

Human Rights Challenges to European Migration Policy (REMAP)

Discussion paper

Prof. Dr. Jürgen Bast, Dr. Frederik von Harbou and Dr. Janna Wessels

August 2018

The aim of the REMAP research project* is to prepare a scientific study which systematically maps the legal framework of human rights law applicable to European migration policy and examines the implications of this framework in practice. In the course of this research project consultations will be held with various experts in the field. This discussion paper forms the basis for the first consultation phase. The REMAP team invites the expert community to participate in the discussion with suggestions and criticism (remap@recht.uni-giessen.de).

I. Establishing a human rights paradigm in the discourse on European migration law

This project assumes that there has been an increasing tendency for human rights considerations to permeate the discourse on European migration law since the 1990s. Human rights guarantees are frequently being invoked in migration-related issues. Such claims are also increasingly being recognised by courts as forming a part of the applicable law (cf. Buckel 2013; Rubio-Marín 2014). The case law of the European Court of Human Rights (ECtHR) has been critical to this development, despite the fact that various barriers exist for migrants to access the court (Dembour/Kelly 2011). Many national courts as well as the Court of Justice of the EU (CJEU) accept the leading role of the ECtHR and take great pains to ensure that their case law is consistent with its jurisprudence. Consequently, judgments rendered by the ECtHR have effects which go far beyond the specific case (Bodnar 2014). Individual and collective actors of civil society (NGOs, networks of attorneys and other legal advisors as well as experts from the judiciary and legal scholars) also play an important role in “universalising human rights through processes driven by non-State actors” (Leisering 2016, 195; trans. by the authors).

However, it is not clear how the ECtHR’s case law will develop on a medium-term basis. It is conceivable that the human rights paradigm in immigration will consolidate further in the Court’s case law. But it is also possible that, as a reaction to the rise of neo-etatism and nationalism currently being experienced in various places in Europe, this trend towards a human rights paradigm will stall or even be reversed, being supplanted by an approach which prioritises sovereignty and extends the scope of discretion of national authorities.

II. Increase of human rights conflicts in European migration policy

The human rights turn in migration law discourses coincides with an expansive trend in EU migration policy. This expansion of the reach of EU migration policy can be seen, first, in the fact that policy fields which the Member States previously regulated autonomously are increasingly subject to EU regulation. The intensity of the European influence varies depending on the subfield, ranging from a looming full harmonisation by way of EU legislation in the field of refugee law to mere isolated provisions in the fields of labour and educational migration. Second, this expansion can be seen in extending EU

* REMAP is supported by the Mercator foundation ([Stiftung Mercator](http://www.stiftung-mercator.de)).

migration policies beyond the EU's external borders to third countries in their capacity as the country of origin or as a transit country. At the same time, both forms of expansion intensify the reach of the EU's regulatory power over migrants' individual rights.

Two complementary processes can thus be discerned: the increasing density of obligations under human rights law which are relevant to migration and the increasing importance of the EU as a key player in migration policy. This has resulted in an increasing number of instances where EU migration policies potentially conflict with human rights. In order to be sustainable, European migration policy has to identify these conflicts and resolve them in favour of rules and practices which are in conformity with human rights.

Due to the peculiar structure of human rights norms, the provisions of human rights law may become relevant to European migration policy at different levels. First, in their capacity as justiciable individual rights they place clear restrictions on States or supranational authorities. This 'core area' of human rights obligations can be defined by the courts. At the same time, human rights function as objective legal standards, i.e. norms which do not confer actionable rights on individuals. In this way, human rights form principles that imply an obligation to formulate policies. Policy makers can satisfy this 'corona' around the justiciable core of human rights in different ways and to varying degrees.

Conflicts between EU migration policy, on the one hand, and duties of performance and providing justification pursuant to human rights law, on the other, can take different forms. In addition to direct violations by EU institutions or bodies, complex issues of attribution may arise where Union institutions and Member State authorities cooperate and act simultaneously. The issue of attribution is even more muddled in the context of so-called externalised migration control: employing third countries as proxies and aiding and abetting acts which violate human rights raise unresolved questions of attributing wrongful acts according to the principles of State responsibility (cf. Mungianu 2016). Another unresolved issue is whether the EU can also violate obligations under human rights law by failing to adopt legislation. This might be the case where, in a specific field, the EU adopts rules which are too lax vis-à-vis the Member States (e.g. in respect of the detention of migrants), so that in the implementation of such rules, obligations of the Member States to observe human rights can only be derived from sources of international law rather than EU law. In other words, in how far is the EU obliged to reiterate and detail human rights norms which are binding under international law in EU legislation? And what are the legal consequences when gaps exist in the set of rules established by the EU?

III. Conflicts in specific areas

The human rights guarantees described below appear to be particularly hard hit by the current developments in Europe. The identification of these specific areas is provisional in nature, meaning it is open to different evaluations and can be supplemented by new fields or instances.

1. Prohibitions on refoulement and protection of individual rights

Due to the special vulnerability of persons seeking international protection, refugee law is the subfield of European migration law which most strongly demands that human rights act as policy guardrails (for an overview see Costello 2016; Moreno-Lax 2017). The prohibition of expelling or returning a person to a State in which his or her fundamental human rights are threatened follows from Art. 33(1) of the 1951 Refugee Convention and Art. 3 of the European Convention of Human Rights (ECtHR, judgment of 23 February 2012, 27765/09, *Hirsi Jamaa et al. v. Italy*), amongst other norms (principle of non-refoulement). In addition to direct violations of these norms, the focus is on intensified attempts in recent years to outsource border controls and to shift the duty to provide protection to States out-

side the European Union (“externalisation of migration control”, see above). Furthermore, the conditions under which prohibitions of refoulement pursuant to human rights law imply a right to access EU territory have not yet been legally settled.

The issues of procedural guarantees and legal remedies ensuring the protection of rights are closely related to the principle of non-refoulement. For example, most recently the ECtHR held that the Spanish practice of “hot returns” to control the border of the Spanish enclave Melilla violated the prohibition of collective expulsions (ECtHR, judgment of 3 October 2017, 8675/15 and 8697/15, *N.D. and N.T. v. Spain*, not final).

Moreover, the network of European and national border protection agencies was put on a new legal footing in 2016 by Regulation (EU) 1624/2016, which confers additional powers on and provides additional resources to the said network of authorities (cf. Campesi 2018; Lehnert 2014). It is questionable whether it foresees sufficiently effective provisions ensuring legal protection and clear attribution of responsibility.

Furthermore, as the “Dublin system” is being amended, it is not clear how a distribution mechanism may be developed which guarantees the rights of migrants, in particular in the light of the CJEU’s and ECtHR’s case law concerning the systemic and individual deficits of the asylum procedures in European countries of first reception (Farahat/Markard 2017).

2. Protection against detention

The legality of restrictions on the liberty of migrants is becoming increasingly urgent, in particular in the context of preparing deportations and the initial reception of asylum seekers in border areas (cf. Lyon 2014). As early as in 1996, the ECtHR ruled that forcibly detaining asylum seekers in the transit area of an airport may constitute a deprivation of liberty (ECtHR, judgment of 25 June 1996, 19776/92, *Amuur v. France*). More recently it also ruled that the illegal internment of Tunisian asylum seekers on Lampedusa infringed their rights as enshrined in the ECHR in multiple ways (ECtHR, judgment of 15 December 2016, 16483/12, *Khlaifia et al. v. Italy*). Current developments within the EU indicate that this does not resolve the human rights issues concerning detention, but rather that they will become more pressing (cf. Cornelisse 2016). For example, the EU’s “hotspot” approach, which foresees coordinated actions of EU and Member State authorities to process asylum applications at particularly heavily frequented border points, has been criticised for routine detentions and violations of procedural guarantees (Markard/Heuser 2016). The human rights problems involved in detention as an instrument to manage migration become especially poignant when minors are detained.

Behind this lies the larger issue that the ECtHR, in line with the time of its drafting, i.e. 1950, primarily foresees provisions protecting against the arbitrary or disproportionate imposition of penal sentences. In contrast, migrant detention in transit areas or deportation centres is a form of administrative detention. An adequate level of protection against all forms of administrative detention has not yet been established (Achermann/Künzli 2015). From the perspective of human rights law, minimum requirements for administrative detention need to be developed, by doctrinal construction or development of the law through judicial practice, which could operate as legal standards for future EU legislation and administrative measures in this field.

3. Protection of private and family life

The protection of family unity is largely governed by Union legislation, in particular the Family Reunification Directive of 2003 (Directive 2003/86/EC; cf. Groenendijk 2006). At the level of international law, in addition to the UN Convention on the Rights of the Child, the protection of family life pursuant to Art. 8 of the ECHR is particularly relevant. The ECtHR grants relatively broad discretion to State parties

in the context of family reunification, referring to principles of international law in respect of the admission of migrants (ECtHR, judgment of 21 December 2001, 31465/95, *Sen v. the Netherlands*, para. 31). However, this discretion is limited where, for example, there are insurmountable obstacles to family life in the third country.

In the context of family reunification, the absence of minimum standards applicable on an EU-wide basis for beneficiaries of subsidiary protection appears to be particularly problematic. The question also arises whether integration requirements which prohibit or restrict family reunification is consistent with the guarantees provided for pursuant to human rights law. Such requirements include, for example, the language requirement under the applicable German migration law, which permits the subsequent immigration of foreign spouses only where a certain mastery of the German language has been proven.

Art. 8 of the ECHR is also relevant for protection against deportation and expulsion (cf. Legomsky 2014). Substantively, it is remarkable that the ECHR not only protects “family life” but also the “private life” of a person (Savino 2016), which, according to the ECtHR’s case law, consists of the totality of a person’s social ties (ECtHR, judgment of 18 October 2003, 48321/99, *Slivenko et al. v. Latvia*). An infringement of this right, in particular by expulsion, is justified only with due regard for the legitimate interests of the person(s) concerned (cf. ECtHR, judgment of 2 August 2001, 54273/00, *Boultif v. Switzerland*, para. 48; ECtHR, judgment of 18 October 2006, 46410/99, *Üner v. the Netherlands*, para. 57). This jurisprudence implies that a migrant’s interest in continued stay is recognised as being protected by human rights, including but not limited to the enhanced protection of “settled migrants”. These safeguards against expulsion are coming under increasing pressure in the EU by measures to combat terrorism, such as the expulsion of so-called “hate preachers”. How can measures to protect the public interest be brought into line with requirements of human rights law?

4. Prohibitions on discrimination

The prohibitions on discrimination laid down in Art. 14 of the ECHR establish additional important requirements under human rights law, although their scope has not yet been fully clarified. Art. 14 prohibits *inter alia* discrimination on the basis of race, national origin or “other status”. The ECtHR has held that especially weighty reasons are required to justify a difference in treatment solely on the basis of nationality (ECtHR, judgment of 16 September 1996, 17371/90, *Gaygusuz v. Austria*). It found, for example, that a rule which conditions entitlement to child benefits on possession of a permanent residency permit infringes Art. 14 in conjunction with Art. 8 of the ECHR (ECtHR, judgment of 25 October 2005, 59140/00, *Okpicz v. Germany*).

The status of refugees and other persons enjoying international protection in the EU also appears to be problematic from the point of view of non-discrimination. When the EU institutions define the social and other rights attached to the uniform asylum status, valid throughout the Union, questions arise relating to the unequal treatment of persons who have a comparable need for protection but a formally different protection status (cf. ECtHR, judgment of 6 November 2012, 22341/09, *Hode v. United Kingdom*). In the light of Art. 14 of the ECHR, it can therefore be asked whether the failure of the EU institutions to adopt legislation to govern family reunification in respect of persons enjoying subsidiary protection violates the prohibition on discrimination (cf. Bast 2018). This raises the difficult issues of legal construction as to whether Art. 14 of the ECHR also applies in cases where legislatures of different levels of government have acted.

5. Economic and social rights

Questions relating to the access of migrants to the labour market, the educational system and social benefits are another area of particular relevance to human rights law. This concerns, *inter alia*, the accessory nature of these rights to a particular immigration status (be it regular or irregular). Specifically, the legal status of labour migrants and educational migrants is an issue here. Issues concerning economic and social rights also arise with increasing urgency in the context of asylum seekers where States use low standards for reception conditions as an instrument to control immigration (cf. Slingenberg 2014). The Directive on Reception Conditions (most recently: Directive 2013/33/EU) may not provide much of a remedy because it sets a low standard for the Member States and foresees numerous clauses permitting restrictions (e.g. restricting medical treatment to emergency care).

A group of migrants who deserve special attention from the perspective of human rights law are irregular migrants (cf. Dauvergne 2014). In particular, access to health care and the educational system is often closed to these persons. Moreover, the mechanisms of enforcing their economic and social rights are noticeably weaker. Legal provisions establishing minimum standards for the protection of individual rights are largely absent also at the EU level, at least so far. Conversely, the Sanctions Directive (Directive 2009/52/EC) sets Union-wide minimum standards for imposing sanctions against employers of third-country nationals who are staying irregularly.

Although the fields of labour and educational migration are still widely regarded as matters falling within the legislative competence of the Member States, they are becoming increasingly subject to the complementary processes referred to above: the activity of the EU is expanding, and constitutional and human rights are playing an increasing role as legal standards in this area. The Lisbon Treaty, which entered into force in 2009, formulates the aim of developing a “common immigration policy” and to this end confers a broadly framed competence on the Union to establish uniform “conditions of entry and residence”. In the medium-term it can therefore be expected that there will be an intensification of EU legislative activity in this area. While respect for the rule of law and individual rights of applicants has been called for in the literature (cf. Bast 2011, 212), so far the human rights requirements tailored to EU legislative acts concerning labour and educational migrants have not yet been spelled out.

In the field of economic and social rights the primary tasks of legal scholarship may therefore be to determine the scope of prohibitions on discrimination and to identify legal obligations arising from human rights to formulate policies for the protection of particularly vulnerable groups and against unfettered administrative discretion.

References

- Achermann, Alberto & Jörg Künzli (2015) “Die ausländerrechtliche Administrativhaft im Licht der internationalen Rechtsvorgaben”, in: Nicolas Queloz, Thomas Noll, Laura von Mandach & Natalia Delgrande (eds) *Verletzlichkeit und Risiko im Strafvollzug*, Bern: Staempfli, 83–105.
- Bast, Jürgen (2011), *Aufenthaltsrecht und Migrationssteuerung*, Tübingen: Mohr Siebeck.
- Bast, Jürgen (2018), Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff, *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 41–46.
- Bodnar, Adam (2014) “Res Interpretata: Legal Effect of the European Court of Human Rights’ Judgments for other States Than Those Which Were Party to the Proceedings”, in: Dordrecht: Springer, Yves Haeck & Eva Brems (eds) *Human Rights and Civil Liberties in the 21st Century*, Dordrecht, 223–262.
- Buckel, Sonja (2013) „Welcome to Europe“: *Die Grenzen des europäischen Migrationsrechts*, Bielefeld: transcript Verlag.
- Campesi, Giuseppe (2018), European Border and Coast Guard (Frontex): Security, Democracy and Rights at the EU Border *Oxford Research Encyclopedia of Criminology*, 26.2.2018.

- Cornelisse, Galina (2016) „Territory, Procedures and Rights: Border Procedures in European Asylum Law“, 35 *Refugee Survey Quarterly* 74–90.
- Costello, Cathryn (2016) *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press.
- Dauvergne, Cathrine (2014) “Irregular Migration, State Sovereignty and the Rule of Law”, in: Vincent Chetail & Céline Bauloz (eds) *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar, 75–92.
- Dembour, Marie-Bénédicte & Tobias Kelly (2011), *Are Human Rights for Migrants?*, Abingdon: Routledge.
- Farahat, Anusheh & Nora Markard (2017) “Recht an der Grenze: Flüchtlingssteuerung und Schutzkooperation in Europa“, *Juristenzeitung*, 1088–1097.
- Groenendijk, Kees (2006) „Family Reunification as a Right under Community Law“, 8(2) *European Journal of Migration and Law*, 215–230.
- Lambert, Hélène (2005) “The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities“, 24(2) *Refugee Survey Quarterly*, 39–55.
- Legomsky, Stephen H. (2014) “The Removal of Irregular Migrants in Europe and America“, in: Vincent Chetail & Céline Bauloz (eds) *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar, 148–169.
- Lehnert, Matthias (2014), *Frontex und operative Maßnahmen an den europäischen Außengrenzen*. Baden-Baden: Nomos.
- Leisering, Britta (2016), *Menschenrechte an den europäischen Außengrenzen: Das Ringen um Schutzstandards für Flüchtlinge*, Frankfurt a.M. u.a.: Campus Verlag.
- Lyon, Beth (2014) “Detention of Migrants: Harsher Policies, Increasing International Law Protection“, in: Vincent Chetail & Céline Bauloz (eds) *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar, 173–193.
- Markard, Nora & Helene Heuser (2016) “‘Hotspots’ an den EU-Außengrenzen: Menschen- und europarechtswidrige Internierungslager“, *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 165–171.
- Moreno-Lax, Violeta (2017), *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press.
- Mungianu, Roberta (2016), *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press.
- Rubio-Marín, Ruth (2014, ed.), *Human Rights and Immigration*, Oxford: Oxford University Press.
- Savino, Mario (2016) „The right to stay as a fundamental freedom? The demise of automatic expulsion in Europe“, 7(1) *Transnational Legal Theory*, 70–94.
- Slingenberg, Lieneke (2014), *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality*, Oxford: Hart Publishing.