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From Exclusion to Participation: Refugee Protection and Migration Policy in Crisis

Debates around the issue of migration policy have been at the top of the agenda in European politics since at least the summer of 2015. The free movement of workers within the European Union played a major role in the recent referendum on the United Kingdom's continuing EU membership ("Brexit"). The Hungarian government held a referendum seeking (unsuccessfully) to block EU decisions that enable the resettlement of people seeking refuge, mostly from Syria, throughout the EU according to quotas. At the same time, the German interior minister has claimed that the "refugee crisis" is in the process of being resolved, even though an ever greater number of people are continuing to cross the Mediterranean to seek refuge in the EU.[1] In this complex situation, where the agenda appears to be determined by fear, antipathy, and political short-termism, it is also hard to initiate a discussion focused on solving problems because terms such as refugees and asylum, migration and integration are used in such a confused manner. The public discourse is buzzing with concepts used in a highly politicized manner: immigrant, asylum seeker, refugee, and migrant – anyone using such terms also mobilizes – whether consciously or unconsciously – specific associations and feelings. Clarifying terminology, legal rights, and the applicable rules and regulations is therefore a necessary precondition for politically responsible action in the controversial field of migration and integration policy.

This contribution begins by illustrating differences and relationships among these concepts and clarifies their status in (international) law. Building on that, we present the regulatory approaches related to refugees, migration, and integration that currently exist both globally and within the EU. We demonstrate that numerous multilateral instruments exist in the policy field pertaining to refugees, which, however, are not applied in pressure situations. On the contrary, migration and integration remain largely matters of national policy. This leads to tension and contradictions, which need to be addressed at the European policy level if Europe is to (re)act more effectively and prevent human suffering. With regard to refugee immigration in particular, we argue for a European solidarity mechanism to replace the failing Dublin sys-

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1 Cf. Spiegel Online, *Neue Asylzahlen: De Maizière meldet deutliche Entspannung in der Flüchtlingskrise* [New Asylum Figures: De Maizière Announces Major Improvement in the Refugee Crisis], 8 July 2016, at: http://www.spiegel.de/politik/deutschland/fluechtlinge-thomas-de-maiziere-meldet-wenige-asyl-suchende-a-1101991.html.

tem. We also call for improved opportunities for regular migration. This would enable the development of more sophisticated policy instruments, the provision of support for integration processes, and the closure of gaps in the Schengen legal framework. There is an urgent need to upgrade institutions concerned with migration and integration policy at both the national and the European level. To this day, Germany, which is a particular focus of attention in this contribution as a result of its central role in dealing with the "refugee crisis", has neither a national immigration law nor a federal ministry with appropriate responsibilities.

Refugees – Migration – Integration

The enormous increase in the numbers of people seeking refuge, especially in the southern states of Europe, has forced the EU to confront several of its structural weaknesses. It has become evident that the existing arrangements for refugee relief and the mechanisms for control of the EU's external borders developed in the last 20 years are not sufficiently robust. The political debate over the "refugee crisis" – i.e. the EU's crisis in dealing with the flight of large numbers of refugees from neighbouring conflict areas – also reflects just how badly the policy fields of refugees and asylum, migration and integration have been neglected in general. Driven by fear of a general collapse of political order, and not infrequently accompanied by a barely disguised xenophobia, in recent years there have been calls for summary deportations and the rejection of asylum applications that would infringe international law and human rights. Immigration – whether in relation to people seeking refuge or migrant workers – is a major topic in political campaigns throughout Europe. Yet the public discourse all too often lacks a basis in factual knowledge and the nuanced vocabulary necessary to evaluate the phenomena of migration and the legally possible options for political action.

Refugees

Although the media and politicians tend to apply the term "refugee" to all individuals who arrive in the EU in an irregular way, it is in fact a precisely defined term in international law. The 1951 Refugee Convention and the 1967 Protocol to the Convention define as a refugee any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country".[2] Refugees in the

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2   Convention Relating to the Status of Refugees, Article 1A (2), in: UNHCR, *Convention and Protocol Relating to the Status of Refugees*, pp. 13-45, here: p. 14, at: http://www.unhcr.org/3b66c2aa10 (hereafter: Refugee Convention).

sense of the Convention have a right to international protection. The overwhelming majority of states worldwide recognize the Convention and the Protocol, including all EU member states.[3] In some states, this is strengthened by national laws. In Germany, for instance, the right to asylum is enshrined in the constitution.[4]

Refugee status and the right to protection are rights that apply to individuals; two principles can be derived from this, which are also binding under customary international law: the principle of non-refoulement,[5] and the prohibition of discrimination.[6] The former entails that no-one may be returned to a country in which their life or freedom would be threatened. Non-discrimination requires that no-one is disadvantaged because of their race, religion, or nationality by, for instance, being denied the opportunity to apply for asylum. However, since not all individuals who cannot be sent back to their country of origin as a result of the ban on refoulement are refugees in the sense of the 1951 Refugee Convention, an additional category of protection has emerged: the concept of "subsidiary protection". This can be granted, for example, to people who face grave danger in their home countries as a consequence of civil war even though they do not belong to a political or social group that is explicitly facing persecution by state or non-state actors.

Migration

While the concepts of refugee and asylum have precise legal definitions, migration and migrant do not.[7] One the one hand, they are used as overarching terms for anyone who shifts their principle place of residence (usually across national frontiers), whether for work or private reasons, and whether voluntarily or not. At the same time, the terminology of migration is also used in explicit contrast to "refugee" to refer to individuals who are not currently recognized in law as facing persecution. Admittedly, this need not mean that they left their home countries entirely without external pressure. In the academic debate, therefore, concepts such as "crisis migration", "survival migration", "migration in the face of violence", and "forced migration" are used to describe people fleeing from physical violence, absolute poverty, or environmental catastrophes. This can also include the category of climate refugees, i.e. people whose livelihood has been destroyed by environmental

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3   Cf. UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, April 2015, at: http://www.unhcr.org/3b73b0d63.html.
4   Article 16 of the Basic Law.
5   Article 33 of the Refugee Convention.
6   Article 3 of the Refugee Convention.
7   It is worth noting that, in EU parlance, migrants are not only "third-country nationals […] coming from countries outside the EU and not holding the citizenship of an EU country", but also "persons born in the EU but not holding the citizenship of a Member State". European Commission, *European Agenda for the Integration of Third-Country Nationals*, COM(2011) 455 final, Brussels, 20 July 2011, p. 3, footnote 9, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0455:FIN.

change. By using this precise vocabulary, migration research is able to focus attention on the global connections between various forms of migration and the political factors that ultimately cause people to flee. The concept of forced migration illustrates that there is simply no clear opposition between "real" refugees and "voluntary" migrants who are allegedly "only" seeking a more comfortable existence in another state and who are therefore often dismissed as "economic migrants" or "bogus refugees".

Integration

In relation to the acceptance of migrants – both refugees and others – a further highly politicized term is often used: the concept of "integration". Within the EU, responsibility for integration policy rests entirely with the member states. However, different states have entirely different histories of migration. France, Germany, and the United Kingdom have long been countries of destination for large numbers of immigrants – even if political rhetoric in Germany has long tried to deny this fact. By contrast, Eastern European states such as Poland have tended to be countries of origin for migrants in recent times and possess a corresponding lack of experience in dealing with immigration. In view of these differences in national self-image, institutional differences among countries, and the requirements migrants have to fulfil, e.g. in order to enter the job market, the primacy of national law in the area of migration policy is unlikely to change in the foreseeable future. Nevertheless, both empirical studies of the different effects of the various national integration strategies (e.g. the use of naturalization policy in France, Germany's assimilatory policy, or the multiculturalist approaches taken in countries such as the Netherlands and Britain) and the increasingly loud calls from the private sector for an integration policy to support the immigration that is desirable from an economic and demographic perspective (including immigration from non-EU countries) have led to the adoption of a European framework strategy. Under the aegis of the European Commission, a set of Common Basic Principles were adopted in 2004, and a Common Agenda was drawn up in 2005 to serve as the foundation for member states' policies. All these measures draw on a concept of integration as a "dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States" in accord with "the basic values of the European Union".[8] This clarification of terminology is nothing new in the academic discourse, but a noteworthy departure in the area of policy. This is because the integration policies effectively being followed by many EU states, as well as the views that dominate public discourse within them frequently do not see integration as a "two-way process" that also makes demands on the "majority population", but rather as a matter of migrants adjusting to existing conditions and customs. It is be-

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8   European Commission, *EU actions to make integration work*, at: https://ec.europa.eu/migrant-integration/the-eu-and-integration/eu-actions-to-make-integration-work.

cause of this that the concept on "integration" is often treated with caution by critical researchers, as it carries more of a sense of assimilation than inclusion.

Regulatory Practice: Between International Refugee Protection and National Sovereignty

As this review of terminology suggests, there is little binding regulation of migration at the international level. No international institutions exist to deal with migration in a way comparable to those that, since the 1950s, have attempted to provide protection and find solutions (by facilitating returns, integration in countries of first arrival, or permanent resettlement in third countries) in the field of refugees, i.e. the Refugee Convention, the Protocol, and the United Nations High Commissioner for Refugees (UNHCR).

The situation is similar within the EU, which has few common instruments for dealing with migration when compared to refugees. Admittedly, this policy area was given a symbolic status boost during the reorganization of the European Commission in 2014, when the Home Affairs department was redesignated the Directorate-General for Migration and Home Affairs. The European Council has also reaffirmed the Common Basic Principles for integration policy. By encouraging a) integration via participation, b) intensified action at the local level, and c) the involvement of countries of origin, these principles are intended to create conditions that will enable immigrants to participate successfully in the economic, social, cultural, and political lives of member states. However, unlike refugee policy, immigration remains largely the responsibility of the member states, and the EU can provide little more than guidelines. This is surprising given that internal freedom of movement in the EU means that the various national migration policies and conditions for naturalization (can) affect the entire European Union.

While very little headway has been made in migration policy at the EU level, progress is more evident when one looks at individual member states. In Germany, for instance, the grand delusion that Germany is not a permanent home of immigrant populations has been abandoned even by many conservatives in the last 15 years. Prior to that, Germany's governing Social Democratic/Green coalition (1998-2005) had already introduced limited birthright citizenship to better reflect reality and make Germany more attractive as a destination for migrants. With an eye on German demographic developments, economists and other social scientists have called for even greater openness to immigration as a necessary means of stabilizing the national economy and social security system in an aging society. Nonetheless, Berlin has still not introduced a national immigration law, very much as though out of fear that to take a stronger pro-immigration position would risk alienating voters. This is despite the fact that the Expert Council of German Foundations on Integra-

tion and Migration has reported for years now that there is a high degree of openness towards increasing levels of immigration in Germany, and not only in terms of the "competition for the best and the brightest" but also on humanitarian grounds. The willingness shown by Germans in the last year to take in and support refugees has confirmed this impressively. Moreover, although many Germans have been strongly critical of their government in 2015-2016, partly as a consequence of a lack of information, partly as a result of the disputes within German politics on how to proceed, a majority continued to be in favour of accepting people fleeing political persecution and war;[9] in spring 2016, 61 per cent of Germans polled stated that they had few or no concerns about the influx of refugees.[10]

In contrast to migration policy, European regulations concerning refugees have expanded considerably in the last two years. The development of the Common European Asylum System (CEAS) was intended, on the one hand, to ensure that asylum seekers cannot make applications in more than one EU member state. At the same time, the CEAS aimed to establish minimum standards for refugee protection throughout the EU. These rules are founded in documents such as the EU Charter of Fundamental Rights and the Schengen Borders Code. There were also advances in determining the need for protection, including the recognition of non-state and gender-based persecution. However, a communitized European asylum system that offers effective protection does not exist. EU measures frequently concentrate on projects relating to border management and the deterrence of people seeking refuge. The willingness to act in solidarity with refugees and to share responsibility within the EU have not developed at the same pace. The Dublin Regulation, for instance, which is at the heart of the EU's asylum policy regulations, does not differentiate between member states that are easily capable of supporting large numbers of asylum seekers and those that are not. Even in the face of the drama that has dominated the picture since summer 2015, existing mechanisms for the event of a "mass influx" have not been activated. Instead, the European Commission, with reference to Article 78 (3) of the Lisbon Treaty, sought to establish a provisional mechanism for the relocation of people seeking refuge. This aimed to relieve the pressure on countries of first arrival, such as Italy and Greece in particular. However, the negative responses by many member states to this programme make clear just how far the EU is from finding a concerted solution.

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9   Cf. infratest dimap, Umfragen & Analysen, *ARD-DeutschlandTREND, Februar 2016*, at: http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2016/februar.

10   Cf. infratest dimap, Umfragen & Analysen, *Flüchtlingsaufnahme: Deutsche fühlen moralische Verpflichtung, viele betrachten die Zuwanderung aber auch mit Sorge* [Taking in Refugees: Germans Feel a Moral Obligation, Yet Many also Have Concerns about Immigrants], May 2016, at: www.infratest-dimap.de/umfragen-analysen/bundesweit/umfragen/aktuell/fluechtlingsaufnahme-deutsche-fuehlen-moralische-verpflichtung-viele-betrachten-die-zuwanderung-aber.

An Overview of Migration Policy

The will towards European solidarity while respecting the fundamental rights of people seeking refuge is weak. By early July 2016, only 2,826 people had been resettled within the EU.[11] Slovakia and Hungary have even filed a lawsuit with the European Court of Justice against the relocation process passed by a majority of EU interior ministers in autumn 2015 with opposition from Hungary, the Czech Republic, Slovakia, and Romania. Hungary also held a referendum in October in which the mechanism was rejected by an overwhelming majority, but which failed to achieve the necessary turnout. Without resettlement, responsibility for processing asylum applications and accommodating or returning applicants falls disproportionately on Greece and Italy in particular. Greece's complete inability to manage these tasks, even before the dramatic rise in refugee numbers, was demonstrated by several European court decisions, as a result of which the return of refugees to Greece is no longer permitted.[12] Yet other member states have also been reluctant to implement all the provisions of the CEAS adequately. In October 2015, the European Commission adopted infringement decisions against 19 member states in 40 cases of failure to implement EU asylum legislation.[13]

The fact that decisions and measures already adopted are implemented inadequately or not at all is one thing. In addition, the intensification of the political crisis in summer 2015 has pushed a key aspect of the European migration agenda[14] into the background, namely the expansion of *legal* opportunities for immigration – within and outside the international protection system. With regard to the former, the Commission called for the creation of Europe-wide resettlement quotas. The possibility of opening paths to the legal immigration of a substantial number of refugees at least from Syria was also reflected in the agreement between Turkey and the EU of March 2016. However, implementation of this deal has been slow. As of 15 June 2016,

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11   Cf. European Commission: *Member States' Support to Emergency Relocation Mechanism*, at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/ press-material/docs/state_of_play_-_relocation_en.pdf.

12   Key decisions included the judgments of the European Court of Justice (ECJ) in cases C-411/10 and C-493/10 of 21 December 2011, and the ruling of the European Court of Human Rights (ECtHR) on Application no. 30696/09, of 21 January 2011.

13   Cf. European Commission, *More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work*, press release, Brussels, 23 September 2015, at: http://europa.eu/rapid/press-release_IP-15-5699_en.htm.

14   European Commission, *A European Agenda on Migration*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 13 May 2015, COM(2015) 240 final, at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_ on_migration_en.pdf.

only 511 Syrians had been able to enter an EU member state from Turkey legally.[15]

Opportunities for immigration outside the asylum system have improved even less. However, they do represent a key means of reducing the level of illegal migration and developing more flexible regulations, e.g. by simplifying temporary migration. Creating more opportunities here could take pressure off the asylum system, as individuals whose chances of receiving asylum were poor would have other ways to escape their lack of prospects in their home countries. Even with better efforts to address the factors that lead to people becoming refugees, large-scale migration is not a temporary phenomenon, nor in a globalized world does simply closing the borders offer any kind of long-term solution. This is why it is necessary to permanently strengthen the ability of European states and societies to accept the normality of immigration and to address the conflicts that this doubtlessly also provokes. The frequently voiced objection that Europe cannot take in "the whole world" fails to acknowledge (alongside the fact that Europe remains a relatively insignificant destination for migrants in global terms) that legal channels for migration provide a means of regulating migrant flows – while also ultimately improving the prospects of integration.

Europe still displays major failings in terms of integration policy; this includes Germany, even though the Federal Republic demonstrated in autumn 2015 that it was far more willing to accept refugees than other EU states. This is a continuing consequence of decades of denying the reality of immigration. While the Annual Reports of the Expert Council of German Foundations on Integration and Migration have been positive for years, this is not so much the result of targeted policies, but rather a consequence of self-help initiatives, civil-society engagement, and the integrative effect of economic activity (which also includes the social security system). Germany continues to have difficulties in developing state structures and offerings, as this requires the abandonment of established categories of thought: One central failing is the tendency for Germany's integration policy to focus primarily on those it treats as alien rather than on the creation of a general political culture that supports the equal participation of all groups within society. One effect of this is that commonalities that cut across the origins of individuals are easily overlooked, while questionable images of collective identity are accepted uncritically.

Despite the problems associated with the underlying "us/them" approach to integration policy in Germany (and not only in Germany), we should not overlook the fact that the language and orientation courses offered to recent arrivals in Germany in the last decade mark the first attempt to provide systematic opportunities for the acquisition of skills that have a crucial

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15   Cf. European Commission, *Managing the Refugee Crisis: Commission reports on progress made in the implementation of the EU-Turkey Statement*, press release, Brussels, 15 June 2016, at: http://europa.eu/rapid/press-release_IP-16-2181_en.htm.

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significance for participation in social and political life and access to education and the job market. However, very little has been done politically to promote an integration process that is supposedly conceived of as a two-way street. This failure to hold a thoroughgoing debate on the basis of social co-existence is an omission with serious consequences. The electoral success of the right-wing populist Alternative für Deutschland (Alternative for Germany) party (AfD) and the rise in the number of attacks on refugee homes demonstrate the urgency with which racist positions need to be called out by name. The shock of the sexualized violence perpetrated by a number of migrants in several German cities on New Year's Eve 2015 catapulted certain issues and prejudices into the political arena in early 2016 that need to be taken seriously. Right-wing and right-wing populist parties have also been enjoying successes in other European states, such as France and Austria. If the immigration debate is to become a constructive process, it is important that political discussions and media reporting remain sophisticated, objective, and fair instead of calling into question in a sweeping manner immigration, the right to participate, and the willingness of immigrants to integrate.

Recommendations for Action: Reform Institutions, Strengthen Social Cohesion

The deficits mentioned above, the experiences of people around the world, and the results of research in policy fields pertaining to refugees, migration, and integration lead us to define three central challenges facing Europe and the world:

1. *Go beyond Dublin*: The crises of 2015-2016 have made it clear that the Dublin system is not working. It suffers from two congenital defects: It takes into account neither the differences in the ability of EU member states to cope with refugees nor the capacity for action on the part of those seeking refuge, who do not always remain in the state deemed "responsible" for them. The long-scheduled evaluation of the Dublin Regulation by the European Commission in 2016 provides the ideal opportunity to replace or fundamentally overhaul the current system. It remains necessary to establish a binding solidarity mechanism that would at least partially uncouple responsibility for securing the EU's external borders from responsibility for admitting refugees, despite the strong resistance of a number of governments. The European Commission has been attempting to move this process forward since the summer of 2015, and it deserves support. The aim here should be to both create – in a fair procedure – opportunities for the resettlement of refugees while also providing financial and administrative support to states that face particular challenges. Furthermore, solidarity – both within the EU and with refu-

gees – requires the establishment of equal access to protection in terms of opportunities for recognition and prospects for participation – in other words, the implementation of the CEAS, as repeatedly demanded by the courts. This, in addition, could contribute to ameliorating Dublin's second congenital defect by stopping people seeking refuge from leaving the country they are assigned to and travelling on by irregular means. Another way of preventing this kind of secondary migration would be to expand the freedom of movement of recognized refugees within the EU: If individuals who have received protection status in a given state were allowed to immediately seek work, training, or university places in other EU states – as is already the case for EU citizens and others with a right to long-term residency – the question of who was responsible for the asylum application would be less fateful. Recognized refugees would be empowered to make life decisions autonomously, e.g. relocating to be near friends or relatives, without being forced to break the law or to put their lives on hold.

2. *Expand Opportunities for Regular Migration*: For many people subject to severe violence or persecution, irregular routes provide the only opportunity they have to gain protection. The same is true of those people who see no prospect of a life without poverty and hardship in their home countries. Since irregular migration is associated with numerous dangers and, moreover, limits opportunities to manage the movements of immigrants, there is a strong argument in favour of expanding opportunities for regular immigration. In the context of refugee protection, this would primarily entail a major increase in resettlement quotas in *all* the states of the Global North. The UNHCR must be empowered to provide refugees with long-term protection via resettlement; it also requires far more resources to support those seeking refuge in their regions of origin. This requires all the states that have promised financial assistance for humanitarian aid, including at the Syria Conference in February 2016, to keep their promises. In the area of migration, new opportunities for the immigration of less-qualified individuals should also be explored. While European freedom of movement means that pan-European co-ordinated measures are desirable in principle, initial steps could also be taken at the national level in the form of immigration laws. Here, German policy-making, for example, has lagged behind not only recent developments in immigration but also the regulatory progress made in countries such as France and Portugal.

3. *Strengthen Social Integration*: While every priority should be given to a comprehensive effort to combat the causes of forced migration, people will continue to flee to Europe and Germany, and other migrants will continue to arrive. Many of those who have arrived in recent years will also remain. To ensure that they are not marginalized on account of their alleged otherness, European societies need to become more willing to

include them as members with equal rights and the ability to participate, and to accept that social heterogeneity is the norm and requires a two-way effort at integration. While the establishment of legislation to ensure equal treatment and legal guarantees for migrants is a long-term goal of the EU, politically it is unlikely to be achieved in the short term. Therefore, it would be foolish to wait for Europe to act in this area.

4. For Germany, which appears destined to play a pioneering role in Europe, the establishment of a federal ministry for migration and integration could raise the profile of this policy area while contributing to the co-ordination necessary between Germany's constituent states and with its European partners. Across Europe, a range of complementary activities are also necessary, in areas such as education, combating youth unemployment, and the provision of social housing, to prevent conflict over resources between new arrivals and more-established population groups and to ensure that migration "expands the pie". Germany's capacity for integration also has to be strengthened by a culture of political debate that discusses controversial topics openly, not least in order to counteract right-wing populist propaganda with factual arguments.