

E-PAPER

# Germany, Land of Immigration

Report from the Commission  
«Perspectives for a For-  
ward-Looking and Sus-  
tainable Refugee and  
Immigration Policy»

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# Introduction

According to the United Nations, right now there are 68.5 million refugees in the world seeking safety from war, persecution, and oppression, whether inside or outside the borders of their own country. Although the number of those seeking protection in Germany is relatively small by international standards, in recent years it has risen steadily in the Federal Republic. As of 1 October 2018, some 1,587 million refugees have applied for asylum in Germany since 2015. Most of them come from Syria, Iraq, Afghanistan, and Eritrea – regions where armed conflicts, unstable political conditions, and blatant human rights abuses abound. At the same time, there has been an increase in immigration to Germany; it is now one of the most important OECD countries for immigration, alongside the United States, Canada, and the United Kingdom.

Over the course of these developments, the question has arisen as to what the content of a sustainable and forward-looking immigration policy would look like, and which institutions should be involved. The debate around this question has been vehement and controversial. The increased acceptance of refugees since 2015 has provoked particular controversy, creating political polarisation and at the same time necessitating rapid changes in legal regulations, some of which have received less than rigorous consideration. In addition, the structural problems of German immigration and refugee policy have become increasingly apparent. These include the complicated legal situation, confusion about institutional responsibilities, inconsistent resources for political institutions, and the lack of a common European refugee policy.

Against this background, the Heinrich Böll Foundation set up a commission in late 2015, “Perspectives for a Forward-Looking and Sustainable Refugee and Immigration Policy”. The commission is structured across disciplines and parties. Its 31 members came from politics, business, public administration, churches, and civil society, so that the members of the commission were able to develop broad options for action from their different positions. The goal of the commission was to describe and analyse the relationship to politics and human rights for flight, migration, and related policy areas (such as demography, the labour market, development policy, security policy, etc.). The analysis was then used to formulate sustainable and forward-looking mechanisms for shaping and controlling immigration.

In this spirit, the commission opposes the incoherent and sometimes divergent decision-making patterns and approaches of the various actors in migration and integration policy at the federal, state, and municipal levels in all areas of this topic, and instead advocates a coherent whole-of-government approach that aims for stronger linkages, coordination, and agreement across political action levels.

The present e-paper presents international perspectives that build on these ideas for the purpose of preventing flight and controlling migration. They expand on the institutional aspect of a whole-of-government approach, the formulation of the UNHCR's approach to resettlement, and a humane and transparent return policy.

The article «International and national aspects of the whole-of-government approach: Elements of a coherent German foreign policy on refugees and migration», by Steffen Angenendt and Petra Bendel, links aspects of foreign and development policy with European and national refugee and migration policy. Precisely because of the mixed migrations of refugees and migrants, countries are no longer able to organise and manage waves of migration on their own; they need European and international cooperation. The authors explain that combating the causes of flight must be more than just a task of development cooperation, and indeed requires coordination among foreign, security, trade and economic policy, as well as crisis management at the European and international level.

The second article, by Hans ten Feld, Günter Burkhardt, Norbert Grehl-Schmitt, Melanie Schnatsmeyer, Andreas Baumer, and Mark Holzberger, uses an in-depth examination of German and European refugee policies to issue the following recommendations: For a sustainable refugee policy, countries of first reception should receive support in both ensuring decent reception conditions and initiating prospects for integration. The authors also recommend that the German Federal Government and the EU commit to accepting a significant amount of refugees over a number of years as part of the resettlement approach of the UNHCR – and that the municipalities receiving those refugees be empowered and strengthened.

The article «Potential for return policy reform: Make processes transparent, emphasise humanitarian conduct, bolster voluntary returns», by Claudia Vollmer, Jan Schneider, and Rainer Ohliger, offers a look at ending non-recognition in asylum proceedings. Terminating the residence of unrecognised asylum-seekers is a fraught political minefield. The (often inadequate) data on voluntary returns and deportations, however, show a different reality than the political debates that are so often focused on deportations. The authors call for the right to remain to be granted faster and for status changes to be made easier, as well as for expanding the management of voluntary returns and enshrining counselling on return options into law.

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# INTERNATIONAL AND NATIONAL ASPECTS OF THE WHOLE-OF- GOVERNMENT APPROACH

## Elements of a coherent German foreign policy on refugees and migration

# 1 Introduction

Mixed migrations of refugees and migrants are an increasing international phenomenon, as are protracted refugee crises.<sup>[1]</sup> Individual states are no longer capable of single-handedly structuring and managing these migration trends. Countries of origin, transit, and destination (with the knowledge that some countries may represent all three) must collaborate more closely in order to combat the causes of flight; provide shelter; and enable labour migration, family reunification, and educational migration, as well as controlled repatriation and reintegration. Aspects of foreign policy and development policy must be given more consideration in refugee and migration policy and better reconciled with domestic and security policy goals.<sup>[2]</sup> In current practice, the coordination between domestic and foreign policy actors, reinforcement of the autonomy of refugees and migrants, and involvement of civil society and private enterprise all remain unsatisfactory. This affects global, European, and national policy in equal measure. Concepts of a coherent approach to asylum and immigration are still nowhere to be found. And at every political level, it is proving difficult to combine political goals and mechanisms in such a way as to develop an effective, sustainable, and legitimate «joined-up politics». This is true of Germany as well.<sup>[3]</sup>

In the search for a coherent policy, it is crucial that the aim of such a policy be clearly specified:<sup>[4]</sup> the striving for coherence ought not degenerate into a more technocratic efficiency, because this simply would not lead to a better, more sustainably effective policy oriented towards fundamental values. Against the backdrop of international and European legal obligations and newly pending objectives for global and European solidarity, a sound policy on asylum and migration first and foremost requires a clear orientation towards human rights and the rights of refugees. Human rights standards must be the basis for combating the causes of flight and cooperating with partner states. They should apply when choosing relevant partners, when guaranteeing standards of asylum along the entire route, and especially when debating «external asylum procedures». Cooperation with states

- 1 UNHCR (2017): Global Trends: Forced Displacement in 2016, [http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/06/2016\\_Global\\_Trends\\_WEB-embargoed.pdf](http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/06/2016_Global_Trends_WEB-embargoed.pdf). All websites last accessed on 24 October 2017.
- 2 On this see, e.g., Hein de Haas (2010): Migration and Development: A Theoretical Perspective, in: *International Migration Review*, 44 (1), p. 227–264; Alexander Betts (ed.) 2011: *Global Migration Governance*, Oxford.
- 3 Cf. Hannes Schammann (2015): Rette sich, wer kann? Flüchtlingspolitik im Föderalismus, in: *Aus Politik und Zeitgeschichte* 65 (25), p. 26–31.
- 4 On this see Petra Bendel (2017): EU-Flüchtlingspolitik in der Krise. Blockaden, Entscheidungen, Lösungen, Bonn, Politik für Europa # 2017 plus, <http://library.fes.de/pdf-files/wiso/13251.pdf>; Petra Bendel (2015): Flüchtlingspolitik der Europäischen Union – Menschenrechte wahren!, in: *Wiso-Diskurs*, 18/2015, Bonn, [http://www.regionenforschung.uni-erlangen.de/aktuelles/dokumente/4\\_WISO\\_Diskurs\\_Fl%C3%BChtlingspolitik.pdf](http://www.regionenforschung.uni-erlangen.de/aktuelles/dokumente/4_WISO_Diskurs_Fl%C3%BChtlingspolitik.pdf).

whose approach to human rights and the rule of law is questionable is not only problematic from a normative point of view, but also threatens to lead to dependence on unreliable partners. Alignment with the standards adopted for reception facilities and asylum procedures must also remain the basis for further development of the Common European Asylum System (CEAS) and for dealing with asylum seekers and refugees in Germany; such standards should not be watered down because of political stalemates among EU Member States. Without more agreement across political levels and departments, however, such a commitment to core standards of human rights and the rights of refugees will not be possible. The partner countries and the many stakeholders here at home have rightly refused to align unilaterally with the interests of the donor countries, but instead have advocated entering into a dialogue on equal terms that gives equivalent weight to the interests of the reception countries and those of origin and transit.

How then, in the context of this changing international migration pattern, can we structure the cooperation between actors in domestic, foreign, and development policy to safeguard refugees so that their rights and those of other migrants are respected, protected, and guaranteed? Which elements are fundamental to a development-oriented foreign policy on migration? How can we succeed in respecting the interests of countries in the global South, who after all comprise the majority of countries of origin, transit, and reception? And how can we establish coherence not only in foreign policy on migration, but also in the way that we balance humanitarian reception, the control of migration, and the integration of those people we wish to protect or whom we need for economic reasons?

## 2 Pressure to act: Mixed migrations, persistent refugee crises

Many governments face difficulties with the intermingling of flight and migration and the distinction, required under international law, between refugees and migrants. Frequently, the motivations for migration among the two groups are difficult to differentiate from one another.<sup>[5]</sup> For people coming from war zones such as Syria, Iraq, and Afghanistan, this remains relatively straightforward, as can be seen in the overall figures for the proportion of refugees from these countries who gain protection: in 2016, 97.9 per cent of Syrian arrivals to Germany were recognised as refugees or as having another protected status, as were 70.2 per cent of arrivals from Iraq and 55.8 per cent from Afghanistan.<sup>[6]</sup> Distinguishing between the forced movement of refugees and voluntary migration is becoming more difficult, however, because many migrants are now also leaving their home countries involuntarily. Yet only those who can prove persecution in their home country or a need to flee intra- or interstate war are entitled to international protection. The reception of migrants and their admission to the labour market, by contrast, is a sovereign decision driven by the needs of the relevant destination country.

One reason for the difficulty in distinguishing between flight and migration is that the causes of flight have changed since the Second World War. The Convention Relating to the Status of Refugees (1951 Refugee Convention) and its additional 1967 New York Protocol provide the backbone of international refugee protection, covering not only individual and group-specific persecution, but also general and gender-specific violence. More and more people are becoming refugees because the economic or ecological foundation of their lives is being destroyed, however. Such causes of flight – which also include the effects of climate change – are only partly taken into account under the existing international system of protection. They are regarded not as reasons for flight, but as grounds for migration.

A second reason is that refugees and migrants increasingly resort to using human traffickers. This is happening first and foremost because most industrialised and emerging-economy countries offer insufficient opportunities for legal immigration. Indeed, more and more states are using restrictive national asylum laws to reduce the opportunities for refugees to enter legally in search of protection. This is the case not only in the EU, but also in other regions of the world. Migrants tend to face similar limitations, although the

5 Steffen Angenendt/David Kipp/Amrei Meier (2017): *Gemischte Wanderungen. Herausforderungen und Optionen einer Dauerbaustelle der deutschen und europäischen Asyl- und Migrationspolitik*, Gütersloh, Bertelsmann Stiftung.

6 Bundesamt für Migration und Flüchtlinge (2017): *Das Bundesamt in Zahlen 2016*, Nuremberg, p. 50ff.

ongoing demographic change in many industrialised and emerging-economy countries has generated a significant economic and societal need for immigration. All the same, many industrialised nations seek to reduce immigration out of domestic political considerations.

The intermingling of flight and migration puts the already overloaded asylum system of some industrialised countries under additional pressure and ultimately undermines the legitimacy of both asylum and migration policy. This problem has been known for some time, but coordinated national, European, and international concepts to solve it are still lacking.

# 3 International and European framework conditions

The framework conditions are promising, at least at the global level: in recent years there has been a clear push to develop international cooperation on international refugee and migration policy. In September 2015, for example, the General Assembly of the United Nations (UN) adopted the Sustainable Development Goals (SDGs), which affect migration, flight, and development in myriad ways. A central aim is that the international community persist in fostering orderly and safe migration. Furthermore, in 2016 a special summit of the UN General Assembly took place, at which the New York Declaration was adopted.<sup>[7]</sup> The countries declared their support for the fundamental rights and protection of all migrants and refugees, irrespective of their legal status, and pledged to negotiate two global agreements by 2018. Under the direction of the UN High Commissioner for Refugees (UNHCR), the Global Compact on Refugees is emerging, an agreement that prioritises greater sharing of international responsibility for the protection of refugees. At the same time, work is ongoing on a Global Compact for Safe, Orderly and Regular Migration within the framework of an international consultation process. The objective is to address all aspects of international migration, including humanitarian, development-oriented and human-rights-based forms; to improve global cooperation; and to advance international cooperation in this area. In order to achieve this, Member States are expected to enter into the appropriate commitments, the implementation of which is verifiable, and which are based on the standards of the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda. In addition, the International Organisation for Migration (IOM) became part of the UN at the special summit the previous year.<sup>[8]</sup> This step brings with it the hope of further improvement on international cooperation on migration policy. The inclusion of IOM into the UN system was regarded as controversial by many NGOs, even though IOM offers access to core processes of international migration policy and therefore the possibility to press for more migration-related cooperation. The mandate and the structure of the organisation have so far remained unchanged, however. This represents a missed opportunity to associate full rights of participation in UN processes with a normative mandate, which would have strengthened the role of IOM in international agreements on migration policy. At the same time, it is to be expected that the new architecture of global cooperation on refugee and migration policy – the Global Compacts, the new position of

7 Steffen Angenendt/Anne Koch (2016): Der erste Gipfel der Vereinten Nationen zu großen Wanderungsbewegungen, Berlin, SWP-Aktuell 49/2016.

8 Founded in 1951, IOM was previously an intergovernmental organisation that cooperated with governments, interstate organisations, and NGOs on migration and repatriation, but did not become a Related Organisation of the UN until September 2016.

IOM, and the implementation of the SDGs – will have a positive effect on the coherence of migration policy in Member States and in regional cooperation.

At the European level, on the other hand, there is currently no similar positive trend towards greater cooperation. Whereas norm-setting in EU asylum and refugee policy lies predominantly with the Union (implementation, conversely, lies with Member States), immigration policy remains almost exclusively the responsibility of Member States and, with the exception of a few tools such as the Blue Card for highly qualified immigrants, is still poorly coordinated. Ever since the massive influx of refugees in 2015 and 2016, moreover, European refugee policy has been characterised by a distinct renationalisation and by stalled negotiations over responsibility for the refugees. Following the de facto collapse of the Dublin System, a number of states on the external borders of the EU have had great difficulty guaranteeing the human rights of those seeking protection.<sup>[9]</sup> Some EU Member States, in contravention of the non-refoulement requirement under international law, have begun to turn away asylum seekers, to pass them through their territory without registering them, or even to place them in internment camps. Some EU countries have built new border fortifications and established temporary border controls within the Schengen area, setting upper limits for immigration. In light of this, we can hardly expect the Member States to take common action on the basis of higher standards of protection.<sup>[10]</sup> But perhaps a group of states could still work together towards coherent European protection for refugees. This would have to have some effect against the erosion of international and European standards of protection in the repeated cycles of negotiations over the Common European Asylum System.

It is precisely this insufficient distribution of responsibility and lack of solidarity among EU states, however, together with the expectation of further immigration from Africa in particular, that is leading them to seek cooperation with origin and transit countries more than ever before, indeed to further «externalise» their refugee policy. This is causing European migration and refugee policy to be ever more tightly bound up with other policy areas, especially development policy and foreign and defence policy. The European Commission has advocated such tighter coordination for more than a decade, and put forward the «Global Approach to Migration» back in 2005, broadened to the «Global Approach to Migration and Mobility» in 2011, which is now being pursued even more intensely against the background of the so-called refugee crisis. In this context, the EU has set up new partnerships on migration. The Union has conducted high-level talks and reviewed the global parameters of its Neighbourhood Policy. Following the EU-Turkey Statement, and the Valletta Summit on Migration from November 2015 in which 35 African States and

9 Petra Bendel (2017), op. cit.

10 Steffen Angenendt/David Kipp/Anne Koch (2016): Grenzsicherung, Lager, Kontingente: Die Zukunft des europäischen Flüchtlingsschutzes?, SWP-Aktuell 30/2016, [https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2016A30\\_adt\\_kpp\\_koh.pdf](https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2016A30_adt_kpp_koh.pdf).

the EU Member States took part, the European Commission put forward a new European Council-approved partnership framework in November 2015. The framework was reinforced by the meeting of the European Council in the same month and the Bratislava Declaration and Roadmap of September 2016, which focused on securing external borders and reducing irregular immigration.

The European Union is thus also concerned with strengthening the border control capacity of partner states in Africa and combating smuggling and human trafficking as part of its management of immigration. The partnerships in the field of migration have been criticised, however, because they (1) prioritise preventing and combating irregular migration over dealing with the causes of flight; (2) put (irrelevant) conditions on development cooperation; (3) extend the possibility of support even to authoritarian regimes with doubtful performance in the area of human rights; (4) may not be efficient. These partnerships have the potential to force refugees and would-be immigrants into taking more dangerous routes. In the worst case, they undermine the right to emigrate and the principle of non-refoulement. This principle prohibits expelling or sending asylum seekers back across the borders of territories in which their life or freedom is threatened because of their race, religion, nationality, membership in a particular social group, or political convictions.

Two years ago, the EU set up an additional instrument for managing migration, alongside the European Border and Coast Guard Agency. Within the framework of the Common Security and Defence Policy (CSDP), the Union launched its first military operation in the form of EUNAVFOR Med, tracking down boats to destroy the business model of smugglers and deter people from irregular entry. Rescue missions were to take place in the Mediterranean at the same time. But the rescues at sea ought not to be minimised in the expansion of the mission combating smuggling, lest fundamental conditions of human rights and the rights of refugees be violated, namely the right to life, the right of non-refoulement, and the right to the humane treatment of persons who are rescued or diverted at sea.

In general, it is to be expected that migration policy will come to play a larger role in European external relations – foreign policy, development cooperation, defence policy. But if a more coherent policy is to be achieved, the issues pertaining to human rights and the rights of refugees must be more strictly respected, and the Directorates-General of the Commission, which previously worked more or less independently of one another, must collaborate more closely on this matter. The Directorate-General for Development and Cooperation (EuropeAid, DG DEVCO since 2015) was established in 2011 to support the priorities set by the Commission – this represents a beginning. For a long time now, European and German development cooperation has followed the guiding principles called for above and has striven for a partnership-based collaboration of equals with respect for human rights. But such cooperation has not yet been sufficiently reflected in migration and refugee policy. In this respect, migration policy can benefit from the lessons learned in development cooperation and value-driven collaboration.

The European Commission does make efforts to involve stakeholders from civil society and private enterprise in consultations on migration and refugee policy. But in the face of the most recent debate over emergency rescue operations in the Mediterranean and the restriction of the work of relief agencies, it is reasonable to remain sceptical as to whether EU Member States would back such approaches.

## 4 Challenges and fields of action

With regard to disentangling the mixed types of migration, the absent or deficient legal opportunities for migration are a particular problem, one that affects both refugees and migrants. Those in the first group are unable to gain legal access to organised asylum procedures; those in the second believe themselves to have no adequate opportunity for legal immigration. This is how both groups end up taking dangerous, irregular routes. Furthermore, those wishing to migrate for economic reasons sometimes claim the right of asylum for immigration purposes. Such actions are a burden on asylum proceedings, complicating the protection of genuine victims of persecution and undermining the credibility of national and international policies on asylum and migration.

If we are to disentangle the mixed types of migration, more legal opportunities for immigration must be established everywhere – not just in developed countries – and that means assisting refugees as well as would-be migrants. Governments have ample room for manoeuvre in this area: legal channels for refugees could include protected procedures for entry, among other possibilities. Permanent transfers to third countries (resettlement) could also be further expanded, humanitarian reception programmes (re-)established, and more humanitarian visas issued. In addition, so far there has been little exploitation of the opportunities for the private sponsoring of refugees within the framework of resettlement programmes, or of individual municipalities' capacity for integration. Such capacities could be extended if, for example, communities willing to operate reception programmes were able to receive EU funding for the costs of those programmes and for their own development at the same time. Legal paths to immigration could be created for would-be migrants through programmes for migration and mobility, together with concerted labour market policies.<sup>[11]</sup>

In general, we must counteract the continuing erosion of the protection of refugees and improve the management of educational and labour migration, as well as family reunification. More coordination of migration and development policy is needed in order to achieve this, without losing sight of the domestic political aspects. Wage dumping (also known as social dumping) and the displacement of local populations should be prevented. New approaches are also necessary in relation to possible transitions in status between asylum and migration. Asylum seekers could be granted a change of status under certain circumstances, for example. Finally, integration policy must also explore new avenues. Refugees and economic migrants must each be offered their own means of integration from the very beginning. Until now there has been no vision of «gradual integration», but it is essential to a coherent approach. In spite of previous integration successes, there remains a significant

11 FRA European Union Agency for Fundamental Rights (2015): Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox, Vienna 2/2015.

and sometimes even increasing lack of integration among certain groups of immigrants. Low-skilled groups with a migration background are particularly vulnerable to unemployment. This makes integration policy a particularly important task in the area of education.

Three aspects are especially relevant for a coherent foreign policy on asylum and migration and the corresponding whole-of-government approach: reduction of the causes of flight and forced migration, sustainable structuring of migration programmes, and consideration for aspects of development policy in (voluntary) repatriation and reintegration.

## Sustainably reducing the causes of flight

Whereas regular forms of migration generally have positive effects for development policy, mass migrations always represent a human catastrophe, usually one with enormous repercussions for human rights and development policy. Consideration for human rights and development policy, therefore, demands that we reduce the causes and driving forces of these mass migrations. Sustainable development policy can make an important contribution here:<sup>[12]</sup> political development programmes can give rise to positive effects in the fight against corruption, for example; they can promote health and education systems or influence the way in which governments manage and regulate mineral resources. In the same way, they can help prevent crises and reduce the causes of flight. The promotion of legal certainty and economic development, reinforcement of civil society structures, and support with climate change adaptation are also becoming increasingly important.

Development cooperation can achieve little when violence has already broken out, however, or when people are fleeing authoritarian regimes. Development policy can exert only a minor influence on acute causes of flight such as violent clashes or political persecution. Comprehensive development cooperation as concerns flight must therefore cover more fields of action. These include the support of countries of first entry in poorer regions of the world, as well as the encouragement of voluntary repatriation and the reintegration of refugees in their home country once there is no longer any local threat of displacement and persecution, and prospects for making a living have reappeared.

Of decisive importance in combating the causes of flight is their context. There is no model solution that fits all circumstances. At the same time, it is obvious that combating the causes of flight is not just a task for development cooperation, but also requires co-ordination with foreign, security, trade, and economic policy, as well as European and international commitment. This includes taking action towards conflict resolution at the

<sup>12</sup> Cf. inter alia Sachverständigenrat deutscher Stiftung für Integration und Migration (2017a): Chancen in der Krise: Zur Zukunft der Flüchtlingspolitik in Deutschland und Europa. Jahresgutachten 2017, p. 60-73, [https://www.svr-migration.de/publikationen/jahresgutachten\\_2017](https://www.svr-migration.de/publikationen/jahresgutachten_2017).

international level, as well as supporting those structures in origin countries which respect the rule of law and conform to human rights standards. Only in this way can regional interests be balanced, conflicts of power defused, and war economies overcome. Cooperation is problematic with states such as Eritrea or Sudan, where those in power have been responsible for flight and displacement. In these cases, a values-driven cooperation should set clear boundaries, and cooperation should be restricted to the furtherance of humane conditions in the countries concerned.

## Programmes of migration

Migration can have both positive and negative consequences for development policy in the countries of origin. In addition to all of the opportunities for development that migration offers countries of origin – not least through the transfer of knowledge and capital by people returning home – there are also risks. Development cooperation offers good approaches to improving and harnessing the development effects of migration. Advances have been made in avoiding brain drain, particularly in the healthcare sector. Industrialised countries used to limit the mobility of the immigrants they had recruited as «guest workers» by making their prospects for return to their home countries unclear or unavailable. This caused many of these migrants to remain, even though they would gladly have returned to their countries of origin on a temporary or permanent basis. In order for such errors to be avoided, the mobility of immigrants must be encouraged (through counselling on voluntary repatriation and reintegration programmes), and the loss of skills must be thwarted (through training and continuing education measures on the part of employers and the state). The possibilities of transnational training partnerships have yet to be explored: as an example, qualified employees could receive training in their countries of origin that would prepare them for employment in both the developed world and their home countries.<sup>[13]</sup> Further potential is evident in programmes of temporary and revolving migration, although the effects of these on development very much depend upon the way they are set up. As experience shows, including that gleaned from pilot projects, such programmes are most likely to lead to positive effects when they are carefully thought out and set up in close collaboration with the labour authorities in partner countries. Of course, these programmes require tight coordination among domestic institutions and stakeholders.

Previously concluded migration partnerships have been the subject of criticism, as described above. Since 2015, the Agenda for Migration and its subsidiary Better Migration Management (BMM) programme have been working with the countries of origin and transit along the most important migration routes. Their objective is to reduce the reasons

13 Michael A. Clemens (2015): Global Skill Partnerships: A Proposal for Technical Training in a Mobile World, IZA Journal of Labor Policy 2/2015, <https://izajolp.springeropen.com/articles/10.1186/s40173-014-0028-z>.

for flight, to control immigration, and above all to limit irregular migration. The Better Migration Management programme describes itself, at least rhetorically, as consistently mainstreaming human rights considerations. This would appear to be a step in the right direction. How it is actually put into practice remains to be seen.<sup>[14]</sup>

The EU could make use of training measures to accomplish this mainstreaming: the involvement of liaison officers, or the use of human rights monitoring, a tool that so far has seen little use in this policy field. These measures could serve as a screening instrument for compliance with standards for human rights and the rights of refugees, combining available sources such as government reports, data collections, and reports from EU agencies. Recommendations could then be worked out in dialogue with third countries. Partner states would thus be increasingly bound by common principles and adapt their standards to requirements such as those laid down in the Convention Relating to the Status of Refugees (1951 Refugee Convention) and the European Convention on Human Rights (ECHR), as well as in the Common European Asylum System. The use of independent experts, to be approved by each of the states involved, would have the advantage over legally based courses of action in that the experts could meet regularly and on their own initiative. Such experts would be independent from the complaints system and from individual cases, and could reach agreement about whether further investigation was required. Systematic monitoring of human rights and the rights of refugees would also assist in clarifying responsibilities between the EU and third countries; it could be an effective means of providing protection from persecution or other risks for those people rescued at sea, of guaranteeing access to international protection at borders, of ensuring that disembarkation occurs only at safe locations, and of preventing cooperation with police and border protection agencies that exercise violence against refugees or migrants.

Another step in the direction of externalisation is the Offshore Asylum Process, which has been recently and repeatedly discussed. The European Council recommended this course in its 2014 guidelines, and the European Commission at least hinted at it in a pilot project in Niger. So far nothing concrete has been put into practice, however. Advocates of the process anticipate that an asylum application process outside the EU would make the perilous irregular migrations over the Mediterranean unnecessary and would destroy the basis for the business model of human smuggling. They also expect that pressure on the European asylum system would be reduced and that, with a decline in irregular immigration, EU states would be able to set up more programmes for legal and regulated access. Opponents of such an outsourcing of the asylum process have offered practical and fundamental objections, such as the lack of clarity over how (African) countries will be convinced to carry out the procedures. Some states – including Tunisia and Chad – have already

14 Steffen Angenendt/David Kipp (2017): «Better Migration Management». Ein guter Ansatz zur Zusammenarbeit mit Herkunfts- und Transitstaaten?, SWP-Aktuell 2017/A 52, July 2017, [https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2017A52\\_adt\\_kpp.pdf](https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2017A52_adt_kpp.pdf).

expressed their reluctance, not least because they fear a knock-on effect. What's more, it is as yet unclear whether the EU states would be able to agree on effective incentives for partner states. We can see this in the reticence with which countries have participated in the new EU Trust Fund for Africa, a possible source for such financial incentives. Still more significant is the fact that the EU states have shown no recognisable appetite for substantial resettlement programmes, as is demonstrated in the resettlement of only one-fifth of the 160,000 refugees from Spain and Greece so far. It is also unclear who ought to be responsible for carrying out external asylum procedures: UNHCR, the European Asylum Support Office (EASO), or the Member States on a voluntary basis? Even more fundamental are the doubts as to whether it would even be possible to carry out procedures in accordance with the rule of law in states such as Libya, and whether the tightening of border controls is not in contravention of the 1951 Refugee Convention and other legal bases. What will happen to asylum seekers who are turned down is another open question.

Clearly, the externalisation of asylum procedures is bound up with essential practical, legal, and human rights problems.

## Voluntary repatriation and reintegration

Rapid and fair processes of asylum can help return rejected asylum seekers to their countries of origin sooner. In cases where this does not happen voluntarily, a repatriation policy must be implemented that is effective but also bound by human rights standards and obligations as a matter of principle.

Voluntary repatriation is generally preferred, not only based on considerations of human rights and on ethical grounds, but also out of practical considerations. Programmes of voluntary repatriation should therefore be expanded, in conjunction with efforts towards the reintegration of the returnees in their countries of origin.<sup>[15]</sup>

Development cooperation should formulate incentives for the reintegration of returnees in their countries of origin and their reception communities, instead of putting short-term sanctions in place against those countries of origin which demonstrate insufficient readiness to cooperate in taking back deportees. As a general rule, the criterion for a successful repatriation should not be deportation, but reintegration, whose effects on development should in turn be encouraged with the funds from development cooperation.

15 Sachverständigenrat deutscher Stiftungen für Integration und Migration (2017b): Rückkehrpolitik in Deutschland. Wege zur Stärkung der geförderten Ausreise, Berlin, [https://www.svr-migration.de/wp-content/uploads/2017/03/SVR\\_FB\\_Rueckkehrpolitik.pdf](https://www.svr-migration.de/wp-content/uploads/2017/03/SVR_FB_Rueckkehrpolitik.pdf); Marianne Haase/Pia Honerath (2016): Return Migration and Reintegration Policies: A Primer, Integration Strategy Group, December, [https://www.giz.de/static/de/images/contentimages\\_320x305px/Haase\\_Honnerath-Return\\_migration\\_primer\\_Dec16.pdf](https://www.giz.de/static/de/images/contentimages_320x305px/Haase_Honnerath-Return_migration_primer_Dec16.pdf).

## 5 Options within German policy action areas

The example of Germany makes clear the extent to which an asylum and migration policy geared towards development and foreign policy goals is dependent on how a country copes with immigration. If the integration of immigrants is not achieved – or at least if the impression arises that it has failed – the domestic public will be unwilling to broaden cooperation with the countries where migrants originate and those which they transit through. An effective, sustainable, and legitimate foreign policy on migration requires an equivalent policy on integration. Both aspects belong together: without successful integration there will be no expansion of legal immigration, and without the prospect of legal immigration there will be no decisive incentive for partner states to cooperate. The integration of immigrants plays a crucial role in a whole-of-government approach to migration policy. Any coherent policy must systematically address the tasks of integration policy. The need for migration policy reform in Germany illustrates this well.

## 6 Elements of a foreign policy on migration

The heavy immigration of recent years puts Germany in a particularly good position at the moment to play a pioneering role in further developing a global agenda on migration and refugee policy, one with binding standards founded on human rights. Many countries of origin have begun to praise German policy on migration and the German efforts to establish clear regulations that are a model of human rights compliance. These countries see Germany as a trustworthy broker and would like to see Germany take a greater role in global negotiations. Conversely, Germany can take away many ideas for its own foreign policy on migration from its participation in global systems of regulation.

Europe and Germany should push for a global sharing of responsibility and for closer cooperation between countries of origin, transit, and destination. Supporting the countries of first reception in the global South, which shoulder the bulk of refugee reception, makes sense not only within the framework of efficient emergency assistance, but also has a long-lasting effect in terms of promoting healthcare and education, legal certainty and economic development, stronger civil society structures, and aid with climate change adaptation. In addition, an equitable migration policy can be the engine for development in countries of origin and ultimately offer advantages to the immigrants themselves. In the end, this kind of policy is properly understood as self-interest. Germany can take action in this respect, putting its experience to use in order to advise and support countries of origin and transit.

In recent years it has become apparent that the lack of international involvement has been a decisive cause of secondary migration towards Europe. Such involvement cannot restrict itself to the financial measures of international organisations and programmes; it ought to be substantially directed towards objectives respecting human rights and the rights of refugees, and to assist in improving compliance with these rights at the reception facilities of the countries of first reception. The EU's cooperation with third countries also requires joint efforts to improve reception conditions and standards for asylum procedures in European partner countries, as well as the establishment of human rights monitoring. The measures Germany can work towards at the international, European, and domestic level include the provision of a greater number of resettlement sites worldwide (and within the Member States of the European Union) and of regulated, legal access to asylum, as well as a guarantee of family reunification.

Within the EU, it continues to be necessary to find a way out of the stalled negotiations on responsibility for refugees. Germany should keep pressing for the fair distribution of refugees and – if this continues to be impossible to achieve – for a new system of

responsibility-sharing between EU Member States, or for an EU core group that could expand on the standards of the Common European Asylum System.<sup>[16]</sup>

An orderly policy on migration, which will increase in importance in the coming years for most industrialised Western countries because of demographic changes, can be made more binding and sustainable by improving instruments such as partnerships with states that are reliable stewards of human rights. This can be encouraged and coordinated at the EU level by means of tools such as the Blue Card. The connection between flight and migration must be more deliberately addressed and discussed, especially in cooperation with countries of origin and transit.

## Integration as a constitutive element of a whole-of-government approach

In the course of the most recent wave of refugee immigration to Germany, and the sometimes considerable reception difficulties, it has become apparent that integration policy cuts across other policy fields and should be organised accordingly. The guiding theme of German integration policy must continue to be the strengthening of participation. We should therefore dismantle the barriers and discriminatory measures obstructing access to the housing market, to a socially just education system, and to a flexible labour market. Family reunification is another essential condition for successful integration.

This goal requires competent institutions of state and concerted efforts among state and non-state actors. Many authorities and ministries have more firmly incorporated integration policy in recent years. This is true at all levels of the German federal system, but especially among the federal states, which have sometimes fundamentally altered their own structures. Many state governments have for many decades had departments in charge of issues relating to integration policy. In most of these states, the department reports to the labour or social affairs ministry. But the legislative areas that are crucial for the legal situation of immigrants – such as the laws pertaining to foreigners and rights of residence – often lie outside the purview of these ministries.

The federal level has the Office of the Commissioner for Integration, which has since been moved to the Federal Chancellery. Yet it is precisely this inclusion which gives rise to various problems: the Federal Chancellery, for example, is responsible for political cooperation between different departments. This makes it difficult for a Commissioner for Integration to come into open conflict with individual ministries. Above and beyond this,

16 On this see Bendel (2017), op. cit. as well as the proposals of the Sachverständigenrat deutscher Stiftungen für Integration und Migration (2017a), op. cit., p. 34-46.

although the Office of the Commissioner is involved in initiating new legislation and can make suggestions to the Federal Government, it does not have sufficient funding available to implement programmes and initiatives. In practice, the office has no operational jurisdiction to formulate integration policy. This is actually decided in the Federal Ministry of the Interior (BMI), which is responsible for legislation on foreigners and residence, as well as the laws covering nationality. Subordinate to the BMI is the Federal Office for Migration and Refugees (BAMF), to which fall a variety of tasks in the operational arena. For example, the BAMF is responsible not only for carrying out asylum proceedings but also for the conception and implementation of integration courses. Furthermore, the Federal Office makes information and support mechanisms available to encourage voluntary repatriation.

Further constituent aspects of migration and integration are dealt with by a range of departments: the Federal Ministry of Labour and Social Affairs (BMAS) is responsible for issues encountered by immigrants in the labour market; the Federal Ministry of Education and Research manages foreign students' access to higher education; the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety is in charge of building new accommodation for refugees; and the Federal Ministry for Economic Cooperation and Development is charged with reducing the causes of flight and supervising the relationship between migration and development. Overall, almost every ministry comes across matters affecting migration, flight, or integration – a «joined-up politics» is therefore difficult to attain, or requires so much coordination that it becomes interminable.

On the whole, there is insufficient coordination of the structures of integration policy at the federal level, as well as between the Federal Government and the states.<sup>[17]</sup> This makes alignment difficult and particularly leads to problems in situations when one institution makes the decisions whilst another carries the cost. It has been suggested for the purposes of institutional reform that integration matters be removed from the responsibility of the Federal Chancellery and instead integrated as an independent department of an existing Federal Ministry, perhaps the BMAS. An alternative would be to set up an independent Ministry of Migration, Flight, and Integration. All the questions to do with immigration, from asylum to the integration of immigrants into the labour market, could be considered together as a whole in such a ministry, and coordinated. The suggestion of creating an independent immigration ministry goes hand in hand with the call to give the Federal Government sole responsibility for enforcing the rights of asylum and of refugees. At the moment, these responsibilities are shared between federal and state authorities. Bundling the policy jurisdictions of asylum, migration, and integration within one ministry could lead to better political coordination. To be able to achieve this, however, the new ministry would

17 Petra Bendel (2014): Coordinating Immigrant Integration in Germany: Mainstreaming at the Federal and Local Levels, MPI Report, Brussels, <http://www.migrationpolicy.org/research/coordinating-immigrant-integration-germany-mainstreaming-federal-and-local-levels>.

also have to be responsible for drawing up the corresponding legislation and would have to receive the necessary funding and personnel. There have been objections to such a solution on the grounds that it does not represent mainstreaming in terms of state regulatory structures being open to all to the greatest extent possible. Indeed, this path does the opposite, by cementing the special treatment of immigrants. Furthermore, an integration ministry covering so many policy areas would frequently need to seek the cooperation of other relevant departments, which would lead to significant friction loss. Another argument against an immigration ministry is that it would be a (weak) specialty ministry, lacking the implementation power of the BMI or BMAS. One fundamental objection against giving the Federal Government the jurisdiction to enforce the right of asylum is that this would deprive the states of room for discretion, which has in the past shown itself to be an important corrective for a refugee policy which also takes the fate of individuals into account.

Independent of the bundling of competencies at the federal level, German districts and municipalities must continue to take care of sheltering, supplying, and integrating refugees. In fact, municipal practice provides substantial flexibility, which is being used in a wide variety of ways. Municipal refugee and migration policy in Germany now resembles a patchwork quilt.<sup>[18]</sup> The federal authorities ought to pay more attention to the needs of municipalities in general, which would require closer cooperation among the federal, state, and municipal levels. In the future, advisory bodies could put more emphasis on opportunities for refugees and immigrants to empower themselves and could intensify cooperation with volunteers (including migrants).

Without a doubt, the increase in refugee numbers in recent years has unleashed a wave of helpfulness among the German people: through countless initiatives, projects, and programmes, both civil society and private enterprise have done their part to make arrival in Germany easier for refugees, and in so doing have made an important and indispensable contribution to German refugee policy.<sup>[19]</sup> This commitment to immigrants in civil society and private enterprise is not new: one cannot conceive of Germany's immigration history without referencing the involvement of churches, trade unions, companies, charities, foundations, and many other stakeholders. During many phases, non-state actors have carried out tasks of integration policy that state institutions were unwilling or unable to attend to. In the context of the tremendous immigration of late, however, it has become clear how much the state depends on this support, and not only in exceptional situations.

18 Hannes Schammann/Boris Kühn (2016): Kommunale Flüchtlingspolitik in Deutschland, Bonn, Politik für Europa #2017 plus, <http://library.fes.de/pdf-files/wiso/12763.pdf>; Dietrich Thränhardt/Karin Weiss (2016): Flüchtlingspolitik im deutschen Föderalismus, Bonn, Politik für Europa #2017 plus, <http://library.fes.de/pdf-files/wiso/12762.pdf>.

19 Olaf Kleist/Serhat Karakayali (2015 and 2016): EFA-Studie 1 and 2: Strukturen und Motive der ehrenamtlichen Flüchtlingsarbeit in Deutschland, Research Paper, Osnabrück/Berlin.

A large part of civil society involvement is organised into initiatives: programmes and projects frequently arise out of a current need and fill in gaps where the state has not been sufficiently active. At the same time, many participants are aware that voluntary commitment can only complement, and not replace, the responsibilities of the state. And individuals are not the only ones making important contributions to the integration of refugees and migrants; businesses and trade associations do too, and these stakeholders also need to be more closely incorporated in order to achieve a coherent policy.

Businesses sometimes show great dedication to helping refugees. Many firms have given financial aid or donations in kind, offered space to accommodate refugees, or provided medical care. Small and medium-sized enterprises (SMEs) in particular have been of considerable help in integrating refugees into the labour market. But there is also the matter of surmounting previously existing difficulties to their employment, most notably clarification of their legal status; recognition of foreign school-leaving certificates, university credentials, and professional qualifications; and improvement in language skills. For this reason, some companies have long called for policymakers to accelerate asylum proceedings, certify the credentials of refugees and other immigrants in a timely fashion and promote language skills, create prospects during and after training for refugees to remain, and support businesses during integration. The Integration Act of July 2016 at least partially implements these points.

Various measures are available to make use of industry involvement more efficiently and to further strengthen this commitment. For one thing, businesses could be more deliberately incorporated into regional cooperation on labour market integration. For another, there could be stronger consideration and encouragement of further vocational training in industry, which, in contrast to standardised job-training programmes, lead to made-to-measure qualifications tailored to the workplace. Finally, it would be appropriate to establish more advisory offices and information points to help with the practical problems of SMEs in particular.

# 7 Summary

Over the next few years, the architecture of the global system for managing flight and migration will change. But this new structure will only be effective if, at all levels – national, European/regional, and global – it achieves a more equitable sharing of responsibility, guarantees human rights, and develops more sustainable strategies. Germany, which has gained in competence after receiving so many refugees in recent years, can play an important role at this global level. The Global Compacts under development offer an opportunity to establish more coherence between refugee policy and migration policy and to encourage the corresponding cooperation among the numerous UN actors.

At the European level, Germany can campaign to ensure that the intermingling of development, foreign, and security policy with refugee and migration policy that has become increasingly important recently does not end up being unilaterally switched to an externalisation of responsibility for protection and a reduction in human rights standards. Instead, the country can see to it that human rights and refugee concerns represent the core of future foreign policy on migration. The first, cautiously promising approaches are reflected in the incipient implementation of the Better Migration Management programme. Partnerships on migration require negotiation on equal terms, not unilateral conditionality; they call for stronger development policy components and effective human rights monitoring, with the cooperation of all partners.

Development policy programmes targeting health, education, climate policy, the sustainable use of raw materials, and the reduction of corruption can have a durable effect. Such programmes take place in complex contexts, however, and do not necessarily contribute to diminishing migration.<sup>[20]</sup> Nevertheless, development policy can encourage the host countries of the global South to improve the human rights standards at their refugee reception facilities and assist these countries in formulating their migration policy. More legal opportunities for entry and the right to family reunification can help in creating sustainable solutions for refugees and migrants. In addition, European and Member State actors can offer incentives for voluntary repatriation in unsuccessful asylum cases, as well as for the reintegration of returnees in their countries of origin. EU refugee and migration policy needs to implement objectives and achieve greater coherence overall, which can be promoted through improved cooperation between the Directorates-General of the European Commission and the committees of the European Parliament. But European advances are dependent on a solution to the currently stalled negotiations among Member States, and on

20 Steffen Angenendt/Charles Martin-Shields/Benjamin Schraven (2017): Mehr Entwicklung – mehr Migration? Der «migration hump» und seine Bedeutung für die entwicklungspolitische Zusammenarbeit mit Subsahara-Afrika, SWP-Aktuell 2017/A69, October, [https://www.swpberlin.org/fileadmin/contents/products/aktuell/2017A69\\_adt\\_etal.pdf](https://www.swpberlin.org/fileadmin/contents/products/aktuell/2017A69_adt_etal.pdf).

better cooperation among them. The protection of refugees and the process of asylum must be improved in Germany as well. An important topic of the next legislative period will certainly be controls on future labour migration, in which the intermediate stages in the transition from asylum and migration will also play a role. Migration and development policy, as well as foreign policy, must be much better coordinated with one another. More coordinated structures are also needed at both the federal level and between the federal and state level in the treatment of mixed migration, as well as for the integration of existing immigrants. The latter process has domestic and socio-political import and is one of several significant factors affecting foreign policy on migration. Making use of the capability of municipalities, as well as the multifaceted, often innovative and creative efforts of civil society and private enterprise to integrate immigrants into the society that receives them, is a pivotal challenge of a whole-of-government approach to the everyday politics of migration and integration.

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# ACTIVE RECEPTION OF ASYLUM SEEKERS AS AN ORGANISATIONAL TOOL OF REFUGEE POLICY

# 1 Introduction

International protection of refugees is based on the requirements of international and European law. The Convention Relating to the Status of Refugees (1951 Refugee Convention), the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the EU (EUCFR) establish an individual legal right to protection from persecution and violations of human rights. To these documented human and refugee rights must be added the right of family reunification for recognised refugees and those entitled to subsidiary protection.

The objective of a humane refugee policy will be understood in this text as the following:

- To guarantee the effective protection of refugees (especially more vulnerable refugee groups)
- To reduce the use of perilous migration routes and dependence on human traffickers
- To offer support to countries of first arrival (inside and outside the EU) and decrease their burden

In actual fact, however, individual factors are particularly essential in determining the chance of finding protection in Europe today – namely one's physical condition, age, health, and gender – if a person can afford the expense of the journey at all. Stronger refugee policy coordination is urgently required in order to make refugee policy more humane. The current negotiations under the auspices of the United Nations towards a global compact for refugees on the basis of the 1951 Refugee Convention deserve full support.

This policy paper is dedicated to exploring the chances of stronger, human rights-focused international cooperation in the field of refugee protection.

In light of the sizeable waves of migrants and refugees worldwide sparked by wars, conflicts, and crises, politicians can and should identify and utilise opportunities to introduce new options for asylum seekers along their flight routes (complementary to the individual right to asylum and guaranteed protection), thereby playing a more active role in shaping policy on refugees.

The global migration and refugee trends are heterogeneous phenomena. We are increasingly confronted with the fact that refugees and other migrants are intermingled in regional

mass migrations («mixed flows»).[1] People set off on these journeys for highly variable reasons and motives. In this respect, we should be wary of the idea that human life processes can be fully planned and managed; they are so only to a certain degree.

Even situations of persecution and mass waves of refugees can only be predicted and influenced to a limited extent. Particularly for this reason, it is important to guarantee refugees an individual legal right of access to a fair process of asylum under the rule of law. To restrict or remove this access (granted upon individual assessment of the need for protection) in order to control refugee flows for reasons of policy (for example through the use of upper limits on numbers or by preventing access to the process of asylum; see below) seems to us to be the wrong choice.

This kind of departure from the human rights obligations of the 1951 Refugee Convention, ECHR, and EUCFR does not lead to an increase in justice. Such an attempt is more likely to pave the way for a state's conduct to be led by its interests – putting those in need of protection at risk of becoming objects of the state's opportunistic thinking.

It is a great intellectual achievement that human rights (and refugee rights) has granted individuals universal, personal claims against the state that should be guaranteed and non-negotiable.

1 On this see Steffen Angenendt/David Kipp/Amrei Meier: Gemischte Wanderungen – Herausforderungen und Optionen einer Dauerbaustelle der deutschen und europäischen Asyl- und Migrationspolitik, Gütersloh 2017.

## 2 Refugee politics in context

The world is presently confronted with the largest refugee flows since the end of the Second World War. According to the United Nations High Commissioner for Refugees (UNHCR), 65.6 million people worldwide have been displaced, over 10 million of them in 2016 alone.<sup>[2]</sup>

There will always be significant variation in the number of refugees seeking entry. In view of the many wars, conflicts, and crises worldwide, however, we will also have to reckon with large mass migrations in the future – in numbers that force the international community (including Europe and Germany) to react.

Internal refugees (those who have found temporary protection within their countries of origin) account for forty million of the displaced; over twenty million refugees have left their home countries.<sup>[3]</sup> UNHCR has reported that the great majority of the latter group (about 90 per cent) remain in neighbouring states. According to UNHCR, this makes Turkey, Pakistan, Lebanon, Iran, Uganda, Ethiopia, Jordan, Germany, Kenya and DR Congo the ten most important reception countries in the world.

At the end of 2016, 84 per cent of refugees were living in low- or middle-income countries – with one in three living in the least developed countries in the world. And it is precisely in poor countries that the acceptance of a large number of asylum seekers presents enormous challenges.

Yet the present refugee and migrant flows also extend to European countries: in the three years from 2014 to 2016, 3.2 million people set off on the perilous journey towards Europe.<sup>[4]</sup> The following (apart from the actual war-induced reasons for flight) appear to be important causes of these movements:

- First off, Europe's regional proximity to the battlefields in Syria and Iraq is a significant factor.
- Second, the three neighbouring countries directly adjacent (Lebanon, Jordan, and Turkey) have accepted millions of war refugees from Syria and Iraq, but they have failed to make genuine opportunities for integration available to them.

2 UNHCR: Global Trends 2016, <http://www.unhcr.org/5943e8a34> (accessed 17 October 2017).

3 There are also another five million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the sister agency of the UNHCR.

4 [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics/de](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics/de) (accessed 17 October 2017).

- Furthermore, Germany and the EU have provided far less support for the refugee camps in these countries than originally promised.
- Finally, not only were the EU quotas for active acceptance of refugees from Turkey, Lebanon, or Jordan extremely low in 2014-2015, but the EU failed to meet even these minimal commitments.

Given this total lack of prospects, numerous people still set off across the Mediterranean. Europe was manifestly unable to react appropriately.

Germany lived up to its human rights obligations in exemplary fashion in this situation and – in a major effort by state authorities and civil society – accepted over a million asylum seekers.

In spring 2016, however, an agreement was reached with Turkey that effectively annulled the right to asylum in Europe,<sup>[5]</sup> blocking the route from Turkey to Europe for refugees. For those who make it to Europe anyway, there is now no process of asylum carried out, only a so-called admissibility procedure. No longer are people asked if they need protection. It is now merely established whether an asylum seeker has come from a safe country of origin or has transited through a «safe third country» during their flight where they ostensibly could already have been able to find protection from persecution. This is the core of the EU-Turkey deal.

The EU's objective is clear: send as many asylum seekers as possible back to Turkey – whether or not they have a right to protection.<sup>[6]</sup> This is not only an offence against the principle of non-refoulement in Article 33 of the 1951 Refugee Convention, but also against Article 3 of the ECHR, which constitutes a legal guarantee of protection in the event of torture or inhumane treatment.

<sup>5</sup> See Deutsches Institut für Menschenrechte: Die EU-Türkei-Vereinbarung vom 18. März 2016: Umsetzung und Konsequenzen aus menschen- und flüchtlingsrechtlicher Perspektive (Statement of 20 July 2016).

<sup>6</sup> As a quid pro quo for the asylum seekers sent back from Greece, up to 76,000 Syrian refugees would be flown from Turkey to the EU according to the terms of the EU-Turkey deal. This upper limit is not only far too low, however, but the sole focus on Syrian refugees is both unjust and counterproductive: those fleeing Iraq, Iran, Afghanistan, Somalia, and Eritrea all continue to have valid reasons for doing so. In fact, as of September 2017, the EU had accepted a mere 8,800 refugees from Turkey (Germany: 2,900) out of the promised 76,000. In addition, Germany had taken in 7,850 asylum seekers (of the 27,000 actually promised) from Greece and Italy – but it should be noted here that Germany (on the basis of the EU Council Decision 2016/2714 of 29 September 2016) has since begun counting the resettlement numbers from Turkey towards its EU relocation quota – with the consequence that not only are Greece and Italy still being left on their own in the reception of refugees, but a complete confusing «number salad» has also now been created (see European Commission: «Fifteenth Report on Relocation and Resettlement», COM (2017) 465, 6 September 2017).

The number of refugees arriving in Europe went down after the EU-Turkey deal was concluded. The situation along the central Mediterranean route has worsened, however, leading to a dramatic increase in the number of deaths among refugees crossing the Mediterranean.<sup>[7]</sup>

<sup>7</sup> <http://missingmigrants.iom.int/region/mediterranean> (accessed 17 October 2017).

# 3 Reactions in refugee policy

## The German level

A multitude of legislative packages on the rights to asylum and residence have been passed in Germany since autumn 2014 (Asylum Package I, Asylum Package II, Integration Act). Not a single one of them had a core objective to improve the protection of refugees. On the contrary, they led to far-reaching restrictions:

- Not only was deportation law strengthened in response to the criminal events in Cologne over New Year's Eve 2015/2016, but access to refugee status was also fundamentally restricted. The exclusion clause of ECHR Article 1 no longer applies only to crimes against the peace, crimes against humanity, or war crimes. Now, asylum seekers in Germany can have their status as refugees revoked due to offences against property or even simple resistance against enforcement officers.
- Furthermore, the steps that had been taken towards converging ECHR refugee status and so-called subsidiary protection status<sup>[8]</sup> (the chief concern of the second harmonisation phase of European asylum law) were rescinded and the former inequality between the two definitions restored.
- A wide-ranging discussion is also being conducted at present over the introduction of an «upper limit» in asylum law, a de facto negation of the fundamental right to asylum in the German Basic Law.
- The conditions under which recognised refugees in Germany could acquire a residence permit were made more difficult in 2016. And should a conflict become «pacified» in any way (thus obviating the original grounds for flight), then even refugees with a right to long-term residence are meant to quickly lose it again – even those who have lived in Germany for decades.
- Deportations occasionally serve as purely symbolic policy: for example, in recent months deportations to Afghanistan have been carried out completely selectively and deliberately – this is a country of origin where almost 80 per cent of its refugees were determined to be in need of protection in 2015. Even if this rate of acceptance has clearly declined in the last two years – owing to the political will for deportations and the signalling effect of foreign policy – it was still at 57 per cent in August 2017.<sup>[9]</sup> In practice, this means that more than half of Afghan asylum seekers are in need of

8 Subsidiary (also known as international) protection status is intended to protect mainly those people who are fleeing the death penalty or inhumane treatment.

9 See response to the written question of Bundestag MP Ulla Jelpke, BT-Drs. 18/13617, p. 14f.

protection even by the reckoning of the Federal Office for Migration and Refugees (BAMF).

- And finally, in the last year changes to Sections 27 and 29 of the Asylum Act have made it permissible to deny refugees access to asylum proceedings in Germany by referring them to alternative sources of protection, including those below the level of «safe third countries». This could lead to wide-ranging restrictions on the right to asylum in the context of bilateral agreements as per the blueprint of the EU-Turkey deal, or through the construction of reception camps outside the EU.

## The European level

The large number of people seeking sanctuary in Europe in 2015 led many Member States in the EU to fail to fulfil their legal and humanitarian obligations. The events also had consequences for the Common European Asylum System: it well and truly imploded. The Dublin system had been in force in the EU for over 25 years, imposing a de facto burden of responsibility on the Member States on the southern and eastern borders of the EU for the first reception and care of asylum seekers. This system, lacking in solidarity, was undermined in 2015 – in the truest sense of the word. Furthermore, it became blatantly obvious in 2015 that some of the new EU Member States were not applying the EU directives on the legal rights of refugees, although these had been valid since 2004 – and that the EU Commission had been ignoring the problem, apparently for many years. Consequently, refugees had not remained in those EU states which had no reliable system of asylum, but had continued on in their journey (secondary migration).

### a. Internal Dimension

In this situation, one thing above all is crucial for the EU and its Member States (not least in view of the nationalistic currents and governments in Europe): the avoidance of another loss of control (as happened in 2015/2016). The decisive control issues are these: are the adopted or suggested measures (1) in conformity with international law, and (2) appropriate for solving the causes of the implosion of the EU asylum system.

Brussels has been negotiating the reform of the Common European Asylum System (CEAS) along these lines since mid-2016.<sup>[10]</sup> The EU Commission is pursuing two fundamental objectives here:

- Block access to the European asylum system for those seeking protection

<sup>10</sup> On this see Joachim Henkel: Zur Reform des Gemeinsamen Europäischen Asylsystems, in: Deutsches Verwaltungsblatt 5/2017, p. 269–278.

- Stop the secondary migration of asylum seekers within the EU

The EU is attempting to achieve these objectives by tightening regulations at the expense of those seeking protection:

- A procedure with proof of concept in the EU-Turkey deal has emerged as a central instrument to deny access to the European asylum system for those seeking protection: from now on, applications for asylum will have blanket inadmissibility under EU law in cases where those seeking protection come from either a safe country of origin, a «safe third country», or a «miscellaneous» third country in which they supposedly would have been able to find sanctuary from persecution (the latter group includes refugee camps such as those in Niger and Jordan). According to the Commission's proposal for a new regulation on asylum procedure, applications for asylum in such cases are henceforth to be rejected as inadmissible, with no further reallocation within the EU allowed.
- The new, revived Dublin Regulation has a central role in stopping the secondary migration of asylum seekers within the EU: asylum seekers are only to be recognised as refugees if they actually reside in the EU state responsible – according to Dublin – and have cooperated with the authorities of that country. The new Reception Conditions Directive (for the implementation of the Dublin Regulation), broadens the residence obligation and introduces new grounds for detention specifically for this purpose. Finally, asylum seekers who «abscond» to another EU state without permission are now to receive only limited material support or complete exclusion from benefits.

We have two observations to make:

- The essence of the CEAS reform lies in almost completely blocking access to a fair process of asylum. An attempt like this, one which blocks the possibility of claiming a human right, calls the right to asylum itself into question in Europe.
- Beyond the human rights criticism, these measures are not suited to solving the actual causes that underlie the processes of secondary migration since 2015 as they have been described above.

We argue that attempts to control a situation with impractical measures will fail – quite apart from the damage they will wreak on international and human rights law.

## b. External dimension

Within the framework of the Khartoum Process and others, the EU has been working systematically since 2014 with actors such as the rulers of Sudan (Omar Al-Bashir) and Eritrea (Isayas Afewerki), both of them wanted by the UN for war crimes.<sup>[11]</sup> The EU wishes to arm the police forces in both of these countries – for the purpose of repelling refugees.

The EU now wants to provide a more systematic foundation for this forward displacement of border protection to the African continent (and the Middle East and Central Asia).<sup>[12]</sup>

As part of these so-called migration partnership agreements, the EU is seeking to arrange the following measures with relevant origin and transit countries, or has already done so:

- *Beginning of «strategic dialogue»/conclusion of rudimentary treaty on migration policy: Nigeria, Ethiopia, Jordan, Lebanon, Afghanistan*
- *Negotiations on/conclusion of agreement on readmission: Nigeria, Senegal, Jordan, Tunisia*
- *Establishment of operational contact points for returns (and for illicit trafficking where applicable): Nigeria, Senegal, Niger, Mali, Ethiopia*
- *Assistance with border regime: Niger, Mali, Senegal*
- *Police missions: Niger (EUCAP Sahel Niger) and Mali (EUCAP Sahel Mali)<sup>[13]</sup>*

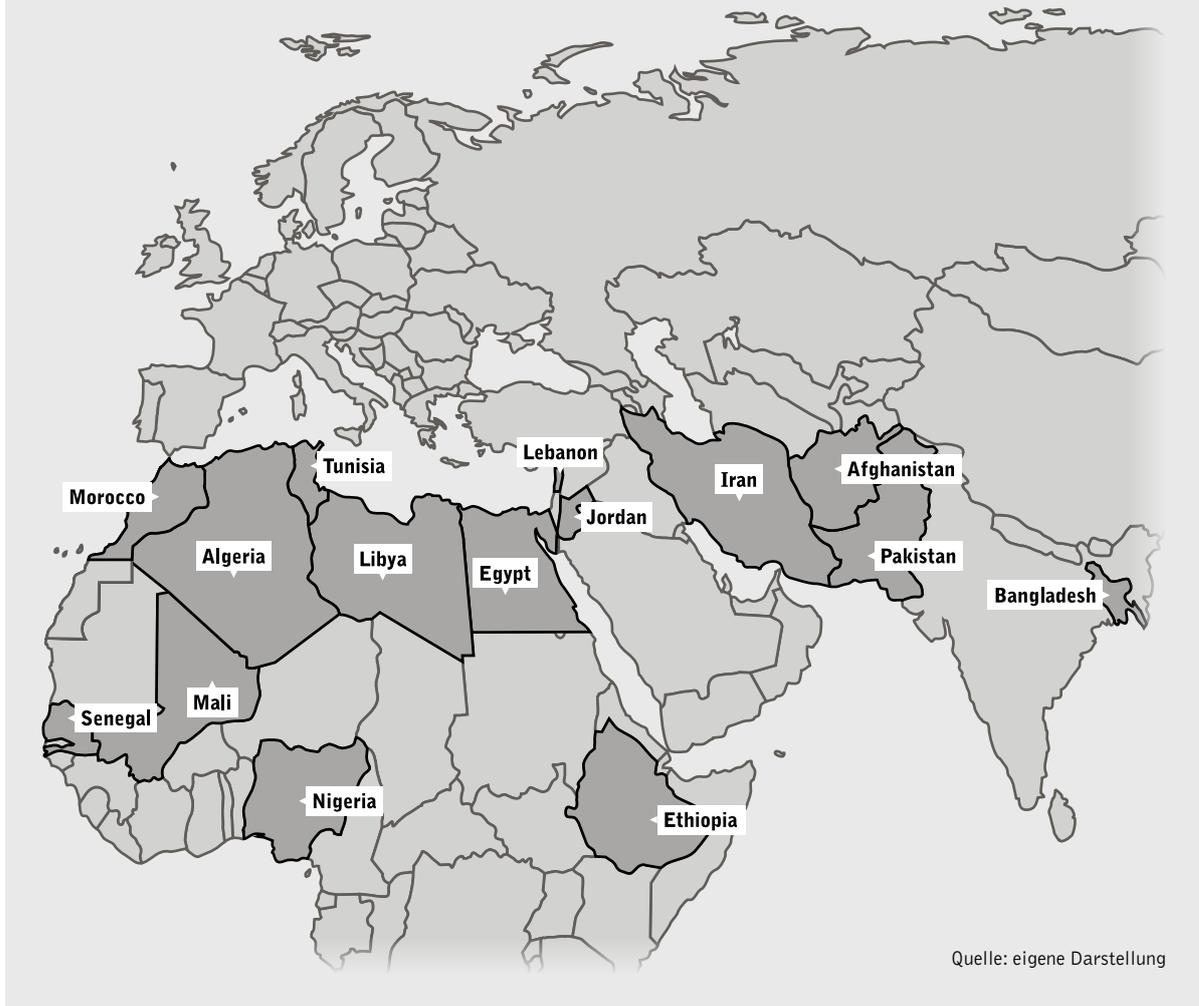
As a sixth element, the establishment of detention centres in some countries (such as Tunisia, Libya, and Egypt) has been put into play (see below).

11 On this see the overview from Amnesty International (as of 4 September 2017): <http://amnesty-sudan.de/amnesty-wordpress/2017/02/17/europaeische-migrationspolitik-der-khartoum-prozess/> (accessed 17 October 2017).

12 European Commission: «Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration», COM (2016) 385, 7 June 2016.

13 Germany is also active in Mali, with 650 Bundeswehr soldiers on the ground as part of the Multidimensional Integrated Stabilisation Mission of the United Nations in Mali (MINUSMA) and the EUTM Mali training mission to give Malian military forces the capacity to ensure the territorial integrity of the country and guarantee a safe environment.

Figure 1: Countries with which the EU is organising or planning Migration Partnerships



### Case study: Libya

Right now the EU is pursuing its goals the most persistently in Libya, a country that has been sinking into chaos since the fall of ruler Muammar al-Gaddafi and which must currently be regarded as a failed state.

The EU military operation SOPHIA was initially launched here in October 2015. First and foremost, it seeks to track down, intercept, search, and seize the boats of suspected traffickers on the high seas (and reroute them when possible). Refugees have also been rescued from ships in distress within the framework of SOPHIA,<sup>[14]</sup> but such rescues are not formally part of the military mandate of this operation.

14 [http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle\\_einsaetze/eunavformed/dereinsatzimittelmeer!/ut/p/zt/](http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle_einsaetze/eunavformed/dereinsatzimittelmeer!/ut/p/zt/) (accessed 17 October 2017)

The EU then turned its attention to Libya itself: in spring 2016, EU foreign ministers resolved to broaden the tasks included in the mandate of SOPHIA and to facilitate direct cooperation with the Libyan coastguard. The goal is clear: the EU intends to initiate action in Libyan coastal waters (Phase 2b) and then to later take that action directly into Libyan sovereign territory, including on land (Phase 3).

The EU is therefore no longer simply pushing ahead with the systematic build-up of the Libyan navy and coastguard, but also wants to participate in the construction of accommodation and detention centres for refugees and migrants.

In February 2017, the EU Heads of State and Government held an informal meeting in Malta. Wide-ranging decisions were made at this meeting:<sup>[15]</sup>

- Phases 2b and 3 of Operation SOPHIA were to be activated as soon as an effective «line of defence» (consisting of Libyan and European border control forces) had been drawn around the Libyan ports of departure.
- The North African component of the EU Trust Fund for Africa would be increased for the purposes of repelling refugees; similar capacity-building would occur for the Libyan coastguard and navy.
- Finally, the civil-military European Union Integrated Border Assistance Mission in Libya (EUBAM Libya) created in 2013 would collaborate with the two other EU missions, EUCAP Sahel Niger and EUCAP Sahel Mali, to assist the Libyan authorities with the closure of the southern and eastern borders of their country.
- This action was to be accompanied by increased deportations from Libya: an initial number of five thousand detainees in Libya were to be returned to neighbouring countries to the south.

But the most serious point is that the EU resolved in Valletta to establish «adequate reception capacities and conditions» for refugees (especially detention camps) – with the evident intention to send those seeking protection back to these places, even though the Federal Foreign Office itself has spoken of »concentration camp-like conditions» with reference to the accommodations of refugees in Libya.<sup>[16]</sup>

15 «Malta Declaration on the External Aspects of Migration: Addressing the Central Mediterranean Route», 3 February 2017. These EU plans have since been updated and refined: <http://www.state-watch.org/news/2017/jul/eu-council-central-mediterranean-implementation-plan-24-7-17.pdf> (accessed 17 October 2017). See also the Conclusions of the Foreign Affairs Council of 17.07.2017 (Council Document 11155/17, points 5, 9, 10, and 12).

16 Cf. Welt am Sonntag, 29 January 2017.

The Maltese EU Presidency's foray into redefining the «non-refoulement» principle of the 1951 Refugee Convention going forward, with consideration for «the circumstances prevailing in crisis situations» must also be understood in this context.<sup>[17]</sup> This too is a building block to be able to send those seeking protection back to Libya.

To this we must add that the EU has begun to regard the humanitarian rescues on the Mediterranean involving civil society as a «pull factor» that encourages people to flee.<sup>[18]</sup> As a logical consequence, the Libyan coastguard has been seizing the vessels of civil rescue missions on an almost regular basis for at least a year now – sometimes with shots fired – as refugees are drowning a few metres away.<sup>[19]</sup>

During this time, the EU and Libya have continued to put systematic pressure on the humanitarian organisations conducting rescues at sea: an attempt was made to force them to sign on to a code of conduct, for one, which would have significantly reduced their range of action. Even the Research Services of the German Bundestag came to the conclusion in two expert reports that this code would run counter to international law, since neither the EU nor any Member State is allowed to enact legally binding measures which would have the effect of «blocking» the coordination of emergency rescues at sea or rendering them futile.<sup>[20]</sup>

Furthermore, the EU-recognised and financed government of Libya announced that it would be setting up a search and rescue zone extending beyond its territorial waters. Rescue operations within this zone were to be controlled and executed exclusively by the Libyan coastguard – which would prevent any rescues at sea not authorised by Libya (especially those by humanitarian organisations).<sup>[21]</sup>

This course of action had the success that the EU and Libya had hoped for: humanitarian organisations announced that they would immediately halt their maritime refugee search and rescue operations because they would no longer be able to guarantee people's safety aboard their ships (both crew members and those seeking protection)<sup>[22]</sup>.

17 Malta Summit – External Aspects of Migration: <http://www.statewatch.org/news/2017/jan/External-aspects-migration-final%20copy-Malta.pdf> (accessed 17 October 2017).

18 See also the interview with Frontex director Fabrice Leggeri in Die Welt, 27 February 2017.

19 According to MONITOR on 15 June 2017.

20 Wissenschaftliche Dienste des Deutschen Bundestages: «Der italienische Verhaltenskodex für private Seenotretter im Mittelmeer Völker-, europa- und strafrechtliche Aspekte» (WD 2 – 3000 – 068/17 of 31 July 2017) and Wissenschaftliche Dienste des Deutschen Bundestages: «Der italienische Verhaltenskodex für private Seenotretter im Mittelmeer - Volkerrechtliche Aspekte» (WD 2 – 3000 – 067/17 of 31 July 2017).

21 On this see BT-Drs. 18/13559.

22 See Der Tagesspiegel, 14 August 2017.

Meanwhile Italy had already begun providing active bilateral support to the Libyan coast-guard in the country's sovereign waters in their campaign against the refugees arriving by boat. Finally, in late August, the Heads of State and Government of France, Spain, Italy, and Germany met at Versailles (France) with their counterparts from Niger and Chad, as well as a representative from the internationally recognised Government of National Accord in Libya. Further efforts were agreed upon there, in particular the closure of the southern border of Libya to migrants and refugees, combined with the building of detention centres in southern Libya and in the countries across its border to the south. The UNHCR was expected to carry out some form of recognition process for the refugees in these locations – and thus to create the preconditions for European countries (to whatever extent was decided) to actively accept refugees from these detention centres.<sup>[23]</sup>

### *The UN level*

Since September 2016, for the first time since the Refugee Convention was adopted in Geneva in 1951, over 150 states within the framework of a high-level UN summit have been debating the question of how they wish to deal with large movements of refugees and migrants. The New York Declaration for Refugees and Migrants was approved at the summit itself and contains a number of basic commitments on the part of the states in connection with refugee and migration flows and with the human rights of refugees and would-be immigrants. It also includes a clear acknowledgement of the international obligations of states in the context of flight and migration according to the 1951 Refugee Convention and human rights standards. The clear statement of the declaration (individual legal rights, plus international coordination and distribution of responsibility) is extremely important in view of those who would prefer to use international coordination mechanisms to replace the individual legal rights of access to the asylum procedures documented in the Refugee Convention.

But the summit also marked the starting point for negotiations on two global compacts:

- *The Global Compact for Safe, Orderly and Regular Migration*: Following on Sustainable Development Goal 10.7 of the 2030 Agenda for Sustainable Development («facilitate orderly, safe, regular and responsible migration and mobility of people»), this compact is intended to set the scene for comprehensive international cooperation on migration and mobility. The negotiations are to be coordinated by the International

23 The resolutions from Versailles can be found here: <http://www.elysee.fr/declarations/article/declaration-conjointe-relever-le-defi-de-la-migration-et-de-l-asile/> and here: [http://europa.eu/rapid/press-release\\_STATEMENT-17-2981\\_fr.htm](http://europa.eu/rapid/press-release_STATEMENT-17-2981_fr.htm). A more critical view: <https://www.amnesty.de/allgemein/pressemitteilung/tschad-gipfeltreffen-paris-zur-eu-fluechtlingspolitik-deutsche-und> (all accessed 17 October 2017).

Organisation for Migration (IOM). IOM, previously organised purely as an intergovernmental organisation, was formally brought closer to the UN for this purpose.<sup>[24]</sup>

- *The Global Compact on Refugees*: The framework of this compact entrusts the UNHCR with the task of developing a coordinating mechanism for situations of mass refugee flows. The reaction mechanism is intended to strengthen the principle of international responsibility-sharing, which also forms the foundation of the 1951 Refugee Convention. As part of this new compact, a claim is being asserted to change the previously very unequal distribution of the burden of refugee movements worldwide, especially between the countries of the global South and the global North. The participating countries were not able to agree in advance on a concrete global goal for the resettlement of refugees. Whether this can be worked out in the ongoing negotiations will be the measure by which the final document will be evaluated.<sup>[25]</sup>

It is not in fact intended that an international treaty with formal legally binding effect (of which the 1951 Refugee Convention is an example) be adopted at the end of this two-year negotiation process, only a «soft law» instrument. That so many countries should begin such negotiations in times as turbulent as these, however – especially with the declared aim of strengthening the protection of refugees and migrants worldwide and acknowledging the shared responsibility of all states for asylum seekers – is an occurrence whose importance should not be underestimated.

<sup>24</sup> Cf. Steffen Angenendt/Anne Koch: «Global Migration Governance» im Zeitalter gemischter Wanderungen – Folgerungen für eine entwicklungsorientierte Migrationspolitik», SWP-Studien, April 2017.

<sup>25</sup> An interim report from the UNHCR on these negotiations and other matters (as of 19 September 2017) can be found here: <http://www.unhcr.org/dach/de/17460-new-yorker-erklaerung-treibt-wichtige-reformen-zugunsten-von-fluechtlingen-voran.html> (accessed 17 October 2017).

## 4 The active reception of refugees as a means of shaping policy

The desire to control refugee and migration flows is omnipresent. The measures understood as germane to this purpose are always highly variable and sometimes contradictory, however: for one thing, combating the causes of flight is based on the view that people should be protected from having to leave their country of origin – but ultimately this often results in nothing more than a forward displacement of European external border protection (e.g., to Africa). For another, the outsourcing of European asylum procedures to reception camps in transit countries is being sold as an instrument to control refugee flows that is justified on humanitarian grounds – specifically, as an instrument to prevent refugees from arriving by boat.

An attempt to reduce the control of refugee and migration flows to concepts of «borders» and «isolation» is not only insufficient, but has also failed time and again in practice, for decades.

If we are ever to make any progress in this debate over control, it would seem helpful to adopt a different perspective: instead of taking only the situation and the goals of Germany as the reception country into account, forward-looking policy on refugees should also consider global aspects – including the interests, skills, and courses of action available to refugees – and recognise asylum seekers as acting subjects.

This makes sense not least because refugee and migration flows have fundamentally changed in recent years:

- The number of crisis areas devastated by war and civil conflict continues to increase, and with it the number of people forced to flee. New phenomena such as «climate refugees» are adding to this number.
- At the same time, the journeys refugees take are growing shorter in a globalised world that is becoming ever smaller.
- Finally, it has been impressive to observe how in recent years asylum seekers in the digital age have been able to plan their escape routes more independently through social media, and to change them more rapidly.

The present paper therefore endeavours to explore possible ways in which those seeking protection can be offered alternative courses of action on their often long escape routes. Depending on how people in flight react to new options presented to them, this could also change the immigration figures in European destination countries.

We would like to outline this approach using five basic control instruments:

- It is only possible to control migration flows if we can successfully contain or eliminate the problems that drive people out of their *countries of origin*. As has already been said, we are confronted with so-called mixed flows, in which refugees and would-be immigrants are commingled. People set off on their journeys for a wide variety of reasons, fleeing wars, dictators, political persecution, torture, and execution. But people also leave because climate change has robbed them of the basis of their existence. They are fleeing hunger and poverty, or because they see no future for themselves and their families (due to misgovernance, corruption, or absence of the rule of law). Frequently several of these motives are true for the same person. We believe that this policy area is in need of a fresh start, to be distinguished most importantly by the following: a multi-dimensional approach (namely, a coherent policy mix of civil crisis prevention, human rights policy, commercial and foreign trade policy, climate policy, internationally aware education and health policy, and sustainable immigration policy) should be used to respond to the bundle of motives common to immigrants and refugees as described above. In addition, all relevant actors should operate within an egalitarian structure that includes (diaspora) organisations of migrants, as well as civil society in the countries of origin. Furthermore, we need a change of perspective. Eliminating the economic causes of flight in origin countries will not eliminate migration itself, but can only change it: in place of a «migration of necessity», we will see labour migration – people will decide for themselves that they want and need to work in other countries. This is another aspect of what we call combating the causes of flight.
- Second, mass migrations also can be influenced through reasonable measures in the countries of first reception. In fact, many refugees seek protection in the regions neighbouring their country of origin. With this in mind, it would seem reasonable and necessary to support these first host countries in guaranteeing humane reception conditions – and thus offering refugees the prospect of integration as well. If this is to be achieved, those seeking protection must on the one hand have the opportunity at the very least to become registered as refugees in a first host country and to receive access to adequate material provisions locally.<sup>[26]</sup> It will also be necessary to develop national legislation for refugees in the countries concerned, as well as to construct an independent, human rights-oriented judiciary. The social framework conditions to integrate refugees (such as schooling and language education, as well as access to the labour market and to the benefits of the social security system where available) also must be created. Finally, we need a human rights-oriented and civil society-based infrastructure for the reception and advising of refugees. Ultimately, however, the commitment by a transit country to make these kinds of changes also depends on the willingness of

<sup>26</sup> Many developing countries have no reception centres. Access to national or UNHCR-run reception camps is available in countries such as Jordan, whereas Syrian refugees of war are largely left to their own devices when searching for shelter in Lebanon, for example.

destination countries in places such as Europe to actively accept appreciable numbers of refugees from such first host countries – as practical experience has shown.

- Border control measures are undoubtedly capable of halting or redirecting refugee and migration flows – partially and temporarily, at least. But it seems more than questionable whether these attempts are in fact reasonable or sustainable. It is also problematic from a human rights perspective if people are being detained and sent back by a border regime when they have a right to international protection because of (threats of) persecution, war, and/or inhumane treatment.
- But refugee movements in particular orient themselves based on the situation in the country of destination: the processes of secondary migration in the EU in 2015 showed quite clearly that people moved on from those EU states in which they could not expect a fair process of asylum or a humane reception, including protection from racist acts of violence.<sup>[27]</sup> Refugees also left destination countries that did not allow them to live with their children or their parents. When refugees evaluate their country of destination on the basis of whether democracy and the rule of law prevail there, whether they will have access to local family connections or a diaspora community, or whether they will have opportunities for education, these are legitimate considerations in that they are related to both the observance of constitutional standards and an improvement in individual chances for integration.
- Finally, one of the factors related to the country of destination that can especially influence migration flows is whether regular and thus safe access is available to migrant workers. An immigration law could open up prospects beyond the asylum system for people. In any case, a study by the BAMF in late 2016 on the level of education and work experience among refugees showed the following: 40 per cent of adult refugees had attended secondary school before fleeing to Germany, and around 12 per cent had attended higher education (22 per cent were uneducated or had only a primary level of education). Ten per cent had either started or completed vocational training. Roughly three-quarters of the refugees had accumulated multiple years of work experience – as manual labourers, white-collar workers, or in their own businesses. In addition, at least 20 per cent of the refugees claimed to have learned at least a little German before their journey to Germany, and a quarter felt they spoke good English.<sup>[28]</sup> All of these are qualifications that play a role in the examination of criteria for immigration, and quite a few refugees might have been able to avoid at least the perilous journey from their first host country to Europe if the possibilities for a legal labour migration process had been better known or less bureaucratic.

27 On this see [https://www.proasyl.de/wp-content/uploads/2016/07/PRO\\_ASYL\\_Ungarn\\_Unerwunscht\\_Broschuere\\_Jul16\\_WEB.pdf](https://www.proasyl.de/wp-content/uploads/2016/07/PRO_ASYL_Ungarn_Unerwunscht_Broschuere_Jul16_WEB.pdf) (accessed 17 October 2017).

28 Deutsches Institut für Wirtschaftsforschung: IAB-BAMF-SOEP-Befragung von Geflüchteten 2016: Studiendesign, Feldergebnisse sowie Analysen zu schulischer wie beruflicher Qualifikation, Sprachkenntnissen sowie kognitiven Potenzialen, 2017.

# 5 The active reception of refugees from third countries

One essential proposition is that in order to influence the movement of refugee groups through active reception of refugees, this openness to refugees must be important enough to be discernible from countries of transit. Three aspects would seem to be especially pertinent here:

- Quantitative dimension: The country must be in the position (and willing) to receive large enough quotas of those seeking protection.
- Temporal dimension: It would seem advisable to work with time-based quotas (stretching over a period of years), especially in cases of longer-lasting conflicts – not least in order to avoid generating a fear of missing out among migrants and refugees.
- Reliability: Trust is a value in itself – including in refugee policy. If people in flight conclude that binding reception commitments are not being kept, this will help to encourage them to make their own (perilous) way elsewhere, as in 2015.

Three different procedural channels are to be differentiated for issues concerning the active reception of refugees:

- Reception within the framework of distribution programmes (relocation)
- Reception without prescreening in a third country
- Reception following a prima facie procedure in a third country

Conclusions:

1. *Relocation*: In this situation we are not dealing with the active reception of protection seekers from third countries in the actual sense, but simply an internal (re)distribution of asylum seekers who have already reached EU territory.  
*Evaluation*: Relocation is a vital – albeit indirect – precondition for access to Europe by refugees: there is a direct interrelationship between an effective distribution mechanism and an ability or willingness among EU external border states to guarantee asylum seekers access and to actively receive additional refugees from third countries. Practical experience shows that even in cases of internal resettlement, the interests and needs of asylum seekers must be taken into account. Ignoring these

aspects – as has happened so far – only provokes unwanted secondary migration processes.<sup>[29]</sup>

2. *Programmes for reception from a third country without prescreening.* The temporary protection system, which was reflected in the EU «mass influx directive»<sup>[30]</sup> and in Section 24 of the German Residence Act, is particularly relevant in this context. *Evaluation:* The advantage of this programme is that it allows larger groups of refugees to be swiftly and unbureaucratically evacuated and admitted directly from abroad (even from perilous areas). One disadvantage of this approach: the uncomplicated use of this mechanism is overshadowed by the bureaucracy involved in enacting it in Brussels, so much so that it has not yet been applied. An even more important disadvantage: the state is «paid» for its willingness to accept larger groups of refugees (without prescreening) through the categorical exclusion of any prospects for permanent residence. In light of this, we can only conditionally recommend this approach.
3. The four *Instruments for reception from a third country following a prima facie procedure* have greater relevance in practice and must therefore be considered somewhat more thoroughly.
  - a) *Humanitarian Admissions Programmes* (such as HAP Syria [2013-2016] or the HAP for local staff in Afghanistan [from 2013]). Advantages: if the political will is there, these programmes also allow the comparatively uncomplicated admission of larger groups of refugees. This is particularly relevant when larger groups of refugees are already residing in a country and their relatives are refused permission to join them because of a narrow interpretation of the term «family». A selection process can also be carried out in a third country using admissions criteria that can be independently developed by the destination country. But the fact is that this instrument in particular fails to focus on refugees; instead, opportunistic foreign policy considerations of the destination country will regularly dominate.<sup>[31]</sup> *Evaluation:* This instrument can only be recommended with reservations. For example, refugees must have prospects for permanent residence.
  - b) *Embassy processes/Humanitarian visas.* These give persons seeking protection the possibility to either have their applications for asylum filed and processed at the foreign diplomatic mission of a destination country, or to solicit a humanitarian visa so that they can go through an orderly asylum procedure in the destination country.

<sup>29</sup> EU Member States currently count their reception of the family members of refugees from Turkey or Greece against their (political) resettlement and relocation quotas: a fundamentally flawed method, since family reunification is a legal entitlement arising directly out of the German Basic Law and the ECHR and therefore cannot be subject to politically motivated control (resettlement/relocation).

<sup>30</sup> Council Directive 2001/55/EG.

<sup>31</sup> BAMF: Resettlement und humanitäre Aufnahme in Deutschland, Working Paper 68, Nuremberg 2016.

This process has the advantage that especially vulnerable groups of refugees who have no (financial) means of escape can be targeted for admission. It could also cover internally displaced persons who do not fall under the UNHCR's protection mandate because they have not abandoned the country where they face persecution.

Most of the experience with embassy processes has so far come from Switzerland, which for some time offered such a procedure.<sup>[32]</sup> Results have shown that it was only able to open up additional opportunities for access to a numerically small group of those seeking protection.

Embassy processes can entail goals that conflict with the diplomatic tasks of the consular posts in the countries of origin: as long as they are not set up to be legally binding, embassy processes risk being practically irrelevant, as demonstrated by the existing German regulations on humanitarian admissions from abroad. A legally binding arrangement providing access to an individual process verifying the need for protection, on the other hand, would give rise to significant capacity problems in the diplomatic missions (at a time when at least Germany's diplomatic missions are already deliberately increasing their processing capacity in order to promptly administer the applications from those who have a pre-established right to family reunification). Besides, most states would likely try to seal off their diplomatic missions as perfectly as possible against those seeking protection, such that they would not even be able to step onto embassy soil.

*Evaluation:* Although embassy processes can and must be possible in principle, their success very much depends upon the political will of both the country operating the embassy, and the state where the diplomatic mission is located. An embassy procedure may be suitable in individual cases. But embassy processes do not seem to be sufficient as an instrument of reliable policy that must regularly handle large groups of refugees.

- c) *Reception centres for those seeking protection in third countries/Bilateral agreements:* Right now there are again discussions about establishing EU reception centres in third countries. These would make it possible to apply for asylum from outside the EU and thus help obviate lengthy and dangerous escape routes. But this approach leaves fundamental questions unanswered: Is it simply a complement to existing processes? Or is it meant to pre-empt the process of asylum in an EU country? A procedure replacing the process of asylum in the EU is to be repudiated out of fundamental concerns: in camps such as these, outside the EU, it is not possible to carry out a process of asylum compliant with European and human rights law, nor for courts to review actions taken by the authorities: Which law actually applies on the ground? How should the need for protection be measured? Who guarantees security in centres of this kind? It is also unclear how those seeking protection should be dealt

<sup>32</sup> <http://www.nzz.ch/schweiz/nutzen-und-leerlauf-der-botschafts-asylverfahren-1.18080090> (accessed 17 October 2017).

with if they receive a positive response to their application and yet are not expeditiously admitted to the EU. And what about those others whose applications are refused – to which court should they appeal? Should they be deported from the centres, and if so, by whom and under which law? What happens to those whose country of origin will not or cannot accept them back, or who have no obvious country of origin? And how should those refugees be dealt with who do not want to make use of such reception centres? Camps full of misery and hopelessness are a real concern (such as those Australia has created on Nauru and in Papua New Guinea). This does not seem like a reasonable instrument to enable the admission of refugees to the EU.

d) *The Resettlement Programme of the UNHCR*. Here resettlement refers to relocating refugees from a state where they have already sought protection to a third state that is willing to receive them. Alongside voluntary repatriation to the country of origin and integration in the country of first arrival, resettlement represents one of three durable solutions to the plight of refugees. The UNHCR considers resettlement to be an instrument proven over decades to guarantee protection and maintain international solidarity among the contracting states. Resettlement has the following objectives:

- Durable options for the protection of refugees: Resettlement enables legal and safe entry without the need for refugees to resort to perilous escape routes or depend on human traffickers.
- Guaranteed protection for particularly vulnerable groups of refugees (such as the traumatised or disabled, children and young people, and women and girls in special need of protection).
- Sharing of responsibility among the destination countries.
- Easing of the burden on first host countries.

Unlike any of the other admissions programmes, this programme is handled by the UNHCR as the central actor, a body which in matters of resettlement is beholden only to international refugee law, especially the 1951 Refugee Convention.

Participation in the resettlement programme by host countries is voluntary. This applies both to determining the size of the admissions quota and to issues such as preferences regarding the countries of origin of the refugees to be admitted.

The UNHCR not only verifies that these parameters are legitimate and non-discriminatory, but also ensures that the actual purpose of resettlement is not undermined.

This process has one key benefit for newly admitted refugees: because they have already been recognised by the UNHCR as refugees prior to resettlement, they immediately receive

permanent resident status in the host country and thus clear prospects for putting down roots there.

The UNHCR's annual projection of the need for resettlement places has for years exceeded the number actually made available by the international community.<sup>[33]</sup> For 2017, the UNHCR determined that over 1.19 million resettlement places would be necessary, but only 190,000 places (just 16 per cent) were actually offered, in approximately 37 host countries.

The most important host countries in 2015 were the United States (82,000), Canada (23,000), and Australia (10,000). Norway, in fourth place, was the top European country at four thousand. Germany took tenth place with around a thousand refugees.

Now that US President Trump has announced his desire to cut the US resettlement quota in half to 45,000,<sup>[34]</sup> we should be worried that conditions for the active reception of those seeking protection could worsen.

The interim conclusions given this background are as follows:

- Purpose-built reception centres in third countries geared towards pre-empting the process of asylum in the EU are to be rejected (with the positive exception of the UNHCR resettlement process).
- All other instruments seem more or less reasonable.
- But the majority of admissions instruments discussed above are likely to apply only to quantitatively small groups of refugees.
- The resettlement programme of the UNHCR appears to be the instrument of choice from a quantitative perspective, as well as because it guarantees the rights of refugees.

The refugee admissions programme coordinated by the UNHCR does more than just create safe corridors for those seeking protection. With the aid of binding and generous admission commitments spread over many years,<sup>[35]</sup> this approach also helps to increase predictability

<sup>33</sup> UNHCR: Projected Global Resettlement Needs 2017, <http://www.unhcr.org/protection/resettlement/575836267/unhcr-projected-global-resettlement-needs-2017.html> (accessed 17 October 2017).

<sup>34</sup> The Guardian, 28 September 2017.

<sup>35</sup> The Robert Bosch Expert Commission to Consider a Realignment of Refugee Policy recommended in 2016 that several hundred thousand resettlement places should be allocated in the EU for 2016 and 2017 («Chancen erkennen – Perspektiven schaffen – Integration ermöglichen», Stuttgart 2016, p. 56ff.).

in the reception of refugees, benefiting not only asylum seekers, but also their host societies.

One final thought at this juncture: for the UNHCR, the resettlement process is primarily an instrument of refugee protection. It also directly serves to facilitate the admission of refugees in special need of protection. All the same, it is in principle possible for a host country to establish additional selection criteria (perhaps with an eye towards the process of integration), such as language ability and level of education. The United States does so regularly. And Germany will now take into account the much cited «ability to integrate» in its reception screenings – as stated in the admissions commitment of 4 April 2016 by the Federal Ministry of the Interior.<sup>[36]</sup> Given this context, we would urgently advise that the utmost caution and sensitivity be exercised on this point. Preserving (and not undermining) the actual objective of the resettlement programme in the function it has had until now (namely, facilitating the admission of those refugees in special need of protection) is and must remain the standard of comparison.

36 <http://www.unhcr.org/dach/de/faq-resettlement> (accessed 17 October 2017).

## 6 The resettlement process and the whole-of-government approach

We can inherently assume that a host country like Germany could also benefit from an expanded resettlement process of this kind. The process could at least level out the often sizeable (crisis-induced) fluctuations in the numbers of arriving refugees, for example. This is especially useful for keeping the reception infrastructure going at a technical and human level, ensuring a basic workload in the long term for municipalities and sponsoring organisations.

The resettlement process is also open to new and creative approaches. An example is the way Canada includes hosting offers from civil society («private sponsorship») as part of its national resettlement programme. This approach allows private groups and civil society organisations to initiate and organise resettlements themselves, with their own funds. This seems interesting in terms of increasing the likelihood of integration, since such voluntary reception offers by private persons could be expected to lead to a direct, mutual, and high motivation to integrate.

Reception programmes of this type are unknown in Germany,<sup>[37]</sup> which so far has seen only the «Save Me» campaign.<sup>[38]</sup> But this was and is a major campaign instrument, albeit a humanitarian one. It was used to exert political pressure at the municipal level, in some instances successfully, to generate a slight increase in Germany's reception numbers. An independent approach has not yet been developed from it, however.

All the same, it would be worthwhile to offer the municipalities a new, self-sufficient role within this framework:

- Municipalities could now (unlike before) adopt the role of advertising their willingness to host, thus providing them an independent incentive rather than compelling them to respond to requirements.
- To a limited extent, then, municipalities could also exert their own influence on *when* they wished to actively receive *which* refugees – which would directly encourage the likelihood that the newly settled refugees would be integrated into the community.

<sup>37</sup> By contrast, the EU Commission reported in a press release of 27 September 2017 («The State of the Union 2017») that the European Asylum Support Office (EASO) had attempted to coordinate pilot projects with interested Member States for private resettlement sponsorships of this type.

<sup>38</sup> <https://www.proasyl.de/thema/aufnahmeprogramme/save-me-kampagne/> (accessed 17 October 2017).

- Finally, it seems reasonable to investigate whether and to what extent it is technically and legally possible to offer financial incentives (e.g., in the form of aid for establishing and maintaining an integration infrastructure) to reception-friendly municipalities in return for declaring municipal admissions quotas. We should also consider how much independent access these municipalities would have to funding from the Asylum, Migration and Integration Fund (AMIF) of the European Commission.<sup>[39]</sup>

Such attempts to give municipalities an active role in reception, however, should not be allowed to undermine the fundamental individual right to asylum (by using diversion to municipalities as a means of setting an upper limit on admissions)<sup>[40]</sup>.

Neither should national programmes for active refugee reception be made dependent upon the extent to which municipalities signal their ability to take people in. Overriding national considerations must be taken into account here. Protection must be given to those who need it. A municipal reception programme should be an instrument that functions alongside an existing resettlement programme – but does not replace or undermine it. If the active reception of refugees at the municipal level were in fact only to occur voluntarily, it should never get to the point where continuing federal reception commitments might be undermined or delegitimised.

But it would make sense to encourage, empower, and support municipalities in taking on a new role and meaningfully carrying it out – and to utilise the resulting opportunities for the self-initiated active reception of refugees. If this is to be achieved, however, a structured and goal-oriented dialogue and exchange of experiences is necessary between the Federal Government, the states, and the municipalities. For it is well known that synergistic effects do not appear out of nowhere.

<sup>39</sup> Germany will receive a total of 247 million euros from the AMIF by 2020 for refugee reception (165 million for relocation and 72 million for resettlement cases). But the municipalities where the reception will occur do not receive this funding; instead, it goes directly to the federal budget.

<sup>40</sup> Yet the «A2 Plan» of CDU Deputy Federal Chairwoman Julia Klöckner proposed exactly this during the Rheinland-Palatinate election campaign in 2016; see Die Welt, 28 January 2016.

## 7 Concluding remarks: On the relationship between the human right to asylum and the instrument of resettlement

The resettlement approach is undoubtedly astute and reasonable. Its effects on control and therefore its success depend crucially on the size of the programme's footprint. In many EU countries, including Germany, its capacity is much too small.

- Resettlement is understood as a voluntary reception offer by a country in the spirit of international responsibility-sharing – but ultimately it is determined by the policy decisions of each respective host country.
- The right to asylum and to protection from persecution, by contrast, is a human right that grants refugees an individual and actionable legal claim to seek protection in countries like Germany (as long as the protection is justified). This human right – like many other fundamental rights – was hard-won and hard-earned.

Commitment to a generous resettlement programme can only be understood as a voluntary additive to the existing refugee protection of the 1951 Refugee Convention, including family reunification. Resettlement must not be allowed (or intended) to replace the fundamental right to protection for refugees, that is, the possibility of spontaneous flight and the legal claim to an individual process of asylum in the reception country.

It is to be expected that in the coming years, Europe will attempt to also use resettlement as a means to control refugee movements.<sup>[41]</sup> A strengthened and reliable European commitment is urgently needed and a central element of international responsibility-sharing. But under no circumstances may this be bought at the price of preventing spontaneous refugee flight to Europe through the forward displacement of border protection and the use of agreements with transit countries to seal off entry. Those seeking protection should only be directed to another country if and when there actually exists in that country effective access to refugee protection in the spirit of the 1951 Refugee Convention. The principle

<sup>41</sup> As an example, in July 2017 Chancellor Angela Merkel offered United Nations High Commissioner for Refugees Filippo Grandi a total of 40,000 resettlement places in Europe to resettle refugees stranded in Libya (<https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2017/08/2017-08-11-pk-bk-grandiswing.html?sessionid=425B0C0A2CB9B-1AF08910D3B066B48B1.s3t1> [accessed 17 October 2017]; see also BT-Drs 18/13638). The EU Commission, for its part, announced in its «Communication on the Delivery of the European Agenda on Migration (COM (2017) 558 [of 27 September 2017], p. 18) that by October 2019 it would accept another 50,000 people in need of protection (from Turkey, the Middle East, North Africa, Libya, Egypt, Niger, Sudan, Chad, and Ethiopia), in addition to the 14,000 resettlements already agreed to in summer 2017 as part of the resettlement programme – an offer that the Commission also wants expressly to be understood as support for the UNHCR's plans for a «temporary mechanism for emergency evacuation from Libya».

must apply that agreements improve possibilities for protection, not limit them. Resettlement *without* the individual right to asylum, including family reunification, would run counter to human rights and refugee law.

As right as it is to ease the burden using admission quotas or resettlement (both for the reception countries and for the refugees in transit countries) and to want to influence refugee flows by demonstrating new options for action, we must not allow fundamental rights to be thrown overboard in a crisis situation.

- The recourse to a human right cannot be made dependent on how many people avail themselves of it.
- Human and fundamental rights are like friendships: they only prove their real value in times of crisis – which is exactly why they were created.

Without the fundamental right to asylum and a human rights-based approach, anyone who really wants to support people in search of protection will fail.

## 8 Recommendations for action

In the field of refugee protection, enhanced and human rights-centred international co-operation makes sense. The active reception of those seeking protection is an indispensable instrument in this context to give these people additional new prospects for action on their lengthy escape routes – away from more perilous paths. The following recommendations for action seem here to be the most pressing:

1. Implementation by the Federal Government of a reception commitment calculated over a period of years and significant in scope within the framework of the resettlement approach of the UNHCR. German municipalities in particular should be encouraged, empowered, and supported in this context to make better future use of the opportunities resulting from their self-initiated active reception of refugees within the framework of resettlement.
2. At the same time, it is reasonable and necessary not to restrict the protection of the human right to asylum or the granting of deportation protection (from the 1951 Refugee Convention and the ECHR). As an example, the German fundamental right to asylum should not be converted into an «institutional guarantee». Access to a fair process of asylum and to refugee status may not be restricted in national or European law (e.g., in the EU-Turkey deal). Third-country reception centres that are expected to pre-empt European asylum procedures are rejected.

We also declare the following recommendations for action:

3. Development of a refugee policy that takes the perspective of those seeking protection. Systematic identification and consideration of the interests, skills, and scope of action of refugees.
4. Implementation of an equitable sharing of responsibility for those seeking protection within the EU; safeguarding of a just, human rights-based, and efficient process of asylum; creation of needs-minded integration offers for those seeking and those entitled to protection – as well as an unequivocal commitment by all Member States to oppose racism and Islamophobia.
5. Respect for human rights within migration partnerships. End cooperation with governments whose leaders are accused or wanted by the UN for crimes against humanity or war crimes. Development aid must not be made dependent on the willingness of recipient countries to accept the forward displacement of EU external border protection.
6. Support for first host countries in guaranteeing humane local reception conditions for refugees and offering them prospects for integration in the first host country.

7. Resumption of humanitarian reception programmes (at federal and state levels) with the possibility of permanent residence.
8. Enabling of unrestricted family reunification, including for refugees with subsidiary protection.
9. Adoption of an immigration act: newly created opportunities for labour migration should be better publicised, including in the first host countries of refugees. In addition, there should be local offerings of counselling and certification for the recognition of foreign educational qualifications.

*Claudia Vollmer, Jan Schneider and Rainer Ohliger*

# POTENTIAL FOR RETURN POLICY REFORM: MAKE PROCESSES TRANS- PARENT, EMPHASISE HUMANITARIAN CONDUCT, BOLSTER VOLUNTARY RETURNS

# 1 Introduction

The sharp increase in the number of petitions for asylum has made the controversial question of returning unsuccessful asylum applicants and terminating their residence into a major policy issue. In the strict and binary logic of asylum law, recognition as a refugee or person otherwise entitled to protection is followed by the granting of a residence permit – whereas non-recognition is followed by an obligation to leave the country or be deported. This dichotomous portrayal does not always conform to the social and legal reality, however. What is the current legal, political, and social reality of return and deportation policy? What challenges exist? How much room for manoeuvre is there? Where is the potential for reform and modification?

## Legal framework and political terrain

A negative decision on asylum requires that an applicant for asylum leave the Federal Republic of Germany unless a right to residence can be justified for other reasons. A deadline for voluntary departure is set, usually thirty days, and the threat of deportation exists under §§ 58 and 59 of the Residence Act (AufenthG), and § 34 of the Asylum Act (AsylG). Terminating the residence of unsuccessful asylum applicants is part of satisfying the principle of the rule of law and the consistent application of the law on asylum in order to maintain its credibility. On the other hand, the obligation to return sometimes falls upon people whose residence has long been legally tolerated in Germany, who are comparatively well integrated structurally, socially, and habitually, and for whom a return to their country of origin represents an enormous individual hardship. In addition, there are numerous obstacles to deportation, whether domestic or related to the country of destination, which stand in the way of terminating residence. The question of how to organise the return of people whose applications for asylum have been turned down and of who is to be deported where, under what conditions, is a controversial subject: repatriating those under removal orders is polarising, divides political parties, and has the potential to split the local society, such as when community initiatives will fight for people's right to remain even as staff from the municipal immigration office are expected to enforce the removal process.

It is in light of precisely this federally formulated domestic policy goal – to more consistently terminate the residence of rejected asylum applicants – that the controversy has become massively more important. On the one hand, this brings into focus the question of the responsibilities for termination of residence and the long-lamented shortcomings in the

enforcement of removals by the German federal states:<sup>[1]</sup> reports have often painted a picture of hardly any removals taking place and of hundreds of thousands of people remaining in Germany illegally.<sup>[2]</sup> The actual situation is a little more nuanced than that, as a look at the figures shows (see the following section). On the other hand, there are various legal possibilities to acquire a (temporary) right to remain, even in cases where an application for protection has been refused. Requests for individual assessment are high in such cases, and the powers of discretion wide. Despite new regulations in the AufenthG on the right to remain, regardless of the reference date, the authorities will often still issue a temporary «toleration certificate» (*Duldung*). In addition, there is sometimes suspicion that unsuccessful applicants for asylum are only granted residence because of political pressure, and that this could become a pull factor. This is all the more true of calls for «lane changes» (*Spurwechsel*) *de lege ferenda*, for example in cases of particularly qualified or well-integrated applicants not recognised as being in need of protection.<sup>[3]</sup>

The standards developed in recent years in European and national law offer a range of options for dealing with people whose asylum assessment ends with a rejection. In current practice between the German Federal Government and the states, such standards receive rudimentary consideration at best. An approach geared towards clarity, transparency, and sustainability can better serve the political-social reality and would be more humane than Germany's present return policy – with its sometimes stark differences between the states – not to mention more effective.

- 1 See the report by the Vollzugsdefizite (Enforcement Deficits) subgroup, on the evaluation of the report of April 2011 on the problems in the practical implementation of departure demands and enforcement measures by the immigration authorities; Bundesamt für Migration und Flüchtlinge: Umgang mit abgelehnten Asylbewerbern in Deutschland. Fokusstudie der deutschen nationalen Kontaktstelle für das Europäische Migrationsnetzwerk (EMN), Working Paper 69 of the BAMF Forschungszentrum, Nuremberg.
- 2 [http://www.bild.de/news/inland/asyl/550-000-abgelehnte-asylbewerber-leben-in\\_ag\\_dp-47955642.bild.html](http://www.bild.de/news/inland/asyl/550-000-abgelehnte-asylbewerber-leben-in_ag_dp-47955642.bild.html), accessed 15 November 2017.
- 3 On this see Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR): «Spurwechsel» aus der Asyl- in die Erwerbsmigration. Chancen und Risiken. Position paper, 19 July 2017, Berlin.

## 2 Background: A quick look at numbers, data, and facts

A quick look at the data on termination of residence shows a different reality as concerns voluntary returns and deportations than does the political debate, with its often heavy focus on deportations. The currently available data on voluntary departures are incomplete, however. The statistics collected in each of the sixteen federal states on voluntary or assisted departures have not yet been processed according to common standards in order to improve the overall return statistics. We can likewise assume substantial defects in data quality with regard to the Central Register of Foreign Nationals (AZR) as a source of statistical information on foreigners under removal orders.<sup>[4]</sup> This deficit tends to lead to an overestimation of the number who are required to leave. These faults in the data are currently being remedied by the Commissioner for Refugee Management, appointed by the Minister for the Interior (BMI) and deployed at the Federal Office for Migration and Refugees (BAMF), who has compiled a manual to improve the quality of the AZR data.<sup>[5]</sup> For the time being, however, there is no alternative to the use of the statistics generated from the AZR, which the BMI and the BAMF publish as part of studies and reports, as well as in answers to parliamentary questions.

### The most important form of residence termination: Voluntary departure

In 2016, almost eighty thousand people left Germany as part of deportations or in voluntary returns funded through the REAG/GARP programme (Reintegration and Emigration Programme for Asylum-Seekers in Germany/Government Assisted Repatriation Programme). Of these residency terminations, around 25,000 were deportations and 54,000 were funded voluntary departures. This means that the number of people who made use of financial support to return voluntarily to their country of origin was already twice as large as the number of deportations. To this must be added the voluntary departures without financial support, the volume of which has so far not been subject to data collection. Deportations took place predominantly by air (23,886 people) and to a lesser extent by land (1,376 people) or by sea (113 people). A good half of the deportations in 2016 were collective deportations (13,464 people). Of those forced to return, 66 per cent came from Albania (6,035), Kosovo (5,037), Serbia (3,776) and Macedonia (1,968). The majority of those

4 See «Große Lücken im Ausländer-Register», Süddeutsche Zeitung, 4 August 2017.

5 Bundestagsdrucksache (BT-Drs.) 18/12725.

departing voluntarily (about 66 per cent) also came from the non-EU countries of southeastern Europe.<sup>[6]</sup>

The number of people in 2016 who left Germany voluntarily or were deported rose in comparison with 2015 (2015: about 71,000 people), echoing the overall increase in asylum seekers and return agreements with the non-EU countries of southeastern Europe. However, the number rose only in absolute terms, not relative to the strong absolute increase in the numbers of rejected asylum applicants.

## Potential for deportations from Germany: Smaller than assumed

According to the AZR, at the end of 2016 there were 207,484 people living in Germany under removal orders. Of this number, however, a good 153,000 had received toleration certificates, meaning that their deportations had been temporarily suspended because of the wide variety of obstacles under § 60a AufenthG. The number of people with toleration certificates stayed almost constant between 2015 and 2016; only between 2014 and 2015 was there a registered increase of 37 per cent (from 114,000 to 156,000 people). As of late 2016, nearly a fifth (28,000) of people with toleration certificates had maintained them for more than six years («chain toleration»). Also in late 2016, only a little over five thousand people had been able to make use of the possibility, in existence from 2015, for those with toleration certificates to achieve secure residence status in the case of «sustainable integration» (§§ 25a and b AufenthG). Most of the people in this group were young people and adolescents, for whom the legal hurdles are lower.<sup>[7]</sup>

Although the BAMF issued nearly 174,000 negative decisions on asylum in 2016 (after about 91,500 in 2015), the number of removal orders rose only slightly in the first months of 2017: 220,000 people as of 30 April 2017. In only about 103,000 cases (47 per cent), however, did these involve people whose application for asylum had been rejected;<sup>[8]</sup> 158,000 (72 per cent) had toleration certificates.<sup>[9]</sup> Only a scant 62,000 were under direct removal orders, that is, they were not in possession of a toleration certificate giving them

6 An additional aspect of terminating residency that will not be further considered here involves return transfers back to other EU Member States in accordance with Dublin Regulation guidelines (Reg. 604/2013 of 26 June 2013).

7 BT-Drs. 18/11101.

8 This percentage does not include so-called «Dublin cases» or unaccompanied minors, both having by definition an asylum background.

9 BT-Drsn. 18/12679 and 18/12725.

temporary leave to remain.<sup>[10]</sup> Less than half of this number (27,093) under immediate removal orders were persons who had applied for asylum at the peak of the refugee immigrations in 2015 and 2016.<sup>[11]</sup> According to the AZR, then, the actual number of «potential» deportations pending immediate enforcement by the immigration authorities is vastly below the figures regularly cited in public and policy discourse relating to the deportation of unsuccessful asylum applicants. Combined with the statistics on returns, this also puts into perspective the perception that German authorities are unsuccessful or lax in enforcing return orders; on the basis of an analysis of Eurostat figures, Germany looks like the repatriation champion of the EU.<sup>[12]</sup>

## Procedural backlogs in the administrative courts: The right to residence in standby mode

In the discussion of return and remain prospects, it should also be kept in mind that many unsuccessful asylum seekers file suit against their rejection decree from the BAMF. The number of pending asylum processes in the courts that imply continued residence permits (see Section 5), has risen sharply. By late February 2017 it stood at almost 188,000 (a 22 per cent increase over the 154,519 pending processes at the end of 2016).<sup>[13]</sup> Legal actions were filed in 174,570 cases in 2016, but only 70,904 suits were decided: 22,357 cases (31.5 per cent) were dismissed, 9,299 actions (13.1 per cent) were successful (refugee protection under the 1951 Refugee Convention was granted in 7,427 of these cases, a right to asylum under the German Basic Law in 62 of these cases, subsidiary protection in 500, and a ban on deportation established in 1,310 of them). The rest (39,248) were settled in other proceedings. As a result of the growing backlog in the administrative courts, which urgently require marked increases in space and staff capacity,<sup>[14]</sup> proceedings are becoming ever more protracted. This brings with it various problems: asylum seekers with middling or low prospects for remaining face longer exclusions from integration measures; at the same time, some of them have already taken significant steps towards integration on their

10 The only document they receive is a certificate giving the deadline for departure according to § 60 Abs. 6 AufenthG: the «Border Crossing Certificate», which includes a form section where the German authorities will later document the completed departure.

11 The remaining cases, about 35,000, involve asylum applications filed years earlier, as well as individuals with expired visas or resident permits (overstayers); these also include some 10,000 foreign nationals from EU Member States (see BT-Drs. 18/11885: 16).

12 Cf. Sergo Mananashvili, EU's Return Policy: Mission Accomplished in 2016? Reading Between the Lines of the Latest EUROSTAT Return Statistics, ICMPD Policy Brief, May 2017.

13 BT-Drs. 18/12623: 59.

14 On this see, e.g., the situation descriptions and projections in the *Süddeutsche Zeitung* of 15 July 2017, «Flüchtlingspolitik: Längst nicht über den Berg» and on FAZ.net of 14 August 2017, «Asylverfahren bringen Verwaltungsgerichte ans Limit».

own initiative – yet must still run the risk of a legal rejection of their complaint after proceedings stretching over many years.

Even though the recorded data is currently incomplete, especially on voluntary departures, the available statistics show that voluntary returns are the more important model of repatriation compared to deportation – and probably also more successful. It can also be assumed that making the allocation of funds for voluntary departure a priority would achieve significant cost savings for the public purse.<sup>[15]</sup> Above and beyond financial arguments, however, the precedence of voluntary return comes first and foremost from the requirements and regulations of EU law, as well as the national legal system.

15 According to press reports, the consultancy firm McKinsey in its 2016 BAMF-commissioned report on return processes and their potential for optimisation came to the conclusion that the average cost of a police-enforced repatriation is about 1,500 euros per person, whereas voluntary return on the basis of the central federal-state repatriation programme known as REAG/GARP costs only about 700 euros (cf. Welt, «So soll das Rückkehrmanagement 2017 funktionieren», 18 July 2017).

### 3 Framework conditions: Human dignity and the protection of fundamental rights as a guideline

Respect for human dignity, the protection of basic rights, and proportionality are fundamental requirements under the rule of law, and are equally valid when terminating the residence and managing the return of those under removal orders.<sup>[16]</sup> The imperative to respect the dignity of the individual is enshrined in German constitutional law as well as European law.<sup>[17]</sup> For Pope Francis, human dignity was the key concept in the context of the influx of refugees.<sup>[18]</sup> As understood in the German Basic Law, respect for human dignity means not regarding people as objects, but rather enabling their autonomy, which is the «core of human dignity».<sup>[19]</sup>

The orientation towards the individual as a legal person and entity rules out administrative action that is based purely on generalised membership in a group or on administrative classifications. This especially applies when areas protected by fundamental rights are affected. Treating people seeking protection differently depending on their prospects of remaining<sup>[20]</sup> is thus understandable in the spirit of practical administrative enforcement, but problematic in contexts protected by fundamental legal rights.<sup>[21]</sup>

- 16 On human dignity in the refugee crisis see also the article by the same name («Menschenwürde in der Flüchtlingskrise») by Walter Frenz in: *Zeitschrift für Ausländerrecht und Ausländerpolitik* 7/2016, p. 223-226.
- 17 Art. 1 Charter of Fundamental Rights of the European Union (ECFR) of 12 December 2007 (OJ C 303/01, p. 1).
- 18 See citations and evidence in Frenz, op. cit., p. 223.
- 19 Stern, *Staatsrecht* III/1, 1988, p. 31.
- 20 See also the policy recommendation from Working Group 3 of the Expert Commission, by Daniel Lede Abal, Dagmar Dahmen, Miriam Koch, and Filiz Polat: Die «Bleibeperspektive» und ihre Folgen für die Integration von Geflüchteten.
- 21 For example, the Expert Council of German Foundations on Integration and Migration (SVR) describes hierarchisation, particularly with regard to integration into the labour market, as «understandable in terms of fiscal policy, but not reasonable in terms of integration policy»; the exclusion from assistance measures is represented as «factual discrimination against people from unsafe countries of origin», many of whom «have very good individual chances of becoming recognised». (SVR, *Chancen in der Krise: Zur Zukunft der Flüchtlingspolitik in Deutschland und Europa*, Annual Report 2017, p. 154).

## Administrative action that conforms to fundamental rights – including removal orders

Fundamental rights provide special protection for the spheres of life and health, marriage and family, and – deriving from Art. 1 Para. 1 of the German Basic Law – a minimum of participation in societal, cultural, and political life.<sup>[22]</sup> These guarantees of protection are also to be respected in the enforcement of removal orders and safeguarded when structuring the management of returns. Administrative action that is geared towards the principle of proportionality must be necessary, appropriate, and proportionate, and must therefore not impose a needless or excessive burden on the persons affected.<sup>[23]</sup> The imperative of necessity is violated when the goal of the measure can be achieved by an equally effective means that is less restrictive of the fundamental right in question.<sup>[24]</sup> The discretionary power built into legal regulations is also to be used within this framework and should be applied in conformity with fundamental rights; the available room for manoeuvre should be used. For example, it is settled case law that the regulations on protection of the family in Art. 6 of the Basic Law and Art. 8 of the ECHR grant a legal claim to tolerated residence according to § 60a Abs. 2 S. 1 AufenthG, and thus can block deportation.<sup>[25]</sup> The concrete circumstances of individual cases must therefore be given due regard even for rejected asylum applicants under removal orders. The intensity of family relationships or the amount of care that family members require (e.g., based on children's ages) are crucial in such cases.<sup>[26]</sup> In connection with the granting of «training» toleration certificates according to § 60a Abs. 2 S. 4 AufenthG and the associated granting of an employment permit, the Bavarian Ministry of the Interior has advised that the applicant's prospect of remaining is only one aspect for discretion and consideration among many, and that there may be other circumstances to be taken into account. Even the case law on maintaining family unity when terminating residence holds that the concrete circumstances of the individual case are materially relevant to the decision.<sup>[27]</sup>

<sup>22</sup> BVerfGE 125, 175 (223), further evidence in Frenz, op. cit. p. 225.

<sup>23</sup> Bonn commentary on the Grundgesetz (GG), Art. 20 Abs. 1, RdNrn. 1897ff. and 2244.

<sup>24</sup> Ibid., RdNr. 1918.

<sup>25</sup> BVerfGE 76, 1; resolution of 12 May 1987.

<sup>26</sup> Bonn Commentary, op. cit., RdNr. 1920 with further reference in RdNrn. 1931ff. and 1968ff.

<sup>27</sup> Judgement of the Federal Constitutional Court of 23 January 2006, see *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2006, p. 682.

# 4 Requirements for termination of residence: EU law and national standards

## Requirements of the EU Return Directive

The guidelines of the EU Return Directive (Dir. 2008/115/EC) were transposed into national law in 2011 (§§ 50-62b AufenthG).<sup>[28]</sup> The EU Return Directive includes standards and processes for the return of «third-country nationals staying illegally» (Art. 2 para. 1 of the Directive). This means that it not only applies to people whose application for asylum has been rejected, but also to all those under an enforceable obligation to return. The EU Return Directive stipulates that the persons affected by return and readmission policy must be repatriated in a manner compatible with human dignity, with full respect for their fundamental rights.<sup>[29]</sup> The procedure should be fair and transparent. Decisions must be taken «on a case-to-case basis and based on objective criteria».<sup>[30]</sup> Voluntary departure is to be expressly preferred to deportation, and «enhanced return assistance and counselling» should be provided to promote voluntary returns.<sup>[31]</sup> Coercive measures are also incompatible with the principles of proportionality and effectiveness under EU law: as such, detention pending deportation should only be used in circumscribed fashion, when measures of less intensive force fail to serve their purpose.<sup>[32]</sup> Children's best interests and the protection of family life should receive special consideration.<sup>[33]</sup>

Persons who until that point had not been recognised in German national law were granted certain procedural rights under the EU Return Directive, such as a written or verbal translation of the return decision, the entitlement to general information leaflets in the five most frequent languages (Art. 12 paras 2 and 3), as well as entitlement to free legal advice (Art. 13 para. 4) and detainee accommodation outside of the regular prison system (Art. 16 para. 1).<sup>[34]</sup>

28 On the transposition and its defects, see Carsten Hörich, Die Rückführungsrichtlinie: Entstehungsgeschichte, Regelungsgehalt und Hauptprobleme, in: *Zeitschrift für Ausländerrecht und Ausländerpolitik* 9/2011, p. 281-286, and Bernd Hecker, Die verspätet und fehlerhaft umgesetzte Richtlinie 2008/115/EG und ihre Auswirkungen auf das Einreise- und Aufenthaltsverbot gem. § 95 Abs. 2 Nr. 1 lit. a, b AufenthG, in: *Zeitschrift für Internationale Strafrechtsdogmatik*, Year 9, 1/2014, p. 47-53.

29 Recital 2 of the Directive.

30 Cf. recitals 4 and 6.

31 Recital 10 and Art. 7 para. 1 of the Directive.

32 Cf. recitals 13 and 16; deportation as *ultima ratio* is expressly anchored in § 62 Abs. 1 S. 1 AufenthG.

33 Recital 22.

34 Tentative implementation in the federal states and the lack of detention places in compliance with the Directive has in recent years regularly led to the rejection or negation of immigration authority requests for deportation detention, all over the country.

## German law on termination of residence when an application for asylum is rejected

If protected status is refused, § 34 AsylG stipulates that along with the asylum decision, the BAMF issue a deportation warning according to § 59 AufenthG that also sets a deadline for «voluntary» departure. According to the requirements of the EU Return Directive, the period specified for departure is normally from seven to thirty days but can be shortened. It may also be waived if urgently necessary in the interest of overwhelming concern for the public (see § 59 Abs. 1 AufenthG; Art. 7 para. 1 Dir. 2008/115/EC). Conversely, the departure period can be extended in consideration of the particular circumstances of an individual case (§ 59 Abs. 1 S. 4 AufenthG; Art. 7 para. 2 Dir. 2008/115/EC).

Special provisions reducing the departure deadline to one week are available in cases where the asylum application is deemed inadmissible or manifestly unfounded (§ 36 Abs. 1 AsylG) or if the foreigner poses a significant threat to public safety or order § 59 Abs. 1 S. 2 AufenthG). Later departure deadlines of two to three months may be granted to crime victims (§ 59 Abs. 7 AufenthG) or in cases where the asylum application is withdrawn or the process of asylum is waived when the individual concerned expresses a willingness to depart voluntarily (§ 38 Abs. 3 AsylG).

If the deadline for voluntary departure expires, the AufenthG assumes in the ideal case that a deportation ensues. In actual practice, however, terminating residence is (still) not possible in many cases for a broad variety of legal and factual reasons, or other options are available based on the right of residence.

## 5 Continuation of residence: Remaining despite rejection of the application for asylum

A negative asylum decision is often followed by continued legal residence in Germany. This is especially common when a suit is filed against the decree from the federal office. Furthermore, the granting of a toleration certificate can act as a temporary stay on the deportation for as long as deportation remains impossible for legal or factual reasons. It is also possible to award a right to residence independently of asylum on the basis of the particular circumstances of an individual case.

### Authorised residence during legal proceedings

On the one hand, the rejection of an asylum application is frequently met with legal actions which, in the face of the backlog in the administrative courts, cannot be decided until a lengthy period of time has passed.<sup>[35]</sup> An asylum seeker who files suit against their asylum decree within the time limit of two weeks stipulated in § 74 Abs. 1 AsylG (one week if the application for asylum is rejected as manifestly unfounded) continues to enjoy authorised residence for the duration of the proceedings in the administrative courts, provided that no rejection is issued on the grounds of being manifestly unfounded (§ 67 Abs. 1 Nr. 4 AsylG). In many cases, the suit against the original decree from the federal office leads to the granting of the right to protection (cf. the aforementioned figures in section 2). Asylum seekers are also allowed to be employed or to start a training course while the legal proceedings are in motion, unless they come from a so-called safe country of origin or have provided false information.<sup>[36]</sup> In many cases, the legal action leads to the granting of a right to protection (right of asylum, subsidiary protection, or deportation ban, see Section 2 above).

<sup>35</sup> Almost half of the legal actions by unsuccessful applicants for asylum and virtually a quarter of litigants are successful. In 2017 this led to a massive overburdening of the administrative courts with matters relating to asylum. More than 283,000 cases were pending as of July 2017, almost twice as many as at the end of 2016. See the response from the Federal Ministry of the Interior to a question from the Bundestag MP for Die Linke, Ulla Jelpke (<http://www.sueddeutsche.de/politik/fluechtlinge-zahl-der-asylverfahren-vor-gericht-steigt-rasant-1.3669934>), accessed on 15 November 2017.

<sup>36</sup> Cf. § 61 Abs. 2 AsylG.

## Temporary suspension of deportation (toleration)

In addition, deportation must be temporarily suspended and a toleration certificate granted for as long as the deportation remains impossible for legal or factual reasons (§ 60a Abs. 2 sent. 1 AufenthG).<sup>[37]</sup> One of the most frequent reasons for deportation unenforceability is that return documents are missing.<sup>[38]</sup> This is not always the result of a failure to cooperate by the person under orders to return; it can also come from a lack of cooperation by the country of origin. For this reason, and as a result of the influx of refugees since 2015, the Federal Government has started or intensified negotiations with a number of states about taking back those under an obligation to depart and has concluded bilateral readmission agreements.

A deportation is also to be suspended when the individual concerned is needed as a witness in a criminal proceeding (§ 60a Abs. 2 S. 2) or is starting or has started a programme of qualified vocational training (§ 60a Abs. 2 S. 4).<sup>[39]</sup> Urgent humanitarian or personal reasons as well as a significant public interest can also justify granting a toleration certificate under § 60a Abs. 2 S. 3, such as a family connection to a German or foreign national with permanent residence, or an illness that makes transport impossible. According to the latest application guidance, issued by the Federal Ministry of the Interior in summer 2017,<sup>[40]</sup> toleration certificates will be more restrictively granted in the future.

When no (further) grounds for toleration exist and no legal residence can be granted, the toleration certificate is revoked. If the individual in question has been tolerated for over a year, they are to be given at least one month's notice of deportation, except in the case of tolerated individuals who have obstructed or delayed their return through false statements, deception, or non-cooperation (§ 60a Abs. 5 S. 5 AufenthG as of 20 July 2017). All the same, in many cases the condition of «temporary» suspension of deportation lasts for years. Nor has the problem of «chain toleration» regulations on the right to remain regardless of the reference date been solved (see below); roughly one-fifth of tolerated foreign nationals have been living in Germany with this status for more than six years (see Section 2).

<sup>37</sup> According to information from the BAMF, at the present time 75 per cent of all those under a departure obligation in Germany are tolerated. On the obstacles to deportation and the legal consequences see the essential work by Simone Grimm, *Die Rückführung von Flüchtlingen in Deutschland*, Berlin 2007, p. 80-105.

<sup>38</sup> According to information from the BAMF, this applies to ca 25 per cent of all tolerated persons.

<sup>39</sup> This «training toleration certificate» (*Ausbildungsduldung*) was first incorporated into the AufenthG in 2015.

<sup>40</sup> Allgemeine Anwendungshinweise des Bundesministeriums des Innern zur Duldungserteilung nach § 60a AufenthG in the version of 30 May 2017.

## Humanitarian rights to residence

In many cases, the rejected asylum applicant under removal orders meets the conditions to be awarded a residence permit. This is due to the often lengthy process of asylum and the subsequent judicial review of the rejection decree, but can also happen because long-term toleration certificates were granted.

The conditions of § 25 Abs. 5 allow even people under an enforceable obligation to depart to receive a right of residence on humanitarian grounds if their self-organised («voluntary») departure is impossible for legal or factual reasons, and if it is improbable that the obstacles to departure will be removed in the foreseeable future. The immigration authorities in charge have considerable discretion in their assessments here, however. Factual obstacles to departure (which are usually obstacles to deportation at the same time) are present, for example, when the country of origin fails to issue identity or departure documents, either generally or at the instigation of the authorities responsible, or when transport connections to the country of origin are interrupted. Legal impossibility is particularly prevalent in the scope of protection covered in Art. 2 Abs. 2 S. 1 of the German Basic Law, involving inability to travel as a result of chronic illness requiring long-term treatment in Germany, or cases that affect the protection of marriage and family life under Art. 6 of the Basic Law and Art. 8 ECHR. In cases falling under § 25 Abs. 5 S. 1, if the deportation has already been suspended for eighteen months it reduces the discretion of the immigration authorities and a residence permit «should» be granted, as usually occurs.

Many asylum seekers manage to commence education or training, take up employment, and acquire language skills when they are already in the asylum process, during the ensuing legal proceedings, or when their deportation is set aside, such that it can be assumed that they will continue to take positive steps towards integration.

As of 1 July 2011, § 25a AufenthG stipulates that well-integrated young people and adolescents must be granted a residence permit if they have resided in Germany for a period of at least four years with permission, toleration, or authorisation; have received a school-leaving qualification; profess their support for a free and democratic constitutional order; and have positive prospects of integration. The parents and siblings of minors granted a residence permit are entitled to receive a residence permit themselves under § 25a AufenthG (§ 25a Abs. 2 AufenthG).

Furthermore, § 25b was added to the AufenthG effective 1 August 2015, constituting a regulation on the right to remain that for the first time did not have a reference date attached. It stipulates that tolerated persons who have lived in German federal territory for at least eight years (individuals) or six years (with a child) can be granted a residence permit in cases of lasting integration.

The precondition in all cases is that the individuals concerned have not obstructed enforcement of the termination of their residence through false statements or a lack of reasonable cooperation and have no criminal history or other grounds for expulsion (see § 25a Abs. 1 S. 3, § 25b Abs. 2 AufenthG).

Occasionally the preconditions for family reunification with Germans or foreign nationals with a residence permit will also be met, or tolerated persons under an obligation to depart will be granted a residence permit under § 18a Abs. 1 or 1a AufenthG on the basis of existing qualifications, or after completing vocational training.

As is evident from the above examples, the grounds for rejected asylum seekers under an obligation to depart to extend their residence are as diverse as the circumstances and developments that arise during years residing in the country. In the cases discussed, the principles of proportionality and the rule of law mandate that the relevant immigration authorities make use of the discretion available to them and assess the preconditions for granting a toleration or residence permit. The individuals under a departure obligation who comprise these sorts of cases have a right to the error-free exercise of discretion, which can be verified by the courts. This means that constitutional law demands case-by-case assessments rather than blanket classifications by case group.

## 6 Back to the country of origin: Deportation

When the deadline for departure has expired, there are (no further) grounds for toleration, and no possibility of a residence permit exists, then deportation must commence. What does deportation imply? Deportation is the use of administrative force to implement an (enforceable) obligation to depart.<sup>[41]</sup> In the political discussion in Germany, the subject of deportation currently refers almost exclusively to asylum seekers whose application for asylum has been considered by the BAMF as the responsible body, and whose need for protection under § 30 AsylG has been denied. According to the AZR, however, around half of those under an obligation to depart have no asylum history.

A person who has delayed the termination of their right of residence through deliberately false statements, identity fraud, or a failure to cooperate with the removal of obstacles to their departure is no longer informed of their deportation date, following changes made to the law in order to accelerate the process of asylum and improve the execution of the departure obligation (§ 60a Abs. 5 S. 5 AufenthG as of 20 July 2017). This applies to those under an obligation to depart whose deportation has been suspended for longer than a year and whose toleration certificate is due to be revoked in order for the deportation to take place.

Deportation generally takes place by air. If health concerns are raised over the deportation, the immigration authority will have an (official) doctor assess the ability to travel. If the person is expected to evade deportation, deportation detention can be arranged through the local court. The deportation is organised by the relevant immigration authority and carried out by the police and, if necessary, by municipal law enforcement.

<sup>41</sup> Masuch/Gordzielik, in: Huber, AufenthG, § 58 AufenthG Rn. 2.

## 7 Changes in legislation: Stricter enforcement of the obligation to depart

In February 2017, the Federal Chancellor and state Ministers-President adopted a series of far-reaching measures to improve enforcement of the obligation to return. Following the assent of the Federal Council, the Bundestag adopted the legislation on better enforcement of the departure obligation on 20 July 2017.<sup>[42]</sup> The following new provisions are especially worthy of mention:

- The states are authorised to extend the time limit on the obligation to live in an initial reception facility to a maximum of 24 months for asylum seekers without prospects for remaining in the country (§ 47 Abs. 1b AsylG). Those belonging to this group will not be redistributed to collective accommodation and thus are not eligible for municipal housing. Not only are reception facilities a stressful form of accommodation generally, but the residence requirement also has the particular consequence that those affected by it may not take up gainful employment (§ 61 Abs. 1 AsylG). Their access to legal and procedural assistance is restricted, moreover, and the principle of payment in kind prevails. Once under the obligation to return, these asylum applicants can be deported directly from the initial reception facility.
- Voluntary returns are to be further strengthened. Additional funds were allocated for this purpose in February 2017, accompanied by the use of an incentivisation principle: the Starthilfe Plus programme allows especially those people still in the process of asylum to avail themselves of much higher amounts of assistance above and beyond the initial grants and travel allowances accessible through the REAG/GARP programme. Those leaving Germany before their application for asylum has been concluded receive an extra twelve hundred euros; after asylum has been denied, the sum is eight hundred euros, provided that they leave before the departure deadline. While applying a downward sliding scale to funding assistance with return travel can absolutely make sense, a «walking-away bonus» meant to motivate those seeking protection to abandon a constitutionally guaranteed procedure is problematic from an ethical standpoint.
- There are plans for the state to provide swift and comprehensive return counselling upon arrival for asylum seekers with few prospects of remaining in the country. The states are to guarantee return counselling in the initial reception centres. The BAMF is also supposed to provide information and counselling on voluntary returns as part of the intake appointment for the asylum application.

42 BGBl. 2017, p. 2780ff.

- The states are to provide counselling and advice to promote willingness to depart voluntarily among those under an enforceable departure obligation. The accommodation in central departure facilities is meant to guarantee availability to the authorities and the courts and to ensure that departures are enforced. This centralised form of accommodation over several months, sometimes even years, has been criticised by refugee councils and aid agencies as on a par with military barracks<sup>[43]</sup> and is a threat to the rule of law, not least with respect to the rights of minors.
- Furthermore, a centre for the support of returns («Zentrum zur Unterstützung der Rückkehr», ZUR) was founded in March 2017 as a facility run collaboratively by the states and the Federal Government. With its five working areas (passport replacement, security, voluntary return, repatriation optimisation, and operational matters in repatriation), the ZUR aims to improve coordination between the state and federal levels on return and readmission issues.<sup>[44]</sup>

<sup>43</sup> Cf., e.g., the press release from the Schleswig-Holstein Refugee Council, «Bund drängt (erfolgreich) Bundesländer zu verschärfter Abschiebungspolitik» of 9 February 2017.

<sup>44</sup> <https://www.bundesregierung.de/Content/DE/Artikel/2017/03/2017-03-13-koordinierungs-zentrum-rueckfuehrungen.html>), accessed 15 November 2017; BT-Drs. 18/12679, p. 3.

# 8 Voluntary return before deportation?

## Current practice in return counselling and termination of residence

### Return counselling during the asylum process and after rejection of the application for asylum

Voluntary return is no longer only being indicated as a possibility after an asylum denial, but for the first time is now routinely being mentioned during the application process, before the BAMF hearing.<sup>[45]</sup> The duty to inform and advise within the process of asylum derives directly from the general Administrative Procedures Act (VwVfG). According to § 25 Abs. 1 VwVfG, federal and state authorities are obliged to inform and advise applicants about all matters affecting their administrative processes; for the process of asylum this obligation can be found in § 24 Abs. 1 S. 2 AsylG.

The BAMF decree rejecting the asylum application also notifies the asylum seeker of the departure obligation and the threat of deportation (§ 34 AsylG). Along with the rejection decree, which includes a written justification, the applicant receives information on applicable legal remedies. During the period leading up to the departure deadline, the BAMF is also supposed to provide information about financial means of support for repatriation, although this is not always the case in practice, for various reasons. Sometimes the state and municipal funding possibilities available are not known to federal office staff or have not been systematically communicated.<sup>[46]</sup>

Return counselling is offered by the immigration authorities, the social welfare authorities, or through non-governmental advice centres, depending on state or municipal jurisdiction. In cases of voluntary departure, three categories may be distinguished: first, departure

<sup>45</sup> While the communication of objective information is desirable in principle, providers of counselling on asylum procedure have indicated that there is nonetheless often a lack of transparency for asylum seekers and that the transmission by various actors (state reception centres, BAMF personnel, state or local immigration authorities) of information about voluntary return causes irritation and uncertainty – and can furthermore become highly problematic in an ethical sense: in some states and municipalities, even individuals whose process of asylum has not yet been concluded have been explicitly confronted with the futility of their application and thus pressured to potentially consent prematurely to voluntary departure (cf., e.g., the situation in Hesse and the «Leitlinien zur Rückkehrberatung» return guidelines of 24 July 2017 issued by the Liga der freien Wohlfahrtspflege in Hessen e.V.).

<sup>46</sup> For further detail on this see Forschungsbereich beim Sachverständigenrat deutscher Stiftungen für Integration und Migration, Rückkehrpolitik in Deutschland. Wege zur Stärkung der geförderten Ausreise, Berlin 2017, p. 30/31.

during an ongoing asylum application; second, departure after the order to depart has been received, but before the departure deadline; and third, departure after the deadline has expired. Whereas departures in the first category are usually voluntary, departures in both of the other categories occur under pressure of the threat of deportation.<sup>[47]</sup> The option of voluntary return is intended to prevent deportations. Those under a departure obligation generally have their confiscated passport returned to them by the federal police at the airport when departing voluntarily. A precondition for this is the withdrawal of the asylum application. Withdrawal of the asylum application is likewise a precondition for the extension of the departure deadline to three months (instead of 30 days). Voluntary returns usually happen by air, in order to avoid transit countries and the conditions they set for passage through their territory. Flights must be paid for by the individuals themselves if the financial means are available. Otherwise funding comes from the REAG/GARP programme, or for returns to Kosovo through the URA («bridge») programme, or through separate state or municipal programmes where appropriate.<sup>[48]</sup> Not only do these programmes provide travel costs and travel allowances, but they also include an opportunity to apply for start-up funding assistance for the period following the return (see below). In addition, individualised reintegration assistance for the period following return can be requested for certain return countries via the EU-cofunded European Reintegration Network (ERIN), a joint repatriation measure common to many European partner institutions.<sup>[49]</sup>

According to the EU Return Directive, which is also valid under German law, a voluntary departure is preferable to a deportation. In contrast to the EU Return Directive, however, the Aufenthaltsgesetz does not expressly prioritise voluntary departure.

Political leaders at the federal and state level rarely miss an opportunity in debate to emphasise the preference for voluntary terminations of residence. In practice, however, there has so far often been something of a problem in effectively putting this priority into action. For example, issues of return counselling have not yet been taken into account in asylum and residence law. They are therefore not genuine or even obligatory components of processing or casework involving foreigners. The federal states have each made very

<sup>47</sup> Neither robust figures nor reliable estimates are available here, especially for the first two categories. In relation to the first category, however, the number of «other settlements of procedure» acknowledged in the statistics on asylum (almost 90,000 of the 700,000 completed administrative procedures in 2016) demonstrates the possible maximum, after excluding decisions in Dublin procedures (almost 20,000) in other EU Member States; see Bundesamt für Migration und Flüchtlinge, Asylgeschäftsstatistik für den Monat Dezember 2016, Nuremberg. In relation to the second category, it is even more difficult to approximate the figures, since the so-called Certificate of Border Crossing (see footnote 10) in most cases is not sent back as it should be or is not compiled in the statistics.

<sup>48</sup> Cf. BAMF Forschungszentrum: «Rückkehrunterstützung in Deutschland», Working Paper 31, Nuremberg 2010 and also «Irreguläre Migration und freiwillige Rückkehr», Working Paper 65, Nuremberg 2015.

<sup>49</sup> Cf. Bundesamt für Migration und Flüchtlinge, Programmsteckbrief ERIN, Nuremberg 2016.

different use of the significant leeway in organising their respective return policies: frequently, the only centrally located and consistently regulated responsibility is that of deportation enforcement. There are no such stipulations for voluntary departures or assistance with them, nor do any structures exist for providing the corresponding counselling.

Case studies in federal states<sup>[50]</sup> have shown that many of the municipal immigration authorities lack clear guidelines about the responsibility, timing, or specific procedure for return counselling. Often there is also little competence or sense of responsibility for this work. Furthermore, the ministries in charge in the respective states and the authorities at the municipal level need to improve their communication, coordination, and cooperation with one another; exchange at the horizontal level is lacking as well.<sup>[51]</sup>

## A comparison of the figures for voluntary departures and deportations in the federal states

A rough analysis of the available data on voluntary departure and deportation (Table 1) shows that there are considerable differences between the states. This raises questions about equality before the law and varying administrative practice under the same legal standards. Although the figures do not provide empirical evidence, they do suggest that voluntary departure is given significantly more effective precedence in some federal states than in others (cf., e.g., Hamburg compared to Bremen, or Saarland compared to Rhineland-Palatinate).

In combination with the high variance in return counselling structures and availability mentioned above, there is also a degree of heterogeneity that is difficult to reconcile with the principle of equal treatment («same case, same treatment») in the German Basic Law. Add in the case-by-case assessments, and this amounts to a «return lottery» (analogous to the much cited «protection lottery» within the European Union) or «deportation lottery» within Germany.<sup>[52]</sup>

50 On this and what follows, see: Forschungsbereich beim Sachverständigenrat deutscher Stiftungen für Integration und Migration (2017), op. cit., p. 23ff.

51 Ibid., p. 33ff.

52 Cf. «Die Abschiebe-Lotterie. Bund und Länder können sich nicht auf einen Kurs für Abschiebungen einigen. Wer in Deutschland bleiben kann und wer gehen muss, hängt oft vom Zufall ab», Der Spiegel 10/2017, p. 28-31.

Table 1: Comparison of repatriations by state

Federal state	Persons under departure obligation on 1 Jan 2016	Deportations in 2016	Voluntary departures in 2016 through REAG/GARP	Ratio of deportations to voluntary returns
Baden-Württemberg	32,711	3,646	6,108	1 : 1.7
Bavaria	16,278	3,310	6,399	1 : 1.9
Berlin	12,531	2,027	2,098	1 : 1
Brandenburg	5,300	570	996	1 : 1.8
Bremen	3,205	76	659	1 : 8.7
Hamburg	7,709	767	518	1 : 0.7
Hesse	13,278	1,723	1,872	1 : 1.1
Mecklenburg-West Pomerania	3,639	817	211	1 : 0.3
Lower Saxony	18,577	1,908	8,547	1 : 4.5
North Rhine-Westphalia	54,290	5,121	16,513	1 : 3.2
Rhineland-Palatinate	11,183	909	3,907	1 : 4.3
Saarland	1,792	216	78	1 : 0.4
Saxony	9,891	1,814	1,924	1 : 1.1
Saxony-Anhalt	5,327	836	1,204	1 : 1.5
Schleswig-Holstein	5,391	790	1,206	1 : 1.5
Thuringia	3,312	569	1,829	1 : 3.2

Remarks: The figures in the first column include persons under a departure obligation with or without a toleration certificate; however, the number of such persons without a toleration certificate includes several thousand nationals of other EU countries. The incomplete statistics in the area of voluntary departures only allow the figures for REAG/GARP departures to be compared at a national level. Some states and municipalities are carrying out additional voluntary departures through their own programmes.

Sources: BT-Drs. 18/7800, p25, 37; BT-Drs. 18/11112, p56

## Inconsistencies in federal return policy – Approaches with greater coherence

Return counselling within the federal system offers opportunities for cross-level co-operation in terms of a whole-of-government approach. Return counselling would then be one facet of a coordinated, holistic, and multi-stage process of need-based advice for asylum applicants as well as those under an obligation to depart. Various actors would be involved, but especially independent agencies, the BAMF, and the state and/or municipal immigration authorities.

A sensible approach to modernising return counselling is embodied in the Federation-Länder Coordination Agency for Integrated Return Management (BLK-IRM), established in 2014 and based at the BAMF. The agency's goal is to bring together all of those working in the return field across their various administrative levels and to work out a coherent approach to managing returns.

So far, however, there has been a lack of efficiency and unity in the return counselling process. This is partly the result of overlapping or poorly coordinated responsibilities in the federal system. Previous cross-level communications have had little relevance in practice, since the BLK-IRM remains a new approach to coordination whose implementation has not been consistent, especially because the fundamental approaches of the individual states will still sometimes greatly differ from one another. Although all states are involved in the BLK-IRM and its working groups, its principles are not given sufficient consideration. Particularly scant attention is paid to the principle that mandates return counselling be neutral, holistic, and unbiased; that it include consideration for the country of origin and applicable legal residence status on a case-by-case basis; and that it be carried out by qualified specialist personnel. <sup>[53]</sup> <sup>[54]</sup>

Also in need of improvement is the substance of the cooperation between the immigration authorities and the respective state ministries responsible, as well as the communication within the immigration authority itself. Cooperation does not usually take place systematically, but is more likely to be the result of personal contacts. The lack of cooperation can partly be blamed on the high workloads and partly on inadequate staffing. The exchanges of experience among the immigration authorities in the larger cities, which take place every six months under the auspices of the German Association of Cities, offer a suitable platform for consolidating cooperation and communication.

<sup>53</sup> Cf. Arbeitsgemeinschaft Freiwillige Rückkehr im Rahmen der Bund-Länder-Koordinierungsstelle Integriertes Rückkehrmanagement, «Leitlinien für eine bundesweite Rückkehrberatung», Version 2.0 of 9 April 2015.

<sup>54</sup> E.g., the state of Hesse wants to ensure return counselling statewide that is as comprehensive as possible. The plans to implement this include deploying about 170 retired police officers to assist the immigration authorities with both counselling and administrative tasks. Although these retired officers are to receive special training, it nonetheless seems questionable whether, as former guarantors of regulatory policy and security, they would be able to fulfil this task in the terms described above (cf. «Flüchtlingspolitik: Land stellt eine Million Euro zur Förderung freiwilliger Ausreisen bereit», press release from the Hessisches Ministerium des Innern und für Sport, 27 March 2017).

## 9 Recommendations for action: Make use of the potential for reform

### *Safeguard human dignity and conformity with fundamental rights*

Enforcement of asylum and residence law in a manner compliant with human dignity and fundamental rights should also be ensured during residence terminations and in the management of returns.

The constitutional orientation towards the individual as a legal person and entity rules out administrative action that is solely on the basis of membership in a group or on administrative classifications. Even people under an «enforceable obligation to depart» should therefore always have the special circumstances of their individual case taken into account and their individual residence rights assessed. The room for manoeuvre in judgments and discretionary powers should be in principle be used to the benefit of the person in question, provided that crimes, acts of deception, or security risks do not preclude its use.

The years 2016 and 2017 were marked by a large number of reforms to asylum and return policy, some of them introduced at very short notice, which were reflected in both legal standards and administrative enforcement. On the one hand, various steps were taken to accelerate procedures, constrain the rights and claims of asylum seekers, and expand administrative capacities. On the other, the reforms also included an attempt to align «refugee management» with specific case groups (such as «safe countries of origin» or the varying prospects for remaining in the country). This practice may seem legitimate in terms of administrative efficiency and as a temporary means of coping with acute crises or administrative overload. But the resolutions at the federal and state levels run the risk of using generalisations and broad classifications to cancel out the constitutionally mandated protection of individual rights.

### *Consistently enforce the primacy of voluntary departure – Deportation as ultima ratio*

Voluntary, assisted departure should always take precedence over forced deportation.

Findings on the effectiveness of return measures in Germany are still scarce, but international studies show that forced measures do not generally go hand in hand with great return success; the opportunity to organise and prepare for one's own return with at least a modicum of self-sufficiency and self-determination increases the probability that the return

will be successful and sustainable.<sup>[55]</sup> Furthermore, there are ways to avoid forced removals under cover of night, which are often especially traumatic for children in families under a departure obligation, involve forced transport to airports, and can also present a considerable burden for the officials carrying them out. To top it off, forced deportations are also extremely expensive because of the high cost of police escorts and the often low load factor of the aircraft. It is possible to achieve success – in harmony with European requirements – with more efficiency for less money.

Unambiguous guidelines will be necessary in order to enforce the primacy of voluntary departure more effectively, whether these are created through legislation or by the highest state authorities (such as by decree). Such guidelines must stipulate that the immigration authorities must first assess and exhaust all possibilities for return counselling and assistance before they can resort to regulatory policy measures, for example by initiating a deportation.

### *Cap chain toleration certificates achieved through status changes*

The change from a toleration certificate to regular residence status should in principle be possible after three years of continuous residence at the latest, especially if initial efforts to integrate have already been made (language ability at level A2, prospects for ensuring one's own livelihood).

«Chain toleration» is an obstacle to return and integration policy. As the duration of a toleration certificate increases, the probability dwindles that a return may yet occur. In addition, such certificates are questionable on ethical and human rights grounds when steps have already been taken towards integration. The political parties in the last Federal Government coalition formulated a goal for the eighteenth legislative term to limit the duration of the asylum procedure preceding the first decision to three months.<sup>[56]</sup> This goal was to be adhered to as an imperative in view of the expected reduction in the backlog at the BAMF. But if there were still obstacles to departure or deportation after the need for protection had been denied, and these could not be cleared up even after several years, taking into account the numerous measures for improved enforcement of the departure obligation, then a residence permit was to be issued in the event that no crime had been committed and the initial steps towards integration or the expectation of a secure

<sup>55</sup> See Jean-Pierre Cassarino: The Conditions of Modern Return Migrants, in: International Journal on Multicultural Societies 10/2, p. 95-106.

<sup>56</sup> Deutschlands Zukunft gestalten. Contract of coalition between CDU, CSU, and SPD, Legislative Term 18, p. 76.

livelihood had been taken.<sup>[57]</sup> The three-year period, which was to begin from the date of application for asylum, corresponds to the period of time which is binding on the BAMF for examining the case for revocation or withdrawal under § 73 Abs. 2a AsylG.<sup>[58]</sup>

So far the existing regulations in residence law (especially those in § 25 Abs. 5 and §§ 25a and b AufenthG [see Section 5 in this paper]) have not been able to find a way to effectively counter the situation of chain tolerations sometimes lasting for years. One reason for this is that the scope is comparatively narrow and at the same time gives broader discretionary power to the authorities; another is that only a very small number of those who apply meet the preconditions to attain a permit.

Both approaches – the impossibility or unreasonableness of departure as well as the rewarding of integration efforts – should be merged as part of a reform of § 25 Abs. 5 and §§ 25a and b AufenthG into an effective regulation that is independent of the reference date. In a new regulation to be drafted as a legislative recommendation, the preconditions for granting a permit and the grounds for exclusion should be spelled out more clearly than they have been, and vague legal terms should be avoided as much as possible in the interest of a more uniform interpretation.

A correspondingly compact regulation on the right to remain that was independent of the reference date would explicitly consider aspects protected as fundamental rights (health, family matters) and also reward integration efforts sooner than before. It would reduce the load on administrative enforcement and would thus also promote an orientation towards terminating residence for criminal offences or security risks.

### *Establish comprehensive monitoring of deportations*

To help ensure that deportation enforcement respects fundamental rights and human dignity, as well as to improve the overall transparency of deportation policy, the Federal Government and the states should work to guarantee the comprehensive monitoring of deportations in accordance with the provisions of the EU Return Directive.

Right now Germany has only an extremely fragmented version of the monitoring system envisaged in the EU Return Directive to be used when deportations occur. The Directive

<sup>57</sup> The fulfilment of the passport requirement as a condition of receiving residence documents was to be waived in cases of the verified impossibility or unreasonableness of obtaining a passport.

<sup>58</sup> It is to be assumed that a three-year period beginning with the application for asylum would not generally disadvantage individuals who would qualify for residence under § 25 Abs. 5 AufenthG according to the current legal situation, since this length of time comprises the duration of the process of asylum as well as any redress procedures.

states: «Member States shall provide for an effective forced-return monitoring system» (Art. 8 para. 6 Dir. 2008/115/EC). Independent observation of deportations is being carried out by Christian charities at the Frankfurt am Main, Düsseldorf, and Berlin airports only.<sup>[59]</sup> This type of implementation does not exist in other states, although the Federal Government is of the opinion that the observation of deportations, as well as other corresponding discussion forums, contribute to increasing transparency about officials' actions when returns are enforced.<sup>[60]</sup> The task of observing, which should be carried out by independent organisations such as charities or by specially created ombudsman's offices and should be linked to a consistent scheme of reporting, must receive adequate resources as far as logistics and capacity, as well as with a view to rights of access and insight. In the future, monitoring should be expanded to include the situation in arrival and departure centres in order to dispel doubts about the legal conformity with certain standards of procedure, accommodation, and supply, and to point out any potential irregularities.

### *Promote acceptance through consistent counselling and legal regulations*

Return counselling in Germany should be anchored in law and comprehensively available, as it is in Switzerland and The Netherlands.<sup>[61]</sup> Going forward, it is advisable to incorporate return counselling into a neutral, state-financed advice programme on asylum procedure that is accessible to all asylum seekers. A legal entitlement to optional counsel from a lawyer could improve the coherence of the asylum system and encourage those affected to accept the decisions to send them back.

A stipulation could be added to the law on either asylum or residence whereby those under an «enforceable obligation to depart» would be given information on the programmes and measures available to assist with their voluntary departure before any deportation measures were initiated, and would also be offered unbiased return counselling geared towards their subjective needs. The regulation could explicitly exclude criminals, those posing a safety risk, and illegal returnees from eligibility. The specific responsibilities for such counselling and departure advice appointments should be regulated by the states and assigned to the immigration authorities. This does not mean that the authorities should themselves provide the counselling, but rather that they should delegate this task to non-governmental local actors in accordance with the principle of subsidiarity. This will

<sup>59</sup> The (re-)establishment of the city-funded, independent observation of deportations is currently pending in the Free and Hanseatic City of Hamburg, in line with a citizens' resolution (cf. LT-Drs. 21/8932).

<sup>60</sup> BT-Drs. 18/5737, p. 17; for general information see Jari Pirjola: Flights of Shame or Dignified Return? Return Flights and Post-return Monitoring, in: European Journal of Migration and Law 17/2015, p. 305-328.

<sup>61</sup> For a proposal in this direction see Forschungsbereich beim Sachverständigenrat deutscher Stiftungen für Integration und Migration (2017), op. cit., p. 39.

first require the development of the most uniform possible guidelines, or «counselling curricula» – perhaps to be drafted by an expert commission, with contributions from associations and non-governmental organisations – which will be binding for all levels and will also specify the window of time during which the counselling should occur. A tender process for counselling services should then take place, and possibly a certification process for providers as well. If there are not enough independent organisations to provide return counselling, then there is no reason why state authorities cannot take over the counselling – the key prerequisite for this is that staff receive the appropriate training and are not simultaneously responsible for enforcing regulatory measures.

The process of asylum, as well as the dealings with various official agencies (the initial reception facilities in the states, BAMF field offices, municipal immigration authorities) are not transparent in the national federal system, especially for those actually seeking protection. Counselling on asylum procedure and returns is only patchily available to those who need it: it falls under the responsibility of the states. Articles 19-23 of the European Union directive on asylum procedure (Art. 20 para. 3 Dir. 2013/32/EU) regulate detailed issues concerning the provision of information and legal assistance during the process of asylum: Member States are required to ensure that applicants may request to receive legal and procedural information on the process free of charge, with consideration for their individual circumstances; a negative decision on an application must be sufficiently justified on request, and an explanation of how the decision can be challenged must also be provided on request. In principle, it is envisaged that legal advice after the rejection of an application for asylum will be free of charge within the framework of legal aid. Member States can, however, link this to adequate prospects of success in the appellate proceedings, as is regulated in Germany by the Code of Administrative Court Procedure and the Code of Civil Procedure. This proviso can accordingly also be found in the EU Return Directive (Art. 13 para. 4 Dir. 2008/115/EU). Federal legislators should design counselling on asylum procedure and return proactively and provide comprehensive funding – not least to compensate for the recent tightening up of procedural law, according to which asylum seekers are to remain in their initial reception facility until the conclusion of their process, a place where they do not always have sufficient access to legal advice.<sup>[62]</sup>

*Improve communication, coordination, and cooperation between the Federal Government, the states, municipalities, and non-governmental organisations*

Return counselling should be conceived as a multi-level process. This means that independent organisations, the BAMF, and the social welfare and immigration authorities

<sup>62</sup> See also the policy recommendation from Working Group 3 of the Expert Commission, by Daniel Lede Abal, Dagmar Dahmen, Miriam Koch, and Filiz Polat: Die «Bleibeperspektive» und ihre Folgen für die Integration von Geflüchteten.

need to coordinate better with one another. All of the authorities and organisations involved in this process ought to know the *who*, *when*, and *where* of the responsibility for providing information, instruction, and concrete counselling. By the first individual orientation appointment, which takes place in the first phase of residence, the applicant should be provided with information in a language they understand explaining how the process will work and describing their accommodation, their chances of asylum, their participation, and their possibilities of employment, as well as preliminary information on return counselling and financial assistance.

A sensible approach to modernising return counselling is embodied in the Federation-Länder Coordination Agency for Integrated Return Management (BLK-IRM), established in 2014 and based at the BAMF. The agency's goal is to bring together all of those working in the return field across their various administrative levels and to work out a coherent approach to managing returns.

Efficiency is lacking in the return counselling process. This is partly the result of overlapping or poorly coordinated responsibilities in the federal system. Previous cross-level communications have had little relevance in practice, since the BLK-IRM remains a new approach to coordination whose implementation has not been consistent, especially because the fundamental approaches of the individual states still sometimes greatly differ from one another. Also in need of improvement is the substance of the cooperation between the immigration authorities and the respective state ministries responsible, as well as the communication within the immigration authority itself. Cooperation does not usually take place systematically, but is more likely to be the result of personal contacts. The lack of cooperation can partly be blamed on the high workloads and partly on inadequate staffing. The exchanges of experience among the immigration authorities in the larger cities, which take place every six months, offer a suitable platform for consolidating cooperation and communication.

### *Prospective lane changes*

Current German immigration law does not allow a direct «lane change» from asylum applicant to labour migrant.<sup>[63]</sup> This political instrument is controversial: depending on how it is set up, it can give rise to false incentives. In certain constellations, however, further reform should be considered.

63 The concept of a «lane change» will be understood (very) differently by the various stakeholders involved in the debate, although there already exist in the asylum field certain possibilities for status or purpose changes, such as the recently established options for simplified access to vocational training for rejected asylum applicants and tolerated individuals; cf. Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR): «Spurwechsel», op. cit.

A look at common practice shows that the reality is often one of mixed migrations taking place for a variety of reasons. Future migration policy should respond to this without creating any pull factors. In cases of rejected or futile applications for asylum, the prospects for return or departure should include the subsequent possibility of re-entry through existing channels of labour migration, e.g., voluntary, financially assisted departures paired with preliminary authorisation from the immigration authorities for gainful employment later on. The applicant would need to have existing qualifications for the labour market or a concrete job offer, regardless of their country of origin; bans on re-entry must be resisted.

*Create prospects for after the return: Develop effective aids to reintegration*

Return policy should not be limited to the payment of travel costs and start-up funding, but should also consider the future prospects of returnees. Additionally, it must take into account the individual needs of «failed» migrants once they return to their country of origin.

This approach, aimed at the individual, must be accompanied by a higher-level policy approach that coherently brings together different policy areas to combat the causes of flight. Repatriation policy should therefore also be linked even more strongly with the objective of systematically encouraging reintegration into the country of origin (this is the external migration policy aspect of return policy).<sup>[64]</sup>

Refugees (including those not recognised as such) have often given up their previous existence through their project of migration. They and those around them perceive their return as a disgrace. It is not to be expected of these individuals that they will be strongly committed to the development of their countries of origin after their return. Instead, there is frequently a need for psychosocial care to ensure even the basic preconditions for reintegration. Developing an intensive project with returnees that offers advantages to both sides where possible can help to prevent follow-on migration and to develop socio-economic prospects in the country of origin. With this in mind, policy fields such as foreign (economic) policy, development cooperation, and environmental policy must shift their focus to include those third countries important in migration and return policy, the same countries that are the object of these reintegration programmes.

<sup>64</sup> On this see the policy recommendation from Working Group 2 of the Expert Commission, by Steffen Angenendt and Petra Bendel, «Internationale und nationale Aspekte des Whole of Government: Wie kann eine verstärkte Kohärenz Menschen- und Flüchtlingsrechte stärken und Partnerschaften mit Herkunfts-, Erstaufnahme- und Transitstaaten auf Augenhöhe fördern?»

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