chapter). However, this stands in stark contrast to common inter-ethnic collaboration and alliances outside formal state structures. As Joshua Forrest's chapter tells us, these have historically allowed rural societies to resist efforts at political centralization, either by European power or by the post-colonial state, thus explaining its "fragility" (p. 37). Likewise, rural societies (Temudo/Abrantes' chapter) and smallholder farmers (Havik's chapter) have shown remarkable resilience and "food sovereignty", despite state absence and their (precarious) integration in global economic exchanges.

In this context, religion and conversion have (sometimes) functioned as means to access certain resources and services, and to link up to "modernity" as well as transnational networks (Sarró/de Barros, pp. 118-120). The diaspora has played a similar role, as transnational agents with direct local effects in Guinea-Bissau (e.g.

remittances, skill transfer, shaping political opinions) (Nafafé). The chapters on global geopolitics and securitization in Guinea-Bissau (Massey) as well as the effect of the "narco-state" on national institutions and neighbouring countries (Ceesay) also clearly relate to the complex interplay of different global and local dynamics colliding in and around Guinea-Bissau (see also below).

The edited volume by Chabal and Green offers a very welcome and helpful addition to the existing literature, especially coming at a time where the general attention to the situation in Guinea-Bissau appears to be either fading or captive to pre-conceived understandings. On the one hand, the wide variety of issues addressed makes it a great introduction to a wide readership with or without prior knowledge of the country (also helped by the provided glossary, biographical sketches and timeline as well as the comprehensive index). On the other, it helps to decentralize, update, and somewhat substantiate a debate that has overly focused on security, and drug trafficking in particular. Especially the general frame provided by Toby Green (significantly influenced by his close collaboration with Patrick Chabal before his death) introduces some nuance to the general narrative on Guinea-Bissau as a "filed" and/or "narco-state", posing important questions.

However, there is a certain tension between the aspirations and objectives formulated by Green in the introduction and some of the findings presented especially in the chapters dealing with the "narco-state". These stop short of effectively moving beyond dominant narratives in the existing literature. Both Simon Massey and Hassoum Ceesay buy into and reproduce the common narrative depicting Guinea-Bissau as the first and foremost problem with negative effects far beyond its borders. While Massey discards critical voices in the literature, in the face of what he calls conclusive evidence (p. 203), Ceesay considers the question whether Guinea-Bissau is or is not a "narco-state" as purely academic and of little relevance vis-à-vis the "narco-surge" (p. 219) he sees in the country. Thus, both ignore the extremely thin evidential basis and research gaps that by now even some of the prime proponents of this narrative have acknowledged.[4] As a consequence, along repeated references to the state in Guinea-Bissau as "failed" or "dysfunctional" (e.g. pp. 37, 186, 202), one of the key messages of Chabal and Daloz – i.e. to move beyond deficit analyses, "Africa works" (repeatedly evoked by Green) – seems to be somewhat diluted.

Nevertheless, thanks to the excellent overall organization of the publication, these chapters, informative nonetheless, are nicely counter-weighed and complemented by the broad range of topics addressed in the others, making the book a very interesting and thought-provoking read.

Notes:

1 Ed Vulliamy, How a tiny West African country became the world's first narco state, in: The zuardian, 9 March 2008.

2 Patrick Chabal died in January 2014, when the editing process was still ongoing.

3 Patrick Chabal / Jean-Pascal Daloz, Africa Works: Disorder as Political Instrument, Oxford 1999.

4 M. Shaw, Drug trafficking in Guinea-Bissau, 1998–2014: The evolution of an elite protection network, in: Journal of Modern African Studies, 53(3) 2015, pp. 339–364.

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