

**CHALLENGES AND RESPONSE TO MIXED MIGRATION: A  
STUDY OF IRREGULAR FLOW TOWARDS EUROPE  
(2015-2022)**

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## LIST OF ABBREVIATIONS

CAT: Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

CCMA: Commission for Conciliation, Mediation, and Arbitration

CEAS: Common European Asylum System

COVID: Corona Virus Disease

CPA: Comprehensive Plan of Action

DAC: Development Assistance Committee

DRC: Danish Refugee Council

ECOSOC: United Nations Economic and Social Council

EMPACT: European Multidisciplinary Platform Against Criminal Threats

ETUC: European Trade Union Confederation

EU: European Union

FDFA: Federal Department of Foreign Affairs

FIO: Federal Immigration Office

GCC: Gulf Cooperation Council

GCM: Global Compact for Safe, Orderly, and Regular Migration

GCM: Global Compact for Migration

GCIM: Global Commission on International Migration

GCR: Global Compact for Refugees

GMG: Global Migration Group

HRC: Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

ICRC: International Committee of the Red Cross

ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

IDP: Internally Displaced Persons

IDWF: International Domestic Workers Federation

IFRC: International Federation of the Red Cross and Red Crescent Societies

IHRL: International Human Rights Law

IHL: International Humanitarian Law

ILO: International Labour Organization

IMRF: International Migration Review Forum

IMO: International Maritime Organization

IO's: International Organizations

IOM: International Organization for Migration

IRO: International Refugee Organization

ITF: International Transport Workers Federation

MCIC: Migrants in Countries in Crisis

MMC: Mixed Migration Centre

MSF: Médecins Sans Frontières

MTUC: Malaysian Trades Union Congress

NGO: Non-Governmental Organization

OAU: Organization of African Union

OECD: Organization for Economic Co-operation and Development

OHCHR: Office of the United Nations High Commissioner for Human Rights

PICUM: Union Migrant Net and Platform for International Cooperation on Undocumented Migration

PRS: Protracted Refugee Situations

RSD: Refugee Status Determination

SAR: Search and Rescue

SAR: Special Administrative Region

SDG's: Sustainable Development Goals

SOLAS: International Convention for the Safety of Life at Sea

TOC: Transnational Organized Crime

UDHR: Universal Declaration of Human Rights

UNCLOS: United Nations Convention on the Law of the Sea

UNHCR: United Nations High Commissioner for Refugees

UN: United Nations

UNGA: United Nations General Assembly

VGCL: Vietnam General Confederation of Labour

WHO: World Health Organization

WWF: World Wildlife Fund

4Mi: Mixed Migration Monitoring Mechanism Initiative

## PREFACE

In contemporary times, migration has evolved from being a distinct problem to becoming an integral component of a global phenomenon that is fundamentally transforming communities and political landscapes worldwide. The current global landscape is characterised by a transformed environment, encompassing many circumstances and viewpoints about tolerance, anxiety, and multiculturalism. Migration in itself is not viewed as a problem. The problem lies in the manner in which it takes place and the fatalities associated with it. My interest towards migration and refugee studies, particularly ‘mixed migration’ was born out of curiosity to know about the possible reasons for rising complexities of irregular, undocumented or illegal migration and what could be the possible solutions to avoid the altogether negative connotations associated with it.

The research aims to primarily understand the meaning and connotations of mixed migration within the broader framework of forced migration and refugee studies. It focuses on the applicability of the International Refugee Law to contemporary human mobility. The research also comprehends the nature of irregular movement specifically by examining the involvement of smuggling and trafficking in facilitating such movement. Other than these, understanding the underlying causes of malfunction of the European asylum system especially in the context of the 2015 surge in migration towards the Mediterranean is also a major focal point around which the thesis revolves.

A plethora of literature is available on the meaning, emergence and development of mixed migration. However, there is lack of literature available on the implications of responding to mixed migration pertaining to the ‘motivations’ factor while formulating policies, and how it would affect the scale of humanitarian assistance to various categories of people on the move. A

review of available literature also revealed lack of information on the nexus between ‘planned political agendas’ and ‘political dilemma’ of state/political authorities behind extremely restrictive policy measures as well as gross violation of human rights that were primarily responsible for a failed humanitarian assistance to irregular migrants in mixed flow during the 2015 migration crisis. Most importantly, the current literature does not imply whether assistance to undocumented migrants in mixed flow should focus on needs-based delivery rather than focusing on status-based delivery. The present study aims to fill these gaps by responding to the research questions which have been framed in the context of addressing these research gaps. The research has also attempted to understand all the laws, conventions and international organisations that are applicable and relevant to mixed migration and how a well-designed collaboration among NGO’s and IGO’s can avoid migrant deaths at sea and ensure their dignity and safety while in transit.

## INTRODUCTION TO THE THESIS

### **Background**

Cross-border irregular migration has turned out to be the most divisive and polemical issue in contemporary times. There is a prevailing perspective that individuals who engage in irregular migration represent a significant and pressing challenge characterised by overwhelming numbers, who are encroaching upon the sovereignty of nation-states and consequently being deprived of essential safeguards. Contrarily, there are many who refute this perspective on the grounds of its perceived lack of empathy, side-stepping international moral obligations, and as a manifestation of prejudice and xenophobia. Migration has evolved from being a distinct problem to becoming an integral component of a global phenomenon that is fundamentally transforming communities and political landscapes worldwide. The current global landscape is characterised by a transformed environment, encompassing many circumstances and viewpoints about tolerance, anxiety, and multiculturalism.

Due to rising complexities of irregular migration, increasing debates over the related concepts and terminologies are coming to the forefront. The debate over cross-border migration reveals that the dividing line between those fleeing as a result of conflict and those migrating for other reasons is not always clear. Large migratory flows are increasingly made up of people with mixed motivations. They may be pursuing economic advancement, or escaping to avoid war, religious strife or lack of rights in the country of origin. In addition to being embroiled in conflicts, States with poor governance and lack of services are more likely to 'push' migration for economic reasons too. Migrants' individual motivations also influence their choice of destination.

Considering the conditions in the host nations, people from the Horn of Africa who move to Yemen or Saudi Arabia, for instance, do not seek greater freedom but rather better economic opportunities. The various categories of people moving together using similar routes and means of transport directs us towards the phenomenon of 'mixed migration' and complex flow.

Mixed migration refers to cross-border movement of people including those (refugees) fleeing persecution. The movements are irregular, frequently involving transit migration where persons move without requisite documents in a discreet manner, 'crossing borders and arriving at their destination, unauthorised'. Irregular movement, normally involving facilitators and smugglers lies at the core of mixed migration. The image of a truck carrying various categories of people, or a boat consisting of 'mixed' group of people crossing an international border are excellent metaphors for understanding mixed migration. In earlier notions of migration, each migrant would be assigned to a fixed category- such as permanent emigrants and settlers, temporary contract workers, professionals, business and trader migrants, students, victims of trafficking, asylum seekers, unaccompanied minors, etc. Mixed migration views each member of a particular group as potentially falling into one or more of the aforementioned categories. The ability of each migrant to deal with the challenges they encounter during their journey determines if they fall into one of these rigid legal categories and the level of protection that they require. Given these circumstances, it is clear that the safety network and access to aid and services are crucial for guaranteeing migrants' well-being in situations of mixed migration. The present thesis revolves around the conceptual understanding, meaning, circumstances, challenges, laws, policies and organisations involved and the possible solutions to challenges posed by mixed migration.

## **Statement of the Problem**

In a globalised society, it is now commonly acknowledged that drawing a clear distinction between the terms ‘refugee’ and ‘migrant’, although important, is extremely difficult in practise; and this distinction has traditionally been formed with the assumption that refugees have a preferential status in international law. However, when viewed from a different perspective, it actually undermines the concept of ‘migrants’, with negative implications for policy, analysis, and the protection of individuals on the move. In the current situation, it makes pragmatic sense to maintain the category of ‘refugee’, while progressively ensuring that other vulnerable categories of migrants receive the necessary protection that they require and deserve under international human rights norms.

The large and mixed movements of people that have occurred since the beginning of the neoliberal economy in the 1990’s has made it increasingly difficult to distinguish between refugees and asylum seekers on the one hand and migrants on the other. Earlier classification of individuals on the move was conflated as well, unable to keep up with the changing global circumstances. The September 2001 terrorist attacks in the United States, as well as subsequent terror incidents in Europe in recent times have resulted in widespread criminalisation, securitisation, and dehumanisation of refugees and other migrants. In such circumstances, national security concerns surpass humanitarian concerns for migrants. Another important distinction is between illegal and legal migrants. The term ‘illegal’ denotes criminality. However it should be noted here that migrants are not criminals, and they should not be punished for crossing borders illegally. It is the laws and policies that make their status legal/illegal. Hence, such terminology has been avoided and the term ‘irregular’ and ‘undocumented’ has been used throughout the thesis to refer to those migrants who travel through irregular channels, and those who arrive at the borders lacking proper documents, respectively.



The refugee crisis shows no signs of abating in coming times; conflicts ranging from Syria and Yemen to South Sudan and now Ukraine- continue to drive thousands of people from their homes on a regular basis. Families are being torn apart and people have died during perilous journeys. However, various States are turning their back on refugees and other migrants and are not fulfilling their share of responsibility towards them. The six wealthiest nations that have the most promising capacity to provide shelter, education and healthcare, host fewer than 9 per cent of the world's refugees. In reality, about 84 per cent of refugees are hosted by poorer nations that are already struggling to satisfy the demands of their own citizens, and risk jeopardising their own stability.

With the world more globalised than ever, nations today are facing numerous challenges and responsibilities with regard to protection of the most vulnerable people on the move. Displacement and mobility is not going to quietly slip away. Many countries are facing tough social and political challenges with regard to sharing of responsibilities and how these responsibilities should be measured. Responsibility-sharing is a 'collective undertaking' that relies on, but does not define, the individual contributions of states. Against this backdrop, States and the UNHCR have examined the idea of 'common but differentiated responsibilities' in the context of refugee law. This idea recognises that States have varied capabilities and capacities to safeguard refugees, and expecting all States to assist in the same manner and to the same degree is neither rational nor practical. This understanding is central to international environmental law, as expressed in the United Nations Framework Convention on Climate Change, for example.

In the context of refugee law, this principle focuses predominantly on the consideration that the protection of refugees is the responsibility of all States irrespective of who has contributed to the causes of displacement; and each country can contribute to protection in different manners. Numerous

commitments have been made, deals have been struck, conventions and laws have been formulated, but they all have to be implemented in practice. The wider question remains that how many nations are being realistic about the long-term challenges to the problem of mixed migration and what are the ways they are dealing with the complex flow of migrants? This question has been explored firstly, by attempting to study the 2015 migration surge towards Europe and subsequent response towards this challenging phenomenon and secondly, by studying the response towards migrants during the pandemic.

There are various instincts and factors which compel people to migrate. When we talk of mixed migration, we are discussing a plethora of 'mixed' reasons/driving forces for migration involving various groups of people who travel through the same route, using the same means of transport and arriving at the same destination in most cases. Few people would intentionally abandon their country of origin, their home, their people, their culture, and their traditions in order to settle in a place that is utterly foreign to them. Due to economic and other difficulties in their home countries, a large number of people choose to travel in the quest of a better future in a more prosperous nation. Others are compelled to leave, such as refugees and asylum-seekers fleeing war or persecution in their homelands. Some migrants may be unaccompanied or separated children, stateless individuals, stranded migrants, or victims of human trafficking. These categories are not mutually exclusive; migrants may fall into multiple categories simultaneously or switch between them during the journey. It is at this point that mixed migration becomes even more complex. While migration from Afghanistan is more heavily influenced by war and instability, migration from West Africa is mostly motivated by economic factors. These reasons, however, fluctuate depending upon the diverse paths that individuals from the same nation or area choose. People travelling from the Horn of Africa to Yemen and Saudi Arabia, for instance, do

so mostly for economic reasons, but those travelling from the Horn to North Africa and Europe do so in part due to violation of basic rights.

To be more specific, it is extremely difficult to interpret the genuine factors which motivate or compel people to migrate. The reason is that not every migrant is ready to disclose why he/she chose to migrate and some may even make up concocted stories. However, there are migrants who do escape violence and need immediate assistance and protection that a refugee would receive in case of persecution.

Academicians argue that the idea of mixed migration should be abandoned since it has a legally irrelevant and perhaps a dangerous ‘motivations’ component. Instead, it should be seen as depicting intricate population movements made up of several legal migrant categories with various standards for international protection. People in mixed flow are rational agents who typically make travel decisions based on the information that is available to them about the circumstances in the host nations. But what would be the policy implications of considering the motivations element in mixed migration and how would it affect the migrants as well as their genuine protection needs? This is one area related to mixed migration that is under-researched. Since it is a relatively new policy concept, and interest on this has gained prominence recently, not much literature is available for in-depth analysis on mixed migration. However the ones available are in the form of various journal articles, policy briefs, documents, research papers and reports from international organisations like the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), Mixed Migration Centre (MMC) to name a few.

Another important problem lies in the manner in which nations have been dealing with mixed flow in the past. The surge in migrant flow during 2015 exposed the lack of solidarity among European states to deal with the situation

which resulted in death of migrants in large numbers on the doorstep of Europe. Since mixed migration refers to people on the move, and the chief mode of travel has mostly been through the sea in unseaworthy boats and rubber dinghies, several migrants perished while trying to reach the coast. They could never make it to their destination. The European Union institutions and national governments are misconstruing the key takeaways from the difficulties encountered in handling mix migratory flows since 2015. The primary emphasis of the EU policy has been on the prevention of migrant arrivals, the delegation of responsibility to nations situated outside the EU (externalisation), and the reduction of refugee protection measures within the EU. The existing policy measures used by EU institutions and national governments in response to mixed migration and asylum especially during the pandemic, gives rise to significant human rights concerns and jeopardises the integrity of the global refugee protection framework. Therefore, it is imperative to adopt a strategy that guarantees the EU's global prominence in safeguarding refugee protection; that which upholds the fundamental right to seek asylum, promotes a fairer distribution of responsibilities among EU member states, protects the rights of all migrants, and at the same time allows EU governments to exercise border control.

During journey, migrants' encounter with human smugglers and traffickers is another cause for concern. The topic of human smuggling occupies a prominent position in the discourse surrounding the management of irregular migration and the policies framed to address the mixed movement of refugees and migrants. It is more preferable to use the term 'human smuggling' instead of 'migrant smuggling' as smuggling involves both refugees and migrants. Various nations throughout the world continue to allocate substantial resources towards mitigating the illegal transportation of refugees and other migrants, notwithstanding the varied outcomes and extensive ramifications that extend beyond the primary objective of diminishing unauthorised border

crossings. Furthermore, there is a tendency to erroneously 'conflate' human smuggling with offences like human trafficking and terrorism, which is used as a rationale for implementing increasingly punitive measures against migrant smuggling. This misguided approach also extends to irregular migration itself, leading to detrimental consequences. In many nations, those who provide essential services like providing food and water to refugees and other migrants in transit, despite their good intentions, face the possibility of being subjected to legal charges. The equation between both the organised crimes mentioned above has further played a role in escalating militarisation of border controls, resulting in heightened risks for migrants.

## **Review of Literature**

*Bimal Ghosh, "Refugee and Mixed Migration Flows: Managing a Looming Humanitarian and Economic Crisis", Palgrave Macmillan, (2018)*

This book was written at the backdrop of the 2015 crisis of refugee and mixed migration flows towards Europe. It explores the various trigger factors for such a huge influx, some of them being religious tensions, conflicts and persecution, poverty or a mix of these. With the available migration policy frameworks, it was indeed difficult to manage the new challenges thrown by mixed migration. One prevalent issue afflicting the present migration system pertains to the insufficient emphasis placed on addressing its underlying factors. These factors include the disparity between the significant push factors for emigration in countries of origin, amplified by the strong pull factors in receiving nations, juxtaposed with the diminishing prospects for legal entry in destination countries, which often harbour concerns about relinquishing control over their borders. The difficulty of effective internal management of migration, which encompasses the protection of migrants' rights, prevention of discrimination, and promotion of migrant integration, is intricately interconnected with these issues and cannot be addressed in isolation.

Historical evidence further demonstrates that while each category of migratory movement, including that of refugees, have unique attributes, they are also interconnected. The occurrence of a malfunction in any given channel is probable to result in an adverse spill-over impact on the operation of either all or a subset of the remaining channels. Therefore, it is imperative to adopt a cohesive and all-encompassing strategy for the management of migration and the influx of refugees. This book offers a perception of the imminent refugee and mixed migration instances within the framework of four prominent and current movements: two occurring in Western and Eastern Europe, and one each in the Americas and Asia. In each instance, a thorough examination is conducted, which is afterwards accompanied by an identification of the primary issues in each of these flows, as well as the introduction of a series of suggested policy measures in response to them.

*T. Alexander Aleinikoff and Leah Zamore, "The Arc of Protection: Reforming the International Refugee Regime", Stanford Briefs, (2020)*

This book provides a thought-provoking analysis of the current worldwide refugee situation proposing a comprehensive framework of responses. In recent decades, an unprecedented number of 70 million individuals have been displaced from their countries of origin due to on-going hostilities, marking a historical record. The majority of those who have been displaced have crossed national boundaries and are presently confined within temporary camps or are in the process of seeking asylum in nations that are displaying growing animosity towards refugees. Aleinikoff and Zamore acknowledge some favourable advancement, including the 2018 Global Compact on Refugees. This United Nations accord urges wealthy nations and international financial organisations to increase financial support to impoverished countries that bear the primary responsibility for hosting refugees. However, proponents contend that the current refugee policy is dysfunctional and advocate for comprehensive changes, which entail enhancing refugee rights and safeguards.

The central pillar of their methodology is around the creation of a comprehensive international framework for ‘responsibility sharing’. This framework would be developed by a global assembly consisting of donor and host governments, international organisations, and civil society entities. Recognising the political challenges associated with this endeavour, the authors contend that the initial stage is establishing agreement on the fundamental values that should underpin the international approach to addressing forced displacement. These principles encompass social justice, human solidarity, and equitable and proportionate contributions from external actors. ‘The Arc of Protection’ exhibits a notable weakness in its inability to effectively attain the delicate equilibrium between visionary ideals and pragmatic solutions. The refugee system is commonly seen as being fundamentally flawed and requiring a full reassessment, which is not provided by the state-centric Global Compact on Refugees, a recent soft law instrument facilitated by UNHCR. The book primarily neglects the discussion of the essential political factors required to bring about transformative change. Instead, it focuses on presenting examples of past occurrences without directly engaging with the fundamental political forces that facilitated the establishment of these precedents.

*Simon Behrman, “Refugee Law as a Means of Control”, Oxford University Press, (2018)*

The field of international refugee law has undergone significant development as a mechanism for managing and regulating the movement of refugees. This article has examined the foundational principles that prioritise the rights of the state over those of refugees. The analysis aims to provide a comprehensive understanding of the underlying framework on which this perspective is constructed. The concept of the ‘right of asylum’ primarily pertains to the state rather than the refugee, if it exists at all. From the standpoint of pursuing a protection regime that prioritises the welfare of refugees, it can be argued that

the existing system is inherently resistant to reform. The argument in this article is grounded in an examination of the historical progression of foundational principles established by legal scholars from the seventeenth century to the twentieth century. This analysis is further supported by an exploration of the historical evolution of refugee law during the inter-war period. Additionally, the drafting process and subsequent implementation of the 1951 Refugee Convention, along with its associated historical records, are considered in order to bolster the argument.

*Nicholas Van Hear, Rebecca Brubaker and Thais Bessa, "Managing Mobility for Human Development: The Growing Salience of Mixed Migration", UNDP, (2009)*

This research paper has analysed the growing importance of mixed migration by initially pointing towards the fact that migration commonly involves a fundamental differentiation between those who make a deliberate decision to relocate and those who are compelled to do so. The policy realm upholds this differentiation, since the management of global migration is influenced by the conceptual differentiation between 'voluntary' and 'forced' migration, regarded as distinct and separate categories. In reality, it is evident that the distinction is quite ambiguous. Migration can exhibit various forms of complexity: the motivations behind the decision to migrate can be multifaceted, involving a combination of voluntary and involuntary factors; individuals may migrate alongside others in diverse migration patterns; motivations may evolve during the journey; and individuals may find themselves among diverse communities during their journey or upon reaching their destination. This study examines the interrelationships between mixed migration and human development, conceptualised as the enhancement of individuals' capacities and opportunities. The paper initially provides a clear explanation of the fundamental ideas within the discourse surrounding migration, specifically focusing on the interplay between voluntary decisions and external pressures that drive migration. It then proceeds to examine the development of the concepts of



‘mixed migration’ and the ‘migration-asylum nexus’ within the realm of policy-making. The later part of the study examines several instances of mixed migration and the circumstances that migrants face within these migratory flows. The subsequent analysis examines the intersection between mixed migration and migration policies, also referred to as ‘migration governance.’ Ultimately, available evidence leads to the formulation of policy conclusions that suggest the potential of transnational practises resulting from mixed migration as a viable and durable solution in contexts characterised by war and displacement.

*Jorgen Carling, Anne T. Gallagher & Christopher Horwood, “Beyond Definitions: Global migration and the smuggling–trafficking nexus”, Danish Refugee Council, (2015)*

This academic study has examined irregular mixed migration, with a specific emphasis on the involvement of smuggling and trafficking in aiding and shaping this movement. The essay provides an overview of the present migratory landscape, followed by a comprehensive examination and evaluation of the interconnection between smuggling and trafficking. The evolving attributes of irregular migration indicate that the current vocabulary and understanding around these criminal activities are being tested by shifting realities. The present legal conceptions and structures are facing challenges and, at times, encountering difficulties in adequately comprehending the intricacies of the on-going developments. Migrants are encountering increased dangers characterised by heightened vulnerability and less protection, mostly due to the contraction of the asylum space. It is crucial to comprehend migrant smuggling and human trafficking as components of a broader phenomenon rooted in the fundamental economic principles of supply and demand. This understanding is essential for the formulation of migration policies that are not swayed by the misapplication of terminology and that prioritise the protection of migrants’ rights and the corresponding responsibilities of States. An

examination of the mechanisms and motivations behind smuggling and trafficking reveals the significant implications for contemporary liberal States when engaging in a ‘war’ against an adversary that can only be overcome via sustained use of substantial force and infringement upon fundamental rights. This study consolidates the perspectives of three experts who possess extensive experience in the field of mixed migration, smuggling, and trafficking. These experts offer varied geographical and disciplinary viewpoints, enhancing the comprehensiveness of the analysis.

*Sarah Spencer and Anna Triandafyllidou (eds), “Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges”, Springer Nature Switzerland AG, (2020)*

This volume has delved into the conceptual complexities that arise from the existence of migrants with irregular immigration status in Europe, as well as the on-going developments in policy responses at the European national and local level. Situated within the framework of contemporary migration trends and the settlement patterns of migrants with varying types of undocumented status, this edited compilation examines the theoretical and policy concerns that arise once these specific individuals have entered a new country. This publication has aimed to transcend the perception of irregular migration as a crisis or an ad-hoc emergency. In contrast, the analysis focuses on the on-going nature of the phenomena, examining its various aspects and their evolutionary patterns in order to provide novel conceptual frameworks that enhance comprehension of a multifaceted reality. The idea of irregularity is understood as a complex condition that has profound consequences for individuals and serves as a catalyst for transformative policy reforms. This has resulted in tensions within the interactions between local and national authorities in the context of multi-level governance. This book has compiled information from several regions in Europe, examining the many conditions included by the term ‘irregular status’ and the varying governmental

approaches and practises that exist. Irregular migration encompasses several forms of irregularity, such as unauthorised immigration and unlawful stay, entry using fake documents, and entry and violation of the conditions of stay, among others. Therefore, they present several governance, political, and moral challenges at the local, national, and European scales. Several civil society organisations are dedicated to provide support and refuge to undocumented migrants, with a special focus on youngsters and families. Simultaneously, there is a rise in the emergence of far-right factions that aim to impede such efforts and employ tactics of intimidation and stigmatisation against undocumented migrants. Nevertheless, a substantial body of literature in this book has focused on the issue of irregular migration in Europe, specifically examining the many processes that occur after migrants have entered the host countries. The primary focus of this study is not just on law or policy, but rather on the dynamic development of legal and policy frameworks. This includes an examination of the factors that influence their evolution, the many individuals and organisations involved, and the potential future trajectories that may arise. The volume has provided a deeper understanding of the conditions inside Europe that contribute to irregular stay, addressing the need to shift focus from an excessive reliance on ‘push factors’.

*Marina Sharpe, “Mixed Up: International Law and the Meaning(s) of “Mixed Migration”, Refugee Survey Quarterly, (2018)*

This research article primarily has centred on the phenomenon of refugees and other distinct migrant populations frequently engaging in collective travel. The emergence of the policy concept of ‘mixed migration’ has been attributed to the need to effectively describe and understand a distinct migration phenomenon. The term however, encompasses a multitude of interpretations. The study has categorised the various understandings of migration into two distinct categories. The first category encompasses understandings that primarily emphasise the complex composition of migration flows. Conversely,

the second category encompasses understandings that not only acknowledge the complexity of migration flows but also take into account the diverse motivations that drive individuals to relocate. The concept of ‘mixed migration’ has not been extensively explored in the realm of migration studies and humanitarian action, thus limiting its potential impact on both theoretical frameworks and practical interventions. This research article has provided some analysis of various interpretations of a specific term, drawing upon relevant legal principles derived from refugee law, human rights law, humanitarian law, transnational criminal law, and the law of the sea. By examining these diverse understandings, the article has supported one particular understanding of the phenomenon. An analysis of international law supports an interpretation that prioritises complexity, as the legal principles governing mixed migration scenarios are applicable irrespective of individual motivations. The incorporation of these motivations into the policy framework effectively separates the notion of ‘mixed migration’ from its legal foundations. Furthermore, it is imperative to comprehend the concept of ‘mixed migration’ in relation to the diverse range of individual motivations that drive people to relocate, as this understanding has the potential to exacerbate the rise of populist anti-immigration sentiment.

*“Challenges of Irregular Migration: Addressing Mixed Migration Flows”, International Dialogue on Migration, IOM, (2008)*

The primary objective of this discussion paper by the International Organization for Migration (IOM) was to foster discussion among states, international organisations, and other relevant stakeholders about cooperative strategies for effectively managing mixed migration flows in a comprehensive manner. The objective of this endeavour was to stimulate intellectual reflection by drawing upon IOM’s extensive knowledge and understanding of intricate migratory phenomena. An essential factor to be taken into account is the treatment of those seeking refuge and asylum. An essential aspect of effectively

managing mixed migratory flows is in the capacity to guarantee protection for refugees, with particular emphasis on upholding the principle of *non-refoulement*, particularly in cases when the number of refugees is relatively less in a mixed flow. While mixed flows occur beyond the confines of authorised migration channels, it is crucial to avoid considering this issue only from the standpoint of its irregularity. A limited scope may pose a potential challenge in adequately addressing the diverse requirements, susceptibilities, incentives, entitlements, and responsibilities of all relevant stakeholders. The IOM adopts a migration management strategy that centres on the development and execution of all-encompassing policies, laws, and administrative frameworks required to effectively tackle migration concerns in accordance with national, regional, and global priorities. This approach is in line with international law, including obligations pertaining to human rights and the protection of refugees. The document promotes the coordination of States and other pertinent entities in effectively overseeing the entirety of the ‘migration lifecycle’. This entails managing mixed migrant flows in a comprehensive manner, both before to their occurrence and as they unfold, during transit and emergency scenarios, after arrival, and over the long term. Within this particular environment, it is imperative to emphasise the necessity and advantages of on-going intergovernmental collaboration, particularly at the regional level where the majority of mixed migration movements occur. Efforts of this nature necessitate the incorporation of political and technical collaboration, the interchange of information, systematic collecting of data, cooperation with international and other relevant organisations, and the acknowledgment of a collective responsibility.

*Jeff Crisp, “Beyond the nexus: UNHCR’s evolving perspective on refugee protection and international migration”, UNHCR, (2008)*

This research paper has acknowledged the precise mandate of the UNHCR in protecting refugees. However, it has also recognised that the current

complexity of displacement extends beyond the traditional understanding of the asylum-migration nexus. The global phenomenon of forced displacement has witnessed a steady rise in recent years, compelling an increasing number of individuals to relocate due to a confluence of factors such as severe impoverishment, environmental deterioration, climate change, as well as instances of conflict and persecution. The multifaceted challenges surrounding the provision of assistance to individuals who have migrated in search of sustenance, and the potential consequences of repatriating them to conditions of severe deprivation in the absence of refugee status, engenders a myriad of complex questions. The scope of the issues discussed here extends beyond the mandate of the UNHCR. However, it is incumbent upon the UNHCR to fulfil its responsibility of notifying states about these problems and assisting in the identification of solutions to address the emerging challenges. This research article has delved into the UN High Commissioner's dialogue on Protection Challenges, with a focus on efforts to utilise this platform to transform the prevailing discourse on the asylum-migration nexus. The objective of this dialogue was not only to modify the substance of the discourse, but also to alter its overall tone. In recent discourse, it has been posited that new patterns of human mobility are coming to the fore. These patterns encompass various forms of displacement and forced migration that are currently not adequately accounted for within the framework of international refugee law. Furthermore, it has been observed that discussions surrounding the topics of mobility and migration often lack a rational basis. The confluence of electoral opportunism, political populism, and media sensationalism has engendered a venomous impact on the discourse surrounding migration, fostering an atmosphere characterised by fear, intolerance, and rejection.

### **Gaps in Literature**

A plethora of literature is available on the meaning of mixed migration (in the form of articles, reports, policy papers and research papers). However, there is

lack of available literature on the implications of responding to mixed migration pertaining to the ‘motivations’ factor while formulating policies, and how it would affect the scale of humanitarian assistance to various categories of people on the move. A review of available literature also revealed lack of information on the nexus between ‘planned political agendas’ and ‘political dilemma’ of state/political authorities behind extremely restrictive policy measures as well as gross violation of human rights that were primarily responsible for a failed humanitarian assistance to irregular migrants in mixed flow during the 2015 migration crisis. Most importantly, the current literature does not imply whether assistance to undocumented migrants in mixed flow should focus on needs-based delivery rather than focusing on status-based delivery. The present study aims to fill these gaps by responding to the research questions which have been framed in the context of addressing these research gaps.

### **Scope of the Research**

The scope of analytical research carried out in this thesis pertains to a study of the challenges and response to mixed migration from the year 2015 till 2022. The reason behind this time frame was to highlight the unprecedented surge in irregular migrant influx in 2015 in Europe. Later on, the policy challenges that barged in during and after the pandemic and subsequently the Ukrainian refugee crisis in 2022, has also been referred to. The study is restricted to challenges that mixed migration entails as well as the current responses observed while dealing with irregular mixed flow. These challenges can be understood in two aspects: one is in terms of understanding mixed migration or rather clarifying the meaning and connotations of mixed migration, and second is the effectiveness of the current policy measures, need for revamping existing laws and frameworks and promoting extensive collaboration among stakeholders that can be more suitable to deal with large number of migrants in mixed flow. These are specific areas where the research actually focuses on.

It has also attempted to understand all the laws, conventions and international organisations that are applicable and relevant to mixed migration and how a well-designed collaboration among NGO's and IGO's can avoid migrant deaths at sea and ensure their dignity and safety while in transit.

In recent years there has been a significant rise in the use of 'evidence-based programming' within the field of humanitarian response. Both donors and practitioners have placed great emphasis on the utilisation of data as a fundamental component for making well-informed decisions, and mixed migration should not be an exception as far as such responses are concerned. This is one example where this particular study opens the door for further quantitative analysis and research on mixed migration.

It must be noted that in certain contexts, individuals who have not experienced the process of migration may be designated as migrants. For instance, those who are offspring of people born in other countries are often referred to as second or third-generation migrants. This phenomenon may also encompass scenarios pertaining to statelessness, when entire groups of individuals are unable to acquire citizenship while being born and brought up in a certain nation. These individuals may also be classified as irregular migrants by government authorities. But the study is not concerned with individuals who fall under this category. The study restricts itself to irregular migrants who cross international borders, lack proper documents and reach their destination/or not in an unauthorised manner. Such migrants are exposed to multiple forms of risks and exploitation (mostly at the hands of smugglers and traffickers) while on the move and are forced to resort to life-threatening journeys.



## **Objectives of Research**

The research aims to primarily understand the meaning and connotations of mixed migration within the broader framework of forced migration and refugee studies. Other than this, the research also intends to:

- Delve deep into the applicability of the International Refugee Law to contemporary human mobility.
- Comprehend the nature of irregular movement specifically by examining the involvement of smuggling and trafficking in facilitating such movement and analysing the smuggling–trafficking nexus.
- Understand the underlying causes of malfunction of the European asylum system especially in the context of the 2015 surge in migration towards the Mediterranean.
- Map the current response to mixed migration through examining the collaborative approach of relevant stakeholders.

## **Research Questions**

1. How to assess the current nature and quality of international refugee law and its applicability to situations of mixed migration?
2. What are the implications and policy outcomes of considering migrants' 'motivations' in situations involving undocumented cross-border migration?
3. How does Transnational Organized Crimes such as Human Smuggling and Trafficking in Persons operate in situations of mixed migration?
4. How to understand and analyse the failure of European asylum system and migration policies in view of the 2015 migration crisis?
5. What are the applicable international laws and policy frameworks relevant to mixed migration?

## **Research Methodology**

The methodology used for research on this topic is analytical and descriptive as part of qualitative research methods, that involves a critical approach. Some form of quantitative data has been analysed to arrive at certain conclusions (use of figures and tables). The study involved an extensive review of both primary and secondary sources to garner relevant and authentic information on the subject of research. The primary sources include several conventions, protocols, government reports and policy documents of relevant organisations like the UNHCR, IOM, MMC, etc. The secondary sources of information include few books, journal articles, research papers and policy briefs. Since mixed migration is an emerging concept, up-to-date news and online articles have also been reviewed which were a part of secondary sources. Videos, films and few documentaries have also been watched in order to become well-versed with the phenomenon of irregular mixed migration. The researcher attended a number of online and offline conferences and seminars for gathering knowledge on the topic of research. The case study method of research has been applied through which incidents narrated by refugees and migrants in mixed flow, stories of human smugglers, restrictive policy measures of Greece and Turkey and the relevant legal cases have been included in the thesis.

## **Content of the Chapters**

### **Chapter I: The Global Refugee Policy and International Refugee Regime**

The chapter reflects upon the legal definition (the 1951 Convention definition) of refugees, an understanding of forced migration and the subsequent birth of international refugee law. It explores few debates over the use of the terms 'refugees' and 'migrants' under forced migration studies in order to achieve conceptual clarity. It discusses the contemporary evolving role of the UNHCR in complicated refugee situations and how it should reform its policies and expand its mandate to cover the various categories of vulnerable migrants

requiring same protection as refugees (notably migrants in mixed flow). It also addresses the real crisis and contemporary challenges that refugees are facing, and to what extent refugee law has been able to protect persecuted individuals in a 'mixed' flow. It analyses the current nature and quality of international refugee regime and attempts to understand whether the refugee law is in practice expanding its mandate to protect vulnerable migrants in mixed migration, or is actually extending primary support to the 'nation states'.

## Chapter II: Mixed Migration: Motive, Route and Implications

This chapter focuses on the emergence, definition, and understanding of the term 'mixed migration' and explains the motivational elements/factors for mixed flows. The main routes for travel used by the irregular migrants on the move towards the Mediterranean (Eastern, Western and Central Mediterranean routes) have been analysed with a special focus on the Eastern Mediterranean Route. It explains the motivational elements/factors for mixed flows and how irregular movement is related to the phenomena of mixed migration. It also brings to light the implications of the 'motivational element' in mixed migration and how can this policy challenge affect the migrants as well as their genuine protection needs. In this context, few case studies have been reviewed revealing the risks and numerous problems faced by migrants in such 'mixed' situation. The chapter also highlights the dual crisis faced by irregular migrants during COVID-19. The chapter finally culminates into notable findings on the motives for travel, conditions in which migrants are forced to travel; and concludes the discussion highlighting 'why' and 'how' mixed migration as a recent policy concept holds significant relevance within the broader context of forced migration and refugee studies.

## Chapter III: Human Smuggling and Trafficking in Mixed Migration

The chapter focuses on human smuggling and trafficking in persons within mixed migration and discusses them as part of Transnational Organized

Crimes. It highlights the convention and protocols related to both the crimes and also the profiles of smugglers and smuggled migrants. The common routes used for migrant smuggling have also been discussed. The chapter studies the interrelation between the two very different crimes related to migration- human trafficking and smuggling of migrants. It additionally highlights the possible implications of an overlap between the two different crimes. The profiles of ‘other facilitators’ apart from the main smuggler, who are equally involved in migrant smuggling (knowingly or unknowingly) and a review of fatalities in the Mediterranean while being smuggled and the steps taken by concerned European authorities in mitigating the situation at sea have also been explored. The chapter delves into facts related to the role played by the smuggler in the journey of a migrant. It looks into the perspectives of both the smuggler and the migrant in situations of mixed migration, in order to get a more nuanced understanding of the dual role of the smuggler as a ‘protector’ and a ‘predator.’ It also states the strategic politicisation of migrant smuggling and trafficking and its wider policy implications. Finally, it studies the role of smugglers and traffickers at the time of the pandemic as well as the multiplicity of crisis situations faced by the irregular migrants and critically analyses the contribution of States and organisations concerned in the protection of human rights of those who fall prey to organised crimes.

#### Chapter IV: The European Asylum System and Mixed Migration

The chapter discusses the historical development of EU laws related to asylum and migration and the consequent development of the Common European Asylum System (CEAS). In addition to the revamp of the CEAS, the systematic flaws in certain regulations related to the asylum system and the evident fallouts of the Dublin regulation too have been highlighted. The chapter reviews measures taken by the EU through the CEAS for the process of reception, resettlement/relocation and detention of refugees, particularly

irregular migrants entering the region. It also maps the practical experiences with regard to these processes by discussing case studies and case laws related to the same. It aims to draw attention towards lack of solidarity and parity among Member States as far as application of these processes is concerned. Wide gaps between policy-making and policy-implementation are evident in EU asylum system. Despite the development of the CEAS, there is still no legislative framework which can present a durable solution to the plight of migrants arriving in mixed flows, lacking legal status but genuinely requiring protection. Lack of solidarity among EU Member States is a consistent problem in this regard. The chapter therefore evaluates the role of states in protecting the migrants in mixed flow. The restrictive policy measures of Turkey and Greece (before and after the pandemic), has also been discussed as case studies, since these have been the main countries of transit and destination respectively for irregular migrants approaching the Eastern Mediterranean region (most affected by the overhaul of migrants during 2014-15). The nexus between ‘planned political agendas’ and ‘political dilemma’ of state authorities behind restrictive policy measures that were primarily responsible for a failed humanitarian assistance to irregular migrants in mixed flow have been assessed. The chapter discusses the Ukraine crisis and the resultant influx of refugees in order to evaluate the current international response to migration. Finally, the chapter explores the possibilities of avoiding a major humanitarian crisis in future by focusing on a ‘solidarity mechanism’ by the States involved.

#### Chapter V: Response to Mixed Migration: Laws, Policies and Organisations

The chapter attempts to understand the laws, policies and international organisations relevant to mixed migration along with a reference to the conventions and agreements through which states are obligated to protect the human rights of all migrants facing risks and vulnerabilities (irrespective of their status). Although the ultimate responsibility for the protection of the rights of migrants as per international law lies primarily with states, the non-

state actors like the international NGO's have and are persistently working with government agencies as frontline supporters to improve current policies and services available for the vulnerable migrants in order to guarantee their safety and dignity. Both IOM and UNHCR have sections on mixed migration, and new institutions have begun to take shape, notably at the regional level for governing the phenomenon. The chapter then focuses on the cooperative initiatives among IO's and civil society which demonstrate that global response through states, non-state actors and IO's have begun accepting mixed migration as an emerging reality and also as a potential problem for global governance on irregular migration. Lastly, the chapter assesses with examples, that how such response has helped in formulating policies, designing appropriate innovative programmes and gathering effective responses for ameliorating the problems associated with mixed migration.

## CHAPTER I

### THE GLOBAL REFUGEE POLICY AND INTERNATIONAL REFUGEE REGIME

#### Introduction

For the first time in the history of mankind, the number of refugees in the world surpassed the ‘100 million mark’ in 2022, according to a report<sup>1</sup> released by the United Nations High Commissioner for Refugees (UNHCR) on 20<sup>th</sup> June, the World Refugee Day. This record which is both alarming and sad, must serve as a wake-up call for governments and concerned organisations to resolve and prevent conflicts, end persecution and together address the underlying causes that lead to forced mobility. Within this context, the chapter has attempted to delve deeper into the on-going global refugee crisis, evaluate policy measures and analyse the original and evolving role of the UNHCR in fulfilling its mandate. Discussion shall also briefly include the area of forced migration, Internally Displaced Persons (IDP’s) and the status of irregular migrants who do not come under the ambit of international law and are hence denied the necessary protection.

The first section has reflected upon the legal definition (the 1951 Convention definition) of refugees, and the subsequent birth of international refugee law. It has discussed few debates over the use of the terms ‘refugees’ and ‘migrants’ under forced migration studies. The second section has discussed the contemporary evolving role of the UNHCR in protracted refugee situations and how it should reform its policies and expand its mandate to cover the various categories of vulnerable migrants requiring same protection as refugees (notably migrants in mixed flow). The third section has addressed

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<sup>1</sup> United Nations (UN) News, 23<sup>rd</sup> May 2022

the real crisis and contemporary challenges that refugees are currently facing, and to what extent refugee law has been able to protect persecuted individuals in ‘mixed’ flow. The application of laws concerning refugees and other migrants during the pandemic period and the response of respective state governments towards their protection has been discussed and evaluated. The fourth section has analysed the current nature and quality of international refugee regime. It has attempted to understand whether the refugee law is in practice expanding its mandate to protect vulnerable migrants in mixed migration, or is actually extending primary support to the ‘nation states’, releasing them from the burden of unwanted refugees and other migrants in a bid to protect state sovereignty.

## **Section 1**

### **1.1 Refugees, Migrants and IDP’s: Debate on terminology**

There have been debates on terminology by scholars working on ‘forced migration’ particularly; which largely focuses on the use of the terms ‘refugees’ and ‘migrants’, and whether migrants can be used as an overarching term to include refugees, or if migrants and refugees should be seen as mutually exclusive categories.<sup>2</sup> There is no universally accepted definition of a migrant. However, according to the understanding of the International Organization for Migration (IOM):

“A migrant is a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as

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<sup>2</sup>Migration Data Portal, “Types of Migration;”<https://www.migrationdataportal.org/themes/forced-migration-or-displacement#:~:text=According%20to%20IOM%2C%20forced%20migration,%2C%20compulsion%2C%20or%20coercion.%E2%80%9D>



well as those whose status or means of movement are not specifically defined under international law, such as international students.”<sup>3</sup>

‘Forced Migration’ as the term itself suggests, relates to migrants who are forced to move against their will, or when movement is initiated due to external factors (war or natural calamity). IOM defines Forced Migration as

“...migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects.”<sup>4</sup>

In his interesting article, James Hathaway has presented an argument on whether we can afford a ‘scholarly shift’ from refugee studies to forced migration studies, or more simply stated, is the ‘effective marriage’ of ‘refugee studies’ and ‘migration studies’ in the union of ‘forced migration studies’ a good thing, or it will be better to just be confined to a ‘dating’ relationship between the two? The argument Hathaway puts forward is that, a merger of refugee and forced migration studies would not benefit refugees since forced migration ignores the particular predicament of a reasonably well-defined category of people, namely ‘refugees’ who share the bond of a common legal status. Scholars like Josh DeWind hold the view that “refugees and other forced migrants are first and foremost migrants, and should therefore be studied in tandem as part of the family of other migrants,” while Hathaway argues that being a refugee is properly distinguished from being a forced migrant, and is only incidentally analogous to being a migrant. DeWind is concerned that distinguishing refugees and forced migrants from economic migrants risks administrative manipulation in general. Hathaway asserts that a far greater risk lies in the potential failure of authorities to adequately consider the particular obligations that arise from the granting of refugee status, if

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<sup>3</sup>International Organization for Migration (IOM), <https://www.iom.int/about-migration>

<sup>4</sup>International Organization for Migration (IOM), <https://www.migrationdataportal.org/themes/forced-migration>

refugees are viewed as nothing more than (forced) migrants. Since refugees have a special international legal status, it is vital that it is preserved.<sup>5</sup>

Speaking of the IDP's, Hathaway argues that since they are in their own countries, they are the primary responsibility of their governments and are expected to enjoy the same rights and freedoms as all other persons in their countries. In response to Hathaway, Roberta Cohen talks in favour of the protection of IDP's from an international legal perspective. According to her:

“The Guiding Principles on Internal Displacement, based on international humanitarian and human rights law make clear that the international community has an important role to play in addressing the protection and assistance needs of IDPs, even though primary responsibility rests with their governments.”<sup>6</sup>

Refugees, being outside their countries of origin and deprived of the protection of their own nation, must receive alternative legal protection from the international community or from nations that grant them asylum. Moreover, the definition of IDP's is not enshrined in any binding international legal document. However, Cohen also has a valid point where she says,

“The operational reality is that the forcible uprooting of people, whether they become refugees or IDPs, is a profound human tragedy overturning lives, livelihoods and communities, and producing far-reaching psychosocial, political and economic consequences that cannot be dismissed simply by denying, as Hathaway does, that involuntary movement constitutes a prima facie case of vulnerability.”<sup>7</sup>

Nonetheless both scholarly views culminate into something very crucial- whether we adopt categorical distinctions or not, we must neither fail to do justice to peoples' lives; nor support arbitrary administrative manipulation. It has been correctly stated in Hathaway's argument: “While the drawing of distinctions is inherent in any effort to shed focused scholarly light on social

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<sup>5</sup>James C. Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?”, *Journal of Refugee Studies*, Vol. 20, Issue 3, September 2007, pp. 349–369, <https://doi.org/10.1093/jrs/fem019>

<sup>6</sup> Ibid.

<sup>7</sup> Roberta Cohen, “Response to Hathaway”, *Journal of Refugee Studies*, Volume 20, Issue 3, September 2007, pp 370–376, <https://doi.org/10.1093/jrs/fem020>

phenomena, we should strive to achieve categorizations which actually map onto the reality of real peoples' lives.”<sup>8</sup>

Let us consider the expression ‘refugees and migrants’. This expression has gained significant prominence in policy debates, media discourse, and scholarly literature. However, it elicits apprehension due to its subtle undermining of the connotation of ‘migrants’, hence resulting in adverse implications for policy, analysis and individuals in the process of migration. Historically, policy-makers, professionals, and researchers have conventionally defined an international migrant as an individual who has relocated from their habitual place of residence with the goal or anticipation of a prolonged stay, regardless of the motives for migration. According to the UNHCR, refugees should be distinguished from migrants, since they constitute a distinct group. In academic discourse, the term ‘migrants’ encompasses a broad and heterogeneous population, excluding those who fall under the category of refugees. It is imperative to acknowledge that the possibility of every migrant being a refugee holds significant importance in the development of migration policy and in the management of borders. For example, the implementation of strategies aimed at addressing migrant smuggling might have adverse consequences when migrants are perceived solely as individuals without valid reasons to seek refuge. Jorgen Carling argues in a recent commentary:

“Upholding an ‘inclusivist’ definition of migrants provides the best conditions for analyses, policy and protection. And all of us who write and talk about migration issues can make a difference:

- Instead of ‘refugees and migrants’, say ‘refugees and other migrants’.
- Instead of ‘migrants and refugees’ say ‘migrants, including refugees’
- And that ‘migrants’ on its own can refer to people with and without the right to protection as refugees.”<sup>9</sup>

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<sup>8</sup> James C. Hathaway, n.5, p 351.

<sup>9</sup> Jorgen Carling, “The phrase ‘refugees and migrants’ undermines analysis, policy and protection”, *Peace Research Institute Oslo*, Norway, Commentary, March 2023, DOI: 10.1111/imig.13147

## 1.2 Birth of the Global Refugee Regime: A Brief Overview

According to Michael Walzer, refugees are ‘necessary strangers’—‘fellow human beings who have encountered tragedy and trauma.’<sup>10</sup> Therefore, providing them with protection is extremely crucial. By ignoring them and their needs, we are rejecting our own humanity. Under this section, it has been explored how the wider political context of the two World Wars and the emergence of the Cold War shaped the early global refugee regime, and subsequently led to the formation of the UNHCR in 1950.

History is exhaustive of instances to prove that refugees have always existed because of factors like ‘wars, political upheavals, ethnic discrimination, religious strife, and a wide range of human rights abuses’ that force people to leave their native land and move to other so called ‘safe’ places. The freedom of individuals to traverse the borders of their respective political entities is widely seen as a long-standing manifestation of human liberty. In the period preceding the First World War, the prevailing customary international law provided protection exclusively to individuals through their respective nation-states. Its provisions did not establish any legal duty for states to ensure the safety and well-being of individuals who are citizens of other states, even though they were present inside the territorial boundaries of the host state. The individuals’ safety was subject to the discretion of the foreign country of refuge, which had the authority to terminate their stay at its own discretion.

Islam and Bhuiyan stated: “Refugee protection had thus become one of those contemporary challenges that bewildered the international community in search of an enduring solution.”<sup>11</sup> After the development of the modern state structure in the 17th century, migrants became an ‘international issue’. Local

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<sup>10</sup> Alexander T. Aleinikoff and Leah Zamore, “Protection, International Protection and Necessary Flight”, in *The Arc of Protection: Towards a New International Refugee Regime*, Stanford Briefs, 2019.

<sup>11</sup> Rafikul Islam, and Jahid Hussain Bhuiyan, “An introduction to International Refugee Law” in *International Legal Protection for Refugees: Articulating Challenges and Options*, Martinus Nijhoff Publishers, 2013.

monarchs attempted to enforce territorial unity on their states when centralised powers emerged in Europe. They specifically targeted religious minorities and other groups whose customs differed from the ‘national norm.’ In this situation, inter-state anxiety over refugees grew significantly. For instance, the Peace of Westphalia of 1648 recognised the significance of providing shelter to at least part of the world’s refugees and defined refugees as those who had lost the protection of their home state. As a result, European sovereigns acknowledged for the first time a fundamental right to emigrate for persons who wished to leave their home country because their faith was incompatible with that of their monarch. However, this was only a temporary situation, and the only grounds for seeking refuge were political and religious.

Against this background, the chapter attempts to delve deeper into the causes that led to the birth/need of a refugee regime<sup>12</sup> and ‘why’ it became necessary. The creation of a regime regulating states’ responses to refugees became increasingly necessary, as states began to introduce immigration laws on the basis of race, national passports, and other legal and administrative barriers to entry in the late nineteenth and early twentieth centuries, largely in response to the rise of nationalism and the assertion of national sovereignty over their borders. This reminds us of the theory and concept of ‘state sovereignty’ and ‘territorial integrity’, which are the fundamental elements of a state and hence needs to be preserved. People who had to abandon their home countries were in need of international protection since they were unable to gain citizenship or permanent residency in another nation without the necessary legal documentation. The Russian Revolution of 1917 caused the first mass exodus of the century, with Russian aristocrats and others fleeing the Bolshevik regime. More than one million people fled Russia between 1917 and 1921. Thus, in defining Russian refugees from the Russian civil war, the League of

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<sup>12</sup> Regimes comprise the norms, rules, principles, and decision-making procedures that regulate the behaviour of states. They are generally created by states in order to facilitate international cooperation in a particular issue area, such as trade, environment or migration.

Nations employed the following definition for Russian refugees from the Russian civil war:

“...any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.”<sup>13</sup>

The reason for such definition was straightforward- since refugees had surrendered citizenship of their home state, either *de jure* or *de facto*, and had not been awarded status elsewhere, what they needed most from the international community was a legal identity.<sup>14</sup> Moreover, the efforts for relief lacked a central body to coordinate, communicate with counterparts and to effectively raise funds to assist refugees. In response to this issue on 16<sup>th</sup> February 1921, the Joint Committee of the International Committee of the Red Cross and the League of Red Cross Societies held a conference that established a High Commissioner to “define the status of refugees, to secure their repatriation or employment outside Russia, and to coordinate measures for their assistance.”<sup>15</sup>

Dr. Fridtjof Nansen, the first appointed High Commissioner, also created ‘identity certificates’ for refugees later known as the ‘Nansen Passports’. Although Nansen passports did not grant rights to refugees, they did make it easier for them to travel internationally and gave them ‘a more secure legal standing,’ as well as helping them regain their ‘lost identity.’ They also established a connection between protection and what are now known as ‘durable solutions’, given the importance of legal identification as a requirement for acquiring citizenship in a new state. The Nansen passports in

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<sup>13</sup> Aleinikoff and Zamore, n.10

<sup>14</sup> Ibid.

<sup>15</sup> Gilbert Jaeger, “On the History of the International Protection of Refugees”, *International Review of the Red Cross*, 83(843), p 728, 2001, [http://www.icrc.org/eng/assets/files/other/727\\_738\\_jaeger.pdf](http://www.icrc.org/eng/assets/files/other/727_738_jaeger.pdf)

many respects gave rise to the very concept of ‘refugees’ as a separate target of inter-governmental obligation and concern.<sup>16</sup>

Another significant refugee influx occurred during the inter-war period as a result of the persecution of Jews in Nazi Germany.<sup>17</sup> The two disastrous world wars, however, which prompted the creation of a ‘formal institutional structure’ to address the escalating refugee population and their plight, brought about the primary focus on resolving the refugee crisis and finding long-lasting solutions to the problems faced by refugees. The result was the establishment of the International Refugee Organization (IRO) by the UN General Assembly on 15<sup>th</sup> December, 1946. The term of the IRO was set to expire in 1950 (later extended to 1951), and it was recognized by Western European states that some kind of international effort would need to continue on behalf of refugees—both for the ‘residual cases’ of a million displaced persons for whom a solution had not been found and for refugees likely to arise from the expansion of Communism in the Eastern bloc. In 1949, the UN General Assembly began working towards establishing an international organization to succeed the IRO and to draft a convention on refugees.<sup>18</sup>

Subsequently, the UNHCR (United Nations High Commissioner for Refugees) was created by the United Nations General Assembly on 1<sup>st</sup> January, 1950 to protect refugees and find durable solutions to their predicament. Originally established as a provisional organisation, its primary mandate was to cater to the exigencies of European refugees who had been uprooted by the aftermath of the Second World War. Over the course of its development, the organisation’s geographical scope expanded outside Europe, leading to its current status as a renowned organisation with a worldwide perspective. The

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<sup>16</sup> Nicole Triola, “The International Refugee Regime: A Failing System”, December 2014, <https://www.ramapo.edu/law-journal/thesis/international-refugee-regime-failing-system/>

<sup>17</sup> Laura Barnett, “Global governance and the evolution of the international refugee regime”, Working Paper no. 54, *New Issues in Refugee Research*, 2002, <https://www.unhcr.org/research/working/3c7529495/global-governance-evolution-international-refugee-regime-laura-barnett.html>

<sup>18</sup> Aleinikoff and Zamore, n.10

global refugee regime now includes a number of inter-state agreements and practices, which define states' obligations towards refugees. Keeping aside the status quo; the UNHCR has expanded its jurisdiction to encompass individuals who have chosen to repatriate (returnees), individuals without a nationality (stateless persons), and internally displaced persons. Thus, the mandate of UNHCR has expanded considerably since its first establishment.

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the main legal documents governing the movement of refugee and asylum seekers across international borders. The Convention provides a definition of the term 'refugee', establishes the principle that refugees should not be subjected to forcible repatriation to a country where their lives or freedom would be at risk, and delineates the responsibilities of both refugees and States in relation to one another. The 1951 Convention establishes a comprehensive framework for determining the eligibility criteria for the ones seeking refugee status and sets forth the entitlements and privileges that should be accorded to all individuals recognised as refugees.

The definition of a refugee, as outlined in the 1951 Convention, pertains to individuals who acquired refugee status due to circumstances that transpired prior to 1<sup>st</sup> January 1951. It was incumbent upon States to determine whether they would restrict the application of this definition solely to events transpiring in Europe or extend it to encompass events occurring in other regions of the world. The emergence of further refugee crises worldwide during the 1950s and early 1960s necessitated the expansion of the chronological and geographical scope of the 1951 Convention. Hence the 1967 Protocol was adopted to fill this gap and it came to remove the temporal and geographic limits found in the Convention. Although independent, it was



integrally linked to the Convention.<sup>19</sup> Let us look at the definition of a ‘refugee’ under the 1951 convention:

“...a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution.”<sup>20</sup>

Later on, the Organization of African Union (OAU) Convention of 1969 broadened the scope of the definition of a refugee and the 1984 Cartagena Declaration of the Organization of American States took note of ‘generalised violence’ that may produce refugees. Various scholars and policy-makers working on areas of refugee and migration studies have questioned the validity of the determining characteristics of a refugee. Even the definition of a ‘refugee’ is not all-encompassing and leaves out certain groups of people who are facing the risks of being displaced due to factors such as climate change, food insecurity, and terrorism. They contemplate and raise questions on whether the policies are valid in the contemporary time, or need to be modified to cater to the growing needs and vulnerability of other categories of forced migrants who are still being governed by the 1951 convention and 1967 protocol. According to a report by Asylum Access:

“Despite the 1951 Refugee Convention’s historical contributions to global refugee protection, a growing movement of governments, scholars and NGOs has called into question the appropriateness of a Euro-centric, World War II-era convention for today’s new and changing displacement situations.”<sup>21</sup>

While discussions on the ‘in-appropriateness’ of the Refugee Convention has been brought to the table several times and the global North has been utilising unconventional terms to describe the refugee status; there are certain regions

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<sup>19</sup> Alexander Betts, Gill Loescher and James Milner, “UNHCR: The Politics and Practice of Refugee Protection”, Second Edition, Routledge Global Institutions Series, 2011.

<sup>20</sup> Definition of a ‘Refugee’ under Article 1 of the 1951 Refugee Convention

<sup>21</sup> “What is the 1951 Refugee Convention—and How Does It Support Human Rights?” 2021, <https://asylumaccess.org/what-is-the-1951-refugee-convention-and-how-does-it-support-human-rights>

in the global South that are still characterised by the absence of any official legal framework dealing with the protection of asylum seekers and refugees. As highlighted by Chowdhury R. Abrar, three possible ways available to South Asian governments for creating a formal legal system were - joining the 1951 Convention or the 1967 Protocol, ratifying a regional convention, or drafting national law. Abrar examined a few of the justifications for why countries in South Asia were hesitant to ratify the 1951 Convention. The majority of state-provided justifications seemed to be unpersuasive. However, there is little motivation for South Asian nations to ratify the Convention at a time when it was being demolished by the very states that developed and adopted it. Undoubtedly, national laws must be implemented everywhere, including South Asia in order to safeguard the rights of those seeking asylum and fleeing persecution.<sup>22</sup> While Bangladesh, a small and densely populated country in the Global South with a population of 160 million, is under enormous pressure to provide shelter to millions of Rohingya refugees; the more affluent and less populated countries of the Global North and regions (the EU, US, and Australia) infamous for its 'Pacific Solution' of transferring asylum-seekers to processing centres in Nauru and Papua New Guinea—are adopting new strategies to deter refugees, primarily by adjusting their immigration policies and twisting international refugee law, international human rights law and international humanitarian law.<sup>23</sup>

### **1.3 Determining the Status of Refugees**

The UNHCR or any State concerned may elect to conduct a Refugee Status Determination (RSD), which is a legal and administrative procedure to determine whether a person has qualified as a refugee under local or international framework. According to international law which has a

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<sup>22</sup> Marion Couldrey & Dr Tim Morris Ed., "UNHCR and the Convention at 50", *Forced Migration Review*, the Refugee Studies Centre in association with the Norwegian Refugee Council/Global IDP Project, 2001.

<sup>23</sup> Anasua Basu Ray Chaudhury, ed., *Revisiting the 1951 Refugee Convention: Exploring Global Perspectives*, New Delhi: ORF and Global Policy Journal, 2022

significant impact on people's lives, liberties, and security; it is seen as essential to a person's ability to exercise their rights and freedoms.<sup>24</sup> A person is regarded as a refugee under the 1951 Refugee Convention the moment she/he satisfies the requirements or conditions outlined in the Convention definition of a refugee. The 1951 Convention Relating to the Status of Refugees, however, did not establish the procedures for evaluating the conditions of refugee status. It was believed that these procedures would be established by the contracting states after taking into account the legal customs, governing structures, and administrative frameworks in each of their different nations. As a result of their UN membership, States are required to carry out the RSD. However, issues can arise if certain RSDs are carried out jointly by the States and the UNHCR or if States are unwilling to address the refugee issues through conducting the RSD. The UNHCR performs the RSD when the States are unable or unwilling to do so. The UNHCR has had to perform the RSD in more States than before in recent years as a result of changes in the patterns of forced displacement. Even in the majority of Asian nations, RSD is not carried out by the governments but rather by the UNHCR and the practice differs from one place to the other. The RSD is typically carried out by the UNHCR in countries that are not parties to the 1951 Convention, have not yet established asylum processes, or continue to have a geographic restriction that prevents some people from accessing their asylum procedures.

The RSD procedure is primarily divided into two stages: (1) it is crucial to determine the pertinent facts of the case; and (2) the definitions in the 1951 Convention and 1967 Protocol must be applied to the facts so ascertained.<sup>25</sup> The 1951 Convention's definition of a refugee is broken down into three sections known as the 'inclusion', 'cessation', and 'exclusion' clauses. One might wonder why it is important to determine the status of a refugee whose

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<sup>24</sup> Arif Ahmed, "Status Determination of Refugees", *The Daily Star*, 2016.

<https://www.thedailystar.net/law-our-rights/status-determination-refugees-1243147>

<sup>25</sup> Ibid.

need for protection is evident. The recognition of an individual as a refugee has significant importance as it grants them access to ‘international refugee protection’, a specialised framework that should afford them certain advantages, aid, and safeguards. Additionally, this recognition serves as a reminder to the individual of their responsibilities towards the host state.<sup>26</sup> In order to determine whether a person is a refugee, each request for international protection must be evaluated on an individual basis in accordance with the standards outlined in the 1951 Convention and any relevant regional convention.

There may be situations where it is neither practical nor essential to personally review each claim for refugee status, such as when a large number of persons are escaping armed conflict, violence, or other widespread human rights violations. In certain situations, States and the UNHCR may opt to grant the entire group a refugee status. Recognition on this basis is suitable where there are clearly identifiable and objective conditions in the country of origin which suggest that people fleeing are in danger, and meet the criteria of a refugee under the 1951 Convention, the OAU Conventions as well as the 1984 Cartagena Declaration.<sup>27</sup>

The only purpose of RSD is to understand the standards that govern the awarding of refugee status, to become familiar with the methods of application evaluation, to examine applications for which one should seek an expert legal opinion, to identify the key elements of eligibility procedures, and finally to understand the process of suggesting changes to the current methods for determining a person’s status as a refugee. The most notable and significant is the protection under the principle of *non-refoulement* in Article 33(1) of the 1951 Refugee Convention discussed in details in the following section. Apart

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<sup>26</sup> Islam and Bhuiyan, n. 11

<sup>27</sup> Frances Nicholson and Judith Kumin, “A guide to international refugee protection and building state asylum systems”, *Inter-Parliamentary Union and the UNHCR*, 2017, <https://www.refworld.org/docid/5a9d57554.html>

from *non-refoulement*, refugees are entitled to a number of other rights and benefits including protection against threats to the refugees' physical security, unrestricted access to the courts in the host country, support to meet fundamental and material needs, freedom of movement, access to adequate education at least at primary level, reunification with close family members in the host country as soon as practicable, and special measures for the protection of refugees who are particularly vulnerable.<sup>28</sup> After an individual has qualified to refugee status under Article 1A (2) of the 1951 Refugee Convention, he may still lose his refugee status if he falls into the cessation clauses (Article 1C) of the 1951 Refugee Convention. The clauses have two components: the first covers the first four clauses in Article 1C that relate to changes in the personal circumstances of the refugee occasioned by his own actions and resulting in his obtaining national protection that makes international protection unnecessary. The second covers the last two clauses in Article 1C relating to changes in a refugee's objective circumstances that makes international protection no longer justified.<sup>29</sup>

#### **1.4 The Principle of '*Non-refoulement*'**

Under the ambit of refugee law, the principle of *non-refoulement* (refugee's right to be protected from forced return) is of prime importance as it protects the 'fundamental human rights' of any migrant or refugee. It is contained in Article 33(1) of the 1951 Convention which states: "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>30</sup>

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<sup>28</sup> See UNHCR, Refugee Status Determination

<sup>29</sup> Ibid.

<sup>30</sup> Article 33(1) of the 1951 Refugee Convention

The words ‘in any manner whatsoever’ imply that this principle applies to any conduct by the State that would place a refugee at risk of being returned, whether directly or indirectly, to his or her country of origin where he/she can face the same threat that forced her/him to flee. This would include refusal of entry at the border as well as removal from within the territory. The principle of *non-refoulement* applies wherever the State exercises its authority, including beyond its borders. Article 33(2) of the 1951 Convention outlines two exceptions to the principle of *non-refoulement*. It permits the *refoulement* of a refugee if there are reasonable grounds for regarding him or her as a danger to the security of the country where he or she is present or if, having been convicted of a particularly serious crime, the refugee constitutes a danger to the community. However, it does not in any manner exempt states from their obligations towards refugees under the International Humanitarian Law (IHL).<sup>31</sup> The principle of *non-refoulement* is found in IHL, international refugee law and International Human Rights Law (IHRL); although with different scopes and conditions of application for each of these statutory bodies. Other international human rights accords reinforce the concept of *non-refoulement* in circumstances when the person repatriated may risk torture, or degrading treatment. Case in point, Article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) states that “[n]o State Party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

In a similar fashion, the Human Rights Committee (HRC) has also interpreted the ‘International Covenant on Civil and Political Rights’ (ICCPR) to enclose the principle of *non-refoulement*. Article 7 of the ICCPR affirms that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” There are certain regional

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<sup>31</sup> UNHCR, 2017

human rights treaties which have expanded the scope of the prohibition on *refoulement*. Article IX of the African Union's Kampala Convention obliges States to "[r]espect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."<sup>32</sup> The exact parameters of the *non-refoulement* concept are still up for debates. It is obvious that all refugees already present on the territory are covered by the prohibition on *refoulement*. There is controversy about whether it also applies to refugees who arrive at the country's borders and request admittance. As previously stated, there is no responsibility to grant refuge under international law. However, it has been argued that rejecting refugees at the border does constitute *refoulement* and that states shouldn't be permitted to do so.<sup>33</sup> However, article 33(2) of the 1951 Convention lays forth the sole permissible exceptions to the principle of *non-refoulement* as it is outlined in international refugee law. They are applicable in two situations: when there are good reasons to believe that a particular refugee 'poses a danger to the security of the country in which he [or she] is' or 'poses a danger to the community of that country' after being found guilty of a particularly serious crime. 'Article 33(2) must be interpreted restrictively and with full respect for the principle of proportionality.'<sup>34</sup> This implies that it must be proven that the refugee's threat to the security of the host nation or to the community justifies *refoulement*.

The 'danger to the security' exemption calls for a threat to be directed at the refugee nation itself and to be of a very serious nature. This must be backed by trustworthy and reliable evidence and be founded on reasonable reasons. The 'danger to the community' exception necessitates both a determination that the

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<sup>32</sup> Oona.A. Hathaway, Stevens, Mark. and Lim, Preston, "Covid-19 and International Law." November 30, 2020. Retrieved from <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>

<sup>33</sup> Catherine Phuong, "Identifying States' Responsibilities towards Refugees and Asylum Seekers"

<sup>34</sup> Nicholson and Kumin, n.27

individual poses a future risk and a final conviction of a particularly serious offence. *Refoulement* must be the final resort for removing or reducing the danger, and it must be reasonable in the sense that the threat to the nation or its people must outweigh the risk to the refugee upon *refoulement*.<sup>35</sup>

## **Section 2**

### **2.1 Evolving role of the UNHCR**

After discussing the background of formation of the UNHCR, let us now come to the circumstances and challenges under which it has been functioning. Later, its fallouts and certain necessary policy changes (to adapt to newer challenges brought by the contemporary refugee situation) shall also be discussed under this section. As mentioned earlier, the disastrous consequences of the Second World War pushed the number of refugees to the brink and even after years, there were approximately more than a million refugees still left in Europe. Hence, a new agency was established to tackle the situation and UNHCR turned out to be the ‘formal structural organisation’ which soon became a permanent body and went on to play a fundamental role in the consolidation of future developments and trends in the refugee regime. Its core mandate was to provide international protection to refugees and seek a permanent solution to the problem in cooperation with national governments, NGOs, and other international organizations. However, UNHCR is also authorized to lend its support to refugees/migrants that do not fall within the strict Convention definition, and is thus able to deal with large refugee flows and situations where there may be no strict persecution.

In the post-World War period, the UNHCR became engrossed in refugee issues that confronted the global order. Refugees flowing into Europe and North America came mainly from countries in the Communist bloc. The Hungarian crisis in 1956 created the first mass flux of refugees from the East,

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<sup>35</sup> Ibid.



followed by the Czech refugees fleeing Soviet repression of the nationalist uprising in 1968. However, the 1970's saw a change in refugee flows as more people started arriving from developing countries. This period was highlighted by the process of decolonization in Africa, which resulted in a large number of individuals fleeing their home country.<sup>36</sup> This movement however was unique, as individuals were leaving their own impoverished nations and migrating to other comparably disadvantaged regions that were already grappling with the challenge of sustaining their populations. The General Assembly was compelled to pass specific resolutions in order to secure funding for the UNHCR, leading to the subsequent drafting of the 1969 Convention on the Specific Aspects of Refugee Problems in Africa. During this particular era, there was a notable occurrence of Vietnamese individuals embarking on perilous journeys in fragile boats, afterwards encountering rejection and repatriation upon arrival at the coastlines of neighbouring nations. The International Conference on Refugees and Displaced Persons in South-East Asia convened in Geneva in 1979 with the objective of examining the notion of burden-sharing and exploring potential resolutions. The outcome materialised as the Comprehensive Plan of Action (CPA) designed for Indo-Chinese refugees. Instances such as the facilitation of a multi-party accord by the UNHCR in response to the crisis in Vietnam might be seen as a further extension of the scope of international refugee regime.<sup>37</sup> Since these new flows were larger and more complex than those in the past, conceptual difficulties arose as the line between refugees and migrants began to blur. Hence the protection needs became much similar for both categories on grounds of increased vulnerability of the other groups of persecuted individuals.

While the end of the Cold War engendered calls for a 'new world order', dramatic changes in global and regional politics during the 1990s presented

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<sup>36</sup> Triola, n.16

<sup>37</sup> Ibid

newer challenges for UNHCR. It was marked by modern day conflicts throughout the world, like political and ethnic conflicts, increasing mass migrations on a global scale. Borders became significantly easier to cross given cheaper transportation and the disintegration of many of the rigid boundaries and territories upheld by Cold War politics. This eventually led to the increase in asylum claims.

If we segregate the decade-wise policies of UNHCR, then the 1990's was the 'decade of repatriation' as the new High Commissioner, Sadako Ogata made repatriation a primary objective for UNHCR shortly after she assumed office in late 1990's. Around the world, more than 9 million refugees repatriated between 1991 and 1996 as estimated by the UNHCR. It is important to note that all conflicts were not easily resolved and some even persisted. Hence, the UNHCR was also confronted with the challenge of addressing refugee situations in those nations where the end of the Cold War could not bring peace. UNHCR began to facilitate the repatriation of refugees, even to situations where the conflict continued for instance in countries like Afghanistan, Liberia, Iraq, Sierra Leone, Somalia, the former Yugoslavia. To justify this, UNHCR developed terminology and concepts such as 'safe return', which specified that conditions in the country of origin need not improve 'substantially' but only 'appreciably' so that there could be a safe return. Repatriation no longer had to be a strictly voluntary decision by refugees to return home. Rather, it would now be UNHCR who would make the assessment as to whether conditions presented a threat to their safety. There were also multiple occasions where UNHCR was involved with the 'forced return' of refugees. Cases such as the forced return of Rohingya refugees to Myanmar (Burma) from Bangladesh in 1994 and the expulsion of Rwandans from Tanzania in December 1996 highlight that UNHCR has supported operations which indulged in serious human rights violations and disregard for the principle of 'voluntariness' that was previously much pivotal for refugee

return. Moreover, there was a growing view that the protection of refugees did not necessarily always outweigh the security interests of states or broader conflict resolution objectives.<sup>38</sup> Since a growing number of refugees were repatriating under some form of pressure into situations of social unrest and political instability, UNHCR felt there was need for an international presence to monitor the welfare of the returnees and to facilitate their reintegration back into their home societies. Moreover, there was international concern for most refugees who were returning to areas that had been devastated by decades of conflict, and hence they would be unable to support themselves and might once again be displaced. To fill the gap between short-term humanitarian relief and long-term development, UNHCR initiated a new strategy of ‘returnee aid and development.’<sup>39</sup>

Local integration and resettlement are other two durable remedies for the refugee problem in addition to repatriation. Local integration is the process by which refugees obtain citizenship or permanent residency in their host nation. Both refugees who have long since established a living in their host countries and those who have grown up in exile frequently prefer it. But host countries are frequently hesitant to offer citizenship or public services. Resettlement has given those refugees who are considered by the UNHCR to be among the most vulnerable, a long-term option although it has only ever been accessible to a minority of refugees. In 2016, just one per cent of refugees worldwide were resettled. In 2020, approximately 1.4 million refugees were estimated to be in need of resettlement, but only slightly more than 2 per cent (34,400) were relocated for protection in a new country.<sup>40</sup> Fewer than forty countries have a resettlement program, and the United States has historically taken in more than half of all resettled refugees. However, since Donald J. Trump’s election

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<sup>38</sup> Betts, et.al, n 19

<sup>39</sup> Ibid.

<sup>40</sup> Benedicta Solf and Katherine Rehberg, “The Resettlement Gap: A Record Number of Global Refugees, but Few Are Resettled”, October 22, 2021, <https://www.migrationpolicy.org/article/refugee-resettlement-gap>

as president, this number has come down significantly. In 2020, the top countries where refugees and asylum seekers were residing were Turkey (with 3.9 million), Jordan (3 million), Palestine (2.3 million)<sup>41</sup>, Colombia (1.8 million), and Germany (1.5 million).<sup>42</sup> Before being relocated, refugees must undergo three procedures: identification, admission to resettlement, and case submission. They are then presented to the country of resettlement for consideration.<sup>43</sup>

Identification is the procedure through which large groups of refugees worldwide are ascertained to require relocation. This process is led by UNHCR, which observes that identification is “based on a refugee’s objective need for resettlement and not on their subjective desire for it,” and that it “should not be based on the desire of any specific actors, such as the host state, resettlement states, other partners, or UNHCR staff themselves.”<sup>44</sup> The UNHCR releases annual estimates of the population in need of resettlement, which serve as the basis for discussions with states about annual quotas and targets. The agency may also decide which locations and situations to emphasise, such as the Syrian civil conflict. After being identified, a person’s ability to be resettled rests on an evaluation and confirmation of their unique circumstances. People seeking protection are registered with the host country government, UNHCR, or both, ideally as quickly as possible, upon arriving in a first country of asylum. In this procedure, basic data including name, age, nationality, and family structure are recorded. To be recommended for resettlement, the majority of people (but not all) must be determined to be refugees either by the country of asylum or UNHCR. Only a small percentage of refugees who are determined to have urgent needs for protection in the host country get resettled. This may entail taking into account the physical security

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<sup>41</sup> Although Palestine is not an internally recognised independent state, it is treated as a separate entity for UN data purposes.

<sup>42</sup> Solf and Rehberg, n.40

<sup>43</sup> “No Refuge”, *Council on Foreign Relations*, <https://www.cfr.org/refugee-crisis/#!/a-system-under-strain>

<sup>44</sup> Ibid.

of the refugees, their exposure to violence or torture, their medical requirements, and other factors. Most resettlement cases are submitted to destination nations by UNHCR. Quotas govern submissions; resettlement nations determine the amount of refugees they will accept in accordance with their own legal, practical, and other requirements, while UNHCR works to fill the resettlement spots. Resettlement Registration Forms, which are filled out during a series of additional interviews and include details about the refugee's family composition and biography, proof of a legally valid refugee claim, justification for the need for resettlement, and examination of any potential legal obstacles or concerns, are the most popular method of submission. Before a case is presented to the country of resettlement, there are typically multiple stages of internal evaluation.<sup>45</sup>

A refugee's case goes through another phase of evaluation after being submitted to a country for resettlement, this time by the host nation. Countries normally perform four different types of assessments as part of their consideration, including identification, status, security, and suitability. Individual processes vary substantially. Despite the fact that the UNHCR often first verifies a refugee's legal identity through interviews and other verification processes, governments frequently carry out their own verification as an extra measure of safety. After that, they frequently determine whether the person satisfies their own requirements to qualify as a resettled refugee and immigrant. Third, a security threat assessment is performed on the individual and any accompanying family members. Last but not least, resettlement states determine if the refugee would probably encounter any insurmountable obstacles to assimilating into the suggested new society or group. Some nations may decide to relocate refugees in this last phase who have particular qualifications or backgrounds, such as those who have relatives living there. If refugees receive preliminary approval for

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<sup>45</sup> Ibid.

resettlement, they often go through medical testing and ‘cultural orientation training’ before departing.<sup>46</sup> The preamble to the 1951 convention recognizes:

“...that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature, cannot therefore be achieved without international co-operation.”<sup>47</sup>

Although the Convention strongly supports the idea of resettling refugees through promoting assimilation, naturalization of refugees in countries that granted them asylum, as well as voluntary repatriation, regional and international organisations lack the tools to enforce such collaboration. Resettlement and integration have always been the state’s responsibility.<sup>48</sup> With these durable solutions receding, more than half of the world’s refugees have by now been displaced for five or more years—and in some cases several decades—in what the United Nations calls Protracted Refugee Situations (PRS). Meanwhile, many of the refugees displaced more recently could end up in protracted situations themselves.

## **2.2 UNHCR and its approach towards Protracted Refugee Situations (PRS)**

Protracted Refugee Situations (PRS) is a term coined by the UNHCR to understand the growing complexity of the refugee crisis. It defines PRS as a situation in which at least “25,000 refugees from the same country have been living in exile for more than five consecutive years.”<sup>49</sup> Refugees in these situations are frequently locked in limbo: although it is not safe for them to return home, they have also not been granted permanent residency to stay in

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<sup>46</sup> Ibid.

<sup>47</sup> Preamble to 1951 Refugee Convention

<sup>48</sup> No Refuge, n.43

<sup>49</sup> See “Protracted Refugee Situations Explained”, 28<sup>th</sup> January 2020, <https://www.unrefugees.org/news/protracted-refugee-situations-explained/#:~:text=1.-,What%20is%20a%20protracted%20refugee%20situation%3F,more%20than%20five%20consecutive%20years.>

another nation. Nearly 16 million people were in a protracted refugee situation at the beginning of 2019. This is a 12 per cent rise over the previous year and accounts for nearly 78 per cent of all the refugees relocated globally.<sup>50</sup> This situation contemplates an important fact- that the global refugee regime has basically been unsuccessful in providing concrete solutions to the refugee problem and to assist displaced persons regain a degree of normalcy and rebuild their lives. Iran and Pakistan, for example, are “one of the longest protracted situations as they have hosted approximately 2.4 million Afghan refugees for the past 40 years.”<sup>51</sup>

In 2004, UNHCR’s Executive Committee had presented a paper on protracted refugee situations in which it described such situation as “one in which refugees find themselves in a long-lasting and intractable state of limbo.” At the end of 2020, over 15.7 million refugees or 76 per cent of the worldwide refugee population were in a state of prolonged displacement, with the vast majority having been there for 10 years or more.<sup>52</sup> Five African countries along with South Asian nations like Bangladesh (Rohingya refugees), Afghanistan, Syria, are known to have the world’s largest number of refugees where conflict and persecution has persisted for many years.

Camp life in PRS- If camps do save lives at times of crisis, it also follows that over time, these lives are ultimately wasted. The greatest consequence of protracted displacement situations is for the human rights of refugees and IDPs. Since the late 1980s, many governments in the global South have required displaced populations to live in designated camps, with serious implications for the human rights and livelihoods of those displaced. Several generations of the same families spend their entire lives in refugee camps.<sup>53</sup> A

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<sup>50</sup> Ibid

<sup>51</sup> UNHCR Report, 2020

<sup>52</sup> Albert Kraller, Benjamin Etzold and Nuno Ferreira, “Understanding the dynamics of protracted displacement.” November, 2021. *Forced Migration Review* issue 68. Retrieved from [www.fmreview.org/externalisation](http://www.fmreview.org/externalisation)

<sup>53</sup> Ibid.

refugee may be eligible for aid, but is unable to exercise the rights, such as the freedom to travel around, the right to employment, and in some circumstances, the right to an education, that would allow him or her to contribute positively to society. Through the continuation of poverty, protracted refugee situations also squander lives. The World Bank lists three aspects of poverty: a lack of resources (income and assets), a lack of participation and influence in societal and governmental institutions, and susceptibility to negative shocks coupled with inability to withstand them. All three of these aspects of being a refugee are frequently present, leaving refugees not only without any form of national protection but also extremely destitute. Refugees and other people who are poor may turn to a variety of harmful survival methods like child labour, environmental destruction, or prostitution.<sup>54</sup>

Why such situation takes place at all? There are certain observations explaining the possible causes for PRS. The UNHCR argues that, “protracted refugee situations stem from political impasses.” It further states, “they are not inevitable, but are rather the result of political action and inaction, both in the country of origin (the persecution or violence that led to flight) and in the country of asylum.” They endure because of on-going problems in the countries of origin, and stagnate and become protracted as a result of responses to refugee inflows, typically involving restrictions on refugee movement and employment possibilities, and confinement to camps. The short-term nature of planning and funding modalities is also a contributing factor.<sup>55</sup> Unresolved push factors, such as persecution, violence, and human rights abuses, as well as a lack of political will in the country of origin, contribute to protracted circumstances in which refugees are unable to safely return home. Furthermore, a lack of integration policies in the host nation denies refugees the freedom to work and move freely, resulting in their

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<sup>54</sup> Executive Committee of the High Commissioner’s Programme, “Protracted Refugee Situations” EC/54/SC/CRP.14. 10 June 2004.

<sup>55</sup>Ibid.



confinement in camps. Furthermore, hostilities may resurface if regional actors fail to enforce peace.<sup>56</sup> According to Loescher and Milner:

“Protracted refugee situations are the combined result of the prevailing situations in the country of origin, the policy responses of the country of asylum, and the lack of sufficient engagement in these situations by a range of other actors.”<sup>57</sup>

PRS has been a challenging factor for countries as well as for organisations dealing with refugees. It also highlights the challenges that the UNHCR has been facing in providing solutions to the on-going refugee crisis. The circumstances in the country of origin, the asylum country’s governmental responses, and a variety of other actors’ inadequate engagement- all contribute to long-term displacement. Refugees and IDP’s are unable to return home since the problems in their country of origin is not being addressed. Failure to communicate with the host nation only serves to promote the notion that refugees are an inconvenience and a security risk, which encourages encampments or seeking refuge in already crowded urban areas and prevents the development of regional solutions. As a result, humanitarian organisations like UNHCR are left to make up for the failings of the players in charge of ensuring international peace and security as a result of these failures.<sup>58</sup>

Mobility has always been a key component of the potential remedies for long-term displacement. It is a crucial coping mechanism for people, frequently in defiance of laws and regulations. The current emphasis on complementary pathways to protection in the ‘New York Declaration’ and the ‘Global Compact on Refugees’ indicates a growing understanding of the role of physical mobility in establishing ‘durable solutions.’ Significant inconsistencies exist between the policies of important receiving States at the same time. In

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<sup>56</sup>John Thon Majok, “A Generation in Limbo: Protracted Refugee Situations in Kenya Must Be Addressed”, *News Security Beat*, August 15, 2019, <https://www.newsecuritybeat.org/2019/08/generation-limbo-protracted-refugee-situations-kenya-addressed/>

<sup>57</sup>James Milner and Gil Loescher, “Responding to protracted refugee situations: Lessons from a decade of discussion”, *Refugee Studies Center*, University of Oxford, January 2011.

<sup>58</sup> Ibid.

the European context, for instance, the EU emphasises on the need to make it easier for refugees to attain long-lasting solutions and to increase the self-reliance of those populations that have been forcibly displaced, for instance by enhancing the link between humanitarian and development aid. And yet, the EU supports policies that primarily rely on deterrence in an effort to address the underlying causes of displacement and irregular migration. Similar to this, the EU's assistance for regional integration and free movement regimes improves access to mobility as a livelihood strategy, but is constrained by its 'externalisation' policies, which require that third countries adhere to migration control requirements in exchange for help.<sup>59</sup>

The concept of 'externalisation' has emerged as a key strategy in the European Union's approach to managing mixed migration flows. This strategy involves the delegation of migration management and border control responsibilities to regions and countries outside the EU. By outsourcing them, including the processing of refugees and asylum seekers, the EU aims to prevent irregular arrivals and maintain control over its borders. Externalisation has become a central component of the EU's overall response to the challenges posed by mixed migration flows. The implementation of certain measures has the potential to enhance the capacity for protection in both transit countries and countries of first arrival. However, it has been observed that the implementation of the EU's externalisation policy frequently results in the infringement upon individuals' rights. The phenomenon under consideration pertains to the obstruction of an individual's fundamental entitlement to freely exit a nation, be it their own or a foreign country. This obstruction often results in individuals becoming embroiled in circumstances characterised by abuse and exploitation. The practise in question undermines the fundamental right to seek asylum, as it compels individuals to pursue protection in nations where asylum systems are not adequately operational. It aggravates instances

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<sup>59</sup> Kraler, et.al, n 51

of human rights violations that serve as a catalyst for migration rather than alleviating them. This exacerbation occurs through the provision of assistance to security or border forces that engage in abusive practises, as well as through the suppression of human rights diplomacy with third countries in the pursuit of collaborative efforts on migration-related matters.<sup>60</sup>

As noted by Slaughter and Crisp (2008), UNHCR launched a series of initiatives addressing PRS in 2002–2004 (‘Convention Plus’, ‘Development Assistance to Refugees’ and ‘Development through Local Integration’) all of which focused on the ‘durable solutions’ dimension of the organisation’s mandate. Other efforts of the UNHCR converged in 2008 and 2009 around three events: the launching of the High Commissioner’s Initiative on Protracted Refugee Situations in June 2008; the convening of a High Commissioner’s Dialogue on Protection Challenges addressing protracted refugee situations in December 2008; and the negotiation of an ExCom Conclusion on Protracted Refugee Situations, culminating in the adoption of the Conclusion during an extraordinary meeting of ExCom in December 2009.<sup>61</sup>

Protracted refugee situations are a sign of political failures, carelessness, and poor resource allocation. In keeping with its mandate to safeguard refugees and seek long-lasting solutions to their plight, UNHCR is working vigorously to ensure that protracted refugee situations are not overlooked and that they are addressed in a way that respects individual refugees, takes into account the larger political and development context, and allows refugees to take advantage of the 1951 Convention rights that would facilitate their independence while a solution is sought. However, humanitarianism will not be sufficient to resolve enduring problems. In order to effectively address the underlying causes of protracted refugee situations and compassionately

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<sup>60</sup> Human Rights Watch, “Towards an Effective and Principled EU Migration Policy”, Recommendations for Reform, June 2018.

<sup>61</sup> Milner and Loescher, n 56

address their immediate repercussions, UNHCR relies on the cooperation and political commitment of Member States to work together to tackle the root causes of PRS.<sup>62</sup>

The UNHCR has always been concerned with its refugee protection mandate and aims to make sure that irregular migration does not hamper or impede the enjoyment of protection by the refugees. The UNHCR believes that being actively involved in the issue of international migration is critical if the Office is to properly perform its mandate for refugee protection and solutions. The key concerns of UNHCR in this area are threefold. Firstly, there is a need to ensure that migration management practices, and in particular border controls, enable a differentiation to be made in the treatment of those people who have protection needs and those who do not. Secondly, The UNHCR seeks to guarantee that the capacity of refugees to get protection and solutions is not jeopardized by irregular migrants' overuse and abuse of asylum processes. Finally, while maintaining a fundamental distinction between refugees and migrants, UNHCR considers that its efforts to find protection and solutions for refugees should be built on a thorough understanding of the dynamics of international migration (UNHCR, 2007). UNHCR takes the clear stand that patterns of human mobility have become increasingly complicated and that due to the intersections between refugee and other migratory movements, UNHCR can only fulfil its mandate if it engages with global migration as well. In the words of Jeff Crisp, 'there was a broad consensus that the traditional UNHCR notion of 'people who are in need of protection' can no longer be restricted to refugees.'<sup>63</sup> In 2000, UNHCR declared a global 'crisis' in the international asylum-refugee system. It highlighted that 'shrinking asylum space, mostly but not exclusively in the developed world' had led to increasing difficulty for UNHCR to fulfil its mandate. The situation was compounded by

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<sup>62</sup> Executive Committee, n.53

<sup>63</sup> Jeff Crisp, "Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration," *UNHCR Research Paper No. 155*. 2008.

the fact that many states in the Global South were threatening to restrict their policies towards refugees and asylum seekers in reaction to the Global North's lack of 'burden sharing'.<sup>64</sup>

### **Section 3**

#### **3.1 International Law and the Global Compact for Refugees**

A number of global events occurred in recent times that have terrified, persecuted, and forced millions of people to flee their homes, such as the protracted civil war between Sri Lanka's government and separatists, the so-called wars on terrorism in Iraq and Afghanistan, the devastating famine and brutal civil wars in Africa, and the Arab spring. This is where the twentieth century becomes highly important. Isaiah Berlin has called 20th century the 'dreadful century' where an estimated 100 million people died in armed conflict and an additional 170 million perished as a consequence of political violence.<sup>65</sup> It was an "extraordinary period of movement and upheavals."<sup>66</sup> The massive influx of African and Syrian migrants across the Mediterranean, which peaked in 2015, prompted European States to call for international action. The next year, in response, the UN General Assembly called a high-level plenary discussion on addressing massive movements of refugees and migrants.

The New York Declaration for Refugees and Migrants adopted by the UN General Assembly in 2016 as a result of the discussion, covered issues much broader than the Mediterranean situation. While acknowledging the sovereign right of States to manage their borders, it upheld key international and human rights rules relating to the movement of persons across borders. It also emphasised on the positive impact migrants have on the social and economic advancement of their host countries, their commitment to eradicating

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<sup>64</sup> Kiseleva Egor and Martin Egor, "The Concept of Mixed Migration Flows and International Legal Regulation of Migration", *Atlantis Press*, 2017

<sup>65</sup> Garry G. Troeller, "Refugees in contemporary international relations: reconciling state and individual sovereignty", *New Issues in Refugee Research*, Working Paper No. 85, 2003.

<sup>66</sup> Barnett, n.16

xenophobia and prejudice, and their dedication to tackling the underlying reasons of mass migration. The adoption of the Global Compact for Refugees (GCR) and the Global Compact for Safe, Orderly, and Regular Migration were intended to advance these as well as other commitments. The UNCHR has described the GCR as follows:

“The global compact on refugees (GCR) is a new international agreement to forge a stronger, fairer response to large refugee movements and protracted situations. It grew out of the historic New York Declaration for Refugees and Migrants of September 2016 and its comprehensive refugee response framework, followed by two years of intensive consultations with UN Member States, international organizations, experts, civil society, and refugees.”<sup>67</sup>

Two main objectives were pursued by the Global Refugee Compact. First of all, it supported a thorough, multi-stakeholder approach to refugee issues. The main point is that in reaction to sudden crises and protracted situations involving refugees, development players become crucial. Secondly, the Refugee Compact called for increased support from front-line nations who are hosting refugees. However, the major issues mostly went unresolved. Despite the fact that States normally allow those who are compelled to flee to seek safety elsewhere, millions of forcibly displaced people still found themselves in uncertain legal, social, and economic situations. The areas where the GCR needs reform are noted below:

Lack of a global responsibility sharing strategy: Any nation chosen for resettlement would not incur considerable costs as a result of a thorough responsibility-sharing plan to handle prolonged refugee crises. Although the compact does not directly address this issue, it does establish new avenues for international cooperation, such as (a) the Global Refugee Forum, where States pledge financial support, additional resettlement places, and other ‘complementary pathways for admission’; and (b) ‘Support Platforms’ for particular large-scale or protracted refugee situations. If Support Platforms

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<sup>67</sup> Annick Pijnenburg, “The Global Compact on Refugees and International Law: A Missed Opportunity?” Blog, *Refugee Law Initiative*, February 5, 2019

adhered to new approaches, such as increased regional mobility for refugees, they could have a significant impact along with seeking to relocate those refugees to areas where they can most successfully pursue self-sufficiency, in addition to the traditional ‘solutions’ of repatriation, resettlement, and local integration.

The need to protect forced migrants who do not come within the definition of ‘refugee’ in the 1951 Refugee Convention: The compact urges States to bridge protection gaps in a way that is consistent with, but not limited by, existing international and regional norms. By doing this, it will give opportunity for advocacy on behalf of all those in need of international protection, even though the language of the compact limited the ‘need for international protection’ to persons already protected by the 1951 Refugee Convention and regional instruments. Due to state pressure on UNHCR to confine the Refugee Compact to Convention refugees, climate-related forced migration was incorporated into the Migration Compact. As a result, the Refugee Compact and the Migration Compact must be read in tandem in order to design policies for movement caused by climate variables.

The absence of commitments regarding IDPs: The most concerning gap in the Global Compacts is the lack of commitments regarding IDPs. However, the New York Declaration can be used to take action in this regard, which promises ‘effective solutions to offer adequate protection and aid for IDP’s and to prevent and decrease such displacement.’ The Declaration expressed the officially recorded will of the UN General Assembly, regardless of whether the Refugee Compact and the Migration Compact contain specific language on IDPs.<sup>68</sup>

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<sup>68</sup>Alexander T. Aleinikoff, “The Unfinished Work of the Global Compact on Refugees,” *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, Pages 611–617, <https://doi.org/10.1093/ijrl/eey057>

Notwithstanding the limited reach and scope of the Refugee Compact, it is nonetheless capable of offering prospects for progress on few of the above mentioned unresolved issues facing the international protection framework. The 1951 Refugee Convention and 1967 Protocol are hardly mentioned in the GCR. Both paragraph 2<sup>69</sup> and paragraph 5<sup>70</sup> make note of them, and paragraph 6 states that ‘[a]ll nations not yet parties are invited to consider acceding to those instruments and States parties with reservations to give consideration to withdrawing them.’ The foundational premise of the refugee protection system, non-refoulement has been only briefly discussed outside of the section on ‘Guiding Principles’ (at para. 87). Human rights in the GCR are mentioned in the context of solutions which states that, ‘the promotion and protection of human rights are key to resolving protracted refugee situations and preventing new crises from emerging’ (para. 85). More specifically, local integration is ‘a sovereign decision and an option to be exercised by States guided by their treaty obligations and human rights principles’ (para. 97) The GCR gave the uncomfortable impression that it promotes state sovereignty while making trivial references to States’ duties under refugee and human rights law, rather than clearly reminding States of their obligations and urging them to uphold them.

The GCR recognised that the ‘the primary responsibility and sovereignty of States’ (para. 33) will be operationalised through voluntary contributions which ‘will be determined by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities’ (para. 4). The GCR’s emphasis on

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<sup>69</sup> The 1951 Convention relating to the Status of Refugees (1951 Convention) recognizes that a satisfactory solution to refugee situations cannot be achieved without international cooperation, as the grant of asylum may place unduly heavy burdens on certain countries.

<sup>70</sup> The GCR affirms its adherence to the objectives and values outlined in the Charter of the United Nations. The foundation of this concept is within the international framework for safeguarding refugees, which revolves on the fundamental principle of *non-refoulement*. At the heart of this framework is the 1951 Convention and the 1967 Protocol. The global compact is directed by pertinent international human rights instruments, international humanitarian law, and other applicable international laws.



cooperation over referencing pertinent international legal principles can be partially attributed to its inadequate grounding in international (refugee and human rights) law. This raises the question as to why the Global Compact for Migration (GCM), which has a comparable objective, makes so many references to international (human rights) legislation. The justification was that- whereas human rights law provides limited protection to migrants, refugee law protects refugees. In this context, the GCM's emphasis on human rights is crucial because the divide between migrants and refugees is based on the implicit presumption that only the latter category deserves protection. On the other hand, it also reflects a more practical point: while migrants are subject to human rights laws because they are humans, refugees are protected by international law which is known as the refugee law.<sup>71</sup>

The promises made in the GCR adopted in 2018 however, were only a written document. In reality, this was the year when continued but accelerating flight of refugees took place. More than 700,000 Rohingya refugees from Myanmar's atrocities are still living in perilous conditions in Bangladesh and are in urgent need of humanitarian aid and long-term protection. More than 2,300 children were separated from their parents as they attempted to enter the country from Mexico, in horrifying images. Later, 'with more soldiers than they had used to combat ISIS in Syria, the US confronted asylum seekers at the border.' On paper, the Refugee Compact is loaded with positive measures where it seeks to: '(i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity'(Para 7). But in reality, it will take considerably longer to evaluate their impactful implementation. The Compact neither establishes any new legal responsibilities nor is it a treaty. Therefore, the key question is that whether States will/are putting them into

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<sup>71</sup> Pijnenburg, n.66

practise so that they may actually reflect significant changes on the ground. The Migration Compact acknowledges:

“[o]ur success rests on the mutual trust, determination and solidarity of States to fulfil the objectives and commitments contained in this Global Compact....It is with this sense of common purpose that we take this historic step, fully aware that the Global Compact...is a milestone, but not the end to our efforts” (para 14).<sup>72</sup>

The GCR recognises the importance of international law, especially that pertaining to human rights and refugee law, but does not actively participate in it. International law is given some mild touch by the GCR, which mentions its importance in the beginning but does not actually take it into account throughout the rest of the document. Although the compact frequently refers to human rights, rather than reaffirming such rights, it is portrayed as a tool for humanitarian and development cooperation. It can be argued that the chance to remind States of their responsibilities towards refugees was missed since the GCR was not more deeply anchored in international law. The question of whether the GCR adequately safeguards the rights of the people who it seeks to assist is raised by the fact that it continues to defer not only States’ sovereignty and resources but also their policies and priorities. Moreover, it does not explicitly acknowledge that international human rights law applies to refugees.

It is significant to note that UNHCR and the global refugee regime were established immediately after the Second World War, a time when principles of human rights and justice played a significant role in the foundation and moulding of global institutions. Several challenges persisted even after more than 70 years of its establishment. The UNHCR continues to respond to displaced populations in need, it faces all-time funding difficulties; seeks to resist the politicization of protection and assistance, while balancing donor interests against the core mandate of providing meaningful assistance and

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<sup>72</sup> The Global Compact on Refugees, United Nations, New York, 2018

protection to displaced persons throughout the world; and against the backdrop of a convention limited in conceptualization and application, the UNHCR strives to address the realities of global forced displacement faced by various population groups. It ensures that the limitations of its definition do not disentitle or deprive those genuinely in need from receiving the assistance and protection they deserve. The organization, despite difficulties, has shown itself to be committed, creative, and responsive in addressing the many challenges with which it has been faced throughout.<sup>73</sup> The core function of UNHCR is predominantly rooted in treaty-based and legal frameworks, rather than being driven by political considerations. The international rules pertaining to asylum, statelessness, and refugee status dictate that their purpose is to safeguard and provide support to refugees worldwide. The organisation was specifically created with the intention of functioning autonomously and impartially inside the administrative and financial structure of the United Nations. Article 2 of the Statute of UNHCR declares:

“The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.”<sup>74</sup>

### **3.2 Responsibility sharing, Cooperation and Commitment in dealing with Mixed Migration**

According to the UN Secretary-General in 2016, “...if there is one lesson to draw from the past few years, it is that individual countries cannot solve [large-scale refugee movements] on their own. International cooperation and action...must be strengthened.”<sup>75</sup> While governments who accept refugees have the legal responsibility to aid and protect them, other countries’ legal obligations to step in and help relieve this burden are less apparent.

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<sup>73</sup> Elisabeth Rehn, “Introduction: UNHCR, the First Fifty Years”, Centre for Refugee Studies, York University. 2001, Vol. 19, No. 5, SPECIAL ISSUE: UNHCR at Fifty (2001), pp. 5-7, 2001

<sup>74</sup> Article 2, UNHCR

<sup>75</sup> Ban Ki-Moon, United Nations, 2016

Responsibility-sharing refers to the acceptance of the fact that refugee protection is a worldwide responsibility, while burden-sharing refers to easing the load on States that are hosting significant numbers of refugees. However, it should be underlined that ‘international cooperation’ in the context of refugees goes beyond just allocating costs and responsibilities. States have used it, for instance, in conversations about managing and monitoring migration, bolstering border security and control mechanisms, handling mixed migration, and preventing human trafficking. States are obligated by the principle of *non-refoulement* as stated in Article 33 of the 1951 Convention even if there is no requirement under international law to grant asylum to refugees. According to this principle, no refugee shall be sent back to a nation ‘where his life or freedom would be threatened on account of his race, religion, nationality, membership of a specific social group, or political opinion.’ It is now generally accepted that this principle is an element of international customary law. It should be highlighted that the rule does not just apply to people who have received official refugee status, or to put it another way, asylum seekers shouldn’t be sent back to any nation where they would face the risk of persecution. States also have a collective duty to protect refugees by finding durable solutions to the refugee crisis. Unfortunately, the 1951 Refugee Convention does not regulate it. After years, there is still no official or even unofficial system in place to assign duties for guarding migrants. The Preamble to the 1951 Refugee Convention acknowledges:

“The grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem [...] cannot be achieved without international co-operation.”<sup>76</sup>

This is the only indirect mention of burden-sharing in any international legal document. Regarding the question of the duration of such protection, the Convention implies that its rules only apply while there is a valid fear of persecution. As a result, if such a fear is no longer there, the state of asylum is

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<sup>76</sup> Preamble to the 1951 Refugee Convention

once more free to decide on the immigration status of the subject, i.e., to allow her/him to stay in the nation or to have her/him removed. In fact, the state is no longer obligated by the requirements of the Convention if the person is no longer considered a refugee. In essence, refugee protection is transient; the Convention even has provisions for cessation in that regard.<sup>77</sup> The compliance (or lack thereof) of governments with regional or international refugee protection regimes is based on internal, often security-related reasons rather than flaws or gaps in existing accords.

States also have responsibilities towards one another, but these responsibilities are not seen to interfere with a country's right to conduct its domestic affairs as it deems appropriate. However, the rules governing inter-state relations may be breached if a government shirks its duty and/or capacity to provide safety by its own actions, legal or illegal; and people who need protection from their own government are unable to receive it and flee to another nation as a result. The goal of refugee law is to create legal norms that bind sovereign governments to provide these people with the protection they need. The conflict between sovereignty and refugee protection stems from how that commitment is expressed, interpreted, and carried out.<sup>78</sup>

During the pandemic, it was evident how nations failed to give priority to refugee protection and it has been discussed exhaustively in the previous section. Hence, apart from the UNHCR and other refugee laws and conventions, it is the initiatives of various state governments who are bound to abide by the law in practice and save the refugees from the precarious situation that they remain in. The failure of the international refugee regime to adequately protect refugees and the absence of a defined 'allocation of responsibilities' among nations are clearly related. Although certain

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<sup>77</sup> Phuong, n 33

<sup>78</sup> Bob Granholm, "Refugee Law and State Sovereignty: Erosion at the Edges", December 2016, [https://www.academia.edu/30687431/Refugee\\_Law\\_and\\_State\\_Sovereignty\\_Erosion\\_at\\_the\\_Edges](https://www.academia.edu/30687431/Refugee_Law_and_State_Sovereignty_Erosion_at_the_Edges)

fundamental concepts are apparent, nations have as usual been reticent to embrace more explicit obligations towards refugees (and other states). It can be argued that it is possible to adopt a universal model of allocation of responsibilities in dealing with the crisis. However, each refugee/migrant situation is different and would hence require a different strategy to deal with them altogether. In any case, it may still be useful to identify some general principles of responsibility-sharing which can then be used in each refugee situation.<sup>79</sup> In order to meet their commitments under international law, States must be able to identify people entering their territory, address their requirements for protection, as well as their concerns for security through an integrated response to asylum and migratory movements. This calls for reliable and effective procedures to screen and register applicants. It is necessary to undertake security threat screening in accordance with the laws' requirements for necessity, proportionality, and non-discrimination and it should be subject to judicial oversight.<sup>80</sup>

Access to protection and sustaining adherence to the principle of *non-refoulement* might present significant difficulties when refugees and asylum seekers are a part of unauthorised, mixed movements of individuals in transit. Refugees are frequently forced to adopt potentially hazardous routes or modes of transportation in their quest for safety due to the numerous barriers in place to stop irregular arrivals in general. Recognising that irregular migratory movements may include refugees, asylum seekers, and others with particular protection needs, (such as trafficked people, stateless people, and unaccompanied or separated children in mixed flow) is important when considering legislation and policies to address irregular arrivals. Governments may implement a variety of legitimate measures to prevent and respond to irregular migration, but these must be framed and implemented in a way which ensures that all persons, regardless of legal status, are treated with

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<sup>79</sup> Phuong, n 33

<sup>80</sup> Nicholson and Kumin, n.27

dignity and respect for their fundamental rights; allows asylum-seekers to secure admission to territory and access to fair and effective asylum procedures; and identifies the vulnerabilities and specific needs of all individuals along with identifying those persons who do not require protection and can be returned to their countries of origin.

### **3.3 Evaluating the Nature of the Contemporary Refugee Law**

After reviewing the academic literature that is currently available on asylum, Abass and Ippolito observed:

“...the vast majority of writers agree that the attitude of most States towards the asylum crisis has more been driven by security considerations rather than by any altruistic desire...to achieve a humanitarian end”<sup>81</sup>

According to many scholars, the definition of ‘refugee’ in the 1951 Refugee Convention is overly restrictive and hence impractical. Additionally, this definition adds a new component that emphasises that a refugee is someone who lives outside of their country of origin. This idea emphasizes that of respecting State sovereignty, suggesting that the protection regime is territorial, and highlights the inability of an international organisation to offer in-country protection. Any reference to the procedure for determining refugee status is lacking from the 1951 and 1967 Conventions, leaving it up to the host country’s discretion. The 1967 United Nations General Assembly Declaration on Territorial Asylum, which was non-binding, addressed this issue by stating that ‘it shall be the responsibility of the state granting asylum to evaluate the grounds for that grant of asylum’ (art. 1.2), but it offered no instructions for determining whether a person is a refugee or not (RSD). Thus, the 1951 Convention’s underlying contradiction and compromise between sovereignty and protection arises from the fact that while an individual has the right to ask

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<sup>81</sup> Ademola Abass and Francesca Ippolito (eds), “Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective”, Routledge, September 2016.

for asylum, the state is not obligated to grant it in exchange. Guy Goodwin has arrived at a similar conclusion in his work where he mentions:

“...the state has discretion whether to exercise its right as to whom it will favour, and consistent with its obligations under international law, as to the form and content of the asylum to be granted”<sup>82</sup>.

The refugee law in all its treaties and legal documents has put prime emphasis on protecting ‘state sovereignty’. The vast majority who support advancing refugee rights appear to believe that international refugee law (underpinned by the 1951 Refugee Convention) at least provides a break from states’ arbitrary treatment of asylum seekers and thus calls for a solid foundation for extending rights and protection to those seeking refuge across borders. Simon Behrman in his seminal work makes a valid point by arguing:

“International refugee law has evolved as a means of control over the refugee. The first principles on which it has been built place the rights of the state above those of the refugee. Insofar as there is such a thing as a ‘right of asylum’, it is a right vested in the state rather than the refugee. For most people forcibly displaced around the world, refugee law is at best an irrelevance and at worst a barrier to protection”.<sup>83</sup>

From the standpoint of pursuing a refugee protection regime that prioritises the needs of the refugee, it is a system that is fundamentally ‘un-reformable.’ Even in times of crisis/emergency when the most vulnerable population (refugees and migrants) seek complete support from states; it is the state which through its political agendas and gimmicks, keep the question of ‘refugee protection’ aside and put other issues on the table. Again quoting the words of Simon Behrman,

“...for during crisis, they (refugees) are painted as “illegal” interlopers unworthy of assistance and protection. More darkly, they are also portrayed as a threat to national security.”<sup>84</sup>

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<sup>82</sup> Guy S. Goodwin-Gill, Jane McAdam, “The Concept of Asylum” in *The Refugee in International Law*, Oxford University Press, p. 414, 2021.

<sup>83</sup> Simon Behrman, “Refugee law as a Means of Control”, *Journal of Refugee Studies*, Oxford University Press, 2018.

<sup>84</sup> Ibid.



## Section 4

### 4.1 Response and ‘Protection’ during the Pandemic

Under this section, an analysis has been done of the extent to which the protection of refugees and migrants as well as their rights have been recognised and addressed through international cooperation in response to the pandemic; and how effective the combined efforts of local, national and international actors has been to ensure their protection during such challenging times. Most notably, the principle of *non-refoulement*, impact on health and well-being of the refugees and various state obligations during the pandemic have been discussed and evaluated. Taking in view the pandemic situation and its effect on the refugee population, the Secretary General of the International Federation of the Red Cross and Red Crescent Societies (IFRC), Jagan Chapagain has remarked:

“Refugees have been disproportionately affected by the impact of the COVID-19 pandemic and have often been left out of socio-economic support policies. A large number of refugees have lost their sources of income or depleted their savings and are now adopting negative strategies to survive.”<sup>85</sup>

Many States have taken harsh actions against migrants, refugees, and other displaced people in mixed flows in response to the COVID-19 outbreak. These have included quarantines, expulsions, border closures, and lockdowns of refugee camps and communities of migrant workers. Programs implemented by States to ensure the health and economic well-being of those within their borders have also excluded these categories who fall within the ambit of mixed migration. Measures taken to curb and stop the virus’s transmission as well as to lessen the devastating effects of the pandemic must have adhered to recognised international human rights standards. These standards and principles, which include those of non-discrimination, the right to health and information, due process, and the prohibition against returning to situations

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<sup>85</sup> “Refugees are paying the highest price in the COVID-19 pandemic”, 18<sup>th</sup> June 2021, <https://reliefweb.int/report/world/refugees-are-paying-highest-price-covid-19-pandemic>

that pose a severe risk of harm, apply to everyone regardless of their immigration status. Such principles are derived from international treaties and instruments, customary international law, decisions of UN treaty bodies, and guidelines widely accepted by the international community. The threat of COVID-19 was unconstrained by region, class, race, age, gender, sexual orientation, or other categories of distinction. This entailed ensuring that everyone who may be at risk has access to medical treatment, testing, and help, as well as State initiatives designed to lessen the financial problems brought by the pandemic. In addition to an increased risk of COVID-19 from spreading, failure to address the health needs of migrants, refugees, or other displaced people because of their country of origin or status would be discriminatory. It would be unreasonable, disproportionate, pursue no justifiable goal and endanger the well-being of the entire community.<sup>86</sup> However, this was apparent when governments all across the world utilised the COVID-19 threat to recede important protections mandated by international law. This has never been clearer than at the time of examining the international refugee law framework. The principle of *non-refoulement*, which forbids any State action “leading to the return in any manner whatsoever to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory,”<sup>87</sup> is one of the cornerstones of international refugee law. Governments stopped processing asylum claims and completely closed their borders during pandemic period, violating the very principle of *non-refoulement*. UNHCR’s Assistant High Commissioner for Protection, Gillian Triggs has noted:

“While the COVID-19 pandemic has profoundly tested global commitment to protecting refugees and forcibly displaced people, it has also shown the value of including refugees in national responses and safety nets to the benefit of all.”<sup>88</sup>

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<sup>86</sup>“Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons,” *International Journal of Refugee Law*, Volume 32, Issue 3, October 2020, Pages 549–558, <https://doi.org/10.1093/ijrl/eeaa028>

<sup>87</sup> Hathaway et.al, n 32

<sup>88</sup>UNHCR, <https://www.unhcr.org/in/news/stories/covid-19-crisis-underlines-need-refugee-solidarity-and-inclusion>

As nations retreated inward during the COVID-19 pandemic to protect their own residents, refugees and de facto stateless people were left out of access to humanitarian aid and medical attention as well as denied the ability to assert their rights. Despite remarkable efforts by local actors and the international community, the worldwide response to the COVID-19 pandemic fell short in preserving the rights of refugees, according to a significant international assessment published on 8<sup>th</sup> July, 2022. This international evaluation, a first of its kind, was conducted by the UNHCR, the UN Refugee Agency, and the Development Assistance Committee (DAC) of the Organization for Economic Co-operation and Development (OECD) and other actors as a part of the COVID-19 Global Evaluation Coalition. It evaluated to what extent refugee rights were upheld during the pandemic, including access to asylum, healthcare, and vaccinations, as well as child protection and protection from gender-based abuse. The actions taken by dozens of states to restrict the rights to enter territory and seek asylum were the most devastating effects of the pandemic. They were intended to protect public health, but in turn, they frequently led to compelled returns to risky situations, which is very much against the principles of international law. Even the responses were mainly insufficient to address the growing threats facing refugees, including gender-based violence, deteriorating educational disparities, problems with child protection, increased xenophobia, and a scarcity of vaccines. Gillian Triggs also said:

“We’ve been urging vigilance ever since the onset of the global health emergency, warning that it would test global commitment to protecting the forcibly displaced. This evaluation illustrates the extent of the damage. It shows clear evidence the pandemic was used to justify restrictive measures detrimental to the rights of refugees. More than two years on, some of these troubling policies and practices remain in place.”<sup>89</sup>

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<sup>89</sup>“Global evaluation: International COVID-19 response fell short in upholding refugee rights”, *UNHCR Press Release*, July 2022, <https://www.unhcr.org/news/news-releases/global-evaluation-international-covid-19-response-fell-short-upholding-refugee>

However, the evaluation did uncover some encouraging data, particularly regarding inclusivity, global cooperation, and responsibility sharing. One of these is the fundamental tenets of the Global Compact on Refugees, which was endorsed by the UN General Assembly in 2018.<sup>90</sup> The evaluation report also emphasised on the tremendous efforts made by local as well as global players to assist refugees and asylum seekers. It applauded remote delivery techniques that allowed many essential refugee services to continue despite lockdowns and movement restrictions.

Some positive case scenarios where local communities were actively involved along with the UNHCR (where it applied a community-based approach) in its work with forcibly displaced people have been highlighted. Through such involvement, it identified and supported community structures and established partnerships with community-based organizations. Altogether, they played a crucial role in interacting with and reaching out to marginalised and vulnerable groups and coming up with innovative solutions to deal with the dire effects of the pandemic. This becomes crucial especially in situations where the UNHCR and its partners have trouble reaching out to refugees, asylum seekers, IDP's and stateless people. Refugee community structures in Ethiopia had been actively involved in outreach initiatives and spreading awareness messages, as well as ensuring that fundamental preventative measures were followed within communities. The distribution of posters, soap, and other necessities as well as the planning of food distribution in smaller groups that respected physical distancing have all been done by refugee representatives and outreach volunteers. They offered assistance to the host community in the area whenever possible. Together with the World Health Organization (WHO) and the Ethiopian government, refugees were assisting in the fight against spread of false information and misconceptions regarding COVID-19. Access to timely and pertinent information was ensured by

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<sup>90</sup> Ibid.

utilising trusted and preferred communication channels and digital media. A number of activities tailored the use of community radio during COVID-19. Additionally, radio was utilised to communicate and disperse information on pertinent services and to sensitise communities about protection concerns, such as domestic abuse and other types of gender-based violence. For instance, ‘Whatsapp Communication Trees’ had proved beneficial in a variety of missions, providing for a two-way communication between the UNHCR and community volunteers, as well as between community volunteers and the larger community.<sup>91</sup>

Schools all over the world had shut as a result of COVID-19, which significantly impacted access to education. Even if attempts were made to keep offering possibilities of distance learning, kids in displaced communities did not always have easy access to them. To make sure that no refugee child is left behind, a variety of community individuals and groups have been offering assistance in innovative ways. In order to help the learning of refugee children who were unable to fully benefit from classroom teachings during the COVID-19 pandemic owing to language issues, refugee university students in Kyrgyzstan offered extracurricular classes through WhatsApp.<sup>92</sup>

Refugee community individuals and organisations developed a variety of other innovative strategies to support their local communities’ needs while preserving employment prospects in times of COVID-19. To address both mask shortage and the need for money for vulnerable families, refugee women began creating fabric masks as part of their business. An Afghan woman organised her tailoring shop in Iran’s Bani Najjar neighbourhood to make 300 protective gowns and 800 masks per day. The UNHCR provided support for the workshop, which employed 16 female family heads and sought a hygiene licence from the Ministry of Health and Medical University. Communities

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<sup>91</sup> UNHCR, 2020

<sup>92</sup> Ibid

collected resources to support those who were most needy, playing a crucial part in distribution of essential items during COVID-19 and ensuring that the most vulnerable families and people have access to the help they require. 300 kilograms of soap were given to six community-based organisations in Nairobi, Kenya who subsequently distributed the supplies to refugees and some members of the host community who were at a higher risk- such as the elderly, sick, orphans, and large families.<sup>93</sup>

#### **4.2 The abrogation of *Non-Refoulement* amidst COVID-19**

One of the crucial pillars of international refugee law is the concept of *non-refoulement*. Governments had stopped processing asylum claims and completely closed their borders during the pandemic, violating the very principle of *non-refoulement*. The UNHCR estimated that ‘167 countries fully or partially closed their borders to contain the spread of the virus’ and that 57 of those countries are ‘making no exception for people seeking asylum.’<sup>94</sup> In response to COVID-19, governments are allowed to enact some protective measures, such as potential movement restrictions, but they are not allowed by international law to completely forbid entry of those who are in need of international protection but whose claim has not yet been decided upon (not all asylum seekers can be recognised as refugees, but every refugee is initially an asylum seeker). Citing the examples of Belgium and Greece- the Belgian Government introduced measures effectively suspending ‘the right to refuge for newly arrived asylum-seekers due to the coronavirus.’ Throughout the nation, the Federal Immigration Office (FIO) closed a number of service and reception facilities. The absolute ban however, did not last long and the Belgian government subsequently had to adopt an online registration system in which applicants seeking asylum must first register online before waiting

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<sup>93</sup> UNHCR, 2020

<sup>94</sup> United Nations High Commissioner for Refugees (UNHCR), April 2020, <https://www.unhcr.org/news/news-releases/beware-long-term-damage-human-rights-and-refugee-rights-coronavirus-pandemic>

for the Aliens Office to schedule an appointment. But the Brussels Court of First Instance determined in October that waiting times were excessive, forcing the Belgian State to take ‘necessary measures to ensure that asylum-seekers are welcomed as soon as they register online’.<sup>95</sup>

There have been reports by the Human Rights Watch that asylum seekers and migrants have been arrested, sexually abused, robbed, and stripped by unidentified armed men at the land border between Greece and Turkey, after which they were forcibly returned to Turkey. As suggested by Nadia Hardman, a refugee rights researcher and advocate at Human Rights Watch:

“The European Union is hiding behind a shield of Greek security force abuse instead of helping Greece protect asylum seekers and relocate them safely throughout the EU. The EU should protect people in need rather than support forces that beat, rob, strip, and dump asylum seekers and migrants back across the river”.<sup>96</sup>

The UNHCR urged Greece to investigate pushbacks at the land and sea borders with Turkey as well as the possibility of sending migrants and asylum seekers back to Turkey after they entered Greek territory or territorial seas. The Greek Coast Guard intercepts refugee boats, puts the migrants in life rafts, tows them towards Turkey and then abandons them in the open sea. This was according to a report published on 16<sup>th</sup> June, 2021 by the German liberal magazine ‘Der Spiegel’. However, the most alarming finding of Der Spiegel’s study is not that Greek authorities are in clear violation of their international commitments for human rights, but rather that they are endangering the lives of migrants by utilising technology that is intended for saving lives.<sup>97</sup>

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<sup>95</sup> Hathaway, et.al, n 32

<sup>96</sup> Human Rights Watch. “Greece: Violence Against Asylum Seekers at Border;” March 17, 2020; [https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border#:~:text=According%20to%20Turkey's%20migration%20authorities,15%2C000%20Iraqis%20lodged%20asylum%20claims\).](https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border#:~:text=According%20to%20Turkey's%20migration%20authorities,15%2C000%20Iraqis%20lodged%20asylum%20claims).)

<sup>97</sup> Rosa Vasilaki, “Greece Is Dropping Migrants into the Sea – And Europe Is Turning a Blind Eye;” The Wire; September 1, 2020

However, some regional human rights treaties like the Kampala Convention present a different aspect altogether. According to Article IX of the Kampala Convention of the African Union (referred to earlier), the States are required to “respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty, and/or health would be at risk.” Such terminology transcends the one stated in the ICCPR and CAT and may be applicable to the COVID-19 situation. According to the Kampala Convention, a refugee cannot be sent back to a nation that has failed to control COVID-19 since doing so would endanger the refugee’s life and health. The obligations are comparable in the American context. A foreign national cannot “be deported or returned to a country, regardless of whether it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”<sup>98</sup> This is stated in Article 22(8) of the American Convention on Human Rights (ACHR). Although there is no specific *non-refoulement* language in the European Convention on Human Rights, the European Court of Human Rights has successfully interpreted the prohibition on ‘torture and cruel or degrading treatment or punishment’ to include *non-refoulement* (Article 3).<sup>99</sup>

In general terms, no nation can use the pandemic as a justification for forcibly turning away refugees at the border without even considering their asylum requests. For States parties to the CAT and ICCPR, the principle of *non-refoulement* is ‘non-derogable’ even if a person does pose a threat (i.e., has a serious infectious disease). Various countries have in the past refused to allow immigrants who are infected with communicable diseases. For instance, the United States allows for the exclusion of people who have a communicable disease with significant public health implications, but only after an individual medical assessment and a chance to appeal. Nonetheless, it should be

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<sup>98</sup> Article 22(8) of the American Convention on Human Rights

<sup>99</sup> Hathaway, et.al., n 32



emphasized under any international law, this cannot be a reason to refuse asylum to vulnerable migrants/refugees or circumvent non-*refoulement* safeguard.<sup>100</sup> Contrarily, a research paper sums up the real scenario, explaining how systematically the pandemic situation has been used as a tool for ‘exclusion’ and had been materialised for political gains. It narrated:

“The biopolitical governance and (mis)management of asylum-related migrants on both sides of the EU south-eastern border were connected to the aims and practices of key state stakeholders to develop and accomplish their preferred geopolitical goals in the region. In the biogeopolitics of COVID-19, such a top-down approach included dichotomised policies and practices to keep these migrants alive or let them die (also from the pandemic), and using them to threaten geopolitically rival states and organisations. The state might keep these unwanted people alive but does not want these residues of the state to mix up with the citizens.”<sup>101</sup>

The paper also talks about how the migrants, in such scenario are mobilising themselves to gain political attention amidst the crisis. The paper noted:

“...the migrants show bottom-up agency by organising themselves in the context of the COVID-19 threat, promoting new political identity by gaining international attention for their case and creating solidarity among themselves – even if they were not fully able to protect themselves from the potential threat of the virus itself.”<sup>102</sup>

During the 1990s, which was an era of widespread forced displacement, the UNHCR’s former High Commissioner Sadako Ogata declared that, ‘there are no humanitarian answers to humanitarian crises’. In the end, only political decisions—made both within and between nations—can end the state of uncertainty that refugees experience or lessen the likelihood of political unrest in host countries where refugees live in hazardous conditions. A successful refugee regime has to be supported by complementary initiatives that not only work to stop the onset of large refugee crises but also to promote peaceful conflict resolution, which is a requirement for refugees to be able to return

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<sup>100</sup> Ibid.

<sup>101</sup> Jussi S. Juahainen, “Biogeopolitics of COVID-19: Asylum-related migrants at the European Union Borderlands”, *John Wiley & Sons Ltd on behalf of Royal Dutch Geographical Society*, May 2020

<sup>102</sup> Ibid.

home safely. Before seeking safety across international boundaries, the average refugee experiences many internal displacements. The number of refugees might be decreased via coordinated measures to safeguard and assist those forcibly displaced in their home countries. Compared to international law on refugees, the treatment of IDP's is significantly less developed. However, experts consider the issue surrounding IDP's to be the same as those of refugees; hence their protection should be a significant part of the extended international policies. Laws and policies dealing with displacement have their own shortcomings and are more concerned with protecting the interests of the state rather than that of the vulnerable migrants and refugees. Contemporary political, legal and popular discourses have reduced the refugee to what Guy Goodwin-Gill has called a 'unit of displacement,' or someone who is 'labelled, stored, and warehoused'. This is facilitated by nothing but the international law itself. As a result, refugee law has not produced safe havens for refugees, but rather has increased the state's control over them.<sup>103</sup>

The phenomenon of mixed migration (discussed in specific details in Chapter II) has deemed the present international instruments and mandates (particularly the 1951 UN Convention and its 1967 Protocol) as inadequate to satisfy the demands and conditions of humanitarian protection in rapidly changing dynamics of international migration. Existing national and international laws are proving insufficient to address the additional protection demands caused by mixed migration and its complexities. The present refugee laws' restricted scope and rigidly defined requirements fail to provide appropriate protection to any of those who are in a refugee-like situation and deserve humanitarian protection, but are excluded. The rigid categorisation of migrants under current frameworks encourages a fragmented and flawed approach to migration management. It ignores the genuine possibility that- if one legal route of movement is disrupted, it invariably disrupts the smooth

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<sup>103</sup> Berhman, n.81

operation of other channel/channels. Many cases of category or ‘channel jumping’ may be found in recent migration history, but this appears to have occurred on a massive, possibly unparalleled scale in the previous migration and refugee surges especially towards Europe.<sup>104</sup>

## **Conclusion**

There is no dearth of a formal legal framework or updated policies to effectively address the many challenges associated with irregular migration. What lacks is mutual cooperation among stakeholders and proper adherence to such policies. The portrayal of the 1951 Refugee Convention as an embodiment of open borders and idealistic humanism overlooks its actual role as a security mechanism employed by nations. It is important to acknowledge that the Convention primarily served as a mechanism for regulating borders. This international agreement was established in a distinct political climate, characterised by the displacement of about 30 million individuals within Europe. The instrument was first developed with a strong emphasis on practical applications within European contexts and addressing European concerns. Subsequently, it underwent a process of globalisation through the 1967 Protocol. It however, still excluded several individuals, particularly groups of individuals, even if they were in refugee-like situations and in genuine need of protection. They are victims of forced migration caused by civil war, armed conflicts and generalised violence, massive violations of human and minority rights, and natural and man-made disasters (some, but not all, of these are addressed in the Cartagena Declaration and, in particular, the OAU Convention on Refugees).

Furthermore, in many cases of forced migration, incidents of individual persecution (a key requirement under the UN Convention) also became

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<sup>104</sup>Bimal Ghosh, “The European Union’s Agonies: Fault Lines, Strategic Errors and Institutional Inadequacies” in *Refugee and Mixed Migration Flows: Managing a Looming Humanitarian and Economic Crisis*, Palgrave Macmillan, p. 39, 2019.

difficult to identify. The limitations of the Convention were also evident in its failure to address instances of persecution by non-state actors, which results in a lack of clarity about the protection of those individuals intercepted or rescued at sea while attempting to seek asylum/refuge. State sovereignty should definitely be a priority in the wake of numerous instances of significant threats (for instance the pandemic, or terrorism); but not at the cost of sacrificing human rights by putting vulnerable lives at risk. Gillian Triggs has aptly stated: “The future must be one of inclusion and shared responsibility, where social and economic rights...can be enjoyed by all those forcibly displaced throughout the world.”<sup>105</sup>

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<sup>105</sup> UNHCR, October 2020, <https://www.unhcr.org/in/news/stories/covid-19-crisis-underlines-need-refugee-solidarity-and-inclusion>

## CHAPTER II

### MIXED MIGRATION: MOTIVE, ROUTE AND IMPLICATIONS

#### Introduction

The chapter focuses on the understanding and scope of the newly developed concept of mixed migration and tries to analyse its current usage under the broader framework of forced migration and refugee studies. It essentially attempts to understand how 'mixed migration' carved its way through the conventional 'refugee' and 'forced migration' studies, shaping an identity of its own. There is widespread skepticism regarding the ability of various organisations and States using the category of mixed migration, to aid in further resolving the ongoing human rights violation of vulnerable migrants and mitigate the difficulties faced by them. There are policy-makers who are convinced that the concept, in reality, is disrupting/complicating the rational policy approach towards the discussion and resolution of other important humanitarian concerns pertaining to categories like labour migrants and refugees due to its all-inclusive nature. In this chapter, we shall explore the implications of adopting mixed migration as a conceptual phenomenon by international organisations, policy makers and States for resolving the ongoing humanitarian crisis.

The subject matter of the chapter has been segmented into five detailed sections. The first section deals with the emergence, definition, and understanding of the term 'mixed migration.' The next section explains the motivational elements/factors for mixed flows and how irregular movement is related to the phenomena of mixed migration. It also brings to light the implications of the 'motivational element' in mixed migration and how can this policy challenge affect the migrants as well as their genuine protection needs.

In this context, few case studies have been reviewed revealing the risks and numerous problems faced by migrants in such ‘mixed’ situation. The third section explores the main routes for travel used by the irregular mixed migrants on the move towards the Mediterranean (Eastern, Western and Central Mediterranean routes). It also highlights the dual crisis faced by the irregular migrants during the pandemic. The fourth section deals with management of large-scale migration. As per the estimate of the International Organization for Migration (IOM), the number of migrants in the world grew to 281 million in the year 2020. This staggering number is equal to 3.6% of the world population who live outside their country of birth. However, there are instances when this number becomes overwhelming and difficult to manage especially in the case of mixed migration. It therefore becomes a matter of concern for organisations and states dealing with migration flow. The later part of this section culminates into notable findings on the motives for travel, conditions in which migrants are forced to travel; and concludes the discussion highlighting ‘why’ and ‘how’ mixed migration as a recent policy concept holds significant relevance within the broader context of forced migration and refugee studies.

## **Section 1**

### **1.1 Understanding ‘Mixed Migration’**

Historically, migration has been considered as a positive force that generates wealth, economic and human development and prosperity. But unfortunately, not all forms of migration are driven by choice and all migration experiences do not necessarily lead to prosperity. Human mobility has become complex than ever. Therefore, management of migration at an international level has become relatively weak with few forums established to deal with movements of people. According to a publication by the Mixed Migration Centre (MMC):

“Refugees and migrants rarely leave their place of origin for a single, isolated reason; generally, departure drivers are multiple and intertwined. Some drivers, such as climate change, are indirect, and may affect other drivers, and different people may leave the same place for different reasons, and head to different destinations. Forced and voluntary mobility are often better understood as points on a spectrum than mutually exclusive categories.”<sup>1</sup>

The chapter intends to lay deeper emphasis on the complexity of ‘mixed migration’ which has developed recently in the policy world of the global phenomena of international migration. Although migration has always been multi-dimensional; mixed migration has come to usage in the refugee and forced migration discourse only within the last two decades. The concept is high on global and political agenda since the 2015 surge in migratory flows towards Europe. It led to a vast range of political initiatives that yielded both positive and negative results. Prominent among the positives measures are the two global Compacts on refugees and migrants<sup>2</sup> which have been discussed in the previous chapter.

Throughout the year, thousands of people from all over the world move to some other destination due to multiple factors motivating, or rather forcing them to leave their country of origin, their home, people, culture, tradition and settle in a different place completely new to them. When we talk about mixed migration, we are discussing the involvement of various categories of people all travelling through the same route, using the same means of transport and arriving at the same destination in most cases. As explained by the IOM, mixed migration is described by complicated population movements in which individuals use the same travel routes and modes of transportation but travel for various reasons. The variety of circumstances influencing the movement as well as the varied demands and profiles of those engaged are the key features of mixed migration flows. These diverse movements may include refugees,

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<sup>1</sup>Mixed Migration Centre (MMC). “Why people migrate?” Insights and key messages drawn from a decade of MMC research and 4Mi data collection. March 2021. Available at:

<http://www.mixedmigration.org>

<sup>2</sup> Ibid.

unaccompanied and separated children, trafficking victims, migrants, some of whom may have special needs. Some people might fit into more than one of these groups. Mixed migration usually takes place irregularly, reaching the destination without necessary paperwork, and frequently entails human smuggling and trafficking.<sup>3</sup>

The Constitution of the IOM noted that international migration also includes refugees, displaced people, and other categories of migrants forced to leave their homes. IOM advocates for facilitating the emigration of people who want to move to countries where they can gain self-sufficiency through employment and live with their families in dignity and self-respect. It emphasises the importance of “regional and global debate and dialogue on migration” to assist “states, migrants, and communities” in addressing the challenges of irregular migration.<sup>4</sup> A discussion paper on the ‘Challenges of Irregular Migration’ has also stated the main aspects of mixed migration flows, such as the irregular nature of movements, the mixed motivations driving such movements, as well as the diverse needs and profiles of the people involved. A number of other categories may also be considered part of the mixed migration flow. These may include environmental migrants, smuggled persons, stranded migrants and victims of trafficking. Unaccompanied children may also be considered as part of the group wherever relevant, as pointed out by the IOM. These mixed flows bring along colossal humanitarian challenges as they require more than temporary solutions and responses to events occurring at the individual level. For instance, the paper further argued:

“Attention needs to be paid to the genesis of mixed migration flows in countries of origin (including the connection between internal and external migration), the movement itself, the arrival of irregular migrants in countries of transit or destination, the post-arrival stage and the longer-term options available to States

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<sup>3</sup> International Organization for Migration (IOM), <https://rodakar.iom.int/mixed-migration>

<sup>4</sup> Ibid



and migrants, such as integration, onward or circular migration, return and reintegration.”<sup>5</sup>

Mixed Migration Centre (MMC) is the leading source for independent and high quality data, research and information on Mixed Migration. The analysis and usage of the term ‘mixed migration’ by MMC holds importance for certain reasons which include describing people as they are moving or in transit, for however long the journey lasts. The term cannot be applied to persons who have not yet left their place of origin, nor can it be applied to those who have arrived and settled at a destination. It enables extra safeguards for persons on the move, as people of all statuses confront similar dangers and vulnerabilities from the same causes and/or offenders. The term recognises that the factors influencing movement—for both migrants and refugees—are numerous, multifaceted, frequently intertwined, and have an impact on each other. Persecution, violence and conflict, lack of basic rights and services, poor standard of living, gender inequality, wide-ranging effects of environmental deterioration and climate change, family separation, as well as specific personal motivations, are some of the reasons why people feel compelled or motivated to move.<sup>6</sup>

Despite legal definitions available for all concepts related to international migration, it has been difficult to make a clear-cut distinction between refugees and migrants. Often they are put in the category of forced and voluntary migration respectively. In an interview, Alexander Betts mentioned that there is a clear institutional distinction between the ‘refugee’ and the ‘migrant’ and this distinction has historically been made with the presumption that refugees enjoy special treatment under international law. The apparatus of the state and inter-governmental systems have been created in order to triage (decide the order of treatment) groups. He further added:

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<sup>5</sup>“Challenges of Irregular Migration: Addressing Mixed Migration Flows”, International Dialogue on Migration, 2008, Discussion Note.

<sup>6</sup> MMC’s Understanding and use of the term Mixed Migration. 2018.

[https://mixedmigration.org/wp-content/uploads/2018/07/terminology\\_mmc.pdf](https://mixedmigration.org/wp-content/uploads/2018/07/terminology_mmc.pdf)

“It legitimates one group – refugees, and sometimes de-legitimizes the other group – economic migrants. In the current context, it therefore, makes pragmatic sense to safeguard the category of ‘refugee’, but gradually ensure other groups of vulnerable migrants also receive access to the protection that they need under international human rights norms.”<sup>7</sup>

To understand the link between these two categories, there is a need to understand the key terminological aspects of both voluntary and forced migration along with the ‘controversial categorisation’ of different types of forced migrants, their reasons to move and change of status which has given birth to the asylum-migration nexus and the emergence of mixed migration.<sup>8</sup>

## **1.2 Emergence and Development of ‘Mixed Migration’**

In order to understand the development of the term ‘mixed migration’, we need to explore the historical context of its emergence. Although the issue of mixed migration has always existed, the growing interest in this particular area of study has recently gained prominence. As Thomas Linde points out,

“The concept of mixed migration has its origins in the efforts in the 1990’s to draw a clearer line between refugees and asylum seekers who are protected by International Refugee Law, and migrants who are not.”<sup>9</sup>

Soon after the Second World War, there was an upsurge in migration as millions within Europe were displaced and were in need of protection and assistance. In response to this, an international system was developed to address the needs of those displaced and to answer government calls for order to be restored. Therefore, an attempt at clear legal separation between refugees and migrants was made which appeared with the signing of the 1951 Refugee Convention and later the 1967 Protocol Relating to the Status of Refugees.

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<sup>7</sup> MMC Interviews Alexander Betts: “A time for bold vision”, *Mixed Migration Centre*, 2 January 2019

<sup>8</sup> Ester Serra Mingot, and José de Arimatéia da Cruz, “The Asylum-Migration nexus: Can Motivations shape the concept of coercion” *Journal of Third World Studies*, vol. 30, no. 2, 2013, pp. 175–90, <http://www.jstor.org/stable/45198687>. Accessed 24 Feb. 2023.

<sup>9</sup> Thomas Linde, “Mixed Migration- A Humanitarian Counterpoint.” *Refugee Survey Quarterly* 30, no. 1 (2011): p 89. <http://www.jstor.org/stable/45054480>.

The hiring of temporary ‘guest labourers’ to meet the need for manual labour was another trend during that period. The 1973 oil crisis, however, decreased the need for these employees, who stayed in the host country and used established networks to contact their family members instead of going home. Resultantly, the relationship between countries in the Global North and migrant labour changed. Many nations in the Global North significantly curtailed regular migration channels starting in the early 1970s. This however, did not occur without repercussions. The only feasible options for conventional migration were through family ties and the asylum system, since legal channels had ceased to exist. This resulted in increase in the number of asylum seekers in the European Union and other areas of the Global North during the 1980s and 1990s, accompanied by a steady rise in anti-immigration sentiment as well as increasing scepticism as to whether those claiming asylum were in fact ‘genuinely’ refugees.

In 2000, UNHCR declared a global ‘crisis’ in the international asylum-refugee system. It highlighted that ‘shrinking asylum space, mostly but not exclusively in the developed world’ had led to increasing difficulty for UNHCR to fulfil its mandate. Scholars emphasised that the Global North supported governments’ moral and legal obligations to aid asylum seekers and refugees while simultaneously taking steps to prevent them from entering state boundaries. This was aggravated by the fact that in response to the Global North’s lack of ‘burden sharing’, many nations in the Global South threatened to impose restrictions on their policies towards refugees and asylum seekers. A concept known as the ‘Asylum-Migration Nexus’ arose amidst this stressful climate that focused on the categories of migrants and asylum seekers and how the lines between them were being more blurred, or ignored by governments.

In its report to the UN General Assembly in October 2003, the UNHCR stated that it will change both its “thinking and its programs so as to better manage both migration and refugee protection challenges, at the nexus where

they intersect.”<sup>10</sup> Such focus of the asylum-migration nexus culminated in a report submitted in June 2007 by the UNHCR to its governing body, the Executive Committee, entitled ‘Activities Relating to the Asylum-Migration Nexus.’ However, nine months after this report was released, the UNHCR began to disassociate itself from the terminology and instead adopted the notion of ‘Mixed Migration’.

This connection made its way into the Agenda for Protection, which was the result of the Global Consultations, where nations reiterated their support for the 1951 Convention and the objective of ‘protecting refugees within broader migration movements.’<sup>11</sup> This however raised a question on the issue of protection of other vulnerable categories of migrants- whether the UNHCR is concerned only with the protection of refugees or it also extends its support/mandate equally to the other broad categories of migrants who are genuinely in need of protection. If we go through various reports and writings on mixed migration, we come to know that the challenging ‘balancing act’ was to address governmental and popular concerns about migration in general while attempting to retain a liberal posture on the admittance of refugees. In 2008, UNHCR re-examined its position on the relationship between migration and asylum and started to disassociate itself from the phrase, migration-asylum nexus, if not the idea behind it. Although the institution continued to acknowledge the significance of mixed migration in terms of both global patterns of mobility and its specific mandate, it was believed that the language around the Migration-Asylum nexus may jeopardise UNHCR’s primary goal of protecting refugees. According to a research paper by the UNHCR:

“On one hand, the organisation recognises the need to underline the distinctive status, rights and obligation of refugees, and is sensitive to charges that it wishes to extend its mandate to broader migration issues that lie beyond its legitimate

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<sup>10</sup> Ekaterina Kiseleva & Markin Egor, “The Concept of Mixed Migration Flows and International Legal Regulation of Migration” (2017). 10.2991/icedem-17.2017.97.

<sup>11</sup> Jeff Crisp, “Beyond the Nexus: UNHCR’s Evolving Perspective on Refugee Protection and International Migration.” Research paper 155, UN High Commissioner for Refugees, Geneva, 2008.

concern. At the same time, UNHCR was aware that human mobility is growing in scope, scale and complexity, and acknowledged that other stakeholders, especially states, increasingly regarded the movement of refugees, asylum seekers and irregular migrants as part of a single (and often unwanted) phenomenon”<sup>12</sup>.

To articulate this for further clarity, let us analyse two different statements:

Statement 1- “The human rights and human dignity of all migrants must be respected and protected at all times. However, there exists an international regime for the protection of refugees because refugees have specific protection needs. To meet these needs, it is essential that refugees be identified, including within mixed flows, as early as possible after their flight.”<sup>13</sup>

Statement 2- “Multilateral efforts should not be expected to entirely eliminate irregular secondary movements, in part because timely solutions will not always be available to all persons in need of protection, and in part because of the reality that persons other than refugees and asylum-seekers will likely continue to seek access to States of their choice using the asylum system.”<sup>14</sup>

These statements are taken from the UNHCR’s ‘Basic Propositions on Irregular Secondary Movements.’ They clearly point towards the intention/motive of the proposition. The primary aim is protection of the refugees and it has conventionally been so in most of the documents of the UNHCR. However in recent years, the phenomenon of mixed migration has laid a significant amount of concentration on vulnerable migrants other than refugees who are in need of equal protection by the state authorities.

In its report to the UN General Assembly of October 2003, under the heading of the ‘Asylum and Migration Nexus’, the UNHCR noted:

“Since the beginning of the 1980s, the attitude of many Governments towards asylum-seekers, refugees and migrants has changed. Their new policies have sought to respond to increasing numbers of asylum-seekers and to the challenges posed as a result of mixed flows, where asylum-seekers are found alongside labour migrants. With many channels of legal migration virtually closed, some migrants fall prey to smugglers and traffickers who misuse the asylum channel as a viable means of entry....UNHCR must strive to ensure that the needs of

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<sup>12</sup> Ibid

<sup>13</sup> UNHCR Convention Plus, “Basic propositions on irregular secondary movements”, 25<sup>th</sup> June 2004

<sup>14</sup> Ibid.

refugees and asylum seekers are properly met within the broader context of migration management.”<sup>15</sup>

Although migration and asylum initiatives may vary in terms of their scope and nature, there is a clear interdependence between efforts to enhance both areas. The proper functioning of asylum systems is contingent upon the management of migration, while the management of migration relies on the establishment of regular protocols and procedures for international refugee protection. However, asylum and controlled migration systems should be established on a clear differentiation between various categories of people on the move. Adoption of the concepts of ‘mixed migration’ and the ‘migration-asylum nexus’ in policy circles may thus be understood as a liberal reaction to concerns of states as well as research findings on refugees and migration. This partly explains the acceptance of the concept of mixed migration by the UNHCR and other migration and refugee agencies. However, the balancing act still remains a challenge in the wider policy debate on mixed migration.

According to another perspective, the terms ‘mixed migration’ and ‘migration-asylum nexus’ were becoming more and more important as a result of pressure coming from two different directions. The first was the analysis of scholars in the 1990s that was adopted by policy circles, and highlighted the common root causes of movements where economic factors were linked to human abuse and violence. The second occurred when multilateral organisations acknowledged that governments and citizens in the ‘global north’ had a case that ‘the asylum system was being abused and used for immigration purposes on a substantial scale.’<sup>16</sup> The human rights and refugee experts, who were earlier hesitant to embrace it, acknowledged later that there was a mix of reasons/motivations responsible for migration.

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<sup>15</sup> UN General Assembly. “Asylum and Migration Nexus”, UNHCR, October 2003.

<sup>16</sup> Van Hear, Nicholas Brubaker, Rebecca and Bessa, Thais, “Managing mobility for human development: the growing salience of mixed migration”, *Human Development Research Paper (HDRP) Series*, Vol. 20, 2009.

While addressing mixed migration, the UNHCR has set out its approach to refugees within mixed flows by formulating a ten-point plan of action. In essence, it is a tool created by the UNHCR to help governments and other stakeholders include refugee protection issues in more general migration policies. The emphasis is mostly on actions in transit and destination countries, with interested nations and other stakeholders cooperating and sharing the 'burden' (the term used for migrants and refugees). It includes both conventional protection measures and particular recommendations for the safety of refugees and asylum seekers moving in mixed flows. The 10-Point Plan does not address the underlying reasons/root causes of mixed migration in details. However, it does acknowledge the need for longer-term participation and sustainable development focused on democracy, livelihood opportunities, and peace-building as part of an all-encompassing and collaborative approach. The table below lists out the ten-point plan of action:

| <b><u>The 10-Point Plan of Action</u></b> |
|---|
| 1. Cooperation among key partners         |
| 2. Data collection and analysis           |
| 3. Protection-sensitive entry systems     |
| 4. Reception arrangements                 |
| 5. Mechanisms for profiling and referral  |
| 6. Varied processes and procedures        |
| 7. Durable solutions for refugees         |
| 8. Addressing secondary movements         |
| 9. Return arrangements for non-refugee    |
| 10. Information strategy                  |

Table 1: The 10-Point Plan of Action

Source: The UNHCR, <https://www.unhcr.org/us/media/29510>

### 1.3 How is Migration ‘Mixed’?

Continuing our discussion on mixed flow, migration may be mixed in two distinct aspects: firstly, the motives for individual migration might vary; secondly, the composition of certain population movements or migrant groups can be diverse within host nations. We shall note in the later section on ‘motivational elements’ how the causes for migration are often as diversified and complex as the individuals who relocate. Those fleeing a country where war, repression, discrimination, and abuse of human rights are rampant, also might be trying to escape severe economic conditions which feed discord, persecution, marginalization, and human rights abuse. There are also few components of migration to understand the types of migratory movement. All migration entails some sort of *outward* travel from one’s home or place of origin to another. As a result of this mobility, individuals must go *inward* as well - those leaving one location must travel to another, even if just momentarily. Following that, there may be a *return* to the place of origin or prior habitation; this too, includes *inward* migration; and *onward* movement to some other place.<sup>17</sup>

There is a broad categorization of migration into ‘internal’ and ‘international’ migration for a clearer understanding of the phenomenon. The former takes place within a country such as between states, provinces, cities, or municipalities and the latter takes place across international borders.<sup>18</sup> International migrants are further classified as legal immigrants, illegal immigrants, and refugees. Legal immigrants are those who moved with the legal permission of the receiving nation, illegal immigrants are those who moved without legal permission, and refugees are those who crossed an international boundary to escape persecution. There is another category which is forced migration- that directly relates to the complexities associated with

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<sup>17</sup> Van Hear, et.al, n.16

<sup>18</sup>Asha A. Bhende & Tara Kanitkar, “Principles of Population Studies”, New Delhi: Himalaya Publishing House, 2006.



mixed migration. Forced migration occurs when a person is transported against his/her choice or due of external circumstances (natural catastrophe or civil conflict). Internal and international migration must be distinguished since they occur for separate causes. Since structural barriers are more likely to impede a potential international migrant's mobility than those of an internal migrant—international migration involves more administrative procedures, greater expense, and greater difficulties associated with obtaining employment, accessing state services, learning a new language, and the like—the motivational factors behind international migration are typically stronger than those for internal migration.<sup>19</sup>

## **Section 2**

### **2.1 Drivers for migration: The 'Motivational Element'**

Recently, both the EU Agenda on migration and the Global Compact for Safe, Orderly and Regular Migration, explicitly stated the need to improve the management of migration by addressing the 'adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin, and so compel them to seek a future'.<sup>20</sup> Although the phrases 'drivers', 'root causes', 'determinants', and 'push and pull variables' are used differently, the reason underlying these assertions is the same: managing migration necessitates an in-depth comprehension of what drives migration in the first place. While investigating the subject of 'why' people migrate, it is critical to use a mixed migration lens while also acknowledging the varied motives of most people who are on the move. Despite the development and understanding of various concepts related to migration, it has never been possible to divide migrants easily into those who are forced to migrate and those who move based on purely economic reasons,

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<sup>19</sup> John.R Weeks, "Population: An Introduction to Concepts and Issues." Belmont, CA: Thomson/Wadsworth. 2008.

<sup>20</sup> Saskia Gent, "The Root Causes of Migration: Criticising the Approach and Finding a Way Forward", 2002

seeking a better standard of living. Motives are always mixed and the complexity of decision making for migrants as well as the 'borderline between political refugees and those dissatisfied economically can indeed be blurred.'<sup>21</sup>

Whenever we initiate a discussion on international migration, there is a diversity of factors and motivations to move/leave one's homeland which come to the forefront. It has become one of the crucial aspects of understanding human mobility. As said by Nicholas Van Hear, 'mobility has mixed motivations.' Also referred to as the push and pull factors for migration, they are the most complicated part of migratory movements as the motivations/reasons may vary from person to person and change for the same person at different points. Van Hear also points out that people frequently switch between categories: they may for instance, enter a nation as students, tourists, or visitors; but subsequently overstay, work, seek asylum, or seek permanent residence, and finally become naturalized citizens. Similarly, internal migrants pushed by conflict or in quest of opportunity may transcend state lines and become international migrants over time. As a result, States find it incredibly difficult and complicated to formulate laws to handle such an 'unwieldy mix.'<sup>22</sup>

Irrespective of factors such as persecution, asylum, or economic needs; migrants with divergent histories and routes of travel experience different outcomes, especially in the European immigration system. Several factors such as demographic shift, unemployment, chronic poverty, natural disasters, increased regional disparities, political violence, poor governance, oppressive regimes among others have influenced the individual decision to migrate. These are known as the push factors for migration (conditions which force people to leave their place of birth). Pull factors are the opposite of push factors- they attract people to a specific location for reasons such as job

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<sup>21</sup> Ibid.

<sup>22</sup> Van Hear, et.al, n.16

opportunities and better living conditions, easy availability of land for settling and agriculture, political and/or religious freedom, superior education and welfare systems, better transportation and communication facilities, a better healthcare system, and a stress-free environment and security.<sup>23</sup> They together determine the choice of destination by irregular migrants. In addition to this - connectivity level, social media and broadcasting media have inspired and empowered modern mobility especially among the young population who have been experiencing politically restrictive societies and socio-economically stagnant lives in their original place of birth.

However, conflict and persecution are key factors for the rapid growth of displacement and mobility from a particular region or state to another. In 1966, Everett Lee in his seminal work, 'A Theory of Migration' has endeavoured to provide a systematic framework for a 'theory' of migration that aims to elucidate the many elements that may account for the magnitude of movement between a given origin and destination. The author established a conceptual framework that categorises the aspects related to the decision-making process of migration into four distinct groups:

- (1) Factors associated with the region of origin;
- (2) Factors associated with the region of destination;
- (3) Intervening obstacles; and
- (4) Personal factors.

Lee's approach carves out the specific details of each of these four categories by pointing out that in every location, there are multiple elements that function to push people away from the location, to keep people in the location, or to draw people towards it. There are considerable disparities in this regard between the parameters connected with the region of origin and those related with the area

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<sup>23</sup> "Push and Pull Factors and Lee's Theory of Migration."  
[http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp\\_content/S000453PO/P001844/M029737/ET/1525155291PS\\_MU\\_15Lee\\_Migration\\_Theory\\_\\_Push\\_and\\_pullModule15Paper10Ed.pdf](http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000453PO/P001844/M029737/ET/1525155291PS_MU_15Lee_Migration_Theory__Push_and_pullModule15Paper10Ed.pdf)

of destination. Migration may occur once both are suitably weighed. Typically, a person has a greater and more realistic understanding of his place of origin, but his knowledge of the destination is relatively shallow and inexact.<sup>24</sup> Hence, the theory makes a very early attempt to figure out the 'mixed' factors and elements that are responsible for migration.

Mixed migration can be seen in various types of migratory movements and mostly in all stages where a mix of motivations or aspirations plays a great role in determining the discussions on 'force, choice and agency.' We have already mentioned few of the mixed motivations where a variety of factors work for regular/irregular movement. In addition to that, there are also changes in motivations during the course of migration, like shifting in between categories; refugees flee their countries to escape violence and persecution, but once they are in a country of asylum, they also start to prioritise rebuilding livelihoods for their families, as well as to support those they may have left behind. There are increasing similarities in the migratory process for both 'forced' and 'voluntary' migrants. As legal channels for migration has become more restricted, both voluntary and forced migrants are driven to resort to agents and smugglers in the thriving migration industry to cross borders (to be discussed in Chapter III). This denotes a fact that most of the time they are using the same means for reaching their destination. Refugee and labour/economic migration can also interlock where utilization of similar routes and channels is concerned. Refugees may turn into economic migrants by entering the labour market.

Hence it is important to note that the phenomenon of mixed migration and its complex motivations element is observed and manifest in all these instances; and there are several examples to buttress this in reality. But despite such complexity of motivations accompanying migrants, policy makers must be aware that there are some people who are denied the safety of their own state,

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<sup>24</sup>Ibid.

and who need safeguards to ensure that they can take asylum in a country that will protect them.

The presence of mixed motivations is very much apparent in the case of Afghans. Since the late 1970s, the continuous movement of Afghans within and from Afghanistan has been shaped by a combination (mix) of security, conflict, political and economic factors. According to the UNHCR:

“By the end of 2019, around 2.6 million Afghans were internally displaced, while around 2.7 million were registered as refugees, representing the world’s most protracted displaced and dispossessed population under the mandate of the UN Refugee Agency (UNHCR).”<sup>25</sup>

For decades, Turkey has served as a host nation and transit centre for thousands of Afghan refugees, who make up the country’s second-largest group of registered refugees and asylum seekers. In 2018, Turkey saw a significant increase in irregular immigration (those without legal paperwork), with Afghan nationals constituting the largest category of new irregular entrants. Afghan arrivals more than quadrupled in 2019, and they remained the largest national group of new entrants. The Afghans also fled to Pakistan and Iran where the dominant image of migration portrays refugees moving out of Afghanistan and living in camps in Pakistan or self-settled in towns. If observed closely, a more complex picture can be visualised. For many decades, a substantial proportion of the Afghan population has looked for income-earning opportunities in Pakistan and Iran, particularly during drought or poor harvests. Many of those who fled conflict in the 1980s and especially the 1990s used these prior labour migration routes and trading networks. Hence refugee movements were tied up with simultaneous movements for work/trade.<sup>26</sup>

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<sup>25</sup>UNHCR Briefing paper, 13<sup>th</sup> December, 2019, <https://www.unhcr.org/news/briefing-notes/unhcr-urges-intensified-support-displaced-afghans-and-refugee-hosting-nations>

<sup>26</sup> Mixed Migration Centre, “Destination Unknown – Afghans on the move in Turkey”, 2020. [www.mixedmigration.org](http://www.mixedmigration.org)

A study was conducted by Monsutti on the Hazaras<sup>27</sup>, in tandem with the effects of war noting that over several decades, a seasonal migratory cycle has developed with many men from southern Hazarajat going to work in the coal mines near Quetta each winter and returning in early spring to start farming. The Hazaras' plight in Iran excellently exemplifies the difficulties of differentiating between economic migrants and political refugees. The study further notes that the converse pattern – “protracted refugees transmuted into labour migrants” – is also common. This is particularly the case among Afghan refugees in Iran, who over the years have effectively become migrant workers.<sup>28</sup>

Another interesting study by MMC that aims to improve understanding of the migration experiences and motivations of Afghans arriving in Turkey outlines key drivers/motives behind migration of Afghans and investigates the variables that affect short to long-term intents, such as choices on whether to remain in Turkey or continue the journey onwards. The study showed that:

“...majority of the surveyed Afghans were men (66%) and relatively young – between 18 and 30 years old (65%). A majority (65%) arrived in Turkey after January 2018, and most arrived irregularly (83%). The prime factors that forced them to make their journey were mainly violence and lack of economic opportunities and access to rights in Afghanistan.”<sup>29</sup>

For some women, domestic violence, sexual abuse, verbal and physical threats, and forced marriages were reasons for embarking on migration journeys. The main reasons for coming to Turkey are mostly ‘expectations of family reunification, easy and fast access to asylum, economic opportunities, and better living standards.’<sup>30</sup> The Afghans had no favoured destination. At the time of survey, the majority of respondents were found to be still on the move,

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<sup>27</sup> Hazaras are an ethno-linguistic group originally from the mountainous region of central Afghanistan, known as Hazārajāt

<sup>28</sup> Alessandro Monsutti, “War and Migration: Social Networks and Economic Strategies of the Hazaras of Afghanistan”, *Routledge*, December 2012

<sup>29</sup>Mixed Migration Centre, “Destination Unknown – Afghans on the move in Turkey.” Available at [www.mixedmigration.org](http://www.mixedmigration.org)

<sup>30</sup> Ibid.

either inside Turkey or abroad. Of those who planned to travel beyond Turkey, revealed that ‘this was less important than finding safety, a welcoming environment and improved living conditions.’ However, as we all know, a majority of these vulnerable migrants are compelled to face numerous challenges during their journeys. Likewise, the same study also noted that upon arrival in Turkey, migrants confronted a number of difficulties, including access to protection, healthcare, education, job, and general living circumstances (housing and shelter). Among the most frequently cited issues were restricted freedom of movement, the danger of deportation, limited access to formal employment, language hurdles, and a lack of awareness about the scope of legal rights and duties. More than two-thirds of respondents interviewed, said they were unaware of their rights as an asylum seeker or migrant. Furthermore, the majority reported receiving insufficient support from official institutions and non-governmental organisations (NGOs).<sup>31</sup> However, the role of respective states and organisations involved in dealing with policies relating to mixed migration will be a subject of discussion in a later chapter of the thesis.

## **2.2 Is the Motivational Element in Mixed Migration overhyped?**

In mixed migration, it is extremely difficult to interpret the genuine factors which motivate or compel people to migrate. Most of the time, these factors can be misleading. The reason is that not every migrant is ready to disclose why he/she has chosen to depart and some may even make up concocted stories. There have been instances where Pakistanis portrayed themselves as Afghan refugees who fled the region due to extreme violence and torture by the Taliban, and migrated towards Europe in search of better livelihood. But there are migrants who escape violence and persecution in need of protection, but once they reach the European borders, they are mistreated and denied the necessary protection.

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<sup>31</sup> Ibid.

Therefore, it is imperative to eliminate the legally insignificant and potentially detrimental aspect of the ‘motivations’ component within the framework of mixed migration policy. Rather, it should be regarded as illustrating intricate patterns of population migration that encompass diverse groups of migrants with varied levels of international protection requirements. Those in mixed flows are rational agents who pick their destinations based on available information about the situation in the destination countries.<sup>32</sup> The question that needs to be addressed here is- what would be the policy implications of considering the motivations element and how would it affect the migrants as well as their genuine protection needs? Since ‘mixed migration’ is a relatively new phenomenon and research interest on this has gained prominence recently, not much literature is available for in-depth study on motivations for irregular migration resulting in mixed flows. Just as Marina Sharpe has argued in her article:

“The international legal principles applicable in mixed migration situations apply for the most part regardless of individual motivations for travel. Including such motivations within the policy concept of “mixed migration” divorces the concept from its legal underpinnings. Moreover, understanding “mixed migration” in terms of varied individual motivations for migrating does not advance humanitarian objectives. In today’s populist political climate, drawing unnecessary attention to the varied drivers of migration only serves to direct the attention towards those aspects of migration about which some sections of the public are not sympathetic.”<sup>33</sup>

As previously stated, the understanding of mixed migration centres around two primary criteria- the first criteria pertains to the diverse character of population movements, encompassing a range of population flows with varying compositions. The second one pertains to the intricate human motives that frequently drive people to engage in migration or relocation. If the prioritisation of humanitarian concerns and governments’ legal duties towards migrants is desired, then it is advisable to favour the previous interpretation of

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<sup>32</sup>Marina Sharpe, “Mixed Up: International Law and the Meaning(s) of “Mixed Migration” , Refugee Survey Quarterly, Volume 37, Issue 1, March 2018, p 116,<https://doi.org/10.1093/rsq/hdx021>

<sup>33</sup> Ibid



mixed migration. The legal responsibilities that States have for individuals who are in the process of moving, generally apply irrespective of the specific reasons behind their decision to migrate. According to Marina Sharpe, the relevance of international refugee law is particularly prominent in mixed migration circumstances, because the intentions of individuals significantly impact the rights and obligations of states. Refugee status is based on a ‘well-founded fear of persecution.’<sup>34</sup> Individual motives for moving are definitely relevant in this context. She further reiterated:

“A critical legal obligation is owed before the State can even undertake any inquiry into an individual’s state of mind: non-refoulement. The state duty not to return an individual to ‘the frontiers of territories where his life or freedom would be threatened’ applies at borders and therefore gives rise to a duty of independent inquiry. When the State knows or should know that a person is in need of international protection, it has a duty to establish whether non-admission would result in a breach of the non-refoulement obligation. In mixed migration situations involving refugees, people in need of other forms of international protection and individuals without any international protection needs; the duty of independent inquiry applies broadly in order to determine the needs of each individual within the mixed flow.”<sup>35</sup>

The relevance of individual motivations is generally recognised in the context of international refugee law. However, in situations involving mixed migration, these motivations are not considered pertinent during the initial interaction between the State and individuals on the move. Instead, a comprehensive investigation is required for all individuals in such situations, irrespective of their personal reasons for migrating. International Humanitarian Law (IHL) follows the same principle. Furthermore, it is imperative that responses to mixed migration are guided by the respective countries’ international legal duties towards those in transit. The examination of these responsibilities reveals that the conceptualisation of diverse incentives for engaging in mixed migration does not provide any distinct advantages,

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<sup>34</sup>See 1951 Refugee Convention definition of a ‘Refugee’

<sup>35</sup> Sharpe, n.32

since these motivations generally do not influence the obligations of States towards individuals in transit.

Regrettably, the inclusion of human motivations in understandings of mixed migration yields contradictory implications. The aforementioned proposal has significant risks within the present political landscape, when several states are actively striving to curtail their responsibilities towards those seeking refuge and better prospects. The inclusion of migrants' motivations in a discussion may inadvertently shift public focus towards the economic factors driving migration. To clarify, when specifically addressing the matter of motives for migration, it may give rise to the notion that such movement is unnecessary and without justification.

Numerous research experts concerned with protection acknowledge the notion that a claim for refugee status may be substantiated by economic deprivation. However, placing emphasis on the economic factors that drive migration has the potential to exacerbate populist attitudes against immigration. However, it is important to note that this reasoning, which interprets 'mixed migration' as exclusively based on the intricate composition of population movements, does not imply that individual reasons are never significant. Motivations are indeed often highly relevant, especially in light of States' New York Declaration commitment to "consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation [...] family reunification and education-related opportunities."<sup>36</sup> Individuals may opt to relocate to a specific country due to employment opportunities or familial ties, and these factors should be taken into consideration by the destination country when making decisions on entrance. However, it is uncommon for the policy framework of mixed migration to be applied in cases of normal migration. Instead, humanitarian organisations utilise it within the framework of the

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<sup>36</sup> UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/71/L.1, 13 September 2016, para. 57

irregular migration of persons, a significant portion of who are likely to have urgent protection requirements. Migrants possess an inherent entitlement to the fulfilment of their needs, irrespective of the specific motivations driving their relocation. The manner in which protection needs are addressed should be guided by individual factors, such as motivations. For instance, an unaccompanied child who relocates to a specific country due to family ties should ideally be reunited with their relatives in that location. However, it is important to note that the legal obligations of a State towards a specific migrant are not contingent upon individual circumstances. The legal frameworks, however, illustrate that States are always bound by legal obligations towards migrants, regardless of the individual motives for travel of these migrants.<sup>37</sup>

### **2.3 Irregular Migration**

Irregular movement normally involving facilitators (smugglers and human traffickers) is at the heart of the phenomenon of mixed migration. Theoretically, irregular migration refers to movement of people that occurs outside of the rules, regulations, or international treaties that regulate arrival into or departure from the state of origin or destination. However, irregular migration is in itself a complex phenomenon. A country's admission, stay, or employment of a person who does not have the proper authorization or documentation required by immigration and labour laws is referred to as irregular migration from the viewpoint of transit or destination nations. From the perspective of the countries of origin, irregularity can be recognised, for instance, when a person crosses an international border without a passport or other legal travel document or fails to meet the administrative conditions for leaving the country. There are instances when migrants enter a nation lawfully, but become irregular by remaining longer than permitted or working illegally. Some migrants enter and exit the country illegally. Others are 'semi-

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<sup>37</sup> Sharpe, n.32

compliant': they seek to conform to national laws and rules, but are unable to do so fully.'<sup>38</sup> The IOM points out: 'The category of semi-compliance - the 'space between' strict legality and (il)legality - is extremely broad...'<sup>39</sup> In clearer terms, it signifies that individuals can enter irregularly through three main routes and ways: 1) entering a country without proper authority, either through clandestine entry or with fraudulent documents; 2) entering with authorisation but overstaying ultimately leading to unauthorized stay, and; 3) deliberately abusing the asylum system. An additional route: movement into a territory under the control of smugglers and traffickers has also been considered.<sup>40</sup>

Just like people 'shift between categories' in migration, many irregular migrants also strive to become regular and some governments facilitate this through 'regularization,' 'legalization,' 'amnesty', or 'registration' programs.<sup>41</sup> In other cases, migrants try to get closer to regular status by buying or even hiring false documents. Irregular migrants are often referred to as 'undocumented', 'illegal', 'unauthorized' or 'clandestine' migrants which are terms common to mixed migration as well. All these terminologies point towards a negative aspect of migration which overshadows the hardship and vulnerability of the migrants who are forced to move and change their status during their journey. Despite the fact that the movement itself may be considered 'illegal', migrants themselves cannot be classified as such because the term is only applicable to describe the activity, not the individual. Additionally, migrants shouldn't be referred to as unlawful or illegal because doing so frequently leads to extremely harmful prejudice and stereotyping that can encourage racism and xenophobia, and lack or necessary support from state authorities themselves. In a Refugee Council poll of UK residents, the

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<sup>38</sup> Derya Ozkul, Stephen Castles, Magdalena Arias & Chulhyo Kim, "Irregular Migration: Causes, Patterns, and Strategies." 2012.

<sup>39</sup> World migration 2008, "Managing global mobility in the evolving global economy." Geneva: International Organization for Migration (IOM), 2008

<sup>40</sup> Katie Kuschminder, Julia de Bresser & Melissa Siegel, "Irregular Migration Routes to Europe and Factors Influencing Migrants' Destination Choices", 2015

<sup>41</sup> Castles and Miller, n.38

term most associated with media coverage of refugees and asylum seekers was ‘illegal immigrant’, selected by 64% of respondents.<sup>42</sup> Hence, it is nothing but laws and policies which label certain forms of mobility as legal and desirable, and others as illegal and unwanted. We must acknowledge the fact that despite various causes and desires to move, restricted possibilities for regular migration forces individuals into irregular movement which involves the assistance of facilitators and smugglers, also requiring lengthy journeys across several countries before reaching a destination. Therefore, the likelihood of irregular migrants experiencing many transit countries en route to their destinations may be much higher than it is for regular migrants. This phenomena or feature of irregular migration serves as a replica of mixed migration. By breaking the terms and conditions of their visas, undocumented migrants who entered the nation through legal channels add to the pool of migrants who are in an irregular position, challenging the authority of the State in a number of ways.

The majority of current irregular migration is ‘mixed’ which refers to movements of people (refugees, asylum seekers, and others with special needs, such as trafficked people, stateless people, and unaccompanied or separated children) who are moving for various reasons but use the same routes, modes of transportation, and vessels.<sup>43</sup> Although there is no universally recognised definition of irregular migration, the word is commonly used to describe people who move outside of conventional migration routes. Whether moving in a regular or an irregular manner, it cannot be denied that all types of migration flows contain a variety of individuals possessing ‘human rights.’ Irregular migration constitutes only a part of the overall volume of global migration (around 10-15% of the total migration stock).<sup>44</sup> According to Koser

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<sup>42</sup>Refugee Council, 2002

<sup>43</sup> Judith Kumin, “The Challenge of Mixed Migration by Sea”, February 2014

<sup>44</sup> Challenges of Irregular Migration, n 5

and McAuliffe, “there is a gap in the literature regarding the specific drivers of irregular migration.”<sup>45</sup>

There are certain similarities that can be drawn between the motivational factors for regular and irregular migration such as ‘political insecurity, economic motivations, or the specific trigger that creates a need to flee.’ Also, in a time of tighter border controls, it is frequently necessary to work with a smuggler or agent to move illegally. Evidence suggests that a lack of legal immigration choices forces individuals to migrate illegally through smugglers, which frequently involves lengthy treks through many nations before arriving in Europe. Thus, irregular migrants may experience more transit countries on their journey to their destinations than regular migrants.<sup>46</sup> Irregular migration affects most regions of the world; however statistics tend to be unreliable due to the very nature of such movements. While irregular migration can also be applied to people who have arrived at their destination, mixed migration can only be used to describe people who are on the move, or in transit. Nonetheless, the fact that individuals migrate illegally or irregularly does not exempt states of the responsibility to defend their rights and give priority to humanitarian assistance. States have the sovereign right to establish the terms of admission and stay for non-nationals in their territory, and they must do so with the knowledge and facts necessary to make reasonable, evidence-based, and principled judgements. Similarly under mixed migration, various categories of migrants who travel in an irregular manner using the same means of travel, cannot be denied their rights to protection by the receiving states.

A typical example of irregular mixed migration is migration during the period between January 2015 to the end of September 2017, where over 1.5 million refugees and irregular migrants arrived in Europe by sea. Almost 70% made

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<sup>45</sup> Marie McAuliffe, and Khalid Koser (eds). “A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making”, ANU Press, 2017.

<http://www.jstor.org/stable/j.ctt20krxxh>.

<sup>46</sup> Katie et.al, n.40

landfall in Greece through the Eastern Mediterranean Route, with a much smaller number from Lebanon and Egypt. Of the remaining, 29% arrived in Italy through the Central Mediterranean Route (principally from Libya) and 3% came to Spain through the Western Mediterranean Route. Two-thirds of arrivals into Europe in 2015 and 2016 were from three countries – Syria, Afghanistan and Iraq. These flows along the Eastern Mediterranean and Central Mediterranean routes were both ‘irregular’ (made without the necessary authorisation) and ‘mixed’ in the sense that they were made up of people moving through some combination of force, choice and agency. The lack of legal and safe routes to asylum in the EU lay at the root of why so many refugees and migrants were forced to travel irregularly.<sup>47</sup>

Based on available data from national immigration authorities and other reputable sources, it has been observed that approximately 5.6 million individuals from Venezuela have fled their home country in recent years. This significant outflow of people can be attributed to the prevailing political and socio-economic crisis, which has been recognised by the United Nations as the most extensive external displacement crisis in the modern history of Latin America and the Caribbean. The majority of individuals accounting for 84% are hosted in nations located in Latin America and the Caribbean region. Among these countries, Colombia and Peru stand out as the primary hosts, accommodating 32% and 19% of the immigrants respectively.<sup>48</sup> Following closely behind are Ecuador and Chile. A multitude of factors contributed to the emigration of a significant number of Venezuelans, encompassing economic circumstances characterised by limited work prospects, inadequate access to fundamental rights and services, concerns over personal safety, and instances of political persecution. Venezuelans who meet the necessary criteria for refugee status traverse same pathways and employ similar means as those

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<sup>47</sup>John Borton and Sarah Collinson, “Responses to mixed migration in Europe: Implications for the humanitarian sector.” December 2017. Accessed from <https://odihpn.org/publication/responses-mixed-migration-europe-implications-humanitarian-sector/>

<sup>48</sup> Migration Data Portal, 21<sup>st</sup> February 2022, <https://www.migrationdataportal.org/themes/mixed-migration>

whose moves are unaffected by circumstances associated with persecution. In light of the prolonged duration of the crisis and the escalating number of Venezuelan refugees and migrants, several nations implemented progressively stringent migration rules. In light of increasingly challenging barriers to accessing legal channels of migration, a rising number of individuals from Venezuela are now turning to more riskier and unauthorised means of travel.<sup>49</sup>

#### **2.4 Root Causes for Migration: A glance**

Throughout the development of migration and asylum policies of the EU, there has been a focus on addressing the root causes for migration. While addressing these causes, one can think of amplitude of factors which cause people to migrate. It can start from the need of having a better standard of living or reunite with loved ones, to factors such as war, climate change/disaster and several motives mentioned in the earlier sections. The ‘root causes’ approach focuses on identifying causes of forced migration and attempting to modify them through activities in the countries of origin.<sup>50</sup> However, is it really possible to eradicate the root cause in order to stop people from migrating? The idea would be that displacement and irregular migration numbers would fall and factors causing migration in countries of origin can be dealt with by addressing the root cause. Bram Frouws, the Director of MMC has discussed in his article that how and why the focus on root causes can be ‘misleading’. While some root causes like civil war or conflict, or some environmental factors behind migration can be addressed, the personal factors can never be put on the table for discussion and policy implementation as they are extremely diverse and can vary from one individual to another.<sup>51</sup>

Mixed migration and the problem of identifying the root cause are related in the sense that motives for migration are always mixed and Wood has outlined the complexity of decision making for migrants and asserts that the ‘borderline

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<sup>49</sup> Ibid.

<sup>50</sup> Saskia Gent, n 20

<sup>51</sup> Bram Frouws, “Op-Ed: Mistaken metaphor: the ‘root causes’ approach to migration is both dishonest and ineffective.” March, 2020



between political refugees and those dissatisfied economically can indeed be blurred'.<sup>52</sup> Zolberg and others have identified examples of the collapse of weak states where the 'very character of root causes makes it impossible to distinguish between flight from violence and flight from hunger'.<sup>53</sup> Bissell & Natsios have stressed upon 'economic, social and political' factors in both sending and receiving countries.<sup>54</sup> Bram Frouws has also added to the problem of dealing with the root cause for migration where his analysis tells us that many of the real root causes are in fact being 'forgotten'.

In recent times, the situation at the Turkey-Greece border attracted tremendous policy and media attention. But these are only symptoms of the real crisis. Elsewhere, for example, in Syria, even after eleven years, there is still no resolution to the conflict in the country where several parties, including both states and non-state actors are involved. Millions of people are still internally and externally displaced, and the humanitarian catastrophe and human suffering persist. Frouws added that the difficulty with migration as a whole arises from the 'fundamental cause' narrative. This results in more stringent measures (such as containment, deterrence, and externalisation), many of which exacerbate the very issues which they were designed to address in the first place, and create greater instability that drives migration and displacement.<sup>55</sup>

On 24<sup>th</sup> February 2022, Russia launched a full-scale military operation against Ukraine. Over 2 million Ukrainians fled the nation in search of safety and security. The bulk fled to Poland (58%), with other significant first-arriving nations including Hungary, Slovakia, Romania, and Moldova. Although the precise number is uncertain, the European Union (EU) and UNHCR have

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<sup>52</sup> W.B. Wood, "Forced Migration: Local Conflicts and International Dilemmas", in *Annals of the Association of American Geographers*, vol. 84, no. 4. 1994.

<sup>53</sup> Aristide Zolberg, Astri Suhrke & Sergio Aguayo, "Escape from Violence: Conflict and the Refugee Crisis in the Developing World". OUP, Oxford. 1989.

<sup>54</sup> Bissell & Natsios, "Development Assistance and International Migration." in Zolberg, A & Benda, P.ed. *Global Migrants, Global Refugees*, Berghahn Books, New York. 2001.

<sup>55</sup> Frouws, n 49

hosted up to 4 to 5 million refugees. It is ascertained that ‘Ukrainians are fleeing sudden and violent armed conflict and are looking for safety; therefore they qualify for international protection under the refugee convention.’<sup>56</sup> However this has been interpreted differently in an article by Bram Frouws, where he has talked about the fact that all legal status categories like the refugees, asylum seekers, economic migrants, labour migrants –do not always capture the reality on the ground. For the first time, a country bordering the EU that enjoys visa-free travel to the EU is also at war. Without a visa, Ukrainians can travel to the EU and stay there for up to 90 days. There are 1.5 million Ukrainians who are legally residing in Poland, Germany, the Czech Republic, Hungary, Spain, and Italy. For years, Ukraine has been one of the main places of origin for economic migrants in the EU. Many people who are escaping will rely on family and the diaspora to settle down or look for direct work prospects, and they will do this without requesting asylum.<sup>57</sup>

On 3<sup>rd</sup> March the same year, the EU decided to implement a previously unimplemented rule to provide temporary protection to persons escaping violence in Ukraine. This implies that people escaping the conflict will receive a residency visa and will have access to both the work market and educational opportunities. Businesses are already mobilising to hire Ukrainians because of the severe labour market shortages in several areas throughout Europe, and it is anticipated that many will integrate into European labour markets rather rapidly. As a result, many people won’t seek asylum or stay in refugee camps; instead, they will relocate around Europe, reunite with loved ones, and probably find employment and educational opportunities. However, this does not qualify them as economic or labour migrants.

Few historical and political contexts of the emergence of ‘root causes’ needs to be referred to, in order to get a clearer picture of how certain circumstances, particularly the end of the Cold War gave rise to this policy development in

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<sup>56</sup> Bram Frouws “When war hit Ukraine. Reflections on what it might mean for refugee, asylum and migration policies in Europe.” March, 2022.

<sup>57</sup> Ibid.

relation to migratory movements. It shall also be discussed how contemporary challenges such as COVID-19 or the Ukrainian crisis which have increased migration flows particularly towards the Mediterranean, are shaping mixed migration policies. In Europe there were specific conditions which made the root causes approach of particular relevance. Within the context of the end of the Cold War, it has been witnessed how the fear of East-West migration contributed to a restrictive approach to migration, and asylum in particular. Conflict in the Balkans and increased refugee flows to the developed countries of Western Europe exacerbated this tendency. During the Cold War there was a strong ideological incentive for states to accept refugees, which initially mainly came from communist countries and then tended to come from countries where one or other side had a strategic interest.<sup>58</sup> After the oil-crisis of 1973 and economic retrenchment by powerful states, migration became less acceptable but states discovered that it was not possible to close the door entirely.

During the 1980's and 1990's, migration became a matter of 'high politics' and forced migration became linked to security issues.<sup>59</sup> To sum up, the post-Cold War political environment with its desire to control migration, rejection of claims of asylum seekers and the increasingly political role of immigration has created the context for the development of the root causes approach. However, it is important to revisit this approach and decipher if it is actually effective or just an 'over-simplistic approach' to understand the motivational factors or drivers for migration. For instance in a briefing paper of MMC, it has been mentioned that the root causes narrative over-simplifies the decision to leave and obscures the role of politics in triggering the conflicts and humanitarian crises that lead people to leave their homes. It often ignores the underlying

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<sup>58</sup>Gill Loescher, "Beyond Charity: International Cooperation and the Global Refugee Crisis", OUP, New York. 1993.

<sup>59</sup> Joanne Thorburn, "Root Causes Approaches to Forced Migration: Part of a Comprehensive Strategy? A European Perspective" in *Journal of Refugee Studies*, vol. 9, no. 2. 1996.

drivers of migration.<sup>60</sup> The approach shifts focus and accountability away from the behaviour of states, multinational corporations, and structural factors that contribute to a worldwide cycle of instability and inequality, causing individuals to embark on dangerous journeys. These factors include investments in the defence industry which manufactures weapons used in conflicts around the world, reliance on fossil fuels such as oil and gas, and trade barriers or subsidies to industries and sectors such as agriculture and fisheries, which undermine the economic viability of those sectors and the availability of jobs in the countries of origin.<sup>61</sup> It basically shifts focus from the real and important causes underlying migration and lead to an overly narrow focus on why people leave their places of origin, often referred to as ‘push’ factors discussed earlier. Consequently, many other considerable factors that facilitate the decision to migrate and the options that are explored, tend to be overlooked.

### **Section 3**

#### **3.1 Movement towards Europe: the Routes for Mixed Migration**

Under this section, we shall begin looking into the 2014-15 migrant crises leading to an unprecedented migrant and refugee flow towards Europe, and then arrive at the present situation where migrants (in mixed flow) are using similar routes for travel (with special focus on the Eastern Mediterranean Route) and reaching the same destination, i.e. Europe. According to the IOM World Migration Report 2020, international migrants represent 3.5% of the world’s population<sup>62</sup>—notably a small fraction—and of those, migrants in an irregular situation represent between 15% and 20%. This involves approximately 1% of the total world population, which still would involve 30–40 million individuals worldwide. Unlike mixed migration responses, which

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<sup>60</sup> Mixed Migration Centre, “Why people migrate. Insights and key messages drawn from a decade of MMC research and 4Mi data collection”, 2022, Available at: <http://www.mixedmigration.org/>

<sup>61</sup> Ibid.

<sup>62</sup> IOM, World Migration Report 2020

keep a track of migrants regardless of their legal status and are hence better adapted to observing irregular movement, traditional migration data sources hardly ever include migrants with an irregular status.

Since the surge in irregular migration during 2015-2016, the most common route for migrants to attempt crossing into Europe has been the Eastern Mediterranean route. This route has been used for irregular arrivals in Greece, Cyprus and Bulgaria and typically involves travelling to Turkey, and then attempting to cross the Aegean Sea to the Greek Islands or, less frequently, trying to get from Turkish territory to Cyprus.<sup>63</sup> The Eastern Mediterranean route 'used for many years as an entry path into Europe, saw the continent's biggest migratory wave since Second World War when 885,000 migrants used it to reach the EU in 2015<sup>64</sup>; seventeen times the number in 2014, which was itself a record year at the time. Most of the migrants on this route originated from Syria, followed by Afghanistan and Somalia. Since then the number of irregular arrivals on this route has plunged following the implementation of the EU-Turkey statement in March 2016. Over 800,000 refugees and migrants came via the Aegean Sea from Turkey into Greece, accounting for 80 per cent of the people arriving irregularly in Europe by sea. The number of people crossing from North Africa into Italy dropped slightly, from 170,000 in 2014 to around 150,000 in 2015.<sup>65</sup> Greece then had become the main entry point for irregular migratory flows into the European Union, while Turkey became the main country of transit. Due to its geographic position at Europe's South-Eastern border, the Greek-Turkish land and sea border is one of the main entry points of irregular migration into the European Union. As far as undocumented migration is concerned, both countries serve primary transit routes towards northern Europe.

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<sup>63</sup> Frey Lindsay, "Migrants Are Taking Ever More Dangerous Routes to Get To Europe", Forbes, January, 2022

<sup>64</sup> See <https://www.medea-project.eu/tcp1-migration/>

<sup>65</sup> UNHCR

According to data gathered by the IOM, about 1,011,700 irregular migrants arrived by sea in 2015 with almost 34,900 arriving by land. In comparison, 280,000 people had arrived by land and sea altogether in 2014. This is more than double the number of people who irregularly crossed a European border from the Mediterranean in 2013.<sup>66</sup> Prior to 2014, large numbers of irregular migrants currently residing in the EU entered regularly, either based on short-term visa-free system or with a visa, but consequently overstayed their visas or took up employment in violation of their visa restrictions, thus becoming irregular migrants.<sup>67</sup> The majority of the migrants were from Syria, where conflict showed no sign of ending. The main route or the best way to get to Europe was by sailing from Libya to Italy. But later, the Syrians discovered the Balkan route which became more popular as it was a cheaper option. The Balkan governments also claimed that ‘an increasing number of people are joining the flow from countries unaffected by war, such as Morocco or Lebanon.’<sup>68</sup> UN data suggests ‘this group still forms less than 10% of the total, but given the proliferation of fake and stolen identification documents, the exact number will be hard to quantify.’<sup>69</sup> It is a possibility that anyone with the money to pay for both a boat journey to Greece, and then for a false Syrian passport, can proceed comparatively easily towards northern Europe. But due to persecution and repression based on identification, millions of people have been displaced by conflicts outside of Syria as well, such as those in Somalia and Eritrea. This tremendous migration is being driven by pragmatic factors, such as how simple it is to go to the Balkans through Turkey and Greece. Additionally, the cost of transportation has decreased from an expected \$5,000 to \$6,000 to \$2,000 to \$3,000. The fall of the central government in Libya

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<sup>66</sup> International Organisation for Migration (IOM), 2020

<sup>67</sup>Frontex, <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-mediterranean-route/>

<sup>68</sup> Patrick Kingsley, “What caused the refugee crisis? You asked Google – here's the answer”, <https://www.theguardian.com/commentisfree/2015/dec/09/what-caused-the-refugee-crisis-google>

<sup>69</sup> Ibid.

created a fresh pathway for African economic migrants.<sup>70</sup> This crisis has been in reality referred to as ‘a multifaceted, mixed refugee-migrant crisis of asymmetric nature producing far-reaching economic and political contradictions, adding a new layer of instability to the already shaky European Union.’<sup>71</sup>

The image below depicts the three main Mediterranean routes (Central, Western and Eastern routes) that were used by irregular migrants to reach Europe during the migrant crisis and are being used even today.

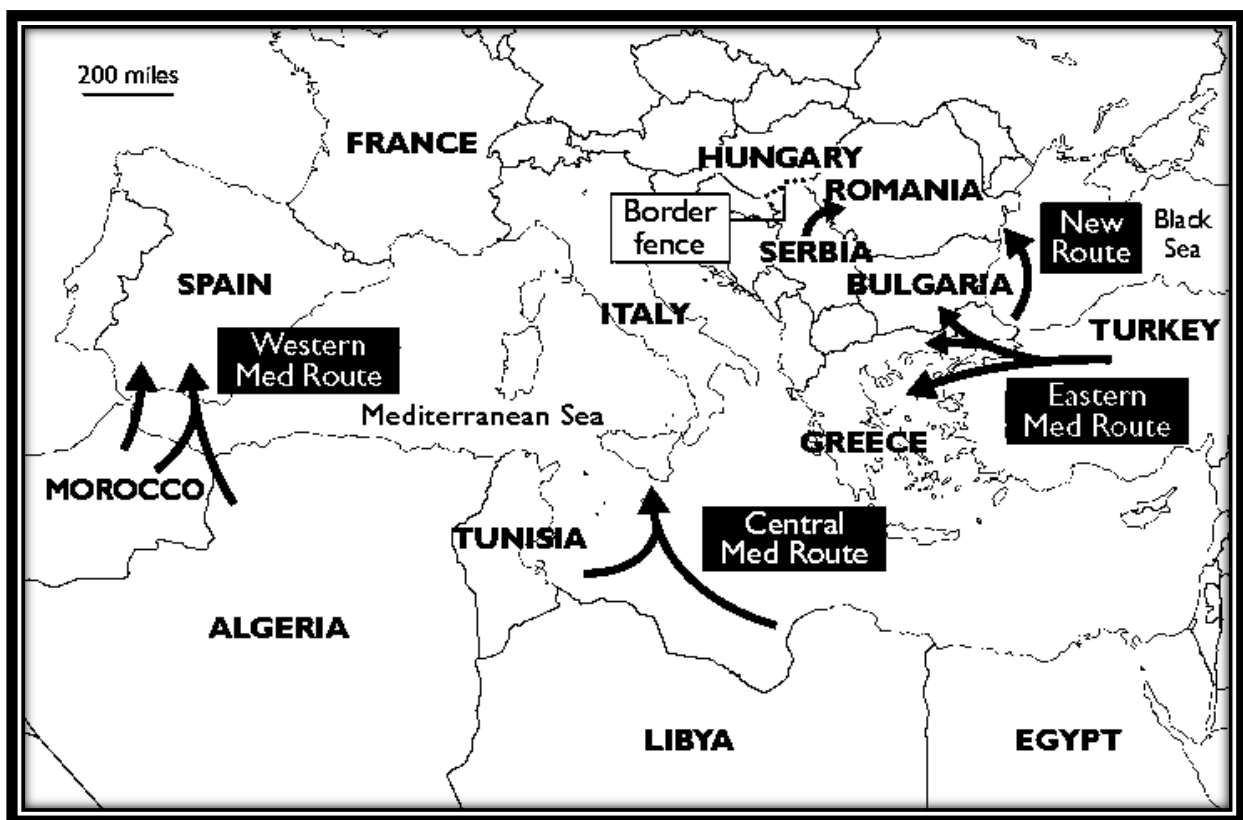


Fig:1- Mediterranean Routes for Irregular Migration

Source: Frontex (crossings); International Organization for Migration (IOM)

By the end of December 2016, the overall number of arrivals in Europe was 387,739. This was a sharp contrast to the arrivals registered in 2015 (which was 1,046,599). The reduction in arrivals was seen in several of the nations

<sup>70</sup>Maha Yahya, “What’s Driving the Refugee Flows”, *Carnegie Europe*, October 2015

<sup>71</sup>The EU and Asymmetrical Pressures, <https://www.cairn.info/revue-politique-europeenne-2018-2-page-98.htm?ref=doi>

with the largest number of arrivals in 2015. In 2016, the number of arrivals from Turkey to Greece declined rapidly, compared with the previous year. Greece received 176,906 arrivals in 2016 compared to 857,363 in 2015, a 79% reduction; whereas Italy saw a minor (16%) increase in visitors. The number of irregular migrants rescued by the Turkish coastguards in 2016 stood at 37,060. The EU-Turkey deal of March, 2016 slowed migratory flows through the Eastern Mediterranean and the Western Balkan route, but arrivals in Italy soared by 118% from April to May.<sup>72</sup> In 2017, approximately 92% of migrants reached European countries in an irregular manner by sea (172,362), and the remaining 8% arrived using various land routes and Italy received the majority (64% of registered overall) of migrants; however it was less compared to the previous years. Following the introduction of the new regulations regarding arrests at sea and assistance given to the Libyan coast guard, the number of illegal migrants decreased that year. The sharp decline in arrivals to Greece and Bulgaria was also correlated with a fall in seaborne flows overall.

The first three nationalities to arrive in Greece were Syrian, Iraqi, and Afghan. However, although the proportion of migrants from Afghanistan fell from 24% in 2016 to 12% in 2017, the proportion of migrants from Iraq rose from 15% in 2016 to 20% in 2017. Additionally, there was an increase in arrivals from Algeria (4%), the Palestinian Territories (3%), Kuwait (3%) and Cameroon (2%), all of which had a rise in 2017.<sup>73</sup> Between January and December 2019, a total of 128,536 migrants and refugees entered Europe via various land and sea routes, which is a 13% decrease from the 147,673 sea and land entries that were recorded during the same time period in 2018. The year 2019 had 81,147 reported arrivals (63% of the total) in Cyprus, Bulgaria, and Greece through the Eastern Mediterranean route. During the same time period, another 32,513 arrivals were recorded by the Western Mediterranean route (25%) that led to

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<sup>72</sup>International Organization for Migration (IOM), *Mixed Migration Flows in the Mediterranean and Beyond*, 2016.

<sup>73</sup>International Organization for Migration (IOM), *Migration Flows to Europe*, 2017



Spain, while 14,876 arrivals were recorded via the Central Mediterranean route (12%) that went by sea to Italy and Malta.<sup>74</sup>

The above scenario demonstrates that the Eastern Mediterranean route continued to surpass both the Western and Central Mediterranean routes as the primary route taken by migrants and refugees travelling to Europe by sea and land as it has done every month since February 2019 and throughout the 2015 migration surge in Europe.

During the period 2020-2021, the pandemic factor decreased refugee and migrant flow towards Europe via all the major routes (Eastern, Western, Central Mediterranean and the Balkan route). However, the flow through Eastern route marked a significant decline. Eastern route crossings decreased by over a third, from approximately 30,000 in the fourth quarter of 2019 to just fewer than 10,000 in the first quarter of 2020.<sup>75</sup> In 2022, there were approximately 42,800 irregular border crossings detected on the Eastern Mediterranean route with maximum of Syrian, Nigerian and Afghan migrants.<sup>76</sup>

The harshness of the strategies used by European coastal nations to send the migrants off at historically safer crossing places was enhanced. Strong 'pushbacks' by Greek police force in particular resulted in a marked decline in 'safer' crossings compared to riskier ones. The consequence was that more individuals took considerably riskier routes to reach their destination than they used to in previous years. As a result, more individuals perished attempting to reach Europe. According to the EU Border Coast Guard Agency Frontex, deaths along irregular migrant routes in 2021 were the most since 2017, accounting for more than half the number of deaths in 2016, which was the case during height of the 'migrant crisis'. The vast majority of these

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<sup>74</sup>International Organization for Migration (IOM), "Mixed Migration Flows in the Mediterranean", *Compilation of Available Data and Information*, December 2019

<sup>75</sup> Frey, n.61

<sup>76</sup> Frontex Migratory Routes, <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-mediterranean-route/>

fatalities occurred on the Central and Western Mediterranean routes as well as the Atlantic route, with only a few casualties on the Eastern route.<sup>77</sup>

The huge number of casualties at sea, irrespective of the routes for travel poses a myriad of questions and makes one stop and ponder as to what compels these migrants to embark on such risky journeys in which there is so less chance for survival? Even if we have the answer, the solution lies elsewhere. It has been stated that putting undue focus on motivational factors will simply delay the process of offering assistance to vulnerable migrants. Whatever situation they have faced or whatever has compelled them to leave their homeland, if they are risking their lives to reach another destination; it is evident that the situation was equally bad or even worse in the country of origin. The banal ‘push factors’ can give an idea of why people make dangerous journeys, but it also at the same time shifts focus from more important issues like the underlying factors which actually induce irregular movement. Instead of the personal factors compelling migration, if these structural factors are addressed in a proper way, then there are chances of reducing migrant deaths and overall percentage of international migration.

### **3.2 A Crisis within a Crisis: Situation amidst COVID-19**

Recent case studies have revealed the horrific incidents which migrants had to face while on perilous journeys during the pandemic. Seven North African men got into a cargo container in a railway yard in Serbia in July 2020, aiming to emerge a few days later in Milan. Three months later, on October 23, officials in Paraguay discovered their horribly decayed remains inside a consignment of fertilizer. Security forces and their violent tactics in Balkan republics had led desperate migrants to take even greater risks in order to reach Europe. It is one of the most dangerous and arduous parts of the Balkan route, through mountains and snow-covered forests without any amenities for migrants. The

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<sup>77</sup> Ibid.

savage pushback carried out by squadrons of Croatian police who guard the EU's longest external border make it much more complicated. The Danish Refugee Council (DRC) tracked 15,672 pushbacks from Croatia to Bosnia and Herzegovina between January and November 2020. According to reports, violence was observed in over 60% of cases.<sup>78</sup> According to Nicola Bay, DRC country director for Bosnia, the onset of the pandemic in 2020 decreased migration flows along the western Balkan route.

Another gruesome incident occurred in December 2020 where a fire devastated a migrant settlement in Bosnia which had been developed to contain the spread of COVID-19 among the migrant community. The IOM declared the facility closed on the same day. The dismantling of the camp, which was heavily criticised as insufficient owing to a lack of essential services, had left thousands of asylum seekers trapped in snow-covered woodlands in sub-zero conditions. Another incident of massive fire outbreak in the Moria Reception and Identification Centre (a major gateway for asylum-related migrants to the EU, located on the island of Lesbos) took place on 8<sup>th</sup> of September 2021, and the government had to announce a complete state of emergency on the island. According to Stephan Oberreit, head of mission for Médecins Sans Frontières (MSF) in Greece, the year was “one of the most terrible years for asylum seekers arriving in Greece.” He further stated: “The combination of violence, pandemic and the continued harmful policies of containment on the islands have led to several breaking points and eventually to the fires that have destroyed Moria.”<sup>79</sup>

It is starkly apparent how COVID-19 had worsened the crisis that migrants were going through already because of their irregular status. Numerous articles, news items, videos and social media reports were highlighting the

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<sup>78</sup> Lorenzo Tondo, “Journeys of Hope: What will migration routes into Europe look like in 2021?” 14 January, 2021, <https://www.theguardian.com/world/2020/nov/12/bodies-of-74-migrants-wash-up-on-libyan-beach>

<sup>79</sup> Ibid.

plight of these people during COVID-19. The entire situation had posed huge challenges for states receiving migrants and they were being forced to limit the irregular arrivals or completely shut the doors to them. Border and port closures have prevented people from accessing safety and protection of their human rights elsewhere and left large numbers of migrants stranded in countries of origin, transit or destination, at sea and between borders with limited preparation, support and unable to return home or continue their journeys. According to the latest migration report by the Population Division of the United Nations Department of Economic and Social Affairs, the growth of global numbers of migrants was slowed down by about 27 per cent or two million migrants, in 2020.<sup>80</sup> In camps and refugee settlements, the situation was unimaginable. Where the entire world was seeking protection from the deadly virus by wearing masks, maintaining social distancing along with hygiene and cleanliness; adopting these protective measures was unimaginable for the migrants in overcrowded camps having poor sanitation and health conditions and being a site fraught with insecurity and violence for the everyday lives of migrants. Not just within camps but in the unhealthy conditions during the journeys, asylum-related migrants more easily fall ill.<sup>81</sup>

In a UNICEF survey of 159 countries where the agency has an operational presence, half the countries reported deterioration in health care among migrant children during COVID-19.<sup>82</sup> Despite having an equal right to social protection including health care, regardless of their nationality or immigration status, migrants frequently encountered barriers to accessing these. Linguistic and cultural barriers, lack of information, and the far-reaching effects of xenophobic attitudes and behaviours in the receiving countries were few other

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<sup>80</sup> “Tackling the Socio-Economic Consequences of COVID-19 on Migrants and their Communities: Why Integration Matters”, UN Network on Migration. 2022.

<sup>81</sup> Jussi S Juahainen, “Biogeopolitics of COVID-19: Asylum-related migrants at the European Union Borderlands;” John Wiley & Sons Ltd on behalf of Royal Dutch Geographical Society; May 2020

<sup>82</sup> Tackling the Socio Economic, n.77

obstacles which were even more prominent amidst the pandemic.<sup>83</sup> In another instance, some 52% of refugees and migrants interviewed in Burkina Faso reported not having money to access healthcare, followed by 47% in Niger, and 38% in Mali.<sup>84</sup> Additionally, although all respondents have heard of COVID-19, information on access to services is lacking: not knowing where to go for healthcare or having clarity on what is advised for testing or treatment are among the top obstacles to accessing healthcare. Moreover, migrants at times in an irregular situation are often unable or unwilling to access health care or provide information on their health status for fear of being reported to the immigration authorities, detained or deported.

Data limitation was also a factor which significantly obstructed the provision of services targeted towards migrants. The actual number of migrants and their location across the country are frequently unknown to national and local authorities, making it challenging to learn about, monitor, and trace impacted communities.<sup>85</sup> The effectiveness of programmes like health promotion, disease prevention, treatment and care, and financial protection in reducing the spread of the virus and its negative effects was limited as a result of this situation, which also limited the inclusion of migrants in health policies or programmes. This was especially true in the context of the pandemic.

COVID-19 proved to be a major challenge also for migrants travelling through the Eastern Mediterranean route specifically. Before joining for the perilous journey to Greece, they were required to first meet and travel with groups of individuals in Turkey. Additionally, they had to stay in extremely crowded receiving facilities both inside and outside the EU during their travel. In addition, rescuing, safeguarding and feeding these migrants was based on ‘othering’ or alienating them and not letting these migrants share the same

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<sup>83</sup>Juahiainen, n.78

<sup>84</sup> Mixed Migration Centre, “Refugees’ and migrants’ access to health services in West Africa in times of COVID-19”, 29<sup>th</sup> October 2020, <https://mixedmigration.org/resource/refugees-and-migrants-access-to-health-services-in-west-africa-in-times-of-covid-19/>

<sup>85</sup> Tackling the Socio Economic, n.77

space with the EU citizens. The state ‘keeps these migrants alive but not in liveable conditions.’<sup>86</sup> In mid-November 2021, four shipwrecks in a span of three days in the Mediterranean claimed 110 lives, including at least 70 migrants whose bodies washed up on the beach of al-Khums, in western Libya. In 2020, at least 575 people died taking the Central Mediterranean route.<sup>87</sup> The IOM claims that the real number is considerably higher.

## **Section 4**

### **Mixed Migration and its Relevance**

Migration in general should not be considered a problem. On the contrary, migration is an inherent element of human society and history, yielding several favourable outcomes for migrants, countries of origin, and host states. Then where lays the problem? Is it in the large number of migrants in mixed migration flow? To ascertain this, we can take Europe as an example. Despite substantial decrease in numbers of migrant flow since 2016, a sense of crisis has remained, indicating that it is not simply about numbers. Then is it that persons migrating in mixed groups arrive in destination nations with a diverse set of norms and values? Or that they come to usurp local employment, or that they are underemployed and hence do not contribute enough to the economy? The answer is no again because when examining the United States, Canada, and Australia, which are widely sought-after destinations for refugees and migrants, it becomes evident that these nations have predominantly developed through a series of successive migratory waves, resulting in significant contributions to their respective economies. Then what are the problems associated with mixed migration specifically? Bram Frouws mentions and points out that ‘it is associated with large numbers of deaths at sea and on overland routes, and extreme levels of abuse — including physical abuse,

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<sup>86</sup>Juahiainen, n 78

<sup>87</sup>Lorenzo, n. 75

kidnappings, sexual abuse, torture, and killings — of people on the move in mixed migration flows.’<sup>88</sup>

Mixed migration’s major form of travel is irregular, which creates a number of issues with national border control, security, sovereign rights of states, as well as immigration and multiculturalism. Irregular migration also encourages criminality, as witnessed by a multibillion-dollar migrant smuggling industry. It is linked to extensive cooperation and corruption among state officials in transit and destination nations, undermining governmental authority and integrity. Because of the heterogeneous composition of the flows, a growing number of individuals are questioning the intentions of those inside those flows, and the calls for a modification or even abandonment of the 1951 Refugee Convention are becoming more vocal. This puts asylum space at risk. Moreover, because of the controversial nature of migration debates, minority and single-issue populist groups in politics are gaining strength. Furthermore, the influence of irregular mixed migration on the politics of liberal democracies is very concerning, generating considerable changes in many countries and threatening the unity of political and economic blocs, most notably the European Union.<sup>89</sup>

## **Conclusion**

Mixed Migration has been described and explained through various connotations. Since the term emerged, it has been shaped by several understandings and interpretations. It has mostly been described as a ‘complex’ phenomenon and if we try presenting mixed migration as a single ‘problem’ that we need to ‘solve’, that will undoubtedly be a simplification of

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<sup>88</sup>Bram Frouws, “Getting to Grips: Is Mixed Migration the Ultimate Social Mess?” Mixed Migration Centre (MMC).

<sup>89</sup> Ibid.

reality. Mixed migration is such a complex phenomenon, especially in terms of how to respond to it, that it can be described as a ‘social mess.’<sup>90</sup>

Mixed migration flow, by definition, comprise a diverse range of people with conflicting objectives. It includes refugees and asylum seekers escaping conflict and persecution, as well as migrants looking for a better life and possibilities. However, migrants who left their home countries may be fleeing insecure conditions, whereas refugees are looking for better lives and prospects. In these mixed movements, how do we then differentiate between refugees and migrants, or between who needs international protection and who does not? While international law, including refugee law provides some of the answers, these answers leave a void when it comes to many more ideological and normative questions. However, despite lack of data and gaps in research on mixed migration, when one actually delves into the phenomenon, she/he cannot and should not deny that it has in reality contributed to a large extent in recognising the needs and vulnerabilities of those larger set of migrants whose rights are not recognised by international law, unlike refugees. Amidst violent pushbacks, harsh detentions, violation of non-refoulement by state authorities and planned political gimmicks, mixed migration offers a ray of hope to vulnerable migrants that are equally in need of protection.

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<sup>90</sup> The concept of social mess as explained by political scientist Robert Horn, refers to political-social problems that are so complex and ambiguous that they have no real solution.



## CHAPTER III

### HUMAN SMUGGLING AND TRAFFICKING IN MIXED MIGRATION

#### Introduction

Since ancient civilization, migration has been one of the evolving phenomena of human society, sparking various debates around rising complexities for the past few decades. In this quick-paced world, the existing terminologies, legal concepts and structures have, however not been so well-equipped to accommodate the dynamic complex patterns of irregular migration, particularly ‘mixed migration.’ Since borders hinder free movement, human smuggling has gradually emerged as the usual practice of dealing with large migration influx through negotiations, to assist migrants cross the borders and reach their destination, undocumented. Hence, global irregular migration has attracted unprecedented interest amongst several politicians, policymakers, international organisations, media and the general public.

The provisions of the international refugee law prevent states from deporting any individual with valid asylum claims by providing the right to seek and enjoy asylum from persecution. However, contemporary migration regimes make international migration expensive and hazardous as it deliberately restricts an individual’s legal access to the preferred destination. Hence, the entire business of smuggling of migrants has emerged as a lucrative form of criminal activity as it deals with people’s illegal movement across borders in order to make a profit. In a discussion paper by Danish Refugee Council (DRC):

“Criminality and excessive profiteering routinely places migrants’ lives and well-being at serious risk. Each year, thousands of smuggled migrants drown trying to

reach Europe across the Mediterranean, cast adrift on unseaworthy vessels once they had paid for their passage.”<sup>1</sup>

In addition to this, the likelihood of long-term refuge and establishment of a new beginning is minimal even in the most hospitable countries. From the migrant’s perspective, the possible solutions to her/his forced movement (whether economic or related to protection or both) mostly does not lie within the person’s immediate geographical region. The neighbouring countries themselves are facing crisis most of the time.<sup>2</sup> Hence they have to make long journeys which is nearly impossible without the assistance of a ‘paid intermediary’ or a smuggler. For instance, the same discussion paper notes that, “while asylum seekers from Iran or Afghanistan may be able to get to Indonesia or Malaysia on their own, the final leg of their journey by sea to Australia will always require costly third-party assistance.”<sup>3</sup>

The chapter makes an attempt to focus on human smuggling and trafficking in persons in the context of mixed migration, and has been organised into five broad sections. In the first section, there is a general discussion on the terms ‘migrant smuggling’ and ‘human trafficking’ as part of transnational organized crimes. This allows us to understand the context in which the improbable mobilization of ‘irregular migrants’ by smugglers and traffickers takes place in mixed migration. It highlights the Convention protocols related to both the crimes and also the profiles of smugglers and smuggled migrants. The common routes used for migrant smuggling have also been covered under the first section. The second section studies the interrelation between the two very different crimes related to migration- human trafficking and smuggling of migrants. It additionally highlights the possible implications of equating the two different crimes. The third section analyses the profiles of ‘other facilitators’ apart from the main smuggler, who are equally involved in

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<sup>1</sup> Jorgen Carling, Anne T. Gallagher and Christopher Horwood, “Beyond Definitions: Global Migration and the Smuggling-Trafficking nexus,” RMMS Discussion Paper No.2, *Danish Refugee Council*, 2015

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

migrant smuggling (knowingly or unknowingly). The fourth section delves into facts related to the role played by the smuggler in the journey of a migrant. It looks into the perspectives of both the smuggler and the migrant in situations of mixed migration, in order to get a more nuanced understanding of the dual role of the smuggler as a ‘protector’ and a ‘predator’. It also states the strategic politicisation of migrant smuggling and trafficking and its wider policy implications. The last section analyses the role of smugglers and traffickers at the time of the pandemic as well as the multiplicity of crisis situations faced by the irregular migrants. It articulates the impacts related to human smuggling and trafficking (especially women and children on the move) and critically analyses the role of States and organisations concerned in the protection of human rights of those who fall prey to these organized crimes.

## **Section 1**

### **1.1 Transnational Organized Crime: A Part of the Globalized Illegal Economy**

The global network of organized criminal activity, better known as Transnational Organized Crime (TOC) poses a significant and growing threat to national and international security, with negative consequence for public safety, health, working of democratic institutions, and economic stability throughout the globe. Criminal networks are not only expanding, but also broadening their operations, which has led to the convergence of threats that were formerly separate but are now having explosive and destabilising impacts. According to the National Security Council of USA, Transnational Organized Crime refers to:

“...those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains,

wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/ or violence.”<sup>4</sup>

TOC does not have a singular structure; it may take numerous forms, such as hierarchies, clans, networks, and cells who together commit a variety of crimes.<sup>5</sup> Millions of people are affected each year as a result of criminal organisations’ operations. In 2009, TOC was estimated to generate \$870 billion - an amount equal to 1.5 per cent of global GDP which is equivalent of close to 7 per cent of the world’s exports of merchandise.<sup>6</sup> TOC encompasses a wide range of criminal activities, including the illegal trafficking of drugs, people, weapons, counterfeit products, wildlife, and cultural artefacts as well as various forms of cybercrime. It jeopardises international peace and human security, results in the violation of human rights, and impedes the political, social, cultural, and civil development of societies all over the world. TOC is a dynamic enterprise that constantly adapts to new markets and introduces new types of crime. In a nutshell, it is an illegal trade that cuts over all barriers—cultural, social, linguistic, and geographic—and has no regard for boundaries or laws. Men, women and children are used as merchandise for sexual or labour-based exploitation in human trafficking, which is a global crime. Although statistics vary, an estimate from the International Labour Organisation (ILO) stated that ‘there were around 2.4 million victims of trafficking’ at any given time, with an estimated ‘\$32 billion in yearly earnings.’<sup>7</sup> However, recent studies on global trends in forced labour will overall lead one to believe that the scope of the problem is considerably more widespread.

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<sup>4</sup> National Security Council of USA,  
<https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/definition>

<sup>5</sup> Ibid.

<sup>6</sup> United Nations Office on Drugs and Crime (UNODC), *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report* (Vienna, October 2011), [www.unodc.org/documents/data-and-analysis/Studies/Illicit\\_financial\\_flows\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf).

<sup>7</sup> Ibid.

Migrant smuggling is a well-organised enterprise that transports people throughout the world using criminal networks, gangs, and routes. The DRC Discussion Paper notes:

“The act of producing or providing fraudulent documentation; issuing a visa on false grounds; arranging or conducting the transportation of a person across a border that he or she is not entitled to cross, in exchange for any payment or benefit, all qualify as migrant smuggling crimes”.<sup>8</sup>

Migrants may be offered a ‘smuggling package’ by criminal organisations, and the treatment they receive along the journey is proportional to the sum they pay to their smugglers. Their rights are frequently violated while being transported, and they might be robbed, raped, abused, kidnapped for ransom, or even abandoned to die in certain circumstances, when the risks become too great for their smugglers. Many traffickers are unconcerned with migrants drowning in the water, dying of thirst in the desert, or suffocating in a vehicle container. This trade is itself worth billions of dollars each year.<sup>9</sup>

Another criminal operation that generates between \$170 million and \$320 million a year is the illegal trade in firearms, which supplies criminals and gangs with pistols and assault rifles. Although it is challenging to estimate the number of people killed by these illegal weapons, there is a significant association between murder rates and the proportion of homicides committed with guns in certain locations (such as the Americas). Smuggling of raw materials like diamonds and rare metals (typically from war zones) is a kind of natural resource trafficking. Timber trafficking in South-East Asia brings approximately \$3.5 billion annually.<sup>10</sup> This type of illegal activity eventually adds to problems of deforestation, climate change, and rural poverty in addition to supporting criminal organisations. Poachers target skins and body parts for sale to foreign markets in the illicit wildlife trade, which is another

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<sup>8</sup> Carling et al., n.1

<sup>9</sup> National Security Council, n.4

<sup>10</sup> The Globalization of Crime: A Transnational Organized Crime Threat Assessment.  
<https://www.unodc.org/toc/en/crimes/organized-crime.html>

profitable sector for organised criminal organisations. Each year, \$75 million in illegal earnings are made by the trafficking of rhino horn, tiger parts, and elephant ivory from Africa and South-East Asia into Asia, endangering the lives of several species.<sup>11</sup> In order to satisfy demand from collectors or ignorant customers, organised criminal organisations also deal in live and rare plants and animals, endangering such species' very existence. According to the World Wildlife Fund (WWF), traffickers illegally move over 100 million tons of fish, 1.5 million live birds and 440,000 tons of medicinal plants per year. Identity theft, which produces about \$1 billion annually for thieves, is one of the most lucrative forms of cybercrime. Criminals are increasingly using the internet to access bank accounts, steal credit card information as well as user's private information.<sup>12</sup>

## **1.2 Meaning and Relevance of the Protocols for Human Smuggling and Trafficking in Mixed Migration**

The 'Convention against Transnational Organized Crime', an instrument for international cooperation to combat TOC, had been supplemented by three additional treaties (protocols) dealing respectively with the 'Smuggling of Migrants', 'Trafficking in Persons- Especially Women and Children,' and 'Trafficking in Firearms'. The implementation of these protocols marked the initial substantial endeavour by the global community to utilise international law as a means to combat TOC. Perhaps even more notable was the selection of trafficking and migrant smuggling as subjects of additional agreements. Both issues are now high on the international political agenda as people are moving faster, more frequently and in much greater numbers than ever. While concerns for human rights might have encouraged collective action towards safeguarding them, it is the sovereignty/security issues surrounding

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<sup>11</sup> Ibid

<sup>12</sup> Ibid

trafficking and migrant smuggling which were the true driving force behind such efforts.<sup>13</sup>

While ratifying the Smuggling of Migrants Protocol, States pledged to implement procedures for law enforcement and judicial cooperation, work in solidarity to combat the smuggling of migrants, and defend the rights of smuggled migrants.<sup>14</sup> The Trafficking Protocol has proven to be a game changer, profoundly affecting international, regional, and national legal and policy responses. However, the Migrant Smuggling Protocol has had far less impact, with state practise exhibiting a strong desire to establish customised solutions to migrant smuggling that are not constrained by international legal principles that are seen to represent and enhance national interests. Of the three protocols, two are relevant to mixed migration situations: ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children’ (the Trafficking Protocol) and the ‘Protocol against the Smuggling of Migrants by Land, Sea and Air.’ Article 3(a) of the Smuggling Protocol defines ‘smuggling’ as:

“...procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”<sup>15</sup>

The adoption of these protocols reflects ‘the international understanding that human smuggling and trafficking are part of organized crimes.’<sup>16</sup> The protocols of the Convention and their direct relevance to the study of mixed migration are clearly evident since it deals with exploitation and smuggling which are the primary concerns in the concept. Exploitation is a key element of

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<sup>13</sup>Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, *Human Rights Quarterly*, Vol. 23, No. 4 (2001), pp. 975-976

<sup>14</sup> UNODC, “Migrant Smuggling in Asia: Current Trends and Related Challenges”, Bangkok, April 2015.

<sup>15</sup> Marina Sharpe, “Mixed Up: International Law and the Meaning(s) of ‘Mixed Migration.’” *Refugee Survey Quarterly*, Volume 37, Issue 1, March 2018, pp 116-138, Retrieved from <https://doi.org/10.1093/rsq/hdx021>

<sup>16</sup> Nourhan Abdel Aziz, Paola Monzini and Ferruccio Pastore, “The Changing Dynamics of Cross-Border Human Smuggling and Trafficking in the Mediterranean”, *Istituto Affari Internazionali (IAI)*, October 2015, [https://www.iai.it/sites/default/files/newmed\\_monzini.pdf](https://www.iai.it/sites/default/files/newmed_monzini.pdf)

trafficking. The concept of exploitation typically focused on the sexual exploitation of women and children, but it is becoming more common for people to be exploited for the purpose of forced work and slavery. Contrarily, smuggling frequently involves exploitation, particularly because those who have been smuggled are exposed to trafficking while travelling, although exploitation is not a legitimate part of smuggling. A person who wishes to travel to another nation engages in smuggling as a business transaction with a third party who makes travel possible. It could take place without any violations of human rights or coercion. When there is no other way for someone to flee persecution, smuggling can help, especially when states tighten their border restrictions.<sup>17</sup> However, most of the time, the migrants are subject to abuse and torture at the hands of the smugglers which not only adds to their plight, but also hurts their self-esteem. Most importantly, it is a gross violation of human rights. The UNHCR observes:

“Those crossing from Turkey to Greece or Bulgaria have described terrifying night journeys across the short stretch of sea to Greece in which more than 1,200 people have drowned since the start of 2015, being held captive for extortion or else abandoned by smugglers, and being sent back across borders at night by masked police. Those moving onwards irregularly from Greece and Bulgaria have reported abuses at the hands of smugglers as well as being beaten, set upon by police dogs and pushed back by some border authorities.”<sup>18</sup>

The deputy director of the Global Initiative against Transnational Organized Crime has stated:

“Human smuggling is a business, one in which the marketplace is human aspirations: the demand for mobility, where no legitimate avenues exist or are difficult to access, is met by smugglers.”<sup>19</sup>

Smuggling of migrants and refugees is not a new phenomenon in international law and policy. Smuggling was mostly understood in terms of smuggling of commodities and it is defined by the Oxford dictionary as, ‘the illegal

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<sup>17</sup> Sharpe, n.15

<sup>18</sup> UNHCR, “Desperate Journeys: Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans routes”, January-June 2017

<sup>19</sup> Tuesday Reitano, July, 2017, <https://medium.com/@Tuesdayjaded/what-pricing-tells-us-about-the-nature-of-the-smuggling-business-49ccd39b97c0>



movement of goods into or out of a country'.<sup>20</sup> But recent instances have transformed this perspective; smuggling is not only limited to goods, but involves 'humans' as well. The more increased external border controls and other stringent measures are being put in place to prevent irregular migration, the more migrants are requiring the assistance of smugglers to illegally cross borders and reach their destination. Regardless of designation- be it migrant smugglers, human smugglers or people smugglers; their roles are similar: to facilitate irregular border crossing of people in exchange of money. The criminalization of certain aspects of irregular migration has been a longstanding practise by states. However, the global call for legal regulation in this area emerged in the early 1990s. This initiative was primarily driven by affluent destination countries in Western and Central Europe, North America, and other regions that had witnessed a substantial rise in the number of unauthorised arrivals. These countries claimed that criminal networks possessed a high level of organisation and were sophisticated enough to exploit legislative, policy, and legal frameworks.<sup>21</sup> The term 'migrant smuggling' has been defined by UNODC as:

“...the facilitation for financial or other material gain, of irregular entry into a country where the migrant is not a national or resident. The criminals behind this highly profitable business seize the opportunity created by the need or desire of people to escape not just poverty and lack of employment opportunities but also natural disaster, conflict or persecution.”<sup>22</sup>

According to the Protocol's definition, migrant smuggling occurs when the criminal engages in the conduct (receiving unlawful admission of a person who is not a citizen or permanent resident) with the objective of obtaining a financial or other material benefit. States Parties to the Protocol are obligated to criminalise migrant smuggling and the production and possession of fake

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<sup>20</sup> Oxford Dictionary

<sup>21</sup> Anne Gallagher, “Whatever Happened to the Migrant Smuggling Protocol?”, in McAuliffe, M. and M. Klein Solomon (Conveners) Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration, IOM, Geneva, 2017

<sup>22</sup> UNODC, <https://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/migrant-smuggling.html#:~:text=Migrant%20Smuggling%20is%20the%20facilitation,not%20a%20national%20or%20resident>

travel or identification documents in connection with smuggling. They are also obligated to criminalise facilitating unlawful stay when it is done purposefully and for money or other material gain. The addition of ‘intention to obtain a financial or other material benefit’ as a component of migrant smuggling crime was intentionally designed to limit its scope by eliminating the acts of individuals who support migration for humanitarian or family reunion reasons. In the official records of their proceedings, the drafters of the Protocol affirmed:

“It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations”<sup>23</sup>

And that:

“The Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers”.<sup>24</sup>

The primary objective of the Smuggling of Migrants Protocol is not to criminalise the act of migration itself. In relation to this, Article 5 specifically delineates that migrants should not be deemed culpable for the offence of smuggling only on the basis of being subjected to smuggling. It notes that, “migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”<sup>25</sup> Further, it is important to acknowledge that refugees frequently depend on smugglers as a means to escape persecution, human rights abuses, or violence. The criminalisation of individuals who utilise smugglers, and the potential undermining of their asylum applications due to their engagement with smugglers or unlawful entrance should therefore be avoided (Article 31 of

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<sup>23</sup> Gallagher, n. 13

<sup>24</sup> Ibid

<sup>25</sup> United Nations, “Protocol Against the Smuggling of Migrants by Land, Sea and Air”, 2000

the 1951 Refugees Convention and Article 19 of the Migrant Smuggling Protocol).<sup>26</sup> Under Article 19(1), it is mentioned that,

“Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”<sup>27</sup>

### **1.3 Who are ‘Smugglers’ and ‘Smuggled migrants’?**

It is commonly assumed that human smugglers are heartless individuals who have no regard for the vulnerable people they abuse and endanger for profit. Countless lives are lost each year as a result of organised crime, especially smuggling and trafficking of migrants within this context. Drug-related health issues and violence, gunshot fatalities, and the shady tactics and goals of human traffickers and migrant smugglers are all part of the larger problem. The act of smuggling frequently entails genuine risks to the well-being and security of migrants. In addition to the geographical distance separating them from their home communities and their unauthorised status in the host country, smuggled migrants face challenges in asserting their rights. They exhibit heightened susceptibility to abuse, exploitation, and trafficking, while also displaying an increased propensity for engagement in criminal activities. The motivation behind migrant smugglers is primarily financial gain, and the intricacy and extent of the smuggling operation are contingent upon the desired destination as well as the capability of the migrant to pay the smuggler. According to a report by the UNODC:

“While prices of smuggling services appear to vary according to the routes and the facilitation services provided, investigations of migrant smuggling cases have

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<sup>26</sup> Issue Paper, “A short Introduction to Migrant Smuggling”, UNODC, 2010

<sup>27</sup> Ibid.

shown that prices of smuggling services can generally reach EUR 20,000 per individual.”<sup>28</sup>

There have been reports of smuggling networks effectively coordinating intricate operations that encompass nations of origin, transit, and destination.<sup>29</sup> The individuals engaged in the illicit activity of migrant smuggling exhibit a diverse range of characteristics. Similar to other manifestations of organised criminal activity, the illicit transportation of migrants predominantly include males, with the mean age of perpetrators ranging from 30 to 35 years. In certain instances, women have been enlisted to facilitate the transportation of migrants from South-West Asia to Australia or Canada, assuming the role of companions and guides in exchange for remuneration in the form of complementary fees. This phenomenon seems to be more prevalent in the context migrant smuggling by air. Women are perceived to be less likely to attract attention of the authorities. According to reports from national authorities in Germany, Lithuania, the former Yugoslav Republic of Macedonia, and Norway, it has been observed that Afghan migrants in Europe are frequently transported illegally by fellow Afghans. Similarly, this pattern seems to hold true for Pakistani nationals as well.<sup>30</sup> Smugglers in most cases have the same national and/or ethnic ties as individuals they smuggle, or they belong to the regions through which the smuggling routes pass. Current smuggling patterns also indicate that even smugglers have previously been trafficked. Smuggling can be a part of sophisticated criminal organisations that pool their expertise and resources. More sophisticated gangs may operate across greater areas and generate huge profits. Smaller, more loosely knit organisations are more intimately linked to the need for their services in their communities, and the profit available to them may be insignificant.<sup>31</sup>

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<sup>28</sup> Katrien Luyten and Smialowski, B. Stephanie. “Understanding EU action against migrant smuggling”, *European Parliamentary Research Service (EPRS)*, January 2021.

<sup>29</sup> Migrant Smuggling in Asia, n.14

<sup>30</sup> Ibid

<sup>31</sup> UNODC, “COVID 19 and the Smuggling of Migrants”, 2021

Smuggled migrants are those individuals who are at great risk of being exploited, their human rights can be easily violated and they face violence at various points in their journeys. They are victimised during the entire smuggling process. The UNODC Global Study on Smuggling of Migrants notes that in 2017, at least 382 migrants were recorded as victims of homicide (murder or manslaughter).<sup>32</sup> Furthermore, within the realm of smuggling, recorded crimes committed against migrants encompass a wide range of offences such as assault, sexual violence, robbery, fraud, inhumane or humiliating treatment, absence of freedom, forceful disappearance, and extortion.

According to the UNODC Global Report on Trafficking in Persons 2016, there exists a discernible correlation between the wider migration phenomena and the occurrence of trafficking in persons. This is due to the heightened susceptibility of migrants and refugees who are fleeing from violence and persecution to falling victim to trafficking. According to the Counter-Trafficking Data Collaborative, a research initiative by the International Organisation for Migration (IOM), their dataset includes data on over 90,000 victims of assisted trafficking. The report reveals that approximately 80 per cent of transnational trafficking cases involved individuals crossing through official checkpoints, while 9 per cent of cases involved the use of forged documents. These findings suggest a strong likelihood that a significant portion of the trafficked individuals sought the assistance of smugglers.<sup>33</sup> Smuggled migrants predominantly consist of young males, who commonly undertake their journeys without the accompaniment of family members. Individuals engage in migration for many reasons, such as providing financial assistance to their families through remittances or assisting in the migration process of their relatives once they have settled in their chosen destination country. The available reports from Greece, Indonesia, Scandinavian nations,

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<sup>32</sup> Ibid

<sup>33</sup> UNODC, n.22

and the United Kingdom indicate that unaccompanied Afghan kids, predominantly consisting of adolescent males, are frequently observed within the population of smuggled migrants.<sup>34</sup> The majority of smuggled migrants from South Asia as well as the Horn of Africa were primarily males aged between 18 and 30 years. Moreover, a significant proportion of Pakistani citizens who engage in irregular migration to Gulf States or Western Europe are predominantly young adult males, often falling between the age of 18 to 30 years. The illicit transportation of women and children from Pakistan has also been observed, but on a lower scale.<sup>35</sup>

Frontex, the European Border and Coast Guard Agency detected a slight growth in the share of women (up 16% to 32,987) and children (up 5.2% to 32,554) as irregular migrants in 2019 compared to the previous year, although men remained the biggest represented group (106,690) of detected irregular migrants at the EU's external borders. The number of detected unaccompanied minors decreased significantly, from 26,430 in 2018 to 4009 in 2019, a decrease of 85%.<sup>36</sup> Over half of all arrivals came from the Middle East and southern Asia (87,500 or 62%), which is reflected in the increased pressure on the eastern Mediterranean and western Balkan routes. According to a policy briefing by the European Parliament:

“The top five nationalities of irregular migrants crossing all EU external borders (sea and land) were Afghans (34,154, up 170 % compared to 2018), Syrians (24 339, up 69 %), unspecified sub-Saharan nationals (14 346, change not applicable), Moroccans (8 020, down 4.1 %) and Turks (7880, down 6.3 %).”<sup>37</sup>

#### **1.4 Common Routes and Ways for Human Smuggling**

There are various routes used for smuggling of migrants, or rather several ways in which migrants can be smuggled. They range from ‘simple to complex’, from ‘safe to dangerous’ and from ‘cheap to very costly’. The sum of

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<sup>34</sup> Migrant Smuggling in Asia, n.14

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Luyten and Smialowski, n.28

money given to smugglers determines the degree of safety and ease of reaching the target destination. Migrants with limited resources may choose a 'pay-as-you-go' package, in which they pay smugglers in instalments for various stages of the journey that may not be linked to one another at all. These migrants are more likely to get stranded and experience mistreatment and abuse. Although the 'package deals' may be speedier, safer, and more likely to succeed, they might also be significantly more expensive. Long diversions and last-minute alterations to the schedule might impact smuggling routes, if they are made or done to exploit specific border rules or gaps in border enforcement. The routes might be transcontinental, originate and terminate on the same continent, or transit through a third continent.<sup>38</sup>

Between 2016 and 2017, the European Union received a substantial number of smuggled migrants and refugees from West and North Africa, as well as the Horn of Africa. For example, 89% of those arriving by sea in Italy were from African nations, while 94% of those arriving irregularly in Spain were from Africa.<sup>39</sup> It is thought that a considerable number of those persons were transported to Europe via sea. The smuggling of migrants, especially Afghan, Iranian, Iraqi and Pakistani migrants to Europe occurs along three main routes. The first route leads through Turkey, Greece and the Western Balkans (the Eastern Mediterranean Route). The second route leads from Turkey into Bulgaria and through other Eastern European countries. The third route takes them through Central Asia, Russia, the Baltic States and/or Belarus and Ukraine to Poland or Slovakia.<sup>40</sup> Migration pressure on the Eastern, Western, and Central Mediterranean routes as well as the Balkan routes varies, based on a range of factors including tightened border controls, geopolitical changes, newly escalating or on-going crises, among others. According to the Frontex Risk Analysis report for 2020:

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<sup>38</sup>"Smuggling of Migrants: The harsh search for a better life", UNODC, <https://www.unodc.org/toc/en/crimes/migrant-smuggling.html>

<sup>39</sup> UNODC,

<sup>40</sup>Migrant Smuggling in Asia, n 14

“The overall decrease in detections in 2019 (to 141,846, down 4.9 % compared to 2018), was primarily due to fewer detections on the western and central Mediterranean routes.”<sup>41</sup>

The two main channels through which smuggled migrants reach Greece from Turkey via the Eastern Mediterranean route are: by crossing the land border, and by crossing the Aegean Sea. The selection of routes by smugglers engaged in illicit activities between Turkey and Greece is contingent upon the prevailing extent of border control measures and the degree of law enforcement operations.<sup>42</sup> Migrants smuggled on the sea route are first taken from Istanbul to cities on Turkey’s western coast where they embark on smuggling vessels bound for an island, such as Lesbos, Kos, Chios, Samos, or to the Greek mainland. Land crossings from Turkey into Greece generally take place at or near the Turkish city of Edirne and the Evros River, which runs between the two countries. Migrants are typically taken across the river in inflatable vessels, in small groups, at night. Some migrants also swim (or attempt to swim) across the river. Border crossings on foot are possible at the Greek towns of Vyssa and Kastanies. For the smuggled migrants, Greece is a transit country for onward smuggling to other parts of Europe and is also the intended destination for most irregular migrants, where they seek asylum. Along these routes, the UNODC found that “a minimum of 2.5 million migrants were smuggled in 2016, generating a minimum annual income for smugglers of about US \$5.5 to 7 billion.”<sup>43</sup>

## **Section 2**

### **2.1 ‘Smuggling’ and ‘Trafficking’ in Migration: How are they different?**

‘Human trafficking’ and ‘smuggling of migrants’ are two different crimes falling within the ambit of organized crimes, but they mostly end up having similar implications. A key difference is that,

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<sup>41</sup> FRONTEX, 2020

<sup>42</sup> Migrant Smuggling in Asia, n 14

<sup>43</sup> UNODC, Global Study on Smuggling of Migrants, United Nations, June 2018



“Victims of trafficking are considered victims of a crime under international law; smuggled migrants are not—they pay smugglers to facilitate their movement.”<sup>44</sup>

However, in recent times their distinction has become blurred which is undoubtedly having serious ramifications for the victims of these crimes as well as within the policy world which will be discussed comprehensively under this section. People leaving their homes and reaching preferred destinations undocumented is possible only with the assistance of paid facilitators or smugglers. Moreover,

“Changes in the reasons people seek to leave home; the nature of their journeys; and the response of preferred destinations to real and anticipated movements has all conspired to create a reality in which the involvement of smugglers is the only way most irregular migrants—persecuted or not—are able to move.”<sup>45</sup>

Before discussing the nexus between human trafficking and smuggling of migrants, let us understand the specific meaning and connotation of human trafficking within the context of irregular migration. Human trafficking is the act of obtaining individuals through unethical means, such as coercion, fraud, or deceit, with the intention of exploiting them. It is a significant human rights violation and a criminal felony. Each year, thousands of men, women, and minors become the victims of human traffickers, both domestically and overseas. Everywhere, including restaurants, farms, construction sites, brothels, factories, marketplaces, and homes; the victims are exploited.<sup>46</sup>

According to article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, human trafficking is defined as

“...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the

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<sup>44</sup> “Human Trafficking and Migrant Smuggling: Understanding the difference.” June 2017, <https://www.state.gov/wp-content/uploads/2019/02/272325.pdf>

<sup>45</sup> Carling et al., n.1

<sup>46</sup>“UNODC research on Trafficking in Persons and Smuggling of Migrants”, UNODC

giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”<sup>47</sup>

The meaning of Human Trafficking is reflected in international law, specifically in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol), the first global instrument to recognize the crime of human trafficking, which has 170 State parties.<sup>48</sup> Under the Trafficking in Persons Protocol,

“Article 3(a) defines trafficking as constituting three elements: (i) an ‘action’, being recruitment, transportation, transfer, harbouring or receipt of persons; (ii) a ‘means’ by which that action is achieved (threat or use of force, or other forms of coercion, e.g. abduction, fraud, deception, abuse of power, or a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent; and (iii) a ‘purpose’, namely, to exploit. In the successive article, 3(b), the Trafficking in Persons Protocol makes it clear that consent of the victim is irrelevant when any of these three criteria have been present, but that all three elements must be present to constitute human trafficking.”<sup>49</sup>

Human trafficking can be distinguished from migrant smuggling on a number of grounds but the most important is ‘purpose’: whereas migrant smuggling seeks to facilitate a person’s illegal movement for profit, human trafficking seeks their exploitation. In a classic/typical migrant smuggling situation, the relationship between the smuggled migrant and his or her facilitator ends when the journey is completed. In cases of human trafficking, both profit and purpose are directly tied to the exploitation of the migrant.<sup>50</sup> In light of the endeavours undertaken by researchers, advocates and policy-makers, it has become more evident that the practical realm often blurs the legal difference between migrant smuggling and human trafficking. Most obviously, many

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<sup>47</sup>UNODC, [https://www.unodc.org/documents/treaties/Special/2000\\_Protocol\\_to\\_Prevent\\_2C\\_Suppress\\_and\\_Punish\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/treaties/Special/2000_Protocol_to_Prevent_2C_Suppress_and_Punish_Trafficking_in_Persons.pdf)

<sup>48</sup> Human Trafficking and Migrant Smuggling, n.45

<sup>49</sup>Tuesday Reitano, McCormack, Samantha, Micallef, Mark and Shaw, Mark, “Global Initiative Against Transnational Organized Crime”, Responding to the Human Trafficking–Migrant Smuggling Nexus, 2018.

<sup>50</sup> Carling et al., n.1

migrants who end up in a situation of trafficking are first smuggled across national borders. But, far more importantly, smugglers are increasingly taking on the role of traffickers, utilising their customers for extortion, forcing them into sexual servitude, and selling them for forced labour. Even when they have paid for their journey, migrants can remain in debt to those who funded their trip, making them highly vulnerable to exploitation in the country of destination.<sup>51</sup>

While smuggling requires the illegal crossing of an international border, trafficking does not necessarily have to be transnational. Furthermore, in those cases where an international border is actually crossed by a victim of trafficking, the crossing can be both legal and illegal. In fact, victims of transnational trafficking often cross borders legally (e.g., with tourist entry visas) but end up as undocumented migrants by overstaying their maximum visa duration. However, the most fundamental difference between smuggling and trafficking is the notable fact that trafficking is classified as a crime against the individual; whereas smuggling is a crime against the state.<sup>52</sup> If we have to summarize the basic points of distinction between migrant smuggling and trafficking, then they can be put under three sub-headings for a clearer understanding:

Exploitation: An essential determinant in distinguishing between cases involving the smuggling of migrants versus trafficking in persons is the manner in which the perpetrators acquire their financial gains. Exploitation serves as the major source of profit and, hence, represents the core objective of human trafficking. In contrast, after assisting a migrant to enter or remain illegally in a nation, the smuggler has no desire to use the migrant for personal gain. Migrant smugglers usually get payment either in advance or upon the arrival of the smuggled migrant, either by the smuggled migrant themselves

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<sup>51</sup> Ibid.

<sup>52</sup> Nourhan et al, n.16

or by intermediaries involved in the process. To clarify, it has been observed that the association between a smuggler and a smuggled migrant often terminates subsequent to the facilitation of unlawful entrance or residency. The generation of profits, however, in trafficking in persons mostly stems from the act of exploitation. The duration of the exploitation phase may extend over a period of several years.

‘Illegal entry’ or residence: The act of smuggling migrants inherently encompasses a transnational aspect, necessitating the involvement of a minimum of two countries. The primary aim of migrant smuggling is to enable the unauthorised admission or residence of an individual from Country A into Country B. The act of trafficking might display instances of unauthorised admission or residence, but this is not a universal characteristic. The transportation and accommodation of a victim of human trafficking can also be carried out through lawful means. Furthermore, the act of trafficking individuals frequently takes place domestically within the victim’s own nation, without necessitating any involvement of border crossings.

Victim: The act of smuggling migrants does not inherently lead to the victimisation of the individuals being transported. It often entails the voluntary agreement of the individuals being transported. However, it is also uncommon for additional criminal activities to be perpetrated against smuggled migrants throughout the smuggling operation, including acts of violence or crimes that pose a threat to the lives of the individuals being smuggled. During a smuggling operation, the migrants may withdraw their assent (for instance, if they perceive the conditions of transit to be too risky), but later, they may be forced to continue the smuggling process (for e.g. by being physically forced to enter a leaking boat or a crowded truck).<sup>53</sup>

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<sup>53</sup>Ibid

## 2.2 Implications for Overlap of the two Crimes

Legal understanding and definitions for both trafficking and smuggling as well as their difference in the policy world seem much harder to apply in real life complicated situations, although on paper they are compact and straightforward. Within forced migration for instance, separation between the terms ‘refugee’ and ‘migrant’ hold major significance in policy-making so that the former, under international law is given the protection and facilities to which he/she is entitled to. In an interview, Alexander Betts mentions:

“It is necessary to safeguard the category of ‘refugee’, but gradually ensure that other groups of vulnerable migrants also receive access to the protection that they need under international human rights norms.”<sup>54</sup>

In a similar fashion, the distinction between migrant smuggling and human trafficking holds prime importance in the policy world of migration, specifically irregular migration. Although this distinction is stated in international law, it is sometimes overlooked in media coverage or purposefully conflated in political rhetoric intended to stir up anti-immigration sentiment or divert voters’ attention from more accurate discussions of mixed migration concerns.<sup>55</sup> Smuggled migrants are denied the protection they deserve, or even treated as criminals for having migrated irregularly.<sup>56</sup> However, their consent to be smuggled does not mean that they have necessarily consented to the inhuman treatment that they received throughout the process. Smuggled migrants are exposed to exploitation, and their lives are frequently jeopardised: thousands of smuggled migrants have died suffocating in containers, in deserts, or drowned in the sea. Migrant smugglers frequently execute their operations with little or no concern for the lives of the individuals whose plight has generated a consistent demand for smuggling

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<sup>54</sup>Alexander Betts, MMC Interviews Alexander Betts: “A time for bold vision” *Mixed Migration Centre*. January 2019

<sup>46</sup>Christopher Horwood, Bram Frouws and Forin, R. (Eds.) “Mixed Migration Review 2022. Highlights. Interviews, Essays, Data” Geneva: Mixed Migration Centre. Available at: <https://mixedmigration.org/resource/mixed-migrationreview-2022/>

<sup>56</sup> Betts, n.55

services.<sup>57</sup> This stands in stark contrast to persons identified as having been trafficked who, under national and international laws are entitled, at least in theory, to a raft of rights related to protection, assistance, compensation, protection from criminalization, safe return, reintegration and non-criminalization of status offences, such as illegal entry or illegal work'.<sup>58</sup> Thi Hoang in his work has thoroughly discussed the differences between 'migration-led human trafficking' and 'human trafficking-led migration.' Migration-induced human trafficking happens either during or subsequent to a migration process, often facilitated by smugglers who first function as contractors or service providers but eventually transition into exploitative roles. This phenomenon is frequently observed in smuggling operations characterised by lower costs, as individuals in transit either make incremental payments at various stages of their voyage or adopt a deferred payment system known as 'travel now, pay later'. One example or a case study of migration led trafficking are the Ethiopians, who have sought to work in Saudi Arabia and their number has been rising since last two decades.<sup>59</sup> Others go irregularly and dangerously overland and by sea, while some use government-approved job agencies and fly there.

The unofficial Ethiopia-Yemen-Saudi Arabia route is often attempted by more than 100,000 people annually, driven by poverty in Ethiopia and aspirations of greater wages in Saudi Arabia. Many individuals who engage in irregular travel often become targets of egregious smuggling and trafficking practises throughout Ethiopia, Djibouti, and some regions of Somalia (such as Puntland), with Yemen being particularly notorious in this regard. In addition to this, there are instances of mistreatment and deportations encountered by Ethiopian individuals when employed in regular or irregular capacity inside Saudi Arabia. Ethiopian individuals, including both males and females of

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<sup>57</sup> Issue Paper, n.26

<sup>58</sup> Carling et al., n.1

<sup>59</sup> Thi Hong, "Questions of Intent: Where mixed migration and Human Trafficking overlap." *Mixed Migration Review*, 2022

various age groups, encounter a range of adverse experiences such as theft, abduction, sexual assault, exploitation, and notably many instances of extortion perpetrated by criminal groups that demand ransom. Consequently, these individuals swiftly transition into de facto victims of trafficking shortly after embarking on their migration journey. This case exemplifies an extreme and persistently violent manifestation of human trafficking facilitated by migration. Along the way, individuals frequently experience repeated imprisonment, and the rate of sexual assault against women and girls is very high. Ethiopians in Yemen (a country which is lawless and embroiled in war), are at greatest risk because smugglers and traffickers, who frequently sell migrants to other groups along the way, frequently cause fatalities. Yemen's forced imprisonment, kidnapping, and human trafficking are still underexplored.<sup>60</sup>

Migration can also take place as a result of trafficking operations, wherein victims are transported across international boundaries for various exploitative objectives, including forced labour, sexual exploitation, slavery, servitude, or organ removal, as outlined in the Palermo Protocol. In certain instances, individuals who fall prey to human trafficking may possess prior knowledge of their victimisation and anticipate being transported over international boundaries for the explicit goal of exploitation, including but not limited to engaging in sex work, being subjected to unpaid or poorly paid employment, or being coerced into forced marriages. Such awareness is typically associated with the utilisation of force or violence. In alternative circumstances, individuals who have become victims of trafficking may become aware of their condition either during their journey or upon arrival in the country of destination.

The Rohingyas of Myanmar, who are routinely trafficked from refugee camps in Bangladesh and from the country's Rakhine province, are one group that is

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<sup>60</sup> Ibid.

severely impacted by trafficking-led migration. Rohingyas, including refugees, are trafficked into nations like Malaysia under false pretences by traffickers pitching promises of reliable work or by them falling prey to exploitation when trying to flee the deteriorating circumstances of refugee camps. The traffickers involved in the transportation of Rohingyas to neighbouring countries, establish their presence or seek refuge in southern Thailand which is a significant hub facilitating the movement of individuals from Myanmar to Malaysia and Indonesia.<sup>61</sup>

Such overlaps between concepts are important to address, and therefore, the question that needs to be addressed here is what can be the implications when the two different crimes of Smuggling and Human Trafficking in migration overlap/conflate in reality? Although similarities are found between the two phenomena and they might possess similar characteristics too, the difference between them is quite remarkable and should be observed and acknowledged in the practical world. ‘Migrant smuggling’ was a colloquial term that was frequently used synonymously with ‘migrant trafficking’ to refer to a variety of conduct related to the facilitation of unlawful entry into a country and, in some cases, unlawful stay before the adoption of an international legal definition less than two decades ago.<sup>62</sup>

Migrants who address smugglers usually pay a fixed amount of money to cross a border irregularly. In trafficking, there is no consent from behalf of the migrants who are generally coerced by traffickers who exploit their labour. It is nonetheless, extremely important that ‘policymakers, law enforcement, immigration officers and civil society organizations’ are conscious of the differences between them. When human trafficking is mistaken with migrant smuggling, victims may not obtain the protections, resources, or legal recourse to which they are entitled, and they may be subject to re-exploitation.

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<sup>61</sup> Ibid.

<sup>62</sup> Gallagher, n.21



Clarifying the distinctions between human trafficking and migrant smuggling, as well as raising awareness of these disparities, is crucial to the establishment and execution of appropriate government policies. For such reasons, national immigration and anti-trafficking regulations should vividly define migrant smuggling and human trafficking and separate the penalties connected with each of these crimes. Human trafficking awareness training is also essential for immigration, law enforcement, and judicial personnel. Screening for human trafficking signs/indicators is required whenever law enforcement personnel detect people during migrant smuggling operations.<sup>63</sup>

### **Section 3**

#### **3.1 Smuggling of Humans in Mixed Migration: Not a ‘One-man Show’**

The act of facilitating irregular migration is a multifaceted criminal offence that exhibits interconnections with several other illegal operations- including document forgery, human trafficking, and human rights violations, among other forms of unlawful smuggling.<sup>64</sup> Smugglers employ a variety of payment methods, ranging from internet to underground banking networks, where money is paid and retrieved upon completion of the agreed-upon service. There has emerged a newer challenge for law enforcement and judicial authorities in dealing with human smuggling; ‘digital smuggling,’ where smugglers are increasingly using digital services and tools, such as:

“...social media and mobile applications for recruitment, communication and money transfers, pick-ups and handover of migrants, providing route guidance, sharing pictures and videos of documents and tickets, and even monitoring law enforcement activities.”<sup>65</sup>

Larger smuggling networks may involve a number of other actors, apart from the smuggler who are related in carrying out the smuggling operation. Article 6 of the ‘Smuggling of Migrants Protocol’ requires States to “criminalize

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<sup>63</sup> Human Trafficking and Migrant Smuggling, n.45

<sup>64</sup> Katrien and Smialowski, n.28

<sup>65</sup> Ibid.

producing, procuring, providing or possessing fraudulent travel or identity documents,”<sup>66</sup> when it is done for the purpose of enabling the smuggling of migrants. This can be more precisely described as a ‘smuggling hub’ which is defined as ‘the location where smuggling demand and supply meet.’ The significance of a smuggling hub is predominantly ascertained by the number of smuggling routes and destinations it provides, as well as the volume of migrants who avail its services. Hubs refer to certain geographical regions where individuals involved in smuggling operations assume positions such as brokers, coordinators, or chiefs, frequently engaging with prospective clients to provide guidance to affiliates about the execution of smuggling endeavours.<sup>67</sup> Smugglers publicly market their services at smuggling centres, often by putting up pictures of happy clients flaunting their sports automobiles and designer outfits in the destinations countries. In some situations, middlemen promote smuggling services and direct prospective migrants to a specific smuggler. They could be compensated for this service by both the migrant and the human smuggler.

In the context of migrant smuggling, social media networks and channels are employed in a variety of ways. One frequent application is when several social media platforms act as ‘consumer forums.’ Migrants frequently use social media platforms to study the smuggler and the journey they are about to take because there is frequently a large gap between the information supplied with them and reality in the industry. The internet is used to communicate recommendations (or unfavourable evaluations) of migrant traffickers as well as details about routes and costs in order to plan travels. Particularly Syrians utilise technology and social networks like Facebook, Viber, Skype, and WhatsApp extensively to communicate their perspectives. For the purpose of choosing smugglers, same tools have also been used in South Asia and Africa. Smuggled migrants share published feedbacks on smugglers and their services

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<sup>66</sup> Issue Paper, n.26

<sup>67</sup> UNODC 2018, n.44

in destination countries, highlighting incidents where smugglers failed, defrauded, or mistreated migrants. Migrants and refugees also share their experiences in receiving nations, as well as on the official procedures required to remain in the country. Smugglers commonly employ deceptive tactics to manipulate migrants, directing their irregular migration routes towards or away from certain transit and destination nations while providing assistance. In Facebook pages, smugglers engage in deceptive practises by assuming false identities as representatives of non-governmental organisations (NGOs) or fictitious European Union (EU) agencies. These individuals claim to be responsible for facilitating secure maritime passage to Europe. On social media, smugglers who target Afghan refugees have also been discovered to assume the identity of 'legal advisors' seeking asylum.<sup>68</sup>

A thorough discussion on the range of actors involved in the smuggling of migrants has been done along with various factors which force migrants in mixed situations to take the assistance of smugglers; not knowing whether the journey will lead them to their destination, or put them in an unimaginable situation and place from where they shall be no return. In a smuggling hub, there are apart from the smuggler; coordinators, transporters/guides, spotters, messengers, suppliers and service providers who are involved in the facilitation of the entire process of smuggling. The organiser is in charge of every part of the smuggling operation and assumes the role of a business manager. He or she may manage, employ, or subcontract those who are involved in a certain operation. A change in people, routes, modes of transportation, or housing can be arranged by the organiser, who is responsible for managing the entire process within his or her area of influence. The organiser has a large network. A single organiser or a network of organisers collaborate together to design a whole smuggling operation. Historically, it has been quite challenging to gather enough evidence to convict the organisers. These so called 'employees'

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<sup>68</sup> Ibid.

of the organisers frequently participate in illegal activity and only report to the organisers when necessary. In order to connect smugglers and migrants who want to employ smuggling services, recruiters market their services and create connections. They frequently have no formal affiliation with any one smuggler.

Recruiters often have a permanent residence in the migrant's country of origin or point of passage, are fluent in their language, and may even know them personally. Recruiters take advantage of vulnerable migrants and exploit them. People are frequently persuaded to immigrate, and are frequently misled about the procedure and the actual realities of the place of destination. Recruiters may also utilise individuals who do not actively solicit people to be smuggled but who do provide recruiters with information about where such people may be discovered, as well as collect the initial money for transportation. Transporters or escorts monitor border crossings and guide and follow migrants as they travel through one or more nations.

During specific stages of their journey, migrants are transferred from one guide to another. Guides often consist of individuals hailing from border regions who possess extensive knowledge and understanding of the local context. The departure of guides from the network may not necessarily create a substantial interruption in the smuggling operation, as they are often readily replaceable. Simultaneously, these persons assume a pivotal function in facilitating the accomplishment of a migrant's border crossing, while also possessing the capacity to exploit or mistreat the individuals under their guidance. In some circumstances, guides may lack affiliation with extensive smuggling networks and instead provide their services on a contractual basis or engage in solicitation at international border regions such as bridges and bus stops.<sup>69</sup>

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<sup>69</sup> Issue Paper, n.26

Additionally, there exist temporary service providers or suppliers that frequently establish and sustain connections with smugglers, receiving a portion of the earnings as compensation for their involvement in facilitating the smuggling operations. Given their frequent engagement with several smuggling networks or groups, these individuals are inclined to provide their services to any party ready to compensate them. The frequency of their usage might vary, ranging from regular to intermittent, contingent upon the nature of the services provided and the specific needs at hand. For example, individuals who own or manufacture boats may permit the utilisation of their vessels for the facilitation of irregular migration.

Service providers may encompass those who are inclined to participate in the facilitation of illicit smuggling activities through a range of roles, such as producing fraudulent passports, visas, and other travel and immigration documents. This includes document counterfeiters, as well as individuals in various transportation sectors, such as train conductors, taxi drivers, and airline staff along with those who own boats or other vehicles used for smuggling, as well as individuals responsible for maintaining these vehicles and ensuring fuel supply. In several cases, it has been witnessed that corrupt public officials such as border police, soldiers, immigration officials, employees in embassies and consulates, port police and other actors are paid a bribe so that they turn a blind eye towards the entire process.<sup>70</sup> In addition, there can be people who participate in facilitating the process of migrant smuggling without even being aware of the fact that they play a role in it. (For instance a taxi driver who transports smuggled migrants for a normal fare.)

Frequently, it is assumed that the 'smuggling of migrants is a business dominated by hierarchically organised criminal groups who utilise existing smuggling routes (for example, those used for drug trafficking) and adapt

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<sup>70</sup> Ibid.

various *modi operandi* to deal with a different ‘commodity’ — migrants.’<sup>71</sup> Commodification is the process through which individuals are transformed into objects of commerce or commodities that may be exchanged for monetary value. Coercion is closely associated with the process of commodification. Coercion through violence or the fear of violence is what defines control, and these helpless migrants are completely under the control of ruthless smugglers. Many migrant interviewees recalled that once in the border areas and away from urban eyes, smugglers with firearms and weaponry would force migrants to do exactly as they were ordered. The individuals recounted instances of being compelled to participate in arduous marches, enduring harsh sleeping conditions, experiencing abandonment, facing scarcity of sustenance and hydration, being subjected to coercion, enduring sexual assault and rape, as well as enduring acts of cruelty and homicide. The individuals in question were subjected to coercion through the use of threats and physical violence, thereby preventing them from escaping or asserting their freedom.<sup>72</sup> The characterization of migrants as a ‘commodity’ is a source of apprehension and a cause for alarm among state governments and other relevant stakeholders. This is due to the undeniable reality that migrants are compelled to depend on smugglers for transportation to their intended destinations, with little regard for safeguarding their fundamental human rights. But what forces them to make this decision and put their entire future at the mercy of smugglers? Stories reveal that smuggling at times involves concealment in a cargo compartment, truck, or in a container on a large merchant vessel. This usually takes place without the knowledge of the captain or crew of the vessel or the driver of the vehicle on board the ship, as mentioned in the previous example. In a recent incident reported by The Indian Express:

“Fifty people died after being abandoned in a tractor-trailer in the sweltering Texas heat, one of the worst tragedies to claim the lives of migrants smuggled across the border from Mexico to the U.S. More than a dozen people had been

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<sup>71</sup> Ibid.

<sup>72</sup> Christopher Horwood, “Captive commodities: This route is like a fire”, *Ravenstone Consult*, March 2023

taken to hospitals, including four children. South Texas has long been the busiest area for illegal border crossings. Migrants ride in vehicles through Border Patrol checkpoints to San Antonio, the closest major city, from which point they disperse across the United States.”<sup>73</sup>

In another instance, seven North Africans got into a cargo container at a Serbian railway yard, aiming to emerge in Milan a few days later. Authorities in Paraguay discovered their horribly decayed remains inside a consignment of fertiliser three months later, on October 23. Violence by security forces in Balkan republics has led migrants to resort to greater risks to reach Europe.<sup>74</sup> According to the UNODC Global Study on Migrant Smuggling, at least 382 migrants were reported as victims of homicide in 2017. In addition, all types of assault- sexual assault, robbery, fraud, cruel or humiliating treatment, denial of liberty, enforced disappearance, and extortion are reported crimes against migrants in the context of smuggling. There is a strong connection between the larger problem of migration and human trafficking as well as smuggling, as mentioned in the UNODC Global Report on Trafficking in Persons 2016, since migrants and refugees fleeing violence and persecution are particularly susceptible to being trafficked.<sup>75</sup>

Smugglers do satisfy a demand and offer a service, but they do it in unethical, abusive and exploitative ways. They are known to market their services, for instance through word-of-mouth and social media, which helps to generate the demand that their services fill. International migration also assumes the availability of transportation, whether legal or illegal. Displaced people in precarious situations sometimes find themselves subjected to the extortionate demands of their smugglers in a number of locations, such as the Libyan coast or between Syria and its bordering countries. When faced with grim local prospects, a lack of access to legal and humanitarian protection, and of allowed

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<sup>73</sup> San Antonio, “50 Migrants die in a Trailer abandoned in San Antonio heat”, The Indian Express, June 2022 Retrieved from: <https://indianexpress.com/article/world/san-antonio-truck-deaths-texas-7995008/>

<sup>74</sup> Lorenzo Tondo “Journeys of Hope: What will migration routes into Europe look like in 2021?” 14 January, 2021.

<sup>75</sup> UNODC, Op.cit.

transit choices towards a safe haven, migrants are forced to believe that this is their only option for coping. These persons might be subjected to psychological abuse, be pressured to use sex as a form of payment, or be physically coerced into obeying the orders of smugglers – from the imposition of additional fees, to where and how long to wait for a boat, to who gets to board and when, where to sit, what to carry, when to jump into the water.<sup>76</sup>

### **3.2 Mixed Migration and Smuggling in the Mediterranean**

Migrant smuggling by sea generally occurs as part of a wider smuggling process, often involving land and/or air movements. It is hard to provide an accurate estimate of smuggled and trafficked individuals in general due to lack of research or paucity of available data. It is nonetheless estimated that 80 per cent of the mixed migration cases crossing the Mediterranean are ‘facilitated’ by migrant smugglers and human traffickers as part of criminal groups.<sup>77</sup> Migrants are particularly susceptible to both human trafficking and migrant smuggling in the context of cross-Mediterranean mixed migratory movements. One of the specific factors mentioned in available literature is the fact that decisions to migrate are frequently made under intense pressure, which frequently forces migrants to leave without informing their families and personal networks about their intentions, or explaining the various steps in the journey. Undoubtedly, this decreased dependence on family and community safety nets contribute to migrants’ increased vulnerability to even the most severe forms of exploitation. It is a widely-known fact that in the year 2015, the Mediterranean route became the deadliest route for migrant sea crossing. According to Frontex report,

“This route, used for many years as an entry path into Europe, saw the continent’s biggest migratory wave since Second World War when 885,000 migrants used it to reach the EU in 2015- 17 times the number in 2014, which

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<sup>76</sup> Albahari Maurizio, “Human Smugglers Roundtable: are smugglers parasites or service providers?” Open Democracy. March 2016, <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/human-smugglers-roundtable-are-smugglers-parasites-or-service-providers-0/>

<sup>77</sup> See Frontex report, <https://frontex.europa.eu/>



was itself a record year at the time. Most of the migrants on this route in 2015 originated from Syria, followed by Afghanistan and Somalia. Since then the number of irregular arrivals on this route has plunged following the implementation of the EU-Turkey statement in March 2016.”<sup>78</sup>

According to the IOM, more than 20,000 irregular migrants died on the ‘most common central Mediterranean voyage to Italy since 2014,’ and more than 26,000 died in total across the Mediterranean. According to the organisation’s Missing Migrants Project, the precise figure stands at 26,358. Faced with unsustainable levels of irregular migration across the Mediterranean, as well as being held accountable for intolerable levels of mortality, the European Union (EU) and its member states were desperately seeking effective interventions. They aimed to limit irregular migration while simultaneously promoting the protection of migrants and their human rights and avoiding destabilising the delicate transition process of irregular migrants.<sup>79</sup> However, Frontex deployed three operations in the Mediterranean to rescue migrants at risk and fight migrant smuggling. More than 629,000 lives have been saved owing to such efforts. The European Union was also extremely worried about the rising significance of mixed migratory flows trying to enter its territory through its eastern land boundaries, namely via Bulgaria and Hungary, as well as its maritime border notably through Italy and Greece. Increasingly, more asylum seekers and other vulnerable migrants were making maritime crossings at present than in previous years. Recent study on the underlying causes of the region’s mixed migration patterns has shown how push factors, which force migrants to leave their homes, are presently expanding more significantly than pull factors, which draw migrants to select particular locations. States in the region and in neighbouring areas, as well as international organisations, are facing very serious and growing difficulties in meeting the challenge associated with managing these ‘mixed migration flows’. In 2016, the EU established the European Migrant Smuggling Centre (EMSC)

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<sup>78</sup> Ibid.

<sup>79</sup> Reitano et al., n.48

to assist member states in combating migrant smuggling. It also works with the nations of origin and transit of migrants to destroy criminal networks. EU operational patrols in the Mediterranean aim to secure EU borders, combat migrant traffickers, and rescue vulnerable people.<sup>80</sup>

There are currently three Frontex operations in the Mediterranean region:

- *Operation Themis* (formerly Triton), covering the Central Mediterranean
- *Operation Poseidon*, covering the Eastern Mediterranean
- *Operation Indalo*, covering the Western Mediterranean

In March 2020 the EU launched military operation *Irini*, which also contributed to the disruption of the business model of human smuggling and trafficking networks through gathering of information and patrolling with the help of planes. Previously, between May 2015 and March 2020, military *Operation Sophia* targeted migrant smugglers in the Mediterranean. The EU has taken significant action against criminal networks that prey on vulnerable migrants. One of the goals listed by the European Multidisciplinary Platform Against Criminal Threats (EMPACT) for the period 2022-2025 is the fight against the facilitation of irregular migration. In 2021 the coordinated action of member states led to 3,409 arrests, 3,285 investigations and the seizure of €926,760 in cash, 159 firearms along with hundreds of fraudulent documents. The EU and its member states also collaborate closely with the countries of origin and transit of migrants to combat smuggling networks. This effort is supplemented by law enforcement collaboration to take action against migrant smuggling networks through joint operational partnerships.<sup>81</sup>

Despite mammoth efforts, policy responses, search and rescue operations and application of Convention protocols, the fight against migrant smuggling and trafficking; or to be more specific, the declared ‘war’ against both these crimes

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<sup>80</sup> European Council ‘Saving lives at sea and fighting migrant smuggling.’ Retrieved from <https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-sea/#operations>

<sup>81</sup> Ibid

in order to end them, has in fact aided in circumventing the wider problem; which lies within ‘mixed migration’ or irregular migration. Smuggling and exploitation of migrants will continue till irregular migration continues. Moreover, the opinions of stakeholders on the crimes of human smuggling and trafficking are yet to achieve a balanced perspective, to deal with the underlying issues. Hence, in the next section, there shall be a thorough discussion on the role that smugglers actually play in the lives of a migrant. Unless we do not comprehend the broader perspectives (of both the smuggler and the migrant) that can open up a different story altogether; it will be extremely difficult to tackle the problems associated with smuggling and trafficking in the context of mixed migration.

## **Section 4**

### **4.1 Human Smugglers: A Different Perspective**

It is a commonly perceived notion in international, national and regional policy statements that human smugglers are ‘heartless criminals, almost single-handedly responsible for the very existence of irregular mixed migratory flow and for all abuses of refugees and migrants.’<sup>82</sup> But have we ever looked at the other side of the picture and perceived migrant smugglers as “benign travel agents who help refugees and migrants to fulfil their aspirations for a better life in the context of shrinking international protection space, increasingly restrictive migration policies and a lack of legal migration channels”?<sup>83</sup> In order to justify increasingly criminalised reactions to migrant smuggling and to irregular migration itself, human smuggling is frequently conflated with crimes like human trafficking (as discussed in the previous section) and terrorism. Even well-intentioned persons, who provide refugees and migrants

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<sup>82</sup>Mixed Migration Centre (MMC), ‘Smuggling and mixed migration’ (2021) Retrieved from <http://www.mixedmigration.org/>

<sup>83</sup> Ibid

with necessities like food and water while on their journeys, risk the danger of being prosecuted in some nations.

A befitting example of such case can be referred to- where in 2018, Sarah Mardini (a young Syrian refugee and the sister of Olympic swimmer Yusra Mardini) was among two dozen humanitarian workers facing charges for espionage in Greece for their humanitarian work on the island of Lesbos. A European Parliament report identified it as “the largest case of criminalization of solidarity in Europe.”<sup>84</sup> Mardini and the other defendants faced up to eight years in prison for their activity as members of NGO's assisting migrants arriving on Greek coastlines from the Middle East. Many international organisations, including the United Nations’ human rights office and Amnesty International, condemned the claims as fabricated scare tactics aimed at preventing immigration to Greece and frightening those who might contribute relief and aid.<sup>85</sup> Thus in fact, the criminalisation of migrant smuggling has expanded to target refugees and migrants themselves and, as noted above, even led to the prosecution of people who assist them out of simple goodwill rather than for monetary gain.<sup>86</sup>

It is very improbable that migrants are unaware of the dangers and possible risks involved with smuggling, particularly the danger of being exploited as a result of trafficking, in this age of advanced and increased communication. Those who choose to take these risks are not acting on an impulsive whim; rather, they are making a well-thought-out and frequently well-researched gamble that they believe has high chances of success. Though they can have erroneous perceptions of their ideal location and excessive expectations of living elsewhere, potential migrants often base their selections on sensible facts. Planning, funding, and implementation are frequently handled by their

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<sup>84</sup> Arab News, December 2022, <https://www.arabnews.com/node/2220471/world>

<sup>85</sup> Matthew De George, ‘Charges Against Sarah Mardini Dismissed by Greek Court’, <https://www.swimmingworldmagazine.com/news/charges-against-sarah-mardini-dismissed-by-greek-court/>

<sup>86</sup> MMC 2021, n.83

family, relatives and community (for instance those fleeing Syrian civil war). Some studies also reveal that the level of awareness about specific hardships and abuse that they can expect to face, including the risk of death, is well known and accepted by migrants who engage smugglers. Many may nevertheless find the scale of hardship, cost and abuse far higher, and their tolerance for it lower than they had expected.<sup>87</sup>

Undoubtedly, the majority of human smuggling operations involve violent and exploitative behaviours and tactics that flagrantly violate fundamental rights and have a long-lasting detrimental impact on refugees and migrants. Particularly, the deaths of refugees and migrants along mixed migration routes often occur directly or indirectly at the hands of smugglers. In most cases however, for those who prioritize the rights, needs and vulnerabilities of those on the move will somehow overlook the exploitation and violations caused by smugglers. They may even believe to be performing an exalted, cherished duty in a 'moral economy' by saving their families and fellow community members. A researcher studying Syrian refugees discovered that the connection between the smugglers and the migrants seemed to be characterised by a strong sense of solidarity and reciprocity, which was deeply rooted in local moral beliefs. They might be perceived as individuals who possess qualities of both a saviour and a hero, or at the very least, a crucial and occasionally challenging means to facilitate the safe passage of refugees or migrants away from persecution and danger.<sup>88</sup>

Many smugglers, for a fee, provide exactly that service without resorting to violence and without exploiting their 'clients'. In other words: some smugglers are protectors, some are demons or predators, and many are 'something in between'.<sup>89</sup> Additionally, contrary to misinformed public discourse on smuggling and irregular migration, which characterises death, exploitation,

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<sup>87</sup> Carling et al., n.1

<sup>88</sup> Horwood, et.al, n.46

<sup>89</sup> MMC 2021, n.83

stranded poverty, refused entry and deportation, the majority of people who undertake irregular migration succeed in doing so and make it to the final destination. Even though the voyage may take months or years to complete and even though there is significant hardship and risks involved, a much higher percentage of people ultimately succeed than fail. When migrants assess the dangers against the anticipated benefits—which may include, in addition to personal security and wealth, the possibility of family reunion and the ability to assist extended networks back home—they are aware of the odds and are taking a calculated risk. Available information appears to confirm that migrants’ assessment of risk is highly accurate. For example, in relation to Mediterranean Sea crossings, the odds of success are heavily in favour of migrants. In 2014, fatalities in the Mediterranean were approximately 1.6 per cent of those recorded as arriving in Europe by sea. The death rate reached unprecedented levels in early 2015, but still remained well below 5 per cent. These percentages translated into thousands of deaths—a large-scale loss of life that is undoubtedly alarming and unacceptable.<sup>90</sup>

Coming back to the point of view that perceives smugglers as benign agents, there are several instances which are available to support this stance. A research conducted by Antje Missbach, a senior research fellow at Monash University in Melbourne and author of ‘Troubled Transit: Asylum Seekers Stuck in Indonesia’, examines the Indonesian fishermen who mostly carry Afghan and Pakistani asylum seekers to Australia. It demonstrates that the men found guilty of smuggling people in violation of Indonesian law do not reflect the stereotyped persons who smuggle people, which are generally depicted in the popular media or in populist political arguments. Rather than being either selfish, predatory, cruel monsters; most condemned offenders have very little formal education and frequently reside on the social and political outskirts of society. Their ‘career paths’ demonstrated that majority had got

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<sup>90</sup> Carling et al., n.1

involved in human smuggling due to some form of instability in their own personal lives. They took up dangerous employment as a result of precarious situations-sick children and wives, enormous debt, being exploited by their colleagues, and having little options to escape the everyday agony of their existence.<sup>91</sup>

Another story by Shahram Khosravi, an associate professor of social anthropology at Stockholm University talks about Amir Heidari, a well-known migrant smuggler in the Middle East and Europe. He narrated that the first 'human smuggler' in history was actually Moses, who led his people escaping Egypt across the Red Sea. History is filled with stories of such heroes who saved people from oppression and death. Helping Jews out of Nazi occupied territory is a case in point. Another example can be the rescuing of enslaved people of African descent in the US in the nineteenth century, a historical episode known as the Underground Railroad. Heidari proudly narrated that he was his own migration board. He stated,

“I work for those who are declined visas and passports. I work for anyone who has no passport, and with pleasure help them go wherever they want.”

By saying this he refers to the unjust distribution of the right of mobility. He continued:

“While those with a surplus of mobility rights, cross borders gloriously as an honourable act of globalism and cosmopolitanism, those without papers have to do it in an informal way.”<sup>92</sup>

For him, the so-called 'smugglers' are an implication of uneven mobility rights and will continue to be necessary players as long as this disparity remains. Using the term 'smuggler' to describe all people who serve as informal migration brokers is definitely deceptive. People classified as 'human traffickers' are definitely not a homogeneous group. Along with the criminals,

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<sup>91</sup> Maurizio, n.75

<sup>92</sup> Shahram Khosravi, "Round Table: Responses by Shahram Khosravi", Allegra Lab, 2016, <https://allegralaboratory.net/round-table-responses-by-shahram-khosravi/>

there are locals, such as nomads, who live in border regions, and border crossing has become critical to their economic and social lives. For a reduced sum, they might enable an ‘illegal’ border crossing.<sup>93</sup>

If we look at data from the research that was conducted by the Mixed Migration Centre’s 4Mi (Mixed Migration Monitoring Mechanism Initiative), 56 per cent of 4Mi respondents said they agreed with the statement that smugglers helped them in achieving their goal of migrating to another country, including 14.9 per cent who said they strongly agreed. Moreover, 41.7 per cent of all respondents described their smuggler as a professional smuggler and 31.2 per cent as a travel agent. Only 9.2 per cent described their smugglers as criminal. Still, respondents also indicated they were misled by their smugglers who never disclosed facts about the crucial steps involved in the journey, including the conditions of travel (27 per cent), the routes (25.5 per cent), cost (28 per cent), safety and security along the route (17.7 per cent) and conditions and regulations in destination countries (14 per cent).<sup>94</sup>

Few other studies suggest that some smugglers undoubtedly resort to horrific things and exploit people who depend on them. They are involved in activities such as rape, torture, kidnapping, and other forms of abuse. Other smugglers are members of underprivileged and oppressed groups, like the Rohingyas in Myanmar, who may gain monetary profit from arranging boat crossings, but in turn, they have also given the Rohingya people a crucial lifeline. People who move as migrants frequently have various reasons for doing so, and the same is true of people who engage in smuggling activities. This reality is distorted by national and international policies and reactions that portray all smugglers as ruthless criminals and are unlikely to result in the closure of smuggling routes. However, the rights of those who are on the move may be further weakened by

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<sup>93</sup> Maurizio, n.75

<sup>94</sup> Bram Frouws & Chris Horwood, “Both angels and demons? The role and nature of migrant smugglers”, Mixed Migration Centre, <https://mixedmigration.org/articles/both-angels-and-demons-the-role-and-nature-of-migrant-smugglers/>



these same repressive measures. For instance, hundreds of Rohingyas were abandoned at sea as a result of Thailand's crackdown on trafficking and smuggling in 2015. This happened so because the traffickers and smugglers were unable to meet them at the usual places to disembark. This tragedy was avoidable but unanticipated.<sup>95</sup>

Hence the part that needs to be focused on is the one which avoids confusion between who is a smuggler and who is not, and this becomes all the more relevant in situations where smuggling involves a wide range of functions and activities. Categories of people such as drivers, food and drink providers, safe house proprietors and boat captains, recruiters of clients, informal bankers, false documentation suppliers and corrupt state officials are all part of the smuggling network. But are they all smugglers? In certain situations, the entire sector of a town or village's economy are related to human smuggling, allowing thousands of individuals to transit every year. Some obvious examples are 'Obock in Djibouti, Agadez in Niger, Izmir in Türkiye, Tijuana in Mexico, and Tripoli in Libya'.

The discussion in any manner does not suggest that violation of laws by smugglers is justifiable. However, evidence also suggests that mixed migratory pattern is a complicated phenomenon riddled with inconsistencies and heterogeneity. It is also an obvious irony that stricter border laws and practises are bound to fail since they amplify the very phenomena that they purport to combat.<sup>96</sup> There is nonetheless, a dearth of literature on success stories of migrants escaping persecution and reaching their destination with the assistance of smugglers, leading a secure and happy life. More of such positive and impactful stories are yet to be narrated and analysed.

#### **4.2 Politicisation of Human Smuggling: Implications for wider policy solutions**

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<sup>95</sup> Maurizio, n.75

<sup>96</sup> Horwood et al., n.46

The terms associated with people smuggling may be the most politicised and misunderstood of all the terminology employed in the discourse on mixed migration. Here, the recently introduced phrases ‘self-smuggling’ and ‘state-sponsored smuggling’ have expanded the vocabulary and demonstrated how frequently language is used with political meaning. Self-smuggling has emerged as a trend in Tunisia where instead of paying human traffickers, increasing numbers of Tunisians are buying their own boats and organizing ‘do-it-yourself ocean journeys to Europe.’ There were several videos posted on social media showing young Tunisians aboard boats, most likely unemployed and frustrated with the political unrest in their nation and hoping to travel to Europe in order to begin new life. The young people engaged are acquainted with one another, reside in the same community, and appear to have banded together. They are, in other words, ‘self-smuggling’. Self-smugglers frequently have a similar social background, such as belonging to a same community or maybe a part of an extended family. They combine their money to purchase a boat, a motor, and diesel, as well as, if they can afford, a GPS device. Research by Tunisian human rights organisations and other organisations indicates that more people are leaving Tunisia as self-smugglers.<sup>97</sup>

In later part of year 2021, when Belarusian officials encouraged and helped thousands of migrants and refugees transit their country in order to join the EU, ‘state-sponsored smuggling’ became a topic of public discussion. The action was a part of Belarus’ efforts to annoy the EU on purpose in what might also be described as a combative type of migrant diplomacy in order to gain their attention. The refugees and migrants served as mere pawns in a political crisis that was effectively being played out on the migratory chessboard. The North Atlantic Treaty Organization (NATO)’s charge that Belarus is carrying out a ‘hybrid attack’ against the EU further exemplifies the bellicose terminology surrounding the subject. In this instance, the phrase ‘state-

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<sup>97</sup> DW News (2021) “To get to Europe, Tunisian migrants turn to self-smuggling”, [Tunisian migrants turn to 'self-smuggling' – DW – 08/11/2021](#)

sponsored smuggling' is more appropriate to describe the purposeful actions of Belarusian officials.<sup>98</sup>

In the midst of migration crisis, political leaders in the preferred destination countries are under extreme pressure to take action. The sense of urgency is fuelled by community-wide humanitarian impulses, a strong sense of disproportionate burdens (especially felt by front-line States), and dangers to public order, national unity, and sovereignty that are deemed to exist. It is commonly suggested that the best course of action to combat the more pervasive and transient spectre of irregular migration is to step up the battle against smuggling. A number of strategic goals can be achieved by demonising smugglers when migration problems are associated with the smuggling of migrants. First of all, a successful fight against smuggling would restore the equilibrium of seeming to uphold the principles of the Refugee Convention while actually providing protection to only a small number of refugees by cutting off a crucial route of escape and entry for asylum seekers. If smugglers were completely eliminated, potential refugees would still face persecution or would have to go for safety elsewhere, and the outward manifestation of the crisis would disappear. Second, by blaming smugglers for migrant sufferings and fatalities, governments engage in politically advantageous 'virtue signalling'<sup>99</sup> by recasting themselves as refugees' defenders as opposed to cynical and cruel villains.

Large segments of the civil society have been critical of migration control policies in Europe, and leaders are frequently seen as being hostile rather than compassionate when it comes to immigration issues. The image of thousands of refugees drowning right at the doorstep of Europe can occasionally be helpful but can also be burdensome. With a focus on combating smugglers, however, European leaders are able to project an image that is simultaneously

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<sup>98</sup> Horwood et al., n.46

<sup>99</sup> Ibid

assertive and caring. The struggle against smuggling is backed by rhetoric that paints migrant traffickers and smugglers as innately malevolent. Smugglers are thus made legitimate targets, despite the fact that their primary goal is to give refugees the opportunity to seek the protection to which they are legally entitled, but denied.

The negative connotations associated with smugglers and smuggling has other important implications. For instance, the prohibition and prosecution of smuggling has a significant selective effect on the economic model for smuggling. The dangers increase and the profile of those participating, necessarily change when smuggling is viewed as a serious crime. This is especially true in Europe, North America, and Australia, where smuggling involves a rising danger of detection, detention, and punitive penalties notwithstanding low detection rates. Organisations and individuals who are willing to participate for bigger sums have displaced small-scale and part-time operators. Another solution has been to cut the journey short by abandoning migrants at sea, sending them on their own towards the beach or leaving them into the arms of prospective rescuers.<sup>100</sup>

In the framework of human smuggling, abuses committed against refugees and migrants frequently take place in an atmosphere of impunity with the participation and collaboration of governmental officials. Policy measures don't adequately address the role of such collaboration and corruption required to support smuggling. In many regions of the world, smuggling routes are linked to corruption. According to 4Mi statistics of MMC, migrants on mixed migration routes regularly come into contact with dishonest state officials, who the migrants or their smugglers must pay in order to continue their journey. Very often complicit state officials share their profits and facilitate movement and exploitation. This is the case across the world, despite greatly increased detection and prosecution efforts on the part of those States who

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<sup>100</sup> Carling et al.,n.1

perceive the threats most strongly and who are consequently most committed to protecting their borders from smugglers.<sup>101</sup>

Smugglers who participated in 4Mi's study between 2017 and 2019 said that state authorities were actively involved in their smuggling operations: 40% of all respondents stated that someone in their smuggling network had direct contact with state officials to facilitate smuggling; 21% said that officials were directly involved; while 29% said officials were not directly involved but turned a blind eye to smuggling.<sup>102</sup> State authorities are frequently listed as the second most common abusers of refugees and migrants after smugglers, and along specific routes, they may even be the most frequent. Their involvement and collusion in perpetrating abuses against refugees and migrants must therefore be better investigated, and perpetrators should be held accountable.

## **Section 5**

### **5.1 Human Smuggling and Trafficking during the Pandemic**

Migrant societies will continue to be affected by socio-economic and protection crises for years to come; in addition to the worldwide health catastrophe that the COVID-19 pandemic had sparked. This had a prominent effect on mobility as a result of many constantly-changing limitations placed on cross-border and intra-border travel by governments all over the world. IOM estimated that as part of initial responses to the pandemic, approximately a hundred nations, territories, and regions globally implemented new travel restrictions in response to COVID-19 by 19th March 2020. According to a research done by the UNODC, the global pandemic and the subsequent implementation of containment measures aimed at safeguarding public health, have posed challenges for several nations in terms of receiving migrants and assessing the

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<sup>101</sup> Ibid.

<sup>102</sup> MMC 2021, n.83

necessity of providing shelter to asylum seekers. Nevertheless, despite such containment measures, individuals were not deterred from seeking refuge from situations characterised by conflict, violence, and perilous and degrading circumstances. According to the Office of the UNHCR, in violation of international obligations under refugee law, 144 nations completely or partially closed their borders, while 64 nations implemented measures to limit entrance during the epidemic, applying these restrictions uniformly to all migrants, irrespective of their specific need for international protection, thus denying them admission to the host country and/or access to national asylum procedures altogether.<sup>103</sup>

Although the pandemic has restricted mobility options globally, the economic consequences of the disease have not changed, and in some cases even boosted the forces driving migration. In a survey of migrants conducted in the Niger, for instance, nearly all participants said that COVID-19 had affected their travels (91%) and their migration plans (49%), but they also said that despite the pandemic's effects on their mobility, most of them were still making their way to their destinations, albeit with longer stops and modified routes. Conflict, humanitarian catastrophes, lack of safety, and other factors have all continued to spur migration during the COVID-19 pandemic. Travel and mobility restrictions associated to COVID-19, for instance, have not stopped individuals from making risky and occasionally lethal journeys through the Mediterranean routes, involving the assistance of migrant smugglers.

When legal migration routes are restricted, migrant smuggling thrives, and the possibility that they would use smuggling services to cross borders is increased by rigorous border controls and restrictive immigration laws.<sup>104</sup> Smuggling facilitation services still exist despite the COVID-19 response-related restrictions. In some markets, the uncertainty brought on by COVID-

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<sup>103</sup> UNODC 2021, n.31

<sup>104</sup> UNODC 2021, n.31

19-related movement limitations is quite likely to increase demand for and price of smuggling services. The high-risk activities that irregular migration facilitation frequently entails will also continue. As has been observed, despite the continuous military war and the choices made by Italy, Malta, and Libya itself to block their ports, smuggling organisers have continued to plan journeys from Libya.<sup>105</sup> In late 2020, the European Union Agency for Law Enforcement Cooperation (Europol) found that:

“As smuggling networks adjusted their business models, smuggling fees increased in many parts of the world owing to mobility restrictions, continued demand and increased risks faced by criminal networks.”<sup>106</sup>

In a survey conducted by the MMC, it was found that approximately 50% of the participants observed a rise in the fee imposed by smugglers following the onset of COVID-19.<sup>107</sup> As a result of changes like border closures, limits, or changes in legislation, smuggling facilitators are known to cease or postpone their services. Nevertheless, the persistent demand driven by migrants’ desires for mobility nearly always resulted in the restoration of these services. In other words, despite COVID-19 restrictions, which perhaps had a short-term influence, smuggling and its facilitators continued to adjust, react, and satisfy the need of unauthorised migrants.<sup>108</sup>

In many areas, the reliance of migrants and refugees on smugglers to cross borders has increased, exposing them to more extreme forms of trafficking that involve violence, abuse, and even death.<sup>109</sup> The livelihoods of the communities who profit from the presence of migrants and/or their journeys (e.g., shop owners, food sellers, those who rent out housing, etc.) have been impacted by COVID-19 measures in combination with migration limitations.

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<sup>105</sup> Gabriella Sanchez and Luigi Achili, ‘Stranded: The Impacts of COVID-19 on Irregular Migration and Migrant Smuggling’, Policy Brief, No. 2020/20 (Florence, Italy, Migration Policy Centre, Robert Schuman Centre for Advanced Studies, European University Institute, 2020)

<sup>106</sup> Ibid.

<sup>107</sup> UNODC 2021, n.31

<sup>108</sup> Gabriella and Luigi, n.103

<sup>109</sup> UNODC 2021, n.31

Campaigns to stop irregular migration, disguised as efforts to stop its facilitation, in places as diverse as Libya, Niger, Central America, or Ecuador demonstrate how the introduction of enforcement practises has seriously harmed local, intimate, and cultural understandings of mobility, trade, and transportation. Growing number of data demonstrates how counter-smuggling tactics eventually affect local livelihoods and social structures, encouraging increased inequality and violence, frequently beyond the context of migration.<sup>110</sup>

As a consequence of the implementation of border restrictions, traffickers have been compelled to choose for alternative routes that are less frequented and entail more risks, so posing a significant threat to the safety and well-being of migrants. Smaller vessels have been utilised inside the English Channel, exemplifying instances when clandestine migrants have been detected confined within enclosed compartments of trucks, freight carriages, and cargo trains, which have traversed international boundaries despite the prevailing pandemic-related limitations. Migration has become increasingly risky as a result of border closures and other movement constraints, where rescue and humanitarian aid are frequently in short supply. For instance, more than 70% of refugees and migrants polled in Malaysia, Niger, and Tunisia said that since COVID-19, smugglers had started choosing more dangerous routes.

In 2020, 1,166 migrants lost their lives while travelling via the Mediterranean Sea, and many more went missing. Beyond the loss of life, smuggled migrants are frequently victims of crimes including sexual and gender-based assault, theft, kidnapping for ransom, robbery, extortion, and human trafficking (as discussed in earlier section). While women and girls are more likely to experience sexual and gender-based violence while travelling, unaccompanied children are particularly vulnerable to exploitation, violence, and abuse. Criminals, militia organisations, other migrants, ordinary people, and

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<sup>110</sup> Gabriella and Luigi, n.103



dishonest law enforcement personnel are some of those who commit atrocities against smuggled migrants. Additionally, in their pursuit of profit, smugglers are extremely likely to disregard the safety of migrants as they travel.’<sup>111</sup>

Amidst the pandemic, individuals categorised as irregular migrants faced heightened vulnerability to human trafficking. This susceptibility was further exacerbated by the implementation of restrictions aimed at curtailing the transmission of the virus. Numerous migrants, including those who have utilised the assistance of smuggling services, found themselves in a state of abandonment, as they were unable to avail housing and other forms of protective services that had been suspended due to the pandemic. Additionally, they faced mobility limitations that impeded their travel arrangements and led to financial hardships, thereby increasing their vulnerability to trafficking. Migrant workers found themselves in more risky positions when they worked in low-wage, informal industries including the garment industry, farming, manufacturing, and domestic labour. The necessity for enterprises to manufacture goods at a cheaper cost as a result of the economic crisis and the authorities’ decreased monitoring of these sectors where victims of human trafficking are most frequently found, would have also led to increasing exploitation of migrants working there. Traffickers quickly changed their methods of operation to fit the new circumstances. For instance, they used the initial confusion caused by the COVID-19 emergency and the various safety precautions to spread rumours and find victims. They also moved their illegal activities online whenever possible. The available data suggested that there had been a rise in the engagement of traffickers in online recruitment, influencing mechanisms and exploitation, with a specific focus on girls. Furthermore, the pandemic amplified the vulnerability of children to various forms of exploitation, as increased economic instability raises the likelihood of child labour, child marriage, and other instances of child trafficking. These

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<sup>111</sup> UNODC, 2021, n.31

include sexual exploitation and involvement in criminal, armed, or terrorist groups.<sup>112</sup>

## **5.2 Migrant Smuggling: The ‘New Normal’**

There is amplitude of policy solutions to win the battle against smuggling and trafficking of migrants. Instead of running after ‘expert solutions’, what is more important at the moment is to look beyond such policies and seek a better response which can deal with a nuanced understanding of both the TOC’s in the world of irregular migration. It is extremely difficult to make a firm prediction on how irregular migration will develop in the next few years due to its expanding scope and complexity. Such ‘unpredictability’ is, understandably, giving many governments pause for thought as they seek to avoid being locked into policies and approaches that may prove disastrously costly into the future.<sup>113</sup>

States Parties are obliged under Article 16 of the UN ‘Protocol against the Smuggling of Migrants by Land, Sea and Air’ to help and safeguard smuggled migrants. Nearly all routes possess dangers of exploitation, torture or other forms of victimisation, and governments are responsible for taking action to reduce these risks in areas under their control. The Protocol states that irregular migrants should not be subject to criminal prosecution and that, if they are detained, the detaining authorities must uphold their legal commitments under international law. Authorities in some transit or destination nations are accountable for ‘push-back’ of smuggled migrants, running the risk of transgressing the principle of *non-refoulement*; while some countries are accountable for unlawful detention. Article 33 of the 1951 Convention Relating to the Status of Refugees first articulated this idea, and article 19(1) of the UN Smuggling of Migrants Protocol reiterates it.<sup>114</sup>

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<sup>112</sup> UNODC 2021, n.31

<sup>113</sup> Carling et al., n.1

<sup>114</sup> UNODC, Global Study on Smuggling of Migrants, 2018

## **Conclusion**

Whatever the policy solutions promise, migration pressures are likely to increase if global disparities persist, and can be made worse by the effects of diseases and climate change along with political propaganda. This will in turn lead to increased demand for smugglers, which could then lead to more stringent measures that spread throughout the target nations and gain acceptance. This entire vicious cycle will continue where smugglers would be the only ones benefitted. States are striving hard to limit irregular migration as the 'war of words' rages on, and optimistic migrants and refugees are caught in an unending struggle. This struggle will only be resolved when the political courage and will to implement effective policies emerge; one that includes significant expansion of legal pathways for mobility, a well-functioning system of return, and which addresses global inequality, trade imbalances and finally, the push factors for coerced mobility. Moreover, once it is ascertained that the 'war' against smuggling and trafficking of humans in mixed migration is not just the war against the smuggler and trafficker, and that there are several other grey areas that needs to be addressed; then better policy outcomes can be guaranteed in order to deal with the larger aspect of TOC in case of mixed migration. It is a herculean task but until then, in coming years, we can only anticipate active trading from smugglers and traffickers in a market with persistent demand and supply.

## CHAPTER IV

### THE EUROPEAN ASYLUM SYSTEM AND MIXED MIGRATION

#### Introduction

Migrants from all over the world have been entering the European Union (EU) countries since last few decades in large numbers. Although this does not sound like a unique phenomenon, the manner in which they are seeking to enter the region is definitely a cause of concern. They are mostly irregular migrants who attempt to enter the EU unlawfully, outside the regulatory standards of sending, transit, and host nations. However since 2011, especially during and after the 2015 ‘migrant crisis’<sup>1</sup>, the number of refugees and migrants entering (or attempting to enter) the EU irregularly has increased tremendously due to which the EU and its member states are being faced with significant organisational and political challenges. The major cause of concern for the European Council is the dynamism of such irregular influx, the manner in which it is affecting the countries involved and its social and political repercussions. Governments fear that occurrence of such phenomenon would exacerbate social tensions and conflict among locals and this is exactly what is happening. A report by Claude Marie aptly points out:

“No government wants to give its electorate the impression that it has lost control of its borders, and this goes some way to explaining the eagerness to strengthen control mechanisms rather than bother about the root causes of the problem...”<sup>2</sup>

The discussion in this chapter is segmented into five detailed sections- the first section discusses the historical development of EU laws related to asylum and

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<sup>1</sup> It refers to the unprecedented surge in migrant flow towards Europe in 2015.

<sup>2</sup> Claude-V. Marie, “Preventing illegal immigration: Juggling Economic Imperatives, Political Risks and Individual Rights”, *Council of Europe*, January 2004.

migration and the consequent development of the Common European Asylum System (CEAS). In addition to the revamp of the CEAS, the weaknesses in certain regulations related to the asylum system and the evident fallouts of the Dublin regulation too have been highlighted. The second section reviews measures taken by the EU through the CEAS for the process of reception, resettlement/relocation and detention of refugees, particularly irregular migrants entering the region. This section also maps the practical experiences with regard to these processes by discussing case studies and case laws related to the same. It also aims to draw attention towards lack of solidarity and parity among Member States as far as application of these processes is concerned. The third section revisits the contradiction between the fundamental human rights of irregular migrants and the question of state sovereignty, and argues that the restrictions that human rights impose on state sovereignty are one of the key problems with immigration policies especially those dealing with mixed migration.

Wide gaps between policy-making and policy-implementation are evident in EU asylum system. Despite the development of the CEAS, there is still no legislative framework which can present a durable solution to the plight of migrants arriving in mixed flows, lacking legal status but genuinely requiring protection. Lack of solidarity among EU Member States is a consistent problem in this regard. The fourth section evaluates the role of states in protecting the migrants in mixed flow. The restrictive policy measures of Turkey and Greece (before and after the pandemic), has also been discussed as case studies, since these have been the main countries of transit and destination respectively for irregular migrants approaching the Eastern Mediterranean region (most affected by the overhaul of migrants during 2014-15). However, a review of available literature revealed lack of information on the nexus between 'planned political agendas' and 'political dilemma' of state authorities behind restrictive policy measures that were primarily responsible for a failed

humanitarian assistance to irregular migrants in mixed flow. In the fifth section, the Ukraine crisis and the resultant influx of refugees has been discussed in order to evaluate the current international response to immigration. An analysis of the historical and contemporary policies, as well as their implementation reveals that the EU is capable enough to effectively address and respond to significant instances of displacement on a pan-European scale. The chapter then reflects on the possibilities of avoiding a major humanitarian crisis in future by relying on a ‘solidarity mechanism’ and why such mechanism was not adhered to in the past.

## **Section 1**

### **1.1 Development of the Common European Asylum System (CEAS)**

The right to asylum is embedded in the EU through the Charter of Fundamental Rights as well as numerous international agreements such as the 1951 Refugee Convention which is the cornerstone of the international protection regime for the refugees. It codifies a legal definition of a ‘refugee’ and obliges signatory States not to return or expel refugees to territories where they would be threatened (principle of *non-refoulement* discussed in details in the first chapter). The aim of the EU was:

“...to develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to all non-EU nationals who need international protection, and to ensure that the principle of non-refoulement is observed.”<sup>3</sup>

The primary emphasis of EU policy in recent years has been more on averting the influx of migrants, delegating responsibility to nations situated outside the EU, and diminishing the level of refugee assistance within the EU. The entry of more than a million migrants and asylum seekers in the continent during 2015–2016 sparked a political crisis, the ramifications of which are still being felt. It revealed problems that must immediately be addressed and overcome.

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<sup>3</sup> Georgiana Sandu, “Factsheets on the European Union”, *European Parliament*, June 2022.

Above all, it brought attention to a basic reality-every action has repercussions for others. While managing external borders remains a concern for certain Member States, others must deal with massive land or sea arrivals, overcrowded reception facilities, and with significant numbers of unlawful and mixed flows.<sup>4</sup>

Before beginning the discussion on the EU migration and asylum policies, let us understand who ‘asylum-seekers’ are and what does ‘right to asylum’ mean. Asylum-seekers are persons who have lodged an application for asylum and whose claim is under consideration. A state may provide asylum as a sort of global protection in order to allow individuals to remain on its territory, usually for reasons of escape from persecution. Persons can be protected with the status of refugee under the 1951 Geneva Convention, or granted subsidiary protection, which is specific to national legislation and may mean a shorter period of support and a regular review of the status. Asylum can also be granted for humanitarian reasons or, in fewer cases, as temporary protection.<sup>5</sup>

Article 14 of the Universal Declaration of Human Rights (UDHR) grants the right to seek and enjoy asylum from persecution. The three main types of asylum rights are territorial, extraterritorial, and neutral. Territorial asylum is an exemption to the extradition rule and is only provided inside the borders of the state granting it. It is primarily utilised and aimed to safeguard those who are being investigated for political offences including treason, desertion, sedition, and espionage. However, it has been a common practise to exclude from this group those who have been charged with the assassination of a head of state, some specific terrorist activities, collaborating with the enemy during war, crimes against peace and humanity, and war crimes. Extraterritorial asylum can be understood as asylum that is provided outside of the country

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<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Commission*, Brussels, 23.9.2020

<sup>5</sup> Claude-V. Marie, p. 43, n 2

from which protection is sought, such as in embassies, legations, consulates, warships, and commercial vessels. Extraterritorial asylum cases—often referred to as ‘diplomatic asylum’—granted at embassies, legations, or consulates, are frequently the subject of controversy. For instance, the United States controversially offered diplomatic shelter to dissident Hungarian Roman Catholic József Cardinal Mindszenty following an unsuccessful rebellion against the communist government of Hungary in 1956. He was given refuge at the U.S. embassy where he stayed for 15 years. Neutral asylum is “employed by states which are exercising neutrality during a war to offer asylum within its territory to troops of belligerent states, provided that the troops submit to internment for the duration of the war.”<sup>6</sup>

With regard to the origin and consequent development of the EU asylum system, notably the Common European Asylum System (CEAS); it was established as a result of the realisation that a ‘unified’ regulation of asylum at the EU level was necessary in a region without internal borders. It was assumed that if this was not done, there could be a second wave of asylum applicants. This meant that asylum seekers may relocate from one State to another with the intention of selecting a destination for personal reasons or selecting a place thought to have the most lenient asylum procedures (regardless of the veracity of such an assumption). As a result, it was decided that in order to compensate for the removal of internal EU borders (after the Schengen Agreement), stronger external border controls and cooperation in the areas of immigration and asylum were necessary. The Schengen Agreement (finally implemented in 1995) between Germany, France, the Netherlands, Belgium, and Luxembourg for the removal of internal border controls was seen as necessitating the strengthening of external border

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<sup>6</sup> See <https://www.britannica.com/topic/asylum>



controls and cooperation in the areas of asylum and immigration as compensatory measures.<sup>7</sup>

In the initial stage, the 'Ad Hoc Group on Migration' which was established in 1986, served as the basis for European cooperation on asylum. The Dublin Convention, commonly known as the Convention defining the state responsible for evaluating an asylum claim made in one of the Member States of the European Community, was adopted in 1990 in large part due to the efforts of this ad hoc organisation. Later, the 1993 Treaty of Maastricht formally incorporated the current inter-governmental cooperation structure into the institutional framework of the EU without making substantial changes. It emphasised that issues pertaining to immigration and asylum were to be dealt with in accordance with the 1951 Convention Relating to the Status of Refugees and the 1950 European Convention on Human Rights. However, because of the unique institutional arrangements established by the Treaty of Maastricht, EU Member States continued to play a significant role in the early stages of the development of European asylum policy. The sole requirements placed on the Council were to 'fully associate' the Commission with its work on asylum and to notify the European Parliament of its measures.<sup>8</sup> However, it is significant to highlight that these measures had only a modest impact, as those were mainly 'soft law' instruments, such as recommendations and resolutions. Thus, it can be ascertained that when the European Council announced its intention to create a CEAS at the Tampere Summit in October 1999, progress had been rather slow in the domain of asylum.<sup>9</sup>

The Treaty of Amsterdam, which went into effect in May 1999, established the framework for a CEAS by making immigration and asylum a subject of

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<sup>7</sup> European Asylum Support Office (EASO), "An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis", August 2016, <https://euaa.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>

<sup>8</sup> Christian Kaunert and Sarah Leonard, "The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?", *Refugee Survey Quarterly*, Volume 31, Issue 4, December 2012.

<sup>9</sup> Ibid

supranational EU authority.<sup>10</sup> The working plans for the development of the Area of Freedom, Security and Justice (AFSJ) was agreed upon in Tampere, which was later adopted by the European Council as the Tampere Programme in October 1999. This specified the content of the CEAS. Subsequently, the Council decided that the CEAS should be implemented in two phases: First, there should be the adoption of common basic standards in the short term, and it should lead to a unified method and uniform status for persons who are granted asylum valid across the Union in the long run.<sup>11</sup> This led to the first phase of creation of the CEAS, which existed from 1999 to 2004 and established the criteria and mechanisms for determining the Member State in charge of reviewing asylum applications (replacing the Dublin Convention from 1990). It also resulted in the creation of the 'EURODAC' which is a comprehensive database for storing and comparing fingerprint data and common minimum standards that Member States were required to adhere to in connection with the reception of asylum-seekers. Additional law provided temporary protection in the case of a large inflow.<sup>12</sup> Despite the adoption of the minimal requirements outlined in the first phase legislative instruments, there remained major differences between Member States in terms of applicant reception, processes, and qualifying for international protection. This was seen to result in different outcomes for applicants, which violated the principle of equal access to protection throughout the EU. According to the European Commission, the minimal standards were not capable of achieving the anticipated level of harmonisation among Member States. As a result, the first phase instruments had to be amended in order to achieve more uniformity and better standards. It was also deemed important to accompany more legislative harmonisation with efficient practical coordination amongst national asylum administrations in order to promote Member States' convergence in asylum decision-making. Finally, it was recognised that steps to strengthen solidarity

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<sup>10</sup> EASO, n. 7, p. 13

<sup>11</sup> Georgiana, p 2

<sup>12</sup> Ibid.

and accountability among EU states, as well as between EU and non-EU states, were required.<sup>13</sup>

The Hague Programme, which was implemented in November 2004, advocated for the adoption of additional measures aimed at advancing the development of the CEAS. The EU underscored its aspiration to surpass minimal requirements and establish a unified asylum system that encompassed shared assurances and a consistent status for those granted refuge, grounded in 'high protection standards.' The European Commission put up a number of legislative recommendations prior to the Treaty of Lisbon's implementation and the Stockholm Program's approval. It recommended the establishment of the European Asylum Support Office (EASO) in 2009 after the Justice and Home Affairs Council adopted conclusions on practical cooperation in the domain of asylum in April 2008. The EASO would be a permanent structure to support practical cooperation among EU Member States in this area. The Commission also submitted proposals for Recast Directive on Reception Conditions (2008), the Asylum Procedures Directive (2009), the Asylum Qualification Directive (2009), the Dublin Regulation (2008), and a recast EURODAC Regulation (2009).<sup>14</sup> The CEAS in its present form is binding on all Member States with the exception of Denmark, Ireland and the United Kingdom (UK).

## **1.2 The Treaty of Lisbon and the Stockholm Programme**

After several rounds of negotiations, the Treaty of Lisbon entered into force on 1 December 2009. In contrast to the Treaty of Amsterdam, which only gave the EU the authority to legislate minimum criteria for a number of issues of asylum, the Treaty of Lisbon gave the EU new competencies in the domain of

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<sup>13</sup> EASO, n. 7, p.14

<sup>14</sup> Kaunert and Leonard, n. 8, p.14

asylum. The table below lists the measures adopted by the EU through the Treaty of Lisbon.

**The Treaty of Lisbon enabled the EU to adopt measures on the following:**

- (a) a uniform status of asylum valid throughout the Union
- (b) a uniform status of subsidiary protection
- (c) a common system of temporary protection
- (d) common procedures for granting and withdrawing asylum and subsidiary protection
- (e) criteria and mechanisms for determining the Member State responsible for assessing an application for protection
- (f) standards on reception conditions of applicants
- (g) Partnership and co-operation with third countries for the purpose of managing inflows of people.<sup>15</sup>

**Table 2: Measures Adopted through the Treaty of Lisbon**

Source: Georgiana Sandu, “Factsheets on the European Union”, *European Parliament*, June 2022.

The Treaty of Lisbon also includes an article that enshrines the idea of ‘solidarity and fair sharing of responsibilities’ in EU asylum and migration policy and authorises the Union to take steps to enforce this principle. (Article 80 TFEU).<sup>16</sup> It should be noted here that the Treaty of Amsterdam required different provisions on minimum criteria for asylum systems to be approved within five years of the treaty’s entry into force, but the Treaty of Lisbon does not specify a deadline for their implementation. A right to asylum is outlined in the Charter of Fundamental Rights, which has been made enforceable by the Treaty of Lisbon. According to Article 18 of the Charter, as modified by the

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<sup>15</sup> Sandu, n. 3, p.2

<sup>16</sup> The Treaty of Lisbon has fundamentally reorganized the legal provisions underpinning the EU’s activities into two treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Treaty of Lisbon, “[the] right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees [...]”.<sup>17</sup> This means that all secondary legislation in the EU, including EU directives and rules on asylum, will be required to conform to the principles of the Geneva Convention and the 1967 Protocol. In 2009, the EU adopted its third AFSJ programme for the period 2010–2014 which is known as the Stockholm Programme. The creation of “a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection”<sup>18</sup> is what this document calls for. The Stockholm Programme also gives the EASO a significant role in the CEAS’ implementation, notably in terms of encouraging Member States to work together practically on asylum-related issues. The Stockholm Programme emphasises that with regard to the ‘solidarity’ theme, “[effective] solidarity with the Member States facing particular pressure should be promoted,” and that this “should be achieved through a broad and balanced approach.” Finally, the Stockholm Programme also includes a section on the ‘external dimension of asylum’ where the creation of a joint ‘EU resettlement programme’ and initiatives to support capacity-building in third countries, particularly on the model of Regional Protection Programmes, are prioritised.<sup>19</sup>

### **1.3 European Immigration Policy and Mixed Migration**

Since the Lisbon Treaty came into force, the European Parliament has been actively involved as a full co-legislator, in the adoption of new legislation dealing with both irregular and regular migration. Factsheets on the immigration policy of the EU confirms that ‘the EU aims to set up a balanced approach to managing regular immigration and combating irregular

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<sup>17</sup>Article 18, The Charter of Fundamental Rights

<sup>18</sup> Sandu, n. 3, p.3

<sup>19</sup> Ibid

immigration.’<sup>20</sup> Proper management of migration flows necessitates ensuring fair treatment of third-country nationals residing legally in Member States, enhancing measures to combat irregular immigration including trafficking and smuggling, and promoting closer cooperation with non-member countries in all areas. Some of the recent policy developments specific to this field include the Global Approach to Migration and Mobility (GAMM), which the European Commission endorsed in 2011. It outlines how the EU conducts its policy discussions and collaboration with non-EU nations based on definite goals that are integrated into the EU’s broader external activity, which includes developmental cooperation. Its ‘four primary goals’ are to better manage legal immigration, stop and combat illegal immigration, maximise the positive effects of migration and mobility on development, and advance international protection.<sup>21</sup>

The goal of the EU’s previous Global Approach to Migration (GAM) was to address migration comprehensively through collaboration with third-party countries of origin and transit. The strategy entailed providing assistance to these nations to improve their capacity to manage migration and facilitate readmission procedures. In addition, the strategy sought to assist these nations in independently resolving refugee crises, bolstering their border control systems, and preventing unauthorised migration. Originally, its scope was limited to Africa and the Mediterranean region, but it has since expanded to include other regions.<sup>22</sup> The incorporation of the ‘legal’ aspect of migration was subsequently implemented to strengthen European Commission’s negotiating position in relation to targeted countries. It was acknowledged that obtaining cooperation from these nations required the provision of mutual benefits for all parties. Enhancing the relationship between migration and

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<sup>20</sup> European Council, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/>

<sup>21</sup> Factsheets on the European Union, Asylum Policy, <https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy>

<sup>22</sup> Guild, Elspeth and Lax, Moreno, “Current challenges for International Refugee Law, with a focus on EU Policies and EU Co-operation with the UNHCR”, European Union, (2013)

development, encouraging mobility and legal migration, and preventing and combating undocumented migration are the three primary objectives of the new strategy. Through a focus on these goals, the programme places substantial importance on the fight against irregular movement.

The inclusion of international protection is a fundamental aspect of the new Global Approach to Migration and Mobility (GAMM), as previously stated. This ensures that the provision of asylum is secured promptly, ideally within the region of origin. The control of the movement of third country nationals towards the EU was primarily achieved through the implementation of Integrated Border Management and GAM. These strategies involved the use of both territorial and extraterritorial means of migration management and border surveillance.<sup>23</sup> There are however, two problems in this context. Whereas most controls were implemented extra-territorially, there was very limited recognition that refugee and migrant rights – and parallel state obligations – may equally have extraterritorial applicability. Similarly, the EU member states demonstrated lack of acknowledgment towards the unique circumstances of asylum seekers and refugees in mixed migration flow. They failed to distinguish between forced and voluntary migration, thus disrespecting the rights to receive international protection.

Despite acknowledgment in official declarations and policy papers that border controls must adhere to basic rights and the principle of *non-refoulement*, there has been a lack of substantial integration of these principles into legislative texts. The practical consequence of this ambiguity is that access to international protection in the EU has been made dependant “not on the refugee’s need for protection, but on his or her own ability to enter the territory of [a Member State] in a clandestine manner.”<sup>24</sup> Maritime interdiction, visa restrictions, and carrier sanctions have emerged as ‘the most

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

explicit blocking mechanism for asylum flows.’<sup>25</sup> In fact, ‘remote control’ tactics force migrants to use unauthorised modes of travel in order to reach a place where there ‘is’ a chance of safety.<sup>26</sup>

After the Stockholm Programme (1999) and The Hague Programme (2004) expired in December 2014, the Commission published a new communication which envisioned a future agenda of the AFSJ entitled: ‘An open and secure Europe: making it happen’. In accordance with Article 68 of the TFEU, the European Council defined the ‘strategic guidelines for legislative and operational planning within the area of freedom, security and justice’ for the period 2014-2020. The principles/guidelines emphasised on the need to address migration holistically, utilising regular migration to its fullest potential, providing protection to those who require it, preventing irregular migration, and managing borders efficiently and effectively.<sup>27</sup>

In order to deal with the challenge of mixed migration, the EU had come up with several policies to handle the unprecedented arrival of irregular migrants during 2015-16, as apparently it had become a huge policy challenge for the EU to deal with around 2 million migrants arriving on the European shores in a span of just two years. In such circumstances, the European Commission had launched a comprehensive European Agenda on Migration on May 13, 2015, outlining the fundamental ideas and steps that must be taken in order to strengthen the EU’s ability to control migrant flows and handle the possibilities and problems associated with migration for the years 2015 to 2020. According to a progress report on the ‘Implementation of the European Agenda on Migration’, progresses made under the EU Agenda on Migration were:

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<sup>25</sup>John Morrison and Beth Crosland, ‘Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy’, *New Issues in Refugee Research*, Working Paper No 39, (Geneva: UNHCR, 2001).

<sup>26</sup> Guild and Lax, n 22

<sup>27</sup> Factsheets on the European Union, n 21



- The number of unauthorised entry points into the EU dropped to 150,000 in 2018, the lowest level in five years. Innovative methods of collaboration with other nations, like the EU-Turkey Statement of March 2016, have been crucial to this progress.
- The EU's intervention has contributed to the preservation of human lives, with an estimated 760,000 maritime rescues and the successful rescue of over 23,000 migrants in the Nigerien desert since 2015.
- The EU provided immediate and concrete assistance to Member States that were most under pressure: Hotspots were currently formed as an operational model to rapidly and effectively deliver assistance to strategic places. Internal EU financing for migration and borders increased to over €10 billion; and 34,700 migrants from Italy and Greece were moved inside the EU under special programmes. Additionally, 1,103 individuals migrated voluntarily since the summer of 2018; the Commission has been organising this process since January 2019.
- The EU had stepped up the legal pathway of resettlement of persons in need of international protection to Member States, with almost 63,000 people resettled since 2015.
- The number of migrants entering Libya from the south has significantly decreased as a result of the EU measures made to disrupt smuggling networks along all routes, including activities in Niger.
- Formal agreements pertaining to practical arrangements concerning the return and readmission of individuals have been established with a total of 23 countries of origin and transit. The EU has provided further assistance to facilitate the process of successful return.<sup>28</sup>

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<sup>28</sup> Communication of the Commission to the European Parliament, "Progress report on the Implementation of the European Agenda on Migration", Brussels, 16.10.2019

## 1.4 The Dublin Regulations

The Dublin Regulations established the standards and procedures for identifying the Member State in charge of reviewing an asylum claim submitted by a citizen of a third country in one of the Member States. There was widespread consensus among civil society actors, non-governmental organizations, think tanks and researchers as well as policymakers that the current Dublin system has failed, or is at least ineffective. The shortcomings of the Dublin Convention were addressed as well as replaced by the Dublin II Regulation. This regulation's principal objective is to guarantee that an asylum seeker can access an asylum procedure in a member state of the EU based on responsibility standards. The law sought to address the issues of 'refugees in orbit' (asylum-seekers unable to locate a State receptive of examining their application in the EU) and 'asylum shopping'<sup>29</sup> (i.e., the same person making repeated asylum claims across the EU).

The idea of 'venue shopping' or asylum shopping in the context of EU collaboration on asylum and migration has emerged as a prominent topic of debate among migration working groups. The concept pertains to the notion that policy-makers, when confronted with challenges within their conventional policy domain, tend to explore alternative forums for policy-making that align more favourably with their preferences and objectives. According to that perspective, the development of the EU policy on asylum is the result of an attempt by EU Member States to avoid liberal constraints at the national level with a view to adopting more restrictive asylum measures at the EU level. In 2013, the European Council and Parliament agreed upon a revision of the Dublin Regulation ("Dublin III") that came into effect in January 2014. Dublin III underlined the hierarchy of norms establishing Member State accountability and established a means to alert of potential problems with

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<sup>29</sup> Kaunert and Leonard, n.8, p.11

Member States' asylum processes. It also prohibited the transfer of asylum seekers to nations with 'systemic flaws' and it provided an early warning and preparedness mechanism to detect deficiencies in Member States' asylum systems before they developed into crises.

After being analysed through a critical lens, the Dublin regulations have come under pressure for "failing to safeguard fundamental rights and consider individual interests."<sup>30</sup> The problems related to the application of the regulation are due to the principles underlying the regulation. There are political as well as technical flaws for instance, 'unclear rules and a design that works only for small numbers of asylum seekers'<sup>31</sup>. However, there is lack of relevant information on how the Dublin Regulation and its strict application has caused certain negative consequences, for instance the Moria camp disaster.<sup>32</sup> The fact that the regulation has worked exactly as intended, has possibly contributed to the disaster. The Dublin Convention has been functioning smoothly especially for Northern European countries as a shield towards migrants who were coming to the EU by pushing the responsibility to countries at the borders. It therefore becomes the responsibility of the country that is processing and accepting an asylum application, to protect that asylum seeker by taking the person into its territory and grant him the rights that are mentioned in the Geneva Convention. Consequently, by applying the Dublin regulation, asylum applicants arriving on the island of Lesbos<sup>33</sup> could not be transferred to other countries for protection, resulting in overcrowding in the camps. Such circumstances led to the destruction of the largest refugee camp

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<sup>30</sup> Julian Lehmann, "Excuse Me, What's the Fastest Way Out of Dublin?" June 2016.

<sup>31</sup> Ibid

<sup>32</sup> A massive fire broke out on 8<sup>th</sup> September 2020 in the largest refugee camp in Greece, the Moria Refugee Camp on the island of Lesbos due to overcrowded conditions which destroyed the major portion of the camp. This incident added to the sufferings of the refugees and other migrants who were residing there.

<sup>33</sup> Lesbos is an island located in the north-eastern Aegean Sea.

in Greece, the overcrowded Moria camp on the island of Lesbos leaving nearly 13,000 people without refuge.<sup>34</sup>

Dublin however, was not intended to be a burden sharing instrument. Its policy objectives were different: preventing onward movement ('secondary migration') and having clear rules about the responsibility of the state that allows the entry of an asylum seeker. At the EU level, Dublin is designed only for small numbers of asylum applications. Large numbers make it impossible for authorities to comply with the maximum duration of procedures and lower the quality of transfer requests. At the individual level, the system is also criticized for failing to take sufficient account of individual interests (eg-language, social ties, and job prospects) of asylum-seekers. The conditions in many camps for asylum seekers in EU member States are so poor that they amount to human rights violation, forcing them to make onward movement.

## **Section 2**

### **2.1 Towards a reform of the CEAS**

The primary and enduring obstacle confronting asylum systems is the issue of ensuring access to protection for individuals who possess a legitimate entitlement to it. Every person has the right to seek asylum on the basis of atrocity or violence, persecution, or threat to their existence and well-being. However, mass influx of migrants and refugees towards a particular destination country certainly puts pressure on the existing laws and policies of that country. Although asylum and migration are two distinct policy challenges, several scholars have claimed that the 'EU asylum and migration policy' has been mostly restrictive and has served to keep prospective asylum

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<sup>34</sup> Godin, Melissa, September 2020, Time Magazine, <https://time.com/5887085/greece-moria-refugee-camp-blaze/>

seekers and migrants outside the EU's borders.<sup>35</sup> By the 1980s, concerns about the alleged increase in 'asylum abuse' by 'economic refugees' was being heard in several EU countries; even then, the mixing of migration and flight was a major problem, and this progressively led to the adoption of visa restrictions for common countries of origin.

Since then, EU nations have made considerable changes to their asylum policies, as an effort to address this issue. Due to the significant rise in refugee flows, mainly from the former Yugoslavia, several member states tightened their asylum regulations in the early 1990s. After that, the Dublin Regulation was established, which has worked since 1997 to prevent attempts to apply for asylum in more than one EU member state. This regulation establishes responsibility towards asylum seekers arriving in Europe and places this responsibility with the State where the applicant for asylum first enters. As a result, the EU countries with external borders were given responsibility for asylum seekers in practise. According to a research paper published by the Global Public Policy Institute, 'many of the system's flaws were political in nature, in particular the disproportionate burden shouldered by frontline states at the external border, as well as differences in the quality of asylum procedures'.<sup>36</sup>

For as long as there were few asylum seekers, this policy worked rather effectively, but Greece and Italy have long complained about the unfair burden it has placed on them and the lack of assistance from the rest of the EU.<sup>37</sup> Northern countries, including those that have ratified the Refugee Convention and other human rights protection instruments, typically declined to accept responsibility for refugees who do not enter their borders 'directly' and present

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<sup>35</sup> Christian Kaunert and Sarah Leonard, "The Development of the EU Asylum Policy: Revisiting the Venue shopping Argument", Migration Working Group

<sup>36</sup>Lehman, n.29

<sup>37</sup>Steffen Angenendt, David Kipp and Amrei Meier, "Mixed Migration: Challenges and options for the ongoing project of German and European asylum and migration policy", German Institute for International and Security Affairs, 2017

themselves promptly to the authorities. In order to manage migration flows at every stage- beginning from the time a person wants to leave his or her country of origin until they arrive at the borders of destination country concerned- developed nations have implemented a range of extra-territorial measures. Non-entrée measures range from simple actions on the high seas outside of territorial waters to concluding agreements with other nations that place responsibility for the care and protection of asylum seekers on those nations.<sup>38</sup>

Needless to say, a major issue that exposed the weaknesses of the EU legislative framework (notably the CEAS and the Dublin Conventions) was the arrival of refugees and irregular migrants in the EU in unprecedented numbers in 2015. Such migratory pressure on Europe necessitated the need for reform of the CEAS, as well as for greater solidarity and fairer sharing of responsibility among Member States. The European Commission presented a new policy proposal, known as ‘A Communication’ on 6<sup>th</sup> April 2016, outlining its suggestions on how to improve the CEAS and provide legal pathways for immigration to Europe. It aimed to fix the CEAS’s core issues and strengthen its crisis-resilience.<sup>39</sup> The Commission identified five priority areas where the CEAS needed structural revamp:

- Establishing a sustainable and fair system for determining the Member State responsible for asylum-seekers: In order to modify the Dublin Regulation, the Commission proposed two potential approaches: streamlining or enhancing the Regulation through the inclusion of a remedial fairness mechanism, or migrating to a new system founded on a distribution key.

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<sup>38</sup> Guild and Lax, n.22

<sup>39</sup> Martin Wagner, “Reforming Europe’s common asylum system – will member states back it?” April, 2016, <https://www.icmpd.org/news/archive/reforming-europe-s-common-asylum-system-will-member-states-back-it>

- Reinforcing the Eurodac system: The proposal put up by the Commission involves the modification of the Eurodac system in order to align with the alterations made to the Dublin mechanism, as well as to broaden its scope beyond the realm of asylum.
- Achieving greater convergence in the EU asylum system: The European Commission has put up a proposal for a law that aims to provide a unified and standardised asylum system across the European Union. This proposed regulation would replace the existing Asylum Procedures Directive. Additionally, the Commission has suggested a new qualification rule to replace the current Qualification Directive, along with specific amendments to the Reception Conditions Directive.
- Preventing secondary movements within the EU: The proposals put out by the Commission in the new asylum procedures and qualifying criteria, as well as the Reception Conditions Directive, incorporate enhanced procedural measures aimed at discouraging and penalising unauthorised movements to other Member States.
- Strengthening the mandate of the EU's asylum agency: The proposed amendment by the Commission entails expanding the mandate of the European Asylum Support Office (EASO) to encompass both an enhanced operational function and a new responsibility for policy implementation. This also involves ensuring adequate financial resources and legal mechanisms to achieve that objective.<sup>40</sup>

When it comes to developing legal pathways to international protection, such as resettlement, as well as the future focus on legal migration and legal channels, the Commission's views have been critical yet ambiguous. If the CEAS is to remain open for the needy, alternate routes for non-refugees (such as irregular migrants forced to leave their countries owing to poverty, dismal

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<sup>40</sup> Detelin Wagner, "Towards a Reform of the Common European Asylum System", European Parliamentary Research Service (EPRS), May 2016

life expectations, and drought etc.) must be provided. Third-country nationals will continue to use the sole ‘open pathway’ (the asylum system) in the absence of such legal channels. Although the statement mentions the potential of drafting an EU action plan, it does not expressly address the integrating needs of foreign protection recipients. In terms of the future role of the EASO, the plan remains blurred. It is expected to transition from a ‘support agency’ to a ‘policy implementation agency’ with a strengthened operational mission. In this regard, the plan falls short of hopes for a more ambitious role for the agency in processing asylum applications under the forthcoming ‘common asylum procedure.’<sup>41</sup>

## **2.2 Reception Conditions in the CEAS**

The CEAS includes regulations on the ‘reception’ of asylum applicants. The reception phase can be understood as the initial period after arrival in the country of resettlement and is often referred to as the first few weeks, although the length is not defined and differs across contexts. A unique feature of reception is that the refugees already have a legal status and do not undergo an asylum process. However, ‘the experiences of refugees themselves show that reception can be extended for many years in a way that blurs the sociological and political distinctions of reception and integration’<sup>42</sup> However, the legal and policy reasons behind this inclusion, as well as a study of the application of the Reception Conditions Directive (RCD) should be done in order to comprehend the level of parity among EU member states. A number of rights outlined in the 1951 Refugee Convention pertain to refugees who are ‘present in the territory’ or ‘lawfully present.’ Therefore, past legal commitments of Member

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<sup>41</sup>“An Overview of Reception Conditions for asylum seekers across European countries”, France terre d’asile - Vues d’Europe, 2018, <https://www.vuesdeurope.eu/en/brief/an-overview-of-reception-conditions-for-asylum-seekers-across-european-countries/>

<sup>42</sup>Ayhan Kaya & Alexander-Kenneth Nagel. “Reception Policies, Practices and Humanitarian Responses”, Working Paper Series: Global Migration: Consequences and Responses, Synthesis Report, Paper 2020/49, May 2020.



States, namely those resulting from the Convention, call for special action. Asylum seekers may conceivably fall into any of these two categories given that a person acquires refugee status the moment she/he satisfies the criteria for refugee status and that refugee status is declaratory. The rights of refugees who are ‘lawfully staying’ are expanded. These rights are only available in the EU context after receiving international protection, and a residence permit on this basis. Member States are obligated for such provision under international and European human rights treaties in addition to international refugee law.

While not explicitly targeted towards individuals seeking asylum, various rights and liberties such as the right to personal freedom and protection, the prohibition of torture and cruel, inhuman, or degrading treatment, as well as principles like prioritising the best interests of the child, have implications for the treatment of asylum seekers. These rights and principles establish a range of entitlements and assurances. The European Court of Human Rights (ECtHR) has provided more rationale for why this group deserves particular protection. The Strasbourg Court argued in the case of *MSS v Belgium & Greece* that asylum seekers are a ‘particularly underprivileged and vulnerable population group in need of special protection.’<sup>43</sup> The ‘vulnerable group’ approach has drawbacks, but it also has the benefit of clearly addressing the unique circumstance in which asylum seekers find themselves. Asylum seekers warrant specific consideration owing to their traumatic flight experiences, limited familiarity with the language and legal frameworks of the host nation, and potential financial constraints, when applicable.

The Directive 2013/33/EU of the EU Parliament and of the Council on 26<sup>th</sup> June 2013 laid down standards for the reception of applicants for international protection. According to the Directive, applicants will be guaranteed access to housing, food, clothing, health care, education for minors, and employment.

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<sup>43</sup>Evangelia Tsourdi, “Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity”, *Immigration, Asylum and Nationality Law*, Vol 29, No 1, 2015.

Special consideration will be given to vulnerable people, particularly unaccompanied minors and tortured victims. Individual assessments will be required of EU nations in order to identify the unique reception requirements of vulnerable individuals and to guarantee that vulnerable asylum seekers have access to medical and psychological care. It will also contain guidelines governing the detention of asylum seekers, as well as alternatives to detention that fully protect their basic rights. While ‘reception’ has no definition, it does go further than simply providing housing for asylum seekers.

Within the European Union, the reception conditions to which applicants for asylum have access upon arrival vary to a great extent. Certain countries, including the Netherlands and Greece have a tendency to house candidates collectively for the duration of the application process. While some nations like Sweden, provide individual lodging from the moment the application is completed, Austria and Belgium first house new applicants in group housing before moving them into longer-term individual accommodations. Even financial help differs from one member state to the other. While some jurisdictions automatically award aid, others base their decision on the applicant’s ability to pay. In Sweden, only emergency care is available, but access to healthcare is universal in France. Though the European Directive (with the exception of Hungary) provides access to the labour market for those seeking refuge, it might vary from a few days to several months depending on the country. However, most jurisdictions guarantee access to quality education to everyone. Further research will expose that the various methods for receiving asylum applicants also reflect the geographical disparities across EU member states. The minimal reception benefits for states on the southern frontiers of the Union may vary depending on whether the asylum seeker is on a mainland or an island.

Additionally, even prior to the ‘crisis’ of 2015, these countries did not necessarily view themselves as ‘asylum countries,’ and they had trouble

offering even the most basic of the receiving conditions. In Italy and Greece, special initial reception centres known as ‘hotspots’ were built where asylum seekers were sheltered, recognised, and registered in response to this enormous surge of applications. Central European and Balkan states are sometimes referred to be ‘transit’ nations along the migration route and have made comparatively little investment in facilities for asylum seekers. They frequently struggle to accommodate news candidates as a result. For instance, the whole of Bosnia only has one centre for those seeking refuge. Destination countries like Germany and the United Kingdom also have their own distinct models, which reflect the desire of asylum seekers to permanently live in those nations. These nations use distribution schemes that disperse asylum applicants across the whole nation. Case in point is Germany, where asylum seekers’ freedom of movement is restricted.

Although reception policies vary among member states, they can also change within the same nation/state. One can clearly detect discrepancies in the treatment given to various asylum seekers if one takes a closer look. Asylum seekers’ nationalities are becoming a more important factor in determining the reception circumstances. The ‘Bamberg model’ in Germany, named so after a tiny town in Bavaria, calls for the registration of asylum seekers from nations with low recognition rates at a transit facility where their application would be reviewed and from which those who are denied will be sent back. The hotspots also demonstrate this distinction. Syrians are held in separate receiving facilities in Greece, whilst in Italy, those nationalities deemed unworthy of international protection (and later labelled as ‘economic migrants’ after their arrival) are detained.<sup>44</sup> Apart from disparities in treatment between persons and states, major problems concerning applicants’ living situations must be highlighted. Some jurisdictions fail to meet the basic conditions outlined in the RCD. These include preserving family unity and ensuring access to school,

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<sup>44</sup>An Overview of Reception Conditions, 2018, <https://www.vuesdeurope.eu/en/brief/an-overview-of-reception-conditions-for-asylum-seekers-across-european-countries/>

employment, professional training, and healthcare. A prolonged lack of shelter is sometimes the cause of poor treatment of asylum seekers. The European Fundamental Rights Agency stated in their most recent quarterly report that only Austria, Bulgaria, Germany, Hungary, Poland, the Netherlands, and Sweden have the necessary asylum receiving capacity. People are sleeping on the streets or in improvised camps in France, Italy, and Greece due to a lack of housing space for applications.

It is apparently difficult for state governments dealing with unprecedented numbers of asylum seekers to provide adequate reception conditions. Therefore, in 2015 and 2016, only a few states were able to lodge everyone, that too under dismal conditions. In Germany, for example, emergency shelter had to be provided in gyms and warehouses. There were evidences of deteriorating conditions in Bulgaria as well: financial subsidies for asylum seekers had been revoked, and food was scarce. A faulty asylum system, unable to handle the volume of requests, can have major ramifications for asylum seekers and how they are handled/treated. This was obvious in Spain, where the asylum registration system was overly sluggish, depriving applicants of basic necessities and putting them at risk of expulsion. In Hungary, official policy prevented asylum applicants from receiving adequate welcome. When asylum seekers arrived at the border, they were immediately placed in a transit zone with limited access to reception facilities.<sup>45</sup>

An asylum case, *R.R. and others v. Hungary* demonstrates a sheer violation of Article 3 and Article 5(1) and (4) of the ECHR. The asylum applicants, consisting of a family of five with Iranian and Afghan origins, entered Hungary through Serbia and proceeded to submit their asylum application in the Röszke transit zone. The lack of food supplies gave rise to a concern over the violation of Article 3 with regards to the primary petitioner, considering

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<sup>45</sup> Ibid

his complete reliance on the Hungarian government while residing in the Röszke transit zone. The applicant mother and children were subjected to a breach of Article 3 due to the inadequate physical conditions of their accommodation, the lack of appropriate facilities for children, inconsistencies in the supply of medical services, and the extended duration of their stay in the region. The family's period of stay within the Röszke transit zone might be seen as a deprivation of liberty. This was primarily owing to the absence of any domestic legislative regulations that provide a specific maximum time for the applicants' stay, as well as the excessively long duration of their stay and the substandard circumstances within the transit zone. The detention of the applicants was deemed unlawful according to Article 5(1) due to the absence of a clearly defined legal basis for their loss of liberty and the failure of the Hungarian authorities to provide a formal decision for their custody. The violation of Article 5(4) occurred as a result of the absence of a timely judicial mechanism for the petitioners to determine the legality of their detention.<sup>46</sup>

### **2.3 Resettlement for Refugees, but what about Undocumented Migrants?**

According to the understanding of UNHCR, resettlement is the transfer of refugees from an asylum country to another that has agreed to admit them and ultimately grant them permanent residence. The EU Asylum and Migration glossary defines resettlement as,

“Selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them as refugees with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also

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<sup>46</sup> European Court of Human Rights (ECtHR), *R.R. and others v. Hungary*, Application no. 36037/17, 2 March 2021, *European Database on Asylum Law (EDAL)*, <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-rr-and-others-v-hungary-application-no-3603717-2-march-2021#content>

carries with it the opportunity to eventually become a naturalised citizen of the resettlement country”<sup>47</sup>

Resettlement is cited as ‘a tool for protection of and solutions for refugees, a tangible mechanism for burden and responsibility sharing and a demonstration of solidarity’<sup>48</sup> in the Global Compact on Refugees. It has three objectives: providing international protection to refugees, ensuring a durable solution, and strengthening solidarity and responsibility-sharing between countries. Resettlement is one of the three durable solutions that UNHCR is required by its statute and the resolutions of the UN General Assembly, to implement. Resettlement is distinctive in the sense that it is the only long-term solution that entails relocating refugees from the country of asylum to a third country. Apart from providing international protection to refugees, its aim is to strengthen solidarity and responsibility-sharing between countries. For a resettlement to take place, the UNHCR has to determine whether an applicant is a refugee according to the 1951 Geneva Convention, and has to identify resettlement as the most appropriate solution.<sup>49</sup>

In order to provide a more organised, consistent, and long-lasting framework for resettlement across the Union, the European Commission had proposed a Regulation establishing a Union Resettlement Framework in 2016. In accordance with the Proposal, individuals who are relocated in Member States must be given either the refugee status or subsidiary protection status.<sup>50</sup> The notion of a resettlement framework for the EU was welcomed by the European Council on Refugees and Exiles (ECRE), but it was not possible to support the plan in its current form due to a number of issues. The main problematic part was on how resettlement would be implemented as an incentive for nations to

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<sup>47</sup> Anja Radjenovic, “Resettlement of refugees: EU framework”, European Parliamentary Research Service (EPRS), March 2019.

<sup>48</sup> Dr.MeltemIneli-Ciger, “Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework”, European Journal of Migration and Law, 2022

<sup>49</sup> Radjenovic, 2019

<sup>50</sup> Dr.MeltemIneli-Ciger, n.47

work together on migration management and the prevention of unauthorised migration. This went against resettlement's long-standing role as a method of lifesaving and protection for the world's most vulnerable people. The eligibility and exclusion criteria in the Framework particularly worried ECRE since they would bar many refugee groups in need of resettlement, such as those who are vulnerable or have no other options in sight. Although the Proposal has not yet been implemented, the Commission urged for it to be done as soon as possible in the New Pact on Migration and Asylum. Although the 1951 Convention requires its parties to grant refugees a number of basic rights as well as “an expanding array of rights as their relationship with the asylum state deepens”,<sup>51</sup> there is no formalised international legal framework that specifies state obligations with regard to resettlement. This implies that governments continue to have the authority to decide if, who, and how many people to resettle, as well as the status that each individual will have when they have done so. For instance, in Canada, refugees resettled by the government are provided with Permanent Resident Status upon their arrival to the country and they become eligible for citizenship after 3 years.<sup>52</sup>

The national resettlement policies and programmes of Member States now vary greatly, and there are notable discrepancies in the selection criteria, resettlement processes, and the rights accorded to refugees who have been placed. The Proposal, in principle, offers an excellent chance to urge Member States to increase the number of resettlement slots available by standardising resettlement procedures and the legal status accorded to refugees who successfully relocate. However, the Proposal contains no provisions that would compel Member States to relocate any more refugees than they presently do, and none are anticipated to stop a potential race to the bottom. This is

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<sup>51</sup> European Council on Refugees and Exiles (ECRE) “Untying the EU Resettlement Framework”, 2016.

<sup>52</sup> Ibid

mentioned here as one of the Proposed Regulation's significant flaws.<sup>53</sup> According to the Framework, refugees who entered the EU illegally or attempted to do so during the past five years would be penalised by being denied resettlement. Additionally, if any Member State declined to accept them within the preceding five years, they are eliminated. Refugees who might otherwise be eligible for resettlement may not receive the benefit because of these two exclusionary requirements. UNHCR can currently recommend refugees who have been turned away by one Member State, to another Member State. This is a crucial precaution since applicants can be turned away by one Member State for reasons that do not apply in another, such as the absence of specialised medical care in a particular nation. They (together with UNHCR) will no longer be prohibited by the proposal's clause from exploring all available options in Europe. Additionally, blanket exclusions that encompass the qualified and vulnerable, may result from permanently banning people who are denied for factors that, on the surface, make sense such as security, international relations, or factors alike.<sup>54</sup>

There is dearth of substantive literature to clearly portray the plans for resettlement, or cases/instances of resettlement of irregular migrants. Hence this section has explored the policy of resettlement and what measures have been taken to resettle those vulnerable migrants who are frequently denied protection and the role of EU Member States in this regard. Few recommendations by ECRE on "breaking the link with migration control and preserving the humanitarian focus of resettlement",<sup>55</sup> call for eligibility requirements to take into account refugees in protracted refugee situations as well as refugees who are unable to reintegrate locally or return to their place of origin and for whom there are no alternative long-term solutions. Punitive provisions in the Framework were required to be eliminated including the

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<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> ECRE, n.50



exclusion of refugees from resettlement due to a past irregular entry into the EU and their exclusion from resubmission after being turned down by one Member State. Using grounds for exclusion like security, foreign relations, or similar presumptive reasons should also be eliminated. IDP's and those who are socio-economically vulnerable are not UNHCR submission categories; hence provisions on them needed to be clarified.

There are recommended policy measures in numerous documents, articles and conventions related to the expansion of legal and safe channels for irregular migrants and increased cooperation among member states. For instance, in the New York Declaration for Refugees and Migrants, adopted by the United Nations General Assembly in September 2016, EU governments joined the global call for “a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner,” and committed themselves to “a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among States.”<sup>56</sup> But despite pledges and promises, such measures are not being implemented in a way that could significantly reduce resorting to dangerous journeys and prevent loss of lives. Governments throughout the EU appear determined to create a hostile climate for migrants and asylum seekers. National governments strive to obstruct access to territory and asylum proceedings, as well as to limit asylum seekers’ and refugees’ rights. Despite some beneficial characteristics, attempts undertaken by the European Commission to alter the CEAS risk undermining protection at the EU level.<sup>57</sup>

Thousands of individuals risk their lives each year trying to enter the EU undocumented in search of safety, and many of them perish doing so, as

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<sup>56</sup> Human rights Watch, “Towards an Effective and Principled EU Migration Policy”, June 2018

<sup>57</sup> Ibid.

evidenced by numerous incidents, particularly in the Mediterranean.<sup>58</sup> This happens only due to a shortage of resettlement alternatives and the ineffectiveness of proposed solutions. According to Troeller, there is currently no established or conclusive evidence to support a direct correlation between increased resettlement efforts and a decrease in the number of individuals seeking asylum, whether through legitimate or illegitimate means. However, Troeller does acknowledge that providing more opportunities for resettlement may potentially diminish the incentive for individuals to engage in irregular migration in their pursuit of asylum.<sup>59</sup> Djajić asserts that asylum seekers employ two primary methods to access industrialised nations: irregular migration, characterised by substantial expenses and hazards facilitated by human smugglers and frequently lacking proper documentation; or alternatively, they may pursue the UNHCR's resettlement submission programmes, which are accessible to only a limited fraction of refugees. The UNHCR argues that "[r]esettlement can have a positive, mitigating influence on irregular movements when it is implemented on the basis of clear and consistent criteria, and when it is used as a policy tool to reinforce protection in countries of first asylum"<sup>60</sup>

Protracted Refugee Situations are a major contributor to numerous unauthorised movements worldwide. In reality, a number of European States have made steps to combat and manage irregular migration, such as expanding resettlement prospects. However, as noted by Troeller, there is no scientific proof that expanding resettlement options will reduce unauthorised immigration. Many refugees have no choice but to commit to the risky route of irregular migration to European countries with the help of smugglers because of political unrest, lack of adequate protection in neighbouring countries, and

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<sup>58</sup> Abdullah Omar Yassen and Salam Abdullah Hassan, "The Failure of the European Union to Respond to the Refugee Crisis", *Turkish Journal of Computer and Mathematics Education*, Vol.12 No.2 (2021)

<sup>59</sup> Ibid.

<sup>60</sup> UNHCR, 1997, p.671

the lack of opportunities for resettlement in third countries.<sup>61</sup> The decision for irregular migration is motivated by the desire to avoid potential arrest, detention, or involuntary repatriation. Indeed, it has emerged as the last feasible recourse for refugees seeking safety, given the absence of alternative legal avenues for securing protection. Alonso highlights the dearth of resettlement prospects as a factor that has rendered irregular migration an enticing choice for refugees who are in dire need of protection in affluent countries.<sup>62</sup> Similarly, former UNHCR High Commissioner, Ruud Lubbers noted that there will be lesser refugees who resort to risky options like human trafficking and smuggling if European Member States improve at implementing durable solutions and supporting those States that host large numbers of refugees. He did, however, issue a warning that in the absence of a long-lasting solution, migrants would be compelled to travel irregularly and rely on criminal networks, something that is currently happening and more frequently. There are a few misunderstandings about border tightening among Europeans and media agencies. Contrary to popular assumption that stricter border controls will prevent irregular migration, it has been witnessed that traffickers and smugglers are being even more benefitted from a method of evading border enforcement, giving more fuel to irregular migration.

Refugees, as discussed earlier, encounter a number of challenges while trying to enter Europe and apply for asylum, including discrimination, expulsion, and arrest and detention in violation of international law. With regard to the existing mechanisms available to provide international protection, the Dublin Regulation has faced many challenges due to the unfair distribution of refugees across Member States. Huge numbers of refugee applications have placed a heavy strain on certain countries, including Greece and Italy; while Hungary

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<sup>61</sup> Markus Sperl, 'Fortress Europe and the Iraqi "intruders": Iraqi asylum-seekers and the EU, *New Issues in Refugee Research*, 2007, Research Paper No. 144, 1-19

<sup>62</sup> Beatriz Tomé Alonso, 'Iraqi Conflict-induced Refugees and Their Regional Impact', in Antonio Marquina Barrio (ed), *Migration Flows, Economic Crisis, Environmentally-induced Migration and Human Security: Visions from Asia and Europe* (UCM 2010).

has prioritised strengthening its borders. The international refugee problem has once again drawn media attention and political debate, with many negative repercussions. Families have been living in inadequate shelters in Greece, Italy, Macedonia, and Hungary; hundreds of people have perished in the Mediterranean; asylum seekers have endangered their lives while travelling to Europe by dangerous boats, freezer trucks, and cramped vehicles. Being a refugee is definitely not a crime. Refugees do want to return to their home country, but due to lack of improvement in circumstances in these areas, many do not wish to return voluntarily. Less than one per cent of refugees are relocated today and unless resettlement chances rise drastically, more than half of those in need of resettlement will be trapped in camps or languish in limbo in asylum countries with no solution in sight. As a result, the unavailability of the three long-term possible and durable solutions for refugees and migrants – voluntary repatriation, local integration, and relocation in a third country – has unambiguously added to their interminable plight.<sup>63</sup>

In two High-Level Forums in July and October 2021, European leaders had strongly emphasised on the significance of resettlement as a vital tool for protecting refugees who face extreme vulnerability in the nations where they first sought asylum, as well as a show of solidarity that can reduce pressure on significant refugee-hosting countries. Historically, nations with lower and middle-income levels have shouldered the predominant burden of hosting refugees worldwide, almost 86% of the total. Nevertheless, despite notable progress made in previous years, the EU's endeavours in resettlement are still failing to meet the established accords and are consistently falling below the required standards.

The failure of the EU to successfully carry out the relocation of 30,000 refugees by end of 2020, notwithstanding the extension of its commitment into 2021 as pledged during the 2019 Global Refugee Forum, is particularly

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<sup>63</sup>Yassen and Hassan, p.307

regrettable. In 2019, the EU witnessed the resettlement of over 20,000 refugees. However, data provided by the UNHCR revealed a significant decline in refugee relocation to the EU in 2020, with only 8,314 refugees being resettled. This figure represents a mere 0.6% of the global demand for relocation.<sup>64</sup> Despite persistent endeavours and the plethora of adaptable and innovative resettlement processes at their disposal, the majority of European resettlement initiatives have not fully regained its customary magnitude even during the second year of the pandemic. In 2021, a total of 15,660 refugees were transferred throughout 12 EU members.<sup>65</sup> As of June 2022, no formal announcements have been made about new EU resettlement commitments for the year 2022, despite the Commission's previous declaration in December 2021. The Commission had reported that 15 member states had expressed their intention to relocate 20,000 refugees in 2022, while also admitting 40,000 Afghans at risk between 2021 and 2022.<sup>66</sup> In light of the increasing global demands, it is imperative for EU member states to promptly reassert their dedication to the resettlement of refugees and take measures to avoid any further reduction in such initiatives. As per a joint statement issued by seven NGOs, there exists a pressing necessity for the EU to revitalise and expand their endeavours pertaining to the relocation of refugees.<sup>67</sup>

## **Section 3**

### **3.1 The New Pact on Asylum and Migration**

After the 2015–2016 refugee crisis, mixed migration and movement of refugees towards the EU increased the complexity and intensified the need for structures of cooperation and solidarity. In terms of immigration and refugee policy, the EU and the Member States' collaboration have greatly increased. In

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<sup>64</sup>Ibid

<sup>65</sup>Ibid

<sup>66</sup>Ibid.

<sup>67</sup>Joint NGO Statement: "The EU has a duty to revive and expand refugee resettlement", June 2022, <https://www.share-network.eu/articles-and-resources/joint-statement-the-eu-has-a-duty-to-revive-and-expand-refugee-resettlement>

reaction to the existing circumstances in the Moria receiving camp, Member States had demonstrated responsibility sharing and solidarity in action. The Commission's decision to collaborate with national authorities on a joint pilot for a new receiving centre demonstrated how collaboration can be most effective when it is most practical. The Commission established an integrated task force with the assistance of Member States and EU Agencies to facilitate the execution of this joint pilot.

Temporary solutions however, are not sustainable, and both in terms of execution and design, there are still significant fundamental flaws. A lack of implementation and inconsistencies across national asylum and return policies have revealed inefficiencies and sparked questions about justice. Additionally, stronger coordination on migration is required with partners outside the EU in order for the EU's immigration and refugee policies to function effectively.<sup>68</sup> However, despite the major significant developments with regard to policy frameworks of the EU asylum system; there remains a void in the practical application of these same legal instruments and fulfilling of pledges and promises.

If we talk of the CEAS or the functioning of the multi-level governance of migration in EU member states, we can observe rapidly changing legislations, high complexity, a very diverse institutional landscape with overlapping authorities, where wide variety of actors with different competencies are involved. For instance, in certain countries the courts are heavily involved while in some countries the police, UN agencies and local or international NGOs. The several drawbacks and inefficiencies (discussed previously) of the current asylum system of the EU, as well as the shortcomings of the Dublin Regulation, more highlighted after the 2015 migration crisis led the European Commission to reform the asylum system in 2020 through an all-

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<sup>68</sup>European Commission, 2020

encompassing approach to migration and asylum policy based on three important pillars:

- efficient asylum and return procedures,
- solidarity and fair share of responsibility and
- strengthened partnerships with third countries

The European Commission released its new work plan in January 2020 where it introduced a New Pact on Migration and Asylum that would recognise the interconnectedness of internal and external aspects of migration and create more resilient, humane, and efficient migration and asylum systems. This proposal for a new pact was included in the political guidelines that Ursula von der Leyen, the candidate for President of the European Commission, presented during her campaign. She also emphasised the need to restart the Dublin system reform, strengthen Frontex, overall reform of CEAS on the basis of secure external borders and support for Member States under growing strain, and forge better ties with origin and transit countries. The President of the Commission reaffirmed her commitment in her speech at the European Parliament Plenary Session in November 2019, to ensuring that the EU will always provide shelter to those who need protection while ensuring that those who do not have the right to stay are sent back to their country of origin.<sup>69</sup>

The New Pact on Migration and Asylum represented an opportunity to effectively tackle the challenges confronting the European Union and its Member States. It aimed to establish a comprehensive framework that effectively managed and regularised migration in the long run, while upholding European values and adhering to international legal principles. The New Pact acknowledged the principle that no Member State should bear an inequitable burden and emphasised the need for all Member States to

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<sup>69</sup> “The Common European Asylum System and current issues”, Annual report by the European Union Agency for Asylum (EUAA), 2021

consistently contribute to solidarity. The strategy offered is comprehensive in nature, as it encompasses several policy domains such as migration, asylum, integration, and border control. It acknowledged that the overall efficacy of the approach relies on advancements made in all these areas. The objective of this initiative was to enhance the efficiency and effectiveness of migration processes, as well as to strengthen the governance of migration and border policies. This could be achieved via the use of advanced IT systems and the establishment of more impactful agencies. Additionally, its objective is to mitigate the use of hazardous and unregulated routes while advocating for the establishment of sustainable and secure legal channels for those seeking refuge. During the development of the New Pact, the Commission engaged in focused discussions at both high-level and technical levels with the European Parliament, all Member States, and various stakeholders from civil society, social partners, and business organisations.<sup>70</sup>

Despite efforts, negotiations have remained mostly stalled since the unveiling of the New Pact in 2020. Member states are unable to achieve an agreement on critical matters, such as establishing equitable rules for regulating migration into the EU zone. In the absence of a single strategy, Member States have continued to act separately on irregular migration, finding common ground only in the pursuit of more effective border controls. In this context, the Covid-19 epidemic further hampered attempts to offer legal and safe passage for asylum seekers seeking to enter Europe.<sup>71</sup>

### **3.2 Border Management by the EU to deal with Irregular Migration**

The first step towards a common external border management policy was taken on 14 June 1985 when five of the then ten Member States of the

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<sup>70</sup> Ibid

<sup>71</sup> Gabriella Sanchez and Achilli Linekar, “Stranded: the impacts of COVID-19 on irregular migration and migrant smuggling”, Policy Briefs, *Migration Policy Centre*, 2020 <http://hdl.handle.net/1814/67069>European University Institute.



European Economic Community signed an international treaty, the so-called Schengen Agreement that led most of the European countries to abolish their national borders in order to build a Europe without borders. The Schengen Area is a region characterised by the absence of border controls, established via the implementation of the Schengen *acquis*, which refers to the collective agreements and regulations. At present, this area encompasses 26 nations in Europe.<sup>72</sup> The Schengen agreement allowed the EU to eliminate national borders. However since 2014, when a large influx of migrants had arrived at the borders, security concerns were on the rise, necessitating the EU's adherence to border control procedures. Security cannot be sacrificed in order to eliminate internal border checks. Therefore, the EU members resolved to work together to achieve the dual goals of increasing security through more effective external border controls and facilitating entry for people with a legal interest to enter the EU territory, because checking is not carried out at the borders between Schengen members.<sup>73</sup> Through the Visa Information System, the Schengen Area safeguards the protection of its inhabitants and tracks down fraudulent travel papers that are used to enter the zone. It is connected to all visa-issuing consulates of the Schengen nations as well as their entire exterior border crossing points, and it consists of two different systems: the VIS central database and an Automated Fingerprint Identification System (AFIS). At certain border crossings, the VIS enables border guards to verify that the holder of a biometric visa is truly the applicant.<sup>74</sup> Schengen Information System and European Dactyloscopy (EURODAC) are other mechanisms ensuring safety of the area. The role of Frontex, the European Border and Coast Guard Agency has become increasingly important since the 2015 migrant crisis. Frontex is contacted for assistance when the situation

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<sup>72</sup> Factsheets on the European Union, 2020

<sup>73</sup> Ernst Hirsch Ballin, Emina Ćerimović, Hubb Dijkstra and Mathieu Segers, "Variation in Asylum, Migration and Border Control" in *European Variations as a Key to Cooperation*, Research for Policy, Springer, Cham, 2020 [https://doi.org/10.1007/978-3-030-32893-1\\_8](https://doi.org/10.1007/978-3-030-32893-1_8)

<sup>74</sup> Factsheets of the European Union, 2020

along the EU's external borders deteriorates. The agency was established in 2004 and has its headquarters in Warsaw. Greece is the most recent EU member to contact the agency, asking for assistance to fortify its border with Turkey, especially when 'many non-EU nationals [are] trying to enter its territory illegally,' emergency Frontex operations are intended to relieve pressure on an EU member state.<sup>75</sup>

The EU has strengthened border controls along its southern and eastern borders in tandem with externalising border controls and refugee obligations to third nations. For instance, Europe has consistently reduced search and rescue operations and criminalised NGO's involved in SAR operations on the grounds that these could attract migration on a large scale, resulting in soaring death rates at sea. Europe also collaborated with Libya's coast guard in intercepting and returning migrants and refugees to Libya.<sup>76</sup> When the Mediterranean naval force of the EU switched from *Operation Sophia* to *Operation Iridi* in 2020, search and rescue missions stopped taking place. While maritime law enforcement in the Mediterranean is the major focus of both marine operations, *Sophia* was also entrusted with providing emergency relief to boats in distress and is credited with saving some 50,000 migrants and refugees over the course of its five-year mission. *Iridi*, its successor, had not attempted any rescues during the first year of its existence.<sup>77</sup>

Meanwhile, several EU Member States not just steadily escalated their border security and pushback in recent years, but they have also subjected migrants and refugees to incarceration, systematic mistreatment, intimidation, and beating. In Greece, these practices have reportedly become the norm among

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<sup>75</sup> <https://www.dw.com/en/frontex-to-boost-eu-border-mission-in-greece/a-52628699>

<sup>76</sup> Jane Linekar and Luigi Achilli, Security costs: How the EU's exclusionary migration policies place people on the move toward Italy and Greece at greater risk – a quantitative analysis, ADMIGOV Deliverable 5.2, Geneva: *Danish Refugee Council/Mixed Migration Centre*, <http://admigov.eu>

<sup>77</sup> *Ibid*

law enforcement officers.<sup>78</sup> Since the implementation of the EU-Turkey Statement in 2016, Greece's border policy has steadily hardened, as evidenced by increased use of new technologies such as thermal cameras, drones, sound cannons, and lie detector tests to deter migrants and remove them from Greek territories as well as pushback where refugee boats are intercepted at sea, with refugees placed in life rafts and towed back to Turkish waters. Most significantly, migrants and refugees are still being imprisoned in deplorable and unsafe circumstances for lengthy periods of time. A number of studies and research papers have clearly demonstrated how imprisonment has been a key component of the Greek government's plan (particularly after 2015) to discourage migrants from entering the country.<sup>79</sup> Starting with Italy, the practice of 'chain pushback' has resulted in the nation routinely expelling migrants and refugees to Slovenia, from which they are forcefully removed to Croatia and finally to Bosnia.<sup>80</sup> There have been reports in Croatia of law enforcement forcefully subjecting migrants and refugees to violence, humiliation, maltreatment, and even sexual assault.<sup>81</sup> According to a recent report by Protecting Rights at Borders (PRAB):

“...since 2016, legal pathways for onward movement to the EU have been gradually limited, leaving an increased number of people stranded in limbo in Greece, Italy and in countries in the Balkans. Facing uncertainty around their status, access to rights and services, and limited integration options, refugees and migrants are continuously exploring perilous routes and turning to smuggling networks, avoiding institutional mechanisms”<sup>82</sup>

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<sup>78</sup> Amnesty International, “Greece: Violence, Lies, and Pushbacks”, 2021 [https://www.amnesty.eu/wpcontent/uploads/2021/06/Greece\\_Violence.Lies\\_.Pushbacks\\_AI-Report22062021.pdf](https://www.amnesty.eu/wpcontent/uploads/2021/06/Greece_Violence.Lies_.Pushbacks_AI-Report22062021.pdf).

<sup>79</sup> Border Criminologies, “Landscapes of Border Control: Greece”, 2022, University of Oxford, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centrebordercriminologies/blog/2020/01/landscapes-border>

<sup>80</sup> Danish Refugee Council, “Push back of responsibility: Human Rights Violations as a Welcome Treatment at Europe's Borders”, 2021, [https://drc.ngo/media/mnglzsro/prab-report-january-may-2021-\\_final\\_10052021.pdf](https://drc.ngo/media/mnglzsro/prab-report-january-may-2021-_final_10052021.pdf)

<sup>81</sup> Linekar and Achilli, Security Costs, n.76, p.13

<sup>82</sup> Protecting Rights At Borders (PRAB), “When there's a will, there's a way to protection”, 2022, <https://helsinki.hu/en/when-theres-a-will-theres-a-way-to-protection-quarterly-report-on-push-backs/>

The concept of ‘integrated border management,’ which incorporates a ‘four-tier access control model,’ took place in the European Union. The method entailed actions to be taken in other countries, collaboration with surrounding nations, border monitoring control inside the Union, and prompt removal of migrants lacking proper paperwork. In order to secure pre-entry inspections before departure, standard visas and carrier sanctions have been adopted. Immigration liaison officers in the regions of origin and transit have helped with this work. Under the direction of the Frontex agency, joint patrols were conducted in both territorial waters and on the high seas to monitor the Union’s external frontiers. According to the Schengen Borders Code, migrants are subject to ‘thorough checks’ when they arrive at the border. The Dublin II Regulation specifies standards for identifying the State in charge of its inspection in the event that an application for international protection is submitted. However, even before the merits of the application are taken into account, such obligation might be shifted through its application to ‘safe third countries’<sup>83</sup> outside the EU. Individuals who fail to fulfil the prescribed entry criteria or have their asylum applications rejected are ultimately repatriated to third countries through the implementation of readmission agreements. The objective of this regulatory framework is to comprehensively monitor the entirety of migrant movements, effectively governing each successive step as they progress towards the European Union.<sup>84</sup>

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<sup>83</sup> The concept of ‘safe third country’ originated in the 1980s and 1990s among several European Union member states. It refers to third countries where there is typically an assumption that those seeking asylum would not face persecution or *refoulement*. As a result, asylum applications might be returned to these countries on a quasi-automatic basis. The aforementioned notion has been employed as a procedural mechanism, enabling State authorities to reject petitions through expedited procedures on grounds of being ‘unfounded’ and ‘inadmissible’, therefore providing justification for prompt expulsion.

<sup>84</sup> Guild and Lax, n.22

## Section 4

### 4.1 EU and Mixed Migration: A Case Study of Greece and Turkey

Greece and Turkey are both primary transit routes for irregular mixed migration to Northern Europe. Turkey has been the main route for migrants trying to cross into Europe, especially since the beginning of the civil war in Syria. Therefore it is obvious that a large percentage of migrants in Turkey comprise of Syrians.<sup>85</sup> From a historical perspective, it can be observed that the Republic of Turkey had its initial significant wave of non-Turkish migrants during the Second World War. This wave consisted of individuals seeking temporary shelter, originating from Greece, Bulgaria, and the Dodecanese islands. European Jews also migrated to Turkey, either in search of temporary refuge or as part of their migration towards Palestine.

In the 1990s, Turkey saw significant waves of migrants and asylum seekers who were escaping from events occurring in Southeast Europe. Following the events of 1989, a considerable number of individuals of Bulgarian Turkish descent, who were escaping the oppressive dictatorship in Bulgaria, sought sanctuary in Turkey.<sup>86</sup> During the period spanning from 1992 to 1994, a considerable number of around 25,000 individuals identifying as Bosnian Muslims sought temporary asylum within the borders of Turkey. Subsequently, in 1999, a similar trend was observed when Kosovo Albanians also sought sanctuary in Turkey. While a considerable portion of individuals who had familial connections in Turkey have chosen to return to their home countries, a notable number have decided to remain in Turkey. Turkey also had a significant influx of non-European migrants during the Iranian Revolution of 1979 and the Iran-Iraq conflict. During this period, Turkey implemented a policy that let Iranians seeking refuge from the Khomeini

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<sup>85</sup> Martin Baldwin-Edwards, "Migration between Greece and Turkey: from the "Exchange of Populations" to non-recognition of borders" in *South East Europe Review*, 2006/3

<sup>86</sup> Celia Mannaert, "Irregular Migration and asylum in Turkey", Working Paper no.89, UNHCR, 2003

regime to enter the country without a visa, granting them temporary residency.<sup>87</sup>

Discussion on Greece and Turkey relations is important to understand their response/cooperation with regard to illegal migration and asylum and which 'constitute a core component of the management of unauthorized migration flows'.<sup>88</sup> Their relation has always been more of tension and conflicts rather than that of cooperation and mutual understanding. Greece and Turkey, as members of the North Atlantic Treaty Organisation (NATO), exhibit a persistent state of tension in their bilateral relationship, notwithstanding their shared membership in the alliance. The contemporary Greek republic, in its present state, has a historical background characterised by a prolonged period of violence and conflict, since it was formerly under the dominion of the Ottoman Empire. Such tense relations have adverse consequences not only for the management of migration, but also for the protection of human rights of unauthorised migrants and individuals seeking refuge in the Eastern region. Greece and its policies towards irregular migrants has often been the subject of criticism by Turkey and both countries blame each other for sidelining human rights issues in migration management. Migrants and refugees face hardships not only during their journeys to Europe but also within Europe.

Turkey and the EU had signed a refugee deal in March 2016, which aimed to discourage irregular migration through the Aegean Sea by taking stricter measures against human traffickers and improving the conditions of more than 3 million Syrian refugees in Turkey.<sup>89</sup> But what was the main purpose of this deal? Was it solely to prevent the loss of lives and to dismantle human trafficking networks? This definitely was the reason, but the more glaring reason for the deal was to prevent refugees from reaching Europe. A mutual

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<sup>87</sup> Ibid

<sup>88</sup> "EU-Turkey relations and the migration conundrum: where does the EU-Turkey Statement stand after three years?" Atlantic Council, Turkey, May 2019.

<sup>89</sup> Ibid

agreement was reached wherein Turkey would cooperate with the EU in efforts to reduce illegal migration to Europe. This cooperation involved Turkey returning migrants who arrived irregularly in Greece and accepting irregular migrants intercepted in Turkish waters. In return, the EU committed to providing financial support to Turkey through two instalments of 3 billion Euros. These funds would be disbursed through the Facility for Refugees and allocated to projects aimed at addressing the immediate needs of refugees and host communities in Turkey.<sup>90</sup> A detailed analysis of these countries, serving as transit or destination countries or both is important in this regard. For instance, Turkey is a transit as well as a destination country hosting the largest number of refugees in the world. In 2015 Turkey became the largest global host of refugees (at the time totalling 2.7 million) as Turkey has been steadily receiving Syrian refugees since 2011. Following the arrival of over one million Syrian migrants in Europe predominantly through the Turkey-Greece sea route, and their subsequent dispersal throughout the continent in 2015, Turkey and the EU initiated a collaborative effort to mitigate the influx of refugees. This endeavour culminated into the signing of the EU-Turkey declaration on March 18, 2016.<sup>91</sup>

In recent times, Greece has emerged as a significant participant in the on-going discourse, assuming the role of a 'transit country' as migrants go to travel farther within the European Union from Greece.<sup>92</sup> Before the EU Turkey deal was signed, Turkish policy was kind of indifferent towards transiting migrants. Meanwhile, the EU is pushing and supporting Turkey to bring its asylum system in line with international standards. The country will continue to only consider applications of 'European' asylum seekers. The majority of asylum seekers and irregular migrants transiting through Turkey

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<sup>90</sup> Ibid

<sup>91</sup> Conference, 2019

<sup>92</sup> Katie Kuschminder & Jennifer Waidler, "At Europe's frontline: factors determining migrants decision making for onwards migration from Greece and Turkey", *Migration and Development*, 9:2, 188-208, 2020.

endeavor to reach Germany, the United Kingdom, the Netherlands and other Western European countries as their final destination. Those travelling by land tend to follow two main routes: (a) Iran, Iraq or Syria – Turkey – Bulgaria or Greece – the Balkans – Italy – Western Europe or (b) Iran, Iraq or Syria – Turkey – Bulgaria –Romania – Hungary – Austria – the Czech Republic – Slovakia – Germany. Another frequently used route is from Turkey’s Mediterranean or Aegean coast aboard smuggler ships heading for Greece, Italy or Southern France. Methods used to cross into or out of Turkey are: (a) land to harbour crossing, where migrants are loaded onto small boats that take them to larger ships travelling to Greece, Italy or France; (b) river crossing; (c) land-border crossing hiding in trucks; (d) border crossing with fake documents; and (e) crossing borders on foot or horse/donkey.<sup>93</sup>

Greece and Turkey have substantially different migration policies and commitments. Greece is party to the 1951 Geneva Convention on Refugees and is therefore required to accept asylum requests from nationals of all countries in the world. In contrast, Turkey is a signatory to the 1951 Geneva Convention on Refugees with a geographic restriction to nationals of European nations.<sup>94</sup> Turkey holds the position of being the European Union’s fifth most significant commercial partner, while also being a geographically advantageous location for European security. This strategic importance has been further underscored by the conflict in Syria. Anna Maria C. Bildt, a Member of the European Parliament and a member of the Joint Commission for Turkey along with being the co-chair of the Turkey Forum, aptly emphasised that Turkey is not obligated to assist Europe in addressing the Syrian crisis, the Iraq crisis, and the situation in Afghanistan. She argued that these issues are not solely ‘Turkish crises, but rather global crises’. She reiterated the importance of addressing concerns regarding the legal foundation of the EU-Turkey Statement, as well as issues related to *non-*

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<sup>93</sup>Mannaert, n.86, p.4

<sup>94</sup>Katie and Jennifer, n.92



*refoulement*, fundamental rights, child labour, and child abuse and trafficking. However, she emphasised that these concerns should be raised in an atmosphere of trust and cooperation rather than through confrontational means.

Turkey serving as a transit route to reach the West has several reasons. Turkey's geographical location between Europe, Middle East and Asia, makes it a strategic actor in terms of regional migration governance.<sup>95</sup> Historically, Turkey has always served as a bridge between East and West as well as North and South. To the east, Turkey shares a common border with regions and countries with a long history of political conflict and ethnic divisions such as the Caucasus, Iran and Iraq. On the other side are Greek islands (some of which are just a few kilometers away) and the periphery of the European Union. Other important factors include a relaxed visa policy and the relative absence of effective migration controls into and out of Turkish territory.<sup>96</sup>

#### **4.2 Situation of Irregular Migrants before the Pandemic**

The confluence of irregular migrants' status as immigrants, their socio-economic circumstances, and their status as members of racial or ethnic minorities, makes them particularly vulnerable. Before the pandemic, Europe's immigration rules had severely limited irregular migrants' access to services, notably those pertaining to necessities of life like housing, education and healthcare.<sup>97</sup> According to a 2015 mapping study of these migrants' rights to healthcare and education in Europe, only emergency healthcare was being provided to irregular adult migrants across all EU Member States, while higher levels of care were only accorded in some states or in relation to specific situations. Clearly, EU Member States had generally restricted the access of

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<sup>95</sup>Seçil Paçacı Elitok, "Turkey's Migration Policy Revisited: (Dis) Continuities and Peculiarities", October 2018

<sup>96</sup>Mannaert, n.86, p.5

<sup>97</sup> May Goodfellow, "Hostile Environment: How Immigrants Became Scapegoats", May 2020, VERSO.

irregular migrants to public services. Legally, Member States of the EU would not accept the presence of third- country nationals without residency rights and must expel them to another member state. This was the foundation for the exclusion of irregular migrants. Thus, policies on irregular migration developed a system of incentives to encourage return (e.g. assisted voluntary return packages) and disincentives to stay for irregular migrants, including setting up a 'hostile environment' by denying these migrants access to most public services.<sup>98</sup>

Exclusion of irregular migrants from the formal labour market and criminalisation of irregularity have frequently resulted in exploitative workplace situations that perpetuate their marginalisation.<sup>99</sup> Therefore, they have been dependent on jobs with unstable schedules and poor wages, particularly in situations that are especially exploitative in the agricultural, care, and other sectors.<sup>100</sup> They lived in poverty without a place to call home, and were in overcrowded and unsanitary conditions, given their absence from the official work market and social support.<sup>101</sup> Moreover, from being exploited at the hands of the ruthless smugglers to staying in overcrowded detention camps; these migrants were easily susceptible to various kinds of physical and mental illness. Lack of food and nutrition, proper source of income, a safe place to reside and an overall uncertainty about their future- all these factors caused high levels of anxiety among migrants.

An added misery in the form of a deadly and highly contagious virus had simply led to 'crisis within a crisis.' Dr. Adam Coutts, a public health specialist at Cambridge University who focuses on the Middle East, mentioned that refugees are especially vulnerable to the corona virus or other diseases due to "high geographical mobility, instability, living in overcrowded conditions, lack

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<sup>98</sup> Marie L. Mallet-Garcia and Nicola Delvino, "Re-thinking exclusionary policies: the case of irregular migrants during the COVID-19 pandemic in Europe"

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Ibid

of sanitation and WASH (waters, sanitation and hygiene) facilities, and lack of access to decent healthcare or vaccination programmes in host communities.”<sup>102</sup> The Reception and Identification Centre of Moria (RICM) located on the island of Lesbos has gained attention as one of the most infamous receiving camps for those seeking refuge. The Greek state authorities are responsible for its operation, with substantial involvement from UNHCR in its actual management. The RICM exhibits a ratio of around one toilet per 100 individuals, one shower every 120 individuals, and one medical practitioner per 10,000 individuals.<sup>103</sup> The locality is afflicted by the dissemination of waste materials, coupled with an insufficiency of potable water resources. The population density within the RICM, encompassing both the interior and outside regions, exceeds 10,000 individuals per square kilometre.<sup>104</sup>

During the pandemic, the asylum seekers were confronted with limited access to health care and access to government support. Whilst undocumented migrants and asylum seekers tried to grapple with these challenges, a bigger fear remained; the fear of deportation. The fear of deportation made undocumented migrants and asylum seekers reluctant to share vital information about their health, and even ask for basic medical assistance.’<sup>105</sup> Furthermore, strict lockdown amidst the pandemic prevented many migrants, including migrant workers from reuniting with their families. They were stranded and left with no other option but to wait till lockdown ends, so that they can continue their journey forward. Not being able to meet or contact family members for months transformed into another level of mental torture for the migrants.

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<sup>102</sup> Eric Reidy, “How the coronavirus outbreak could hit refugees and migrants;” *The New Humanitarian*; 27 February 2020

<sup>103</sup> Jussi S. Juahainen, “Biogeopolitics of COVID-19: Asylum-related migrants at the European Union Borderlands;” *John Wiley & Sons Ltd on behalf of Royal Dutch Geographical Society*; May 2020

<sup>104</sup> Ibid.

<sup>105</sup> See <https://www.ies.be/content/covid-19-welfare-undocumented-migrants-asylum-seekers-and-question-return>

Turkey, as the world knows, hosts millions of undocumented migrants from Syria, Afghanistan, Iraq and other neighbouring countries. According to the UNHCR, in 2014 Turkey became the country hosting the largest number of refugees in the world.<sup>106</sup> In Turkey, there are often two distinct healthcare pathways available to those falling under the categories of temporary protection and irregular migration. Individuals who are granted temporary protection are eligible to receive free healthcare services at primary care facilities and hospitals, but irregular migrants do not have access to these benefits.

On 13<sup>th</sup> April 2020, a Presidential Decree was enacted as a response to the pandemic outbreak. This decree stipulated that individuals seeking medical assistance at hospitals due to suspected cases of Covid-19, irrespective of their social security coverage, would be provided with complimentary access to personal protective equipment, diagnostic testing, and medical treatment. Nonetheless, there exists a persistent danger of potential reporting to law enforcement agencies about irregular migrants and refugees who are officially registered in provinces other than their current location. Therefore, the potential threat of deportation resulted in migrants and refugees displaying increased hesitancy when seeking medical assistance from public healthcare facilities.<sup>107</sup> This was one area where there was an urgent need for measures and proper policies to eliminate any kind of threat to irregular migrants. Along with accessing healthcare facilities, there were other factors like hygiene and nutrition which were equally important in supporting a strong immune system to fight the virus. Yet, the living conditions of migrants in camps did not sufficiently provide the necessary resilience to confront the outbreak.

Migrants who were hard-hit by the economic crisis could not afford to ‘stay at home.’ Struggling to survive in tough times also meant that migrants also

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<sup>106</sup> UNHCR, 2014

<sup>107</sup> Kemal Kirişci ; M. Murat Erdoğan; “Turkey and COVID-19: Don’t forget refugees;” Brookings; April 20, 2020

cannot risk losing their jobs. Fearing a confirmed COVID-19 case and ultimately the risk of losing sustenance, along with ‘social exclusion’, ultimately increased the risk of spread of the contagious virus. Language was always a barrier in this region and after COVID-19, the problem had only aggravated, bringing in newer challenges to the migrants. Lack of accurate information reportedly caused a lot of confusion which, inadvertently, led to more complicated health problems among refugees and migrants because they could not seek medical assistance when needed, also for non-COVID related health issues. This not only entailed the risk of spreading the virus if infected, but also of worsening other medical conditions and more expensive treatment in the future.<sup>108</sup>

#### **4.3 Policies of Protection after the Pandemic**

After the pandemic struck the entire globe, the vulnerable migrants arriving at the borders of Greece and Turkey were left more helpless with minimum support and cooperation from State authorities. The displaced communities were put at a greater risk both in terms of their health and the already dire situation which they have been facing. Greece’s strong initial response to the pandemic did help in averting a humanitarian disaster in its refugee camps. However, along with the praise came critical reports of Greek authorities using aggressive, illegal tactics to keep asylum seekers and migrants away.<sup>109</sup> Even the EU-Turkey Statement was based on the assumption that the influx of refugees into the EU is a security threat. The principle of *non-refoulement* that prohibits states to return individuals to a country where they would be at risk of serious human rights’ violations, is binding on all those countries — including Greece and Turkey—which are signatories to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees or the 1984 Convention Against Torture. But the

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<sup>108</sup> Simon Verduijn, “Concerns and Confusion: Afghan Refugees and Migrants in Turkey Face COVID-related Challenges Every Day”, *Mixed Migration Centre*, 2020, [www.mixedmigration.org](http://www.mixedmigration.org)

<sup>109</sup> Issue Brief, UNHCR

incidents of violent pushback and strict border controls portrayed that both countries were simply turning a blind eye to these principles.<sup>110</sup>

Greece used forceful repatriation measures in response to the significant arrival of migrants at the Turkish-Greek border. It denied admission to around 35,000 refugees, temporarily halted the acceptance of new asylum applications for duration of one month, and declared the suspension of asylum services in light of the Covid-19 outbreak.<sup>111</sup> It should be noted here that looking at migration primarily through the security lens is a fallacy, because this leads to restrictive policy measures instead of humanitarian ones.

## **Section 5**

### **5.1 Assessing EU Solidarity amidst Political Crisis**

At present, the EU member states are not taking sincere efforts to prevent loss of lives pertaining to irregular crossings. In light of this, false beliefs about the effects of global migration have rather polarised politics in EU Member States and given rise to populist and racist political movements throughout Europe. Contrary to what the media and right-wing politicians assert, refugees do not apply for asylum in order to get social security benefits, but rather to improve their lives and find safety. In fact, most refugees wish to integrate into society and contribute to the economy of the asylum country. Political divisions between and within the national and supranational levels had occurred as a result of the EU's incapacity to create a cogent response to the migrant crisis during 2015–17. The inter-institutional discussions on the revision of the Dublin Regulation, which were stuck in an impasse over whether to replace the 'state of first entry' provision with a forced relocation mechanism to distribute asylum seekers across EU member states, were the main examples to support such disagreement.

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<sup>110</sup> Ibid

<sup>111</sup> Daniela Guggenbühl, "EU-Turkey Statement Four Years On: Success or Failure?" July 2020, <https://en.rechtverblueffend.com/post/eu-turkey-statement-four-years-on-success-or-failure>

The Covid-19 outbreak had put solidarity of EU member states to test, highlighting major weaknesses in EU migration policy and the EU's limits in the face of disaster, exacerbating these political cleavages.<sup>112</sup> The EU's governance on migration is growing more disjointed, and at the same time is getting harsher on undocumented immigrants. Due to the increased perception of irregular migrants as disease spreaders, the pandemic had also led to the introduction of more stringent immigration policies in the majority of EU member states. For the duration of the health emergency, Italy and Malta, for example, have prohibited those who have been rescued at sea from entering their ports. Both governments then announced that migrants saved in the Mediterranean would be isolated at sea to stop the virus from spreading, which drew condemnation from several NGO's and advocates of migrant rights.

The atrocities inflicted upon the migrants had become common in Greece and in the neighbouring islands. Instead of putting the migrant issue on the table, the authority seemed to be more concerned regarding its own political gimmicks and selfish agendas. The Wire reported:

“...they are part and parcel of a wider strategy that capitalizes on the rampant xenophobic political climate in Greece. This atmosphere has culminated in violent attacks on refugees at the Greek islands and at the Greek-Turkish border at Evros this March. The erection, in early July, of a floating barrier—essentially an artificial border, almost 2,700 meters long and more than a meter high — northeast of the island of Lesbos falls within the same logic of deterrence. Little regard is shown for human suffering, or even for life itself.”<sup>113</sup>

It is widely accepted that there was the existence of a ‘dilemma’ which authorities of host countries were trapped in at the time of pandemic. They were stuck between the decision that whether they should save their people from contracting the virus, or save the vulnerable migrants from being stranded on the island. However, this dilemma was not just during the

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<sup>112</sup>Nadia Petroni, “Assessing the impact of Covid-19 on the EU's response to irregular migration”, 23<sup>rd</sup> September 2020, <https://blogs.lse.ac.uk/europpblog/2020/09/23/assessing-the-impact-of-covid-19-on-the-eus-response-to-irregular-migration/>

<sup>113</sup> Rosa Vasilaki, “Greece Is Dropping Migrants into the Sea – And Europe Is Turning a Blind Eye;” The Wire; September 1, 2020

COVID-19 crisis; it was always there. From a normative perspective, dilemmas arise because of certain constraints: whether an action is politically feasible or not and the public attitude that can arise from political decisions. This dilemma can never be fully resolved; however it can be addressed in some way or the other. The key challenge when it comes to protecting the fundamental rights of migrants in general is the tension between protecting the rights of irregular migrants and immigration control policies and laws. This is manifested in the EU charter where irregular migrants do have access to various rights, but they are often discouraged to come forward to claim those rights. The reason is precisely that even if they are successful in their claim, the subsequent outcome is deportation. There is a structural link between protecting rights on one hand and removal from the territory on the other. The challenge therefore is to make protection meaningful for those whose immigration status makes them liable to deportation.

Following a considerable drop in the number of persons attempting to reach the EU's external borders irregularly in recent years, the trend has actually reversed since 2021. Frontex estimated that around 331,000 irregular entries will be identified at EU external borders in 2022 which actually happened; and it indicated a 65% rise over 2021 and was the largest since 2016.<sup>114</sup> In 2021 and 2022, the Western Balkan and Central Mediterranean migration routes into the EU were the most active. The number of unauthorised border crossings detected at the EU's external borders reached approximately 80,700 in the first four months of 2023. In 2022, five migrants perished on average everyday while attempting to cross the Mediterranean to reach Europe.<sup>115</sup> This makes it evident that legislative frameworks dealing specifically with irregular migration require a revamp as well as complete solidarity among EU member States. Pertaining to a recent incident of

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<sup>114</sup> Costica Dumbrava, Katrien Luyten and Anita Orav, "EU Pact on Migration and Asylum State of Play", European Parliamentary Research Service (EPRS), June 2023

<sup>115</sup> Ibid



hundreds of migrants drowning off the coast of Greece in June 2023, the United Nations agencies have called for ‘urgent and decisive action’ to be taken by the European Union to prevent further deaths in the Mediterranean. UNHCR Assistant High Commissioner for Protection, Gillian Triggs also rightly mentioned in her statement: “The EU must put safety and solidarity at the heart of its action in the Mediterranean.”

The EU has approved significant changes to its legislation governing immigration and asylum, including fines of €20,000 (£17,200) per person for members that refuse to accept migrants. Interior ministers reached an agreement on a ‘historical’ new strategy after hours of difficult talks in Luxembourg and years of conflict. As part of a last moment compromise, it was decided that member states, not the EU as a whole, would decide which nation is ‘safe’ for migrants who have been sent away because they were ineligible for asylum. Countries will be required to demonstrate a ‘connection’ with the nation to which any immigrant is moved, although the member state might define this connection. This would provide each member country with flexibility on whether they can return migrants to third countries that not every EU nation might agree is a safe haven.<sup>116</sup>

## **5.2 Crisis of Solidarity**

It is crucial to highlight the possible weaknesses of the CEAS pertaining to the fact that it was not the 2015 migrant crisis that initially exposed the structural weaknesses in the CEAS and the stages of asylum processes in the EU. Such ‘deficiencies (both legal and operational) are inherent to the very nature of the CEAS.<sup>117</sup> However, the detailed discussions on the asylum procedures of

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<sup>116</sup> “UN agencies seek ‘decisive action’ from EU after Greece tragedy”, Al Jazeera, <https://www.aljazeera.com/news/2023/6/17/un-agencies-seek-decisive-action-from-eu-after-greece-tragedy#:~:text=The%20International%20Organization%20for%20Migration,plan%20for%20Mediterranean%20migration%20route>.

<sup>117</sup> Hanne Beirens, “Cracked Foundation, Uncertain Future Structural weaknesses in the Common European Asylum System”, Migration Policy Institute, March 2018

reception and resettlement in the earlier section bring to light a very pertinent fact that the weakness actually lies somewhere else: in the absence of solidarity among EU member states.

Let us first articulate some of the possible weaknesses of the CEAS. The shortcomings of the CEAS are distributed across the four stages of the asylum system, i.e registration, reception, asylum procedures, and adjudication, but they are inextricably linked, in the sense that delays and anomalies in one stage have repercussions on others. Certain Member States have been unable or unwilling to register all people who enter their territory at the registration stage, owing to migrants' unwillingness to produce fingerprints at times and a lack of capacity at others. Several national governments fail to put EU law obligations into practise during the reception stage, with some asylum systems chronically underinvested and many without the design flexibility to respond to shifting intakes. Under the strain of an increasing number of applications, some Member States have also struggled to apply the asylum procedures outlined by the CEAS in a timely and consistent manner, resulting in 'growing backlogs, long wait times, and inconsistencies in which type of asylum procedure is applied to which cases—both between and within individual Member States.'<sup>118</sup>

Finally, Member States differ greatly in how they adjudicate asylum requests, with applicants of a common nationality almost guaranteed to get refuge in one Member State but just a tiny chance in another. Afghans, for example, had a recognition rate of 1.7% in Bulgaria in 2016, yet 97.0% in Italy the same year.<sup>119</sup> The consequences of these flaws are far-reaching. When Member States fail to implement tough legal measures, a gap between law and practise emerges and deepens, resulting in increasingly worse situations for asylum seekers as they pass through inefficient systems. Delays in registering or

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<sup>118</sup> Ibid

<sup>119</sup> Ibid

adjudicating asylum requests might prevent applicants from gaining access to vital services such as health care and education. These delays can have a significant influence on the capacity of persons granted refuge to assimilate into the host society. Inefficient and uneven refugee systems have also caused European citizens to lose trust in their governments' ability to handle asylum flows, resulting in crisis-driven choices which counter the very fundamental principles of the EU.

While several of the member states of Northern and Western Europe have decades of extensive expertise in designing and operating receiving systems, a significant part of Europe suffers from severe underinvestment. Successive administrations have demonstrated an inability and/or unwillingness to allocate funds required to construct receiving infrastructure (e.g., centres) and sufficiently educated workers. In other circumstances, this is only a symptom of the greater state of governmental finances (e.g., insufficient funding or corruption issues). In others countries, underinvestment is part of a more deliberate plan to keep inflows low by discouraging asylum seekers from coming or remaining in deplorable conditions. The consequent result has been a gap between reception legislation and practise that have always existed in the European Union. This financing vacuum can be partially filled by EU funds like the Asylum, Migration and Integration Fund (AMIF), that too only if Member State-level action is present. In order to increase reception capacity, EU actors will need to acquire political pledges from the countries receiving these funds. They will also need to develop a monitoring system to monitor Member States' compliance with their obligations. The European Union Asylum Agency (EUAA), which would replace the EASO, would be tasked with overseeing the effectiveness of asylum systems, including reception, and would be required to establish a procedure for disclosing risks to the European

Commission, European Council, and European Parliament and, where appropriate, activating EASO support and intervention.<sup>120</sup>

Evidently, EU's migration crisis had exposed a deficiency of solidarity among member states in their approach towards migration management. Member states along the southern border of the EU, for instance, wanted institutionalising relocation quotas and increasing shared accountability for migrant arrivals, but the Visegrád group<sup>121</sup> members rejected any kind of solidarity system. While northern and western European nations frequently underlined their greater openness to small relocations, they appeared more concerned about preventing secondary movements. The European Commission was simultaneously pressing for changes that would expand the role of what it refers to as 'safe third countries' in accepting migrants. Since the EU's relocation plans are still temporary and lack clarity in its process, these nations worry that they might end up serving as a 'holding area' for the bloc's undesirable migrants. With regard to Search and Rescue (SAR), disembarkation, or relocation- member states' approaches to cooperation on migration and asylum do not create any clear laws, practices or protocols.

The EU first started addressing the relocation of asylum seekers through a short-term, pan-European instrument with outlined norms and procedures, but it now appears to be sliding backwards to participate in relocation with less formality, fewer actors, and greater space for discriminating practises. The EU-Turkey migration deal, the Emergency Trust Fund for Africa, and other informal, locally negotiated efforts suggest that the bloc favours collaboration with third countries as well as informal, locally negotiated measures on migrant governance. SAR in Europe is now at a halt as EU members are

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<sup>120</sup> Ibid

<sup>121</sup> The Visegrád Group (V4) is a loose regional framework for cooperation among the four Central European nations of Poland, the Czech Republic, Slovakia, and Hungary. These nations are connected not only by proximity to one another and by a similar geopolitical situation, but also, and perhaps most importantly, by a shared past, present, culture, and values.

progressively delegating its management to nations on the other side of the Mediterranean.<sup>122</sup>

Coming to a further discussion on the role of member states, the European Parliament and the Council presidency had reached a broad provisional agreement in June 2018 on five proposals (reception conditions, qualifications for international protection, Eurodac, the asylum agency, and the resettlement framework), but that agreement did not secure the necessary Member States' support. The Council was unable to achieve an agreement on the revision of the Dublin and Asylum Procedures Regulations. So the only CEAS reform proposal that was enacted, is the 2021 rule on the EU Agency for Asylum (EUAA).

In order to increase returns, reduce unauthorised immigration, and support the asylum system more effectively, Member States committed to negotiating mandates for the Screening and Eurodac regulations in June 2022 and also started voluntary solidarity mechanisms. In the first half of 2022, there were over 86,000 unauthorised border crossings throughout the Western Balkans, more than three times as many as in 2021 and more than 10 times as many as in 2019.<sup>123</sup> The proposed Regulation on screening, an updated Eurodac Regulation, as well as a general strategy for the modification of the Schengen Borders Code were all agreed by the European Council in June 2022. A political Solidarity Declaration creating a temporary solidarity mechanism was backed by 18 Member States (together with Norway, Switzerland, and Liechtenstein) in an effort to address the migration challenges that the

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<sup>122</sup> Shoshana Fine, "All at Sea: Europe's Crisis of Solidarity on Migration", Policy Brief, *European Council on Foreign Relations*, October 2019

<sup>123</sup> European Commission, 2022 Report on Migration and Asylum: "The Adoption of the Migration Asylum Pact Remains Key for Lasting Progress," [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_5985](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5985) (Cited in Mareci, Alina, Liliana Dumitrache, Mariana Nae, Anca Tudoricu, and Alexandra Cioclu. 2023. "A Qualitative Exploration of Experiences of Asylum Seekers and People with Refugee Backgrounds in Accessing the Education System in Romania" *Sustainability* 15, no. 5: 4120. <https://doi.org/10.3390/su15054120>)

Member States of First Entry were facing. In December 2022, the Council modified its negotiating mandates for three proposals from the CEAS package based on the 2018 preliminary agreement.<sup>124</sup> Those proposals were ‘a regulation establishing a Union Resettlement Framework, a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, and the recast of the directive laying down standards for the reception of applicants for international protection.’<sup>125</sup> By June 2023, the European Parliament accepted reports on most of the reform proposals, with the exception of the draft report on the Schengen Borders Code, which is yet to be voted upon, and the draft report on the proposal on migration instrumentalisation, which is still being developed. During the same period, the Council adopted general approaches for proposals on migration management and the asylum procedure, which is expected to unblock the legislative process and potentially lead to the reform being completed before the next European elections in June 2024, the target which has been agreed upon by co-legislators.<sup>126</sup>

### **5.3 EU Solidarity during the Ukraine Refugee Crisis**

The Ukraine crisis brought forth a novel perspective on solidarity, wherein refugees were afforded the ability to migrate, their agency was acknowledged, and they were encouraged to rely on diaspora communities. This evolution has predominantly yielded good outcomes, warranting consideration in the formulation of alternative approaches towards responsibility sharing and solidarity within the EU’s refugee policy.

The EU activated the Temporary Protection Directive, established a Solidarity Platform, and carried out a coordinated response in reaction to the violence in Ukraine and the extraordinary number of people fleeing for safety. In order to

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<sup>124</sup> EPRS, n.114, p.4

<sup>125</sup> Ibid

<sup>126</sup> Ibid

reduce the strain on national asylum procedures, the EU implemented a temporary protection programme on 4<sup>th</sup> March 2022. These include the actual temporary protection mechanism, 523 million euros in humanitarian aid, assistance with civil protection for Ukraine, Poland, the Czech Republic, Slovakia, Moldova, and the UNHCR, financial and technical assistance for member states hosting refugees, and assistance with border management for EU nations as well as Moldova. Around 4.7 million Ukrainian residents enrolled for temporary protection or comparable programmes in the EU.<sup>127</sup>

Following Russian invasion in Ukraine in February 2022, a considerable influx of individuals affected by the conflict started their migration towards nearby countries that are members of the European Union. The EU has implemented robust and often harsh measures to prevent the entry of asylum seekers from non-European regions, even when they possess compelling grounds for refugee status. However, in the instance of Ukraine, prompt actions were taken to formalise the status of the recently arrived individuals. Ukrainian refugees were granted visa-free entry into the EU, enabling them to exercise their rights of residence and employment for a maximum duration of three years. Moreover, they were afforded the freedom to relocate between different member states within the EU.<sup>128</sup> In 2022 on World Refugee Day (20<sup>th</sup> June), about 78% of respondents to an annual online survey of over 20,500 individuals in 28 countries indicated that persons fleeing violence or persecution should be entitled to seek asylum in other nations. The improvement from the survey's 2021 score of 70% is most likely attributable to the international community's rallying support for Ukraine in 2022.<sup>129</sup>

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<sup>127</sup> Alina Mareci, Liliana Dumitrache, Mariana Nae, Anca Tudoricu and Alexandra Cioclu, "A Qualitative Exploration of Experiences of Asylum Seekers and People with Refugee Backgrounds in Accessing the Education System in Romania", *Sustainability* 15, no. 5: 4120, <https://doi.org/10.3390/su15054120>

<sup>128</sup> Chris Horwood, "Resisting the Extreme", Report by Mixed Migration Centre, 2022.

<sup>129</sup> Ipsos, "World Refugee Day 2022: 78% globally agree that people should be able to take refuge in other countries" 20th June 2022 (Cited in Horwood, MMC, 2022)

The disparity in the reception and support provided to Ukrainian refugees, as compared to the measures implemented by the international community backed by security forces, to discourage asylum seekers from other crisis zones, has garnered severe condemnation. Discrimination was observed towards individuals of non-Ukrainian origin who sought refuge outside of Ukraine. Moreover, instances of prejudice were seen in many locations, including the US-Mexico border, when a considerable number of Ukrainian individuals attempted to gain admission into the United States. At the border, immigration authorities selectively deviated from established protocols to grant admission to Ukrainian individuals, while concurrently rejecting access to a significant number of Mexican, Central American, Haitian, and other refugee populations.<sup>130</sup>

The UNHCR promptly hailed this development as evidence that the global community is capable of effectively handling the rapid influx of a large number of refugees and addressing their requirements through a combination of crisis management and burden-sharing. Other commentators suggested that the data presented was indicative of a positive trend in countering the severe issue of indifference towards refugees. Furthermore, it demonstrated that when there is a convergence of political determination and public backing, significant achievements could be attained. However, it was promptly highlighted that the reception shown to Ukrainian refugees further exemplified the differential treatment experienced by non-Caucasian, non-European immigrants. The reaction in the Americas and other regions towards Haitian asylum seekers, both in the present year and throughout history, serves as a striking illustration. The UNHCR, along with other entities, has voiced concerns regarding what they perceive as instances of racial discrimination. They have observed that while certain countries are welcoming Ukrainian refugees, they are simultaneously implementing measures such as detention, deportation, and

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<sup>130</sup> Horwood, n. 128, p.221



negotiations pertaining to external border controls for individuals originating from sub-Saharan Africa, Afghanistan, Iran, Syria, and other regions.<sup>131</sup>

## **Conclusion**

The Ukraine refugee crisis has posed a significant opportunity for Europe to showcase its altruism, humanitarian principles, and dedication to the international refugee protection framework in every other refugee crisis in future. It has served as a pivotal juncture for introspection, prompting contemplation on whether the European population can transcend prevalent racial prejudice and hostility, and instead adopt the inclusive ethos espoused in pledges and promises. Despite fractured policy frameworks and weak asylum systems, it is still possible to have a positive response to mixed migration which upholds humanity and avoids death. Nations should open borders to accommodate individuals seeking refuge from conflicts and other forms of violence. It is imperative to minimise the imposition of unnecessary identity and security screenings. Individuals escaping conflicts should not face punitive measures for their arrival in the absence of valid identification and travel documentation. The use of detention measures should be avoided wherever feasible. Additionally, refugees should have the freedom to reunite with their family members residing in other countries. Last but not the least, communities as well as political leaders should extend a warm welcome to refugees and other migrants, demonstrating generosity and solidarity in every way possible.

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<sup>131</sup> Ibid

## CHAPTER V

### RESPONSE TO MIXED MIGRATION: LAWS, POLICIES AND ORGANISATIONS

#### Introduction

Laws and policies are important guidelines that shape the society, which would otherwise be chaotic and disorganised. Laws help prevent conflict and provide justice; policies assist in shaping a nation's/organisation's way of functioning and dealing with various complexities. International organisations are powerful players in the international arena, with influence in areas such as global governance<sup>1</sup>, peacekeeping, conflict resolution and mediation. They also aid in addressing important emerging worldwide concerns such as global health policies, monetary policies, resource depletion, climate change and most importantly, international migration. Nearly all of the political and economic concerns of the twenty-first century are now largely influenced by international organisations. The independence, impartiality, and neutrality of international organisations are their most outstanding attributes.

It is therefore insignificant to study or research on a concept or phenomenon (specifically mixed migration) without a detailed discussion on the relevant laws, policies, international organisations and the overall response concerning the variegated set of migrants (in mixed flows) while in transit, and examining how these are actually assisting nations in dealing with this complex issue. Hence, the chapter attempts to understand all the laws, policies and

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<sup>1</sup>The concept of governance refers to the act of exercising power and possessing a valid entitlement to the processes of rule-making and execution. Legitimate rights for international actors to govern are acquired either by delegation, which involves authorization from states, or through the acknowledgment of their competence or moral standing by society.

international organisations relevant to mixed migration along with a reference to the conventions and agreements through which states are obligated to protect the human rights of all migrants facing risks and vulnerabilities (irrespective of their status).

Although the ultimate responsibility for the protection of the rights of migrants lies primarily with states, the non-state actors like the international Non-Governmental Organisations (NGO's) have and are persistently working with government agencies as frontline supporters to improve current policies and services available for the vulnerable migrants in order to guarantee their safety and dignity. Both the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) have sections on mixed migration, and new institutions have begun to take shape, notably at the regional level for governing the phenomenon. The Danish Refugee Council (DRC), an NGO, established the Mixed Migration Centre (MMC) in the Horn of Africa and the Euro-Mediterranean region, where there are significant mixed migration movements, and the Mixed Migration Hub in Egypt brings together the DRC, UNHCR, the IOM, and other UN agencies as well as NGO's like Save the Children. The chapter focuses on such cooperative initiatives which demonstrate that response through various states, non-state actors and international organisations have begun to accept mixed migration as an emerging reality and also as a potential problem for global governance on irregular migration. This response has aided to a great extent in formulating policies, designing appropriate innovative programmes and gathering effective responses for ameliorating the complexities of mixed migration.

## Section 1

### The notion of Irregular Migration

Before discussing the legal instruments governing mixed migration, it is important to contemplate on some of the issues surrounding irregular migration. In Chapter III dealing with the conceptual understanding and meaning of mixed migration, the notion of irregular migration<sup>2</sup> suggested:

“...migrants, some of them who are eventually recognized as refugees, may have used irregular means to travel to, enter and stay in a particular country of safety because there was no other feasible alternative open to them in order to leave their countries of origin, precisely because of the difficulties created by their national authorities.”<sup>3</sup>

Irregular migration is unambiguously a major concern for countries of origin, transit and destination; especially when the numbers are on the rise. Migrants in irregular situation have various reasons to choose the path of escape and therefore, any legal framework for irregular migrants must acknowledge the variety of motivations for movement, and also the possibility that some migrants within a larger migratory flow would need higher standards of protection.<sup>4</sup> Within the existing framework of international standards, there is recognition of the requirements of such group of persons, including refugees and asylum seekers, those among them who have been trafficked or brought in illegally by smugglers and vulnerable groups such as minors, particularly unaccompanied minors.<sup>5</sup> In practice however, most migration flows are in a

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<sup>2</sup> The term ‘irregular migration’ or ‘undocumented migration’ has been preferred throughout in all the chapters of the thesis, since the term “illegal” denotes criminality, which in most cases might be invalid.

<sup>3</sup> Stefano Valenti “Protecting the human rights of irregular migrants: the role of national human rights structures”, *University of Padua -Interdepartmental Centre on Human Rights and the Rights of Peoples*, 2009

<sup>4</sup> Ibid

<sup>5</sup>Valenti, n.3

mixed form, which can be located along a continuum structured by the two axes (from voluntary to involuntary, and from regulated to unregulated).<sup>6</sup>

The issue of irregular migration, which had previously received minimal attention in international politics, has increasingly become a global concern since the beginning of the 21st century. The issue garnered considerable attention during the migration and refugee crisis that occurred between 2015 and 2016, hence elevating migration and displacement as key focal points within political agendas. The United Nations High-Level Summit on ‘Large Movements of Refugees and Migrants’ was convened in New York in September 2016. The primary objective of this Summit was to address the interconnected issues of migration and asylum, with the aim of establishing a foundation for the adoption of two Global Compacts for migration in 2018. The Summit was a significant milestone in the chronicles of the United Nations and in the realm of international migration. Notably, it marked the inaugural occasion where refugees and migrants were expressly addressed together, thereby acknowledging the prevailing worldwide phenomenon of mixed migration.<sup>7</sup>

The complexity of migration dynamics, particularly in the context of mixed migration, has posed significant challenges in the formulation of various laws and policies. The issue of determining those individuals who should be granted refuge and the criteria upon which such decisions should be based, is only one of various inquiries that emerge. Moreover, concerns regarding the specific benefits and rights that should be granted to particular categories of migrants post-admission are frequently posed to the governments of receiving states in instances of mixed flow. The primary concern arises from the inherent conflict between the nature of migration policy and the attributes of migratory

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<sup>6</sup> Steffen Angenendt, David Kipp and Amrei Meier, “Mixed Migration: Challenges and options for the ongoing project of German and European asylum and migration policy”, German Institute for International and Security Affairs, 2017

<sup>7</sup> Nele Kortendiek, “International Organisations in the Field: Governing Mixed Migration in and through Practice”, Robert Schuman Centre for Advanced Studies, June 2018.

movements.<sup>8</sup> As previously stated, a multitude of variables such as the need for employment, concerns for personal safety, the aspiration to reunite with family, and the pursuit of educational opportunities, may serve as the underlying motivations for migration. Consequently, a variety of policy measures are necessary to effectively tackle these concerns. Such mixed migratory patterns “amplify the need for international cooperation in refugee and migration policy, or global migration governance.”<sup>9</sup>

The different motives behind migration (discussed comprehensively in Chapter III) make it difficult to distinguish between refugees, who are forced to migrate and are entitled to protection under international law; and migrants who in the broadest sense are migrating voluntarily and on economic grounds. Mixed migration not only entails risks for the individuals involved, it also poses major challenges for the receiving countries. Since international migration flows have become increasingly mixed, it has become even more difficult to identify/distinguish refugees and asylum seekers from other international migrants. Despite all the similarities with regard to migration routes and networks along with the difficulties in clearly identifying migration motives; differing responsibilities and competences exist. For instance, members of the European Union (EU) are bound not only by international law to provide protection to refugees, but also by the European and national/state law. Thus, refugees and migrants are to be distinguished, if only, for legal reasons.

It is also necessary from a development policy perspective: refugee flows must be averted to the greatest degree possible, because they are always considered a humanitarian catastrophe. By contrast, voluntary migration is an important driving force for development. If it is well-regulated, based on fair agreements between origin and receiving countries and the rights of migrants are

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<sup>8</sup> The Migration Observatory, <https://migrationobservatory.ox.ac.uk/resources/primers/mixed-migration-policy-challenges/>

<sup>9</sup> Steffen Angenendt and Anne Koch, “Global Migration Governance and Mixed Flows Implications for Development-centred Policies”, *Stiftung Wissenschaft und Politik (SWP)*, 2017

respected, it is in the interest of all parties –the countries of origin and destination as well as the migrants themselves. For this reason, the UN members, as outlined in Agenda 2030 and the Sustainable Development Goals (SDGs), have made the decision to promote organised, secure, consistent, and accountable movement of individuals. This objective is to be achieved via the effective execution of carefully devised and well administered migration policies.<sup>10</sup>

## **Section 2**

### **2.1 International Laws and Conventions applicable to Mixed Migration**

Clearly established guidelines address the management of a wide range of migrants, encompassing migrant women, men, and children, refugees, stateless individuals, migrant workers, and migrants who are victims of trafficking. International human rights law, international labour law and standards, international refugee law, international criminal law, international humanitarian law, international consular law, and international maritime law constitute the fundamental pillars of international law that serve as the foundation for the resultant migration laws, policies, and practises.<sup>11</sup>

The modern framework of international legal obligations pertaining to individuals in need of international protection dates back to the end of World War II. The international conventions were revised and updated in response to the immense pressures that had developed in Europe since the 1930s.<sup>12</sup> With regard to ‘illegal immigration’, it will not be incorrect to mention that it is mostly driven by national policies, since those individuals who lack the required permits or fail to satisfy the standards set out by national legislation are classified as illegal immigrants. This very well illustrates the link between

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<sup>10</sup> Ibid

<sup>11</sup>United Nations, OCHR and Migration, <https://www.ohchr.org/en/migration/international-standards-governing-migration-policy>

<sup>12</sup> Elspeth Guild and Moreno Lax, “Current challenges for International Refugee Law, with a focus on EU Policies and EU Co-operation with the UNHCR”, *European Union*, 2013

irregular migration and the policies that deal with it. Immigration policy is the outcome of an interactive process at the national level that incorporates information based on a country's actual experience with immigrants, as well as the perceptions of policy-making elites regarding the role of immigration and its desirability. International migration policies are not static but undergo constant modification and change as a country's experience with, and perception of migrants change. According to a report,

“While countries that receive refugees have certain legal obligations to assist and protect them; the legal duties of other states to step in and help relieve this burden is less clear.”<sup>13</sup>

In dealing with mixed migration, the legal framework and the legal status of the individuals involved are of key significance. Globally, the requirements of the 1951 Refugee Convention are crucial, while for the European Union, the Common European Asylum System (CEAS) and its relevant regulations and directives are important, along with migration-law directives particularly on the issues of family reunification, immigration of highly skilled individuals and seasonal workers.<sup>14</sup>

Laws that apply directly to other migrants and refugees are also the same laws that would obviously apply to all categories of people on the move, irregularly. The International Refugee Law is one which has been discussed exhaustively in Chapter II (along with discussions on the 1951 Refugee Convention and the principle of *non-refoulement*). Another very basic but extremely important law is the International Human Rights Law (IHRL). The rationale behind this is that in mixed migration, migrants who adopt irregular pathways to travel are actually putting their entire lives at risk, only because they are suffering tremendous violence and persecution in their country of origin. Therefore it is the duty of states to be obliged to the provisions of the law and protect

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<sup>13</sup> Rebecca Dowd and Jane McAdam, “International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?”, *The International and Comparative Law Quarterly* 66, no. 4, October 2017: pp.863–892. <https://www.jstor.org/stable/26800625>.

<sup>14</sup>Angenendt and Koch, n. 9



migrants even if they have not been recognised as refugees by law. IHRL has its roots in the Universal Declaration of Human Rights (UDHR). Adopted in 1948, the UDHR served as the model for several international human rights accords that are now enforceable by law. It continues to serve as a source of inspiration for everyone. It stands for the widespread understanding that each and every person is born free and endowed with the same dignity and rights, and that these rights and freedoms are inalienable and apply to everyone equally. According to Article 1 and 2 of the UDHR:

“All human beings are born free and equal in dignity and rights. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as Race, colour, sex, language, religion, political or other opinion, National or social origin, property, birth or other status. [...]”<sup>15</sup>

The 1951 Convention does not offer the same level of protection that the IHRL does in terms of the quality of care required to refugees. It defends rights like the freedoms of association and expression that the 1951 Convention is silent on. These rights are especially crucial for refugees, who frequently leave their nations due to their political opinions. When a certain right is addressed by both international refugee law and international human rights law, the later usually upholds the right to a higher level. For instance, the 1951 Convention provides less protection against discrimination than the International Covenant on Civil and Political Rights (ICCPR). Finally, IHRL has the capacity to offer remedies in situations where international refugee law may be insufficient, primarily due to its comprehensive oversight. *Non-refoulement* has significant importance among the several safeguards provided to migrants under IHRL. The ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) offer safeguards against *refoulement* that supplement or complement the protections provided by refugee law. Consequently, the human rights *non-*

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<sup>15</sup> Universal Declaration of Human Rights, Articles 1 and 2, UN General Assembly, 10 December 1948

*refoulement* regime is commonly referred to as ‘complementary protection’. Individuals who do not meet the criteria for refugee status, have apprehensions of being subjected to torture or cruel, inhuman, or degrading treatment or punishment in their country of origin. Hence, they might avail themselves of the advantages offered by this kind of complementary protection. Article 3(1) of the CAT provides:

“[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>16</sup>

Another particularly important right in mixed migration situations is the ICCPR’s Article 9(1) liberty provision. This provides that:

“[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>17</sup>

The importance of this article is related to detention, which is frequently resorted to by states during situations of mixed migration, when the number of arrivals is larger than usual. Article 9(1) does not make immigration detention illegal or ‘categorically unlawful.’ Rather, it restricts it to cases where it serves a legitimate purpose and is judged to be both necessary and reasonable in a specific situation.<sup>18</sup>

Human rights perspectives have been included into migration policy by governments in an increasing number of destination nations. For instance, in order to guarantee and preserve the human rights of all migrants, Mexico updated its immigration policy in 2011 and adopted the human rights approach. Family reunion concerns, as well as migrant children’s access to

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<sup>16</sup> Article 3 (1) of the ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (CAT)

<sup>17</sup> Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)

<sup>18</sup> Marina Sharpe, “Mixed Up: International Law and the Meaning(s) of “Mixed Migration”, *Refugee Survey Quarterly*, 2018

health care and education, received a lot of attention. The general public and the political environment are much more apprehensive about refugees and immigrants in present times. There is so much mistrust and suspicion in society and an increasing number of people see migration as a threat as well as a significant problem that needs to be properly addressed. Hence, the study of mixed migration and the policies that concern it has recently attracted increased attention.<sup>19</sup> According to a 2013 report by the UN Special Rapporteur on the human rights of migrants to the UN General Assembly;

“All migrants, without discrimination, are protected by international human rights law. There are very few and narrowly defined exceptions to this, namely the right to vote and be elected, and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be respected, as well as obligations related to non-refoulement, best interests of the child and family unity....Any distinction must be proportionate, reasonable and serve a legitimate objective: the two human rights Covenants (ICCPR and ICESCR) explicitly refer to “national origin” as a prohibited ground of discrimination in the enjoyment of civil, political, economic, social and cultural rights.”<sup>20</sup>

With regard to irregular migration, the Preamble to the ‘International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ (ICRMW) reads:

“Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.”<sup>21</sup>

Article 5 of ICRMW establishes a clear differentiation between migrant workers who possess proper documentation and are in a lawful position, and those who lack documentation and find themselves in an irregular status. Consequently, the convention assigns corresponding rights to each category of

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<sup>19</sup>Claude-V. Marie, “Preventing illegal immigration: Juggling Economic Imperatives, Political Risks and Individual Rights”, *Council of Europe*, January 2004.

<sup>20</sup>“Report of the Special Rapporteur on the human rights of migrants”, UN General Assembly, 68th Session, UN doc A/68/283.para 28, August 2013

<sup>21</sup> See Preamble to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)

workers. The ICRMW does not extend its provisions to refugees and stateless individuals, unless there are explicit provisions within national laws or international agreements applicable to the respective State. ICRMW would, however, be applicable to refugees who are granted any type of migrant worker status. For instance, several Gulf States have positioned themselves as guardians of Syrian individuals seeking safety, but by granting them status distinct from that of a refugee.<sup>22</sup>

According to the Common European Asylum System (CEAS), the European Union has a legal obligation to provide protection to a particularly vulnerable category of migrants and asylum seekers, namely unaccompanied minors. EU Member States are obligated to address requests made by unaccompanied minors in accordance with the concept of the best interests of the child. This principle is established in both EU asylum legislation and the Convention on the Rights of the Child, which has been ratified by all EU Member States. The act of repatriating an unaccompanied minor to their country of origin, despite the possibility of them facing persecution, could potentially result in a breach of specific provisions outlined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. These provisions safeguard the right to life and prohibit subjecting individuals to ill treatment or torture by returning them to their country of origin. According to the asylum legislation of the EU, an individual classified as an ‘unaccompanied minor’ refers to a person who is under the age of eighteen and is either a third-country national or stateless. This person enters the territory of a Member State without being accompanied by an adult who holds legal or customary responsibility for them, and remains in this situation until they are effectively placed under the care of

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<sup>22</sup> Sharpe, n.19

such an adult. This also encompasses the situation in which a minor is not accompanied after entering the territory of a Member State.<sup>23</sup>

International Humanitarian Law (IHL) refers to the specific field of public international law that is relevant and applicable during periods of both international and non-international armed conflict. During migration journey, those who are classified as refugees and migrants in mixed flow may encounter situations of armed conflict. In this scenario, IHL has the potential to make a valuable contribution towards safeguarding their well-being. The on-going wars, such as the one in Libya, are characterised by a non-international nature. Therefore, in addition to any relevant customary regulations, the sole body of IHL that holds applicability is Common Article 3. Common Article 3 is typically applicable to those who find themselves involved in a non-international armed conflict during their trips, as long as they are not actively engaged in hostilities. The provision stipulates that citizens must be treated in a compassionate manner, without any kind of discrimination. Provision of care must be extended to individuals who are wounded or afflicted with illness and there will be

“...prohibition of violence to life and person, in particular murder, mutilation, cruel treatment, and torture; the taking of hostages; humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without due process of law.”<sup>24</sup>

Where discussions on laws and conventions applicable/relevant in situations of mixed migration are concerned, then the Convention against Transnational Organized Crime, also known as the Palermo Convention needs a special mention. It was supplemented by three protocols, known as the Palermo Protocols. Two of these are directly relevant to mixed migration: the ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women

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<sup>23</sup> Theresa Papademetriou, “European Union: Status of Unaccompanied Children Arriving at the EU Borders”, The Law Library of Congress, September 2014.

<sup>24</sup> See Common Article 3 of the Geneva Conventions.

and Children' (the Trafficking Protocol) and the 'Protocol against the Smuggling of Migrants by Land, Sea and Air.' Article 3(a) of the Smuggling Protocol defines "smuggling" as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."<sup>25</sup> The convention protocols deal with exploitation and smuggling which are their primary concerns. Exploitation is an inherent element of human trafficking, typically linked to the sexual exploitation of women and children. However, there has been a noticeable increase in instances of exploitation for the purpose of forced labour and slavery in contemporary times. In contrast, smuggling often involves exploitation, as individuals who are smuggled may be vulnerable to trafficking during their journey. However, it is important to note that exploitation is not a legal element of the act of smuggling. Smuggling may be characterised as a commercial transaction involving one individual seeking to cross international borders and another individual who facilitates the illegal passage. It can occur in the absence of coercion or infringement of human rights. In certain circumstances, smuggling can serve as a means of escape for individuals who lack alternative avenues to evade persecution, particularly in instances where governments impose stricter border controls.<sup>26</sup>

However, most of the time, the migrants are subject to abuse and torture which not only adds to their plight, but also hurts their self-esteem. More than 1,200 people have drowned while trying to cross from Turkey to Greece or Bulgaria since the beginning of 2015, and those who were alive recalled the horrifying journeys especially during the night. They have also spoken of being held captive for ransom or left behind by smugglers, as well as being sent back across borders at night by masked police. Additionally, they

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<sup>25</sup> United Nations, Article 3 (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000

<sup>26</sup> Sharpe, n 19

encounter violence when they attempt to cross the land border. People from Greece and Bulgaria, who are travelling undocumented, have claimed mistreatment by traffickers as well as being assaulted, attacked by police dogs, and pushed back by certain border authorities.<sup>27</sup>

The Trafficking and Smuggling Protocols encompass measures aimed at enhancing border controls, deterring unauthorised mobility of humans, and establishing legal frameworks to classify trafficking and smuggling as illegal activities within the realm of international law. Some of these policies, especially if used indiscriminately, may have adverse effects on the safeguarding of refugees. Article 6 of the Trafficking Protocol encompasses several concerns pertaining to the assistance and protection of trafficking victims. These concerns include but are not limited to privacy, physical and psychological well-being, social well-being, specific needs of children, and the provision of compensation through domestic legislation. According to Article 7, it is incumbent upon States to establish appropriate laws or undertake alternative measures that would enable trafficking victims to remain within their jurisdiction. The legal framework for the repatriation of individuals who have been subjected to trafficking has been created in Article 8. The optional nature of Articles 6–8 of the Trafficking Protocol is noteworthy. Nevertheless, it is imperative to acknowledge that Article 9 pertaining to the prevention of trafficking must be regarded as obligatory. The text emphasises the importance of employing preventive measures, such as the establishment of appropriate regulations, media campaigns, and international cooperation, to effectively address the underlying factors that make individuals susceptible to trafficking. Additionally, it aims to diminish the demand for services offered by trafficked individuals. Article 16 of the Smuggling Protocol pertains to the obligatory implementation of protective and supportive measures for individuals who have been smuggled. These measures encompass safeguarding

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<sup>27</sup>UNHCR, 2017

their rights and ensuring their safety from any form of human rights violation. Additionally, the specific requirements of women and children are taken into consideration. Furthermore, the rights granted to smuggled individuals under the Vienna Convention on Consular Relations (Article 36)<sup>28</sup> are upheld, particularly in situations involving their detention.

The sea serves as a crucial mode of transportation for goods, and remains particularly significant for human beings, whose value surpasses all material possessions. Governments are now striving to enhance their endeavours in combating irregular migration, given that migrant smugglers and human traffickers have resorted to increasingly perilous routes and methods of transportation for the purpose of smuggling people. This makes the Law of the Sea relevant to mixed migration and three of its conventions are crucial in this regard: the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Maritime Search and Rescue (SAR), and the United Nations Convention on the Law of the Sea (UNCLOS).<sup>29</sup> International law of the sea aims to regulate the world's oceans in a manner which considers the interests of all parties involved and the international community on a whole. Regarding migration by sea, customary international law as codified in the UNCLOS Article 98 (1) provides that assistance be given to persons in distress at sea regardless of their nationality, status, or the circumstances in which they are found. This is also manifest in the SOLAS regulation V/33.1. Under Article 98(2) of UNCLOS and SOLAS regulation V/7, the State is responsible for making provisions for coordination of rescue efforts and

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<sup>28</sup> The Vienna Convention on Consular Relations establishes the legal responsibilities of countries that have ratified the convention towards detained foreign individuals. In 1963, the United States embraced the Vienna Convention and its accompanying Optional Protocol, subsequently ratifying both in 1969. Article 36 requires that detained foreign nationals be informed-‘without delay’-of their right to confer, communicate, and seek representation by their consulate throughout their detention.

<sup>29</sup> Sharpe, n.19



communication within its territorial waters and in the authorised search-and-rescue region in times of emergency.<sup>30</sup>

Even though the rescue of migrants at sea is mandated by laws like UNCLOS and SOLAS and might be seen as compassionate by nature, certain governments are frequently reluctant in carrying out such rescues, which reduces international solidarity. States' unwillingness to cope with search and rescue operations and the disembarkation of rescued migrants leaves them with the burden of hosting refugees and those seeking asylum. While merchant ships are occasionally the first to assist people in need at sea, they are not supposed to take the responsibilities of coastal nations. Such nations will thus continue to be cautious on such matters in the absence of accountability and agreements detailing their particular responsibilities towards migrants coming from unstable countries of origin. The SAR and SOLAS require that nations communicate and work together so that those who have been rescued at sea can depart to a safe zone without delay, despite the fact that UNCLOS does not specifically address disembarkation protocols or burden sharing of coastal states.<sup>31</sup>

Travel through the sea undoubtedly poses serious life risks for the migrants. There are boats with a capacity of hundred people, but they mostly end up carrying thousands which results in overload and sinking of these small boats. In a recent incident on 14<sup>th</sup> June 2023, an overloaded fishing vessel sank off the coast of Greece, which was recorded as one of the 'deadliest shipping disasters'. Approximately half of those on board were Pakistani nationals and more than 500 were presumed dead.<sup>32</sup> Such tragic incident points towards the continued risks associated with irregular migration, also drawing attention to the scale

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<sup>30</sup> Ibid

<sup>31</sup> UN High Commissioner for Refugees (UNHCR), "Protection Challenges", 7th High Commissioner's Dialogue, 10 December 2014. <http://webtv.un.org/watch/opening-plenary-unhcr-7thhigh-commissioners-dialogue-on-protection-challenges/3933947430001> (Retrieved 21.07.2016)

<sup>32</sup> India Today, 19<sup>th</sup> June, 2023, <https://www.indiatoday.in/world/story/greece-boat-tragedy-pakistan-arrests-human-traffickers-feared-dead-top-developments-2394790-2023-06-19>

and dynamics of mixed migration towards Europe. Few other instances have occurred earlier where a number of reports involved ship masters ignoring distress signals from vessels in trouble at the sea; although shipmasters and States are both obligated by treaties and international law to save the ones who are in such situation.

## **2.2 International Organisations and their Governance of Mixed Migration**

There is a very limited body of knowledge available to understand the role of International Organisations (IO's) in governing mixed mobility, although they play an increasingly important role in it. Cross-border migration has been acknowledged as an issue of expanding scope and complexity; therefore initiatives to deal with it at the global level have been increasing over the past two decades. States have been hesitant to surrender sovereignty and delegate responsibility in the area of global migration because it strikes upon the fundamental foundation of state sovereignty—the management of a state's territory and people. It is a very contentious area of policy where moral, economic, and security interests clash and where it is challenging to choose which global public good its governance should achieve.<sup>33</sup> Numerous scholars confirm that regulation of global migration is under-regulated and tremendously fragmented.<sup>34</sup>

Since the turn of the millennium, efforts have been made to institutionalise cooperation at the global level and globalise migration governance-beyond existing arrangements on forced migration- in an effort to harmonise migration policies among states and better coordinate the activities of global actors involved in managing migration. As a result, migration policy-making has expanded beyond the state. Numerous public and private IO's are

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<sup>33</sup> Philip Martin and Susan Martin, "GCIM. A New Global Migration Facility", *International Migration*, 2006, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2435.2006.00350.x#pane-pcw-references>

<sup>34</sup>Nele Kortendiek, "How to govern mixed migration in Europe: transnational expert networks and knowledge creation in international organizations", Global Networks Partnership and John Wiley & Sons Ltd, 2020.

becoming more actively involved in influencing and executing political norms surrounding human mobility.<sup>35</sup> There are several international bodies striving to frame policies that are catering to the needs of all categories of migrants involved in mixed migration. Hence the relevance of such organisations is an important area of study in itself. Therefore, this section shall proceed by looking at the policies framed by such organisations that are both relevant to mixed migration, and to the broader aspects of forced migration and refugee studies.

The United Nations High Commissioner for Refugees (UNHCR)'s notion of mixed migration pertains to the diverse characteristics of specific population migrations, also introducing the notion of individual motivations for moving. It has been anticipated that expanding UNHCR's mandate to include other types of migrants travelling in mixed flows may strain its organisational capabilities and compromise its capacity to carry out the primary responsibility of protecting refugees. UNHCR however, acknowledged that it must broaden the scope of its concern rather than remaining stagnant. As a result, UNHCR is now conceived of as an organisation that engages in governance of international migration. The role of UNHCR in dealing with mixed migration has been discussed in specific details in the second chapter. Hence this section shall skip further discussion on UNHCR and discuss all other IO's revolving around mixed migration.

The International Organization of Migration (IOM) established in 1951, is the leading international agency working closely with governmental, intergovernmental, and non-governmental partners in the issue of migration. IOM's strategy for managing migration focuses on developing and putting into effect the broad policies, laws, and administrative frameworks required to effectively address migration issues in accordance with national, regional, and global priorities while being compliant with international law, including

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<sup>35</sup> Ibid.

obligations related to human rights and refugee protection. It urges States and other relevant actors to manage the whole ‘migration lifecycle’ coherently, especially by handling mixed migration flows before or as they occur, while in transit and in emergency situations, post-arrival and over a longer period of time.<sup>36</sup> IOM used to be an international, project-based agency without any official connections to the UN structure. The absence of a powerful international agency for migration with an independent, all-encompassing, and normative purpose has long been challenged by academics and decision-makers. The global governance of mixed migration, with a large number of international players participating and no obvious organisational focal point, continues to be comparatively fragmented even after IOM was formally admitted into the UN system.<sup>37</sup> The following definition of mixed migration is taken from a discussion note written for the 2008 International Dialogue on Migration, which took place during the 96th session of the IOM:

“The principal characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved. Mixed flows have been defined as ‘complex population movements including refugees, asylum seekers, economic migrants and other migrants.’”<sup>38</sup>

Unaccompanied minors, climate migrants, smuggled persons, victims of trafficking and stranded migrants, among others, may also form part of a mixed flow. IOM is increasingly providing support to vulnerable migrants such as victims of trafficking or unaccompanied and separated children. When the nations in which migrants live, work, study, transit, or travel are affected by a conflict or a natural disaster, IOM strives to improve the safety of migrants through programmes like the Migrants in Countries in Crisis (MCIC) Initiative. IOM’s Department of Operations and Emergencies implements humanitarian assistance in post-conflict situations and other

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<sup>36</sup> International Organization for Migration (IOM), 2008

<sup>37</sup> Nele, n 34

<sup>38</sup> 96th Session of the International Dialogue on Migration, “Challenges of Irregular Migration: Addressing Mixed Migration Flows”, Discussion Note, 2008

migration and refugee emergencies to assist individuals in need. By engaging in these kinds of operations, IOM transforms into a considerably more ‘protection-oriented agency’ than what its official mandate and institutional structure would imply, and it therefore becomes a key player in the regulation/governance of mixed migratory flows.<sup>39</sup>

Mixed Migration Centre (MMC) is a ‘leading source for independent and high-quality data, information, research and analysis’ on mixed migration. The MMC is dedicated to providing support to agencies, policy makers, and practitioners in order to assist them in making informed decisions. The ultimate goal is to have a positive impact on global and regional migration policies. Additionally, the MMC aims to contribute to protection and assistance efforts for individuals who are on the move and strives to promote forward thinking within the sector by offering credible evidence and expertise on mixed migration. The Danish Refugee Council (DRC), which oversees MMC, is a private non-profit humanitarian organisation founded in 1956. Even if its institutional connection to DRC guarantees that its work is ‘grounded in operational reality’, MMC functions as an autonomous entity that provides statistics, conducts research, does analysis, and engages in policy development pertaining to mixed migration to assist policy makers, practitioners, journalists, and the broader humanitarian sector. DRC adopts Van Hear’s comprehensive interpretation of the concept of mixed migration and emphasises that by adopting a mixed migration perspective, it may surpass inflexible technical and legal classifications and get insights into vulnerabilities, as well as offer practical aid to those requiring assistance. This is a good illustration of how an agency’s objectives and mission might affect how well it understands mixed migration. Furthermore, it is imperative for the DRC to get a comprehensive understanding of mixed migration and engage in appropriate participation. This approach is essential in order to go beyond

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<sup>39</sup>Nele, n 35

legal classifications and provide assistance based on the actual needs of individuals, rather than their legal status.<sup>40</sup>

MMC is a worldwide network that concentrates on seven geographical areas: East Africa & Yemen, North Africa, West Africa, Middle East, Asia, Europe, and Latin America & the Caribbean.<sup>41</sup> The objectives of MMC are:

- To aid in the development of a better, more nuanced and balanced knowledge of mixed migration (knowledge)
- To contribute to evidence-based and better-informed migration policies and debates (policy)
- To contribute to effective evidence-based protection responses for people on the move (programming).<sup>42</sup>

Charlotte Slente, Secretary-General of the Danish Refugee Council has stated:

“When the Mixed Migration Centre was established in 2018, it was an attempt by the Danish Refugee Council to create a global platform that, based on evidence and analysis, offers a voice of reason and reflection in the often emotional and politicized debate on migration and people on the move. It was about providing a nuanced and balanced perspective on mixed migration so as to inform and inspire policy choices and responses based on principles, values and decency. Today MMC plays a key role in the organization, where the data and analysis as well as regional field presence, enable us to plan better and provide more evidence-based programming in support of people on the move.”<sup>43</sup>

Over 10,000 in-depth interviews with migrants and refugees are conducted annually by 120 monitors stationed on major migratory routes as part of MMC’s flagship data collecting initiative, the Mixed Migration Monitoring Mechanism Initiative (4Mi). This field-based network gives MMC direct access to individuals who are on the move and guarantees that the work is grounded in practical experiences and actual scenarios.

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<sup>40</sup>Sharpe, n 19

<sup>41</sup>Taha Jawashi, “Insights and Evidence on Mixed Migration”, *Mixed Migration Centre (MMC)*, 2017, <https://mixedmigration.org/wp-content/uploads/2020/07/Insights-evidence-introduction-to-MMC.pdf>

<sup>42</sup>Ibid

<sup>43</sup>Ibid

Human rights are ‘universal, inalienable, indivisible and interdependent’. The international framework for human rights emphasises the importance of considering the specific circumstances of each individual in order to respect the principle of non-discrimination and effectively implement these rights. Within this context, the (OHCHR) works to promote, protect and fulfil the human rights of all migrants regardless of their status, with a particular focus on ‘migrants in vulnerable situation.’ This refers to persons who “are unable effectively to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer’s heightened duty of care.”<sup>44</sup>

The OHCHR advocates for the adoption of a migration framework that prioritises human rights. This approach places migrants at the core of migration policies and governance, aiming to guarantee their inclusion in all pertinent national action plans and strategies. These may encompass initiatives related to the provision of public housing or national efforts to address issues of racism and xenophobia. Migration may have positive and empowering implications for both individuals and communities, as well as provide benefits for nations of origin, transit, and destination. However, it is evident that when movement leads to people situated in vulnerable circumstances, it becomes a serious concern for human rights.

When migrants do not fit into the defined legal category of ‘refugee’, it becomes particularly crucial to prioritise the preservation, safeguarding, and realisation of their human rights. Certain migrants may require specialised protection due to the circumstances they have fled, the manner in which they have travelled, the conditions they encounter upon arrival, or their individual characteristics, including age, gender identity, disability, or health status. The OHCHR offers a comprehensive analysis of mixed migration, acknowledging

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<sup>44</sup> OHCHR, “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations”, Global Migration Group, *Federal Department of Foreign Affairs (FDFA)*, United Nations, <https://www.ohchr.org/sites/default/files/PrinciplesAndGuidelines.pdf>

the absence of a universally agreed-upon definition for this complex phenomenon. It describes mixed migration as ‘the cross-border movement of people’ who possess diverse profiles, motivations for relocation, requirements, yet traverse same routes, employ similar modes of transportation, and frequently engage in irregular migration.<sup>45</sup>

Mixed migration results in innumerable loss of lives at sea every year. The perils of irregular maritime migration make the International Maritime Organization (IMO) extremely relevant to situations of mixed migration. Although maritime travel accounts for a small number of refugees and migrants, it receives disproportionate attention from politicians, the media, and the general public. Migration by sea is frequently greeted with crisis-driven responses ranging from rescue to strong deterrent, possibly because it conjures up notions of ‘invasion’ to some people and displays heart-wrenching images of suffering and death when overloaded boats capsize. Unexpected outcomes frequently result from such responses. Refugees may have no other means to flee persecution as a result of deterrence efforts where their journeys are more firmly placed in the hands of professional smugglers, many of whom are members of ruthless criminal networks; all due to increased and sophisticated procedures to intercept unauthorised vessels. In the worst case scenario, marine rescue operations can promote risk-taking on perilous journeys and lead to an increase in maritime fatalities. Such incidents have taken place recently, for instance, returning a dilapidated ship loaded with desperate migrants towards France. Such acts straightaway contravene maritime law and a long-standing moral duty, for nations that wish to avoid assisting asylum seekers at sea, there is no legal shortcut. The refusal to help migrants who are in danger at sea should not be a legal choice, despite any political plans about making such proposal ‘safe and legal’.<sup>46</sup> Gaspare, a

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<sup>45</sup> Ibid.

<sup>46</sup> Burak Şakir ŞEKER, “International Law of the Sea and Maritime Security Implications Arising From the Ongoing Crisis Related to Migration by Sea”, 2017



fisherman from Sciacca in Sicily, saved dozens of migrants who were trying to reach Italy by boat from Libya, despite the Italian police threatening to detain him and his crew for facilitating illegal migration. He narrated:

“I wonder if even one of our politicians has ever heard the desperate cries for help at high sea in the black of night...what they would have done. No human being – sailor or not – would have turned away.”<sup>47</sup>

According to experts, any forcible return of boats is a breach of the Geneva Conventions, the EU law, and the UDHR, since it denies someone the opportunity to request asylum. Sending back small vessels carrying asylum seekers is not like ‘asking a truck driver who has taken the wrong road to reverse and go back’.<sup>48</sup> Migrants on rafts have risked everything for their journey. The journeys they make are fraught with difficulties; they travel in overcrowded, unseaworthy boats, some of which are in critical need of repair. Migrants frequently lack swimming skills, and occasionally make the mistake of diving into the ocean with their clothes on when they see a ship approaching to save them, without considering the distance between them and their potential rescuers. Over the past few years, hundreds of migrants have perished at sea while such rescue operations were going on.<sup>49</sup>

There are no ordinary solutions to these problems. In addition to being highly risky, maritime migration is also extraordinarily complicated. A wide array of actors are involved which may include networks of migrants, their families, and communities in both destination and origin countries. Others are government entities like immigration and border protection agencies, business interests like fishing boats and commercial shipping, regional organisations like Frontex, international and humanitarian organisations like the UNHCR, civil society that stands up for human rights and dignity in society, and

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<sup>47</sup> Lorenzo Tondo, “Return of migrant vessels: a violation of maritime law and moral duty”, The Guardian, September 2021, <https://www.theguardian.com/world/2021/sep/09/returning-migrant-vessels-violates-maritime-law-and-moral-obligation>

<sup>48</sup> Ibid

<sup>49</sup> Ibid

criminal gangs that take advantage of migrants' desperation and vulnerability. Unauthorised maritime migration is viewed by each of these parties from a different perspective, depending on whether they prioritise humanitarian protection, law enforcement, national security, profit, or politics. Coherent policies thus become difficult to establish and put into practise since each actor responds to different laws, rules, incentives, conventions, and operational standards.<sup>50</sup>

### **Section 3**

#### **3.1 International Labour Organization (ILO) and Governance of Mixed Migration**

The most obvious reason that compels human migration is search for decent work and a better standard of living. However, most of these migrant workers either travel irregularly or fall in irregular situations during their journey. Mixed migration includes undocumented migrant workers travelling along with other categories of people on the move. This is where the International Labour Organization (ILO) and its provisions for migrant workers in irregular mixed situations become significantly relevant. There is absence of a universally acknowledged definition for irregular labour migration. A migrant workers (who is undocumented or in an irregular situation) is defined by international human rights law as 'someone who is not authorized to enter, to stay or to work in the county of destination'<sup>51</sup>

The ILO's strategy for approaching this issue from the viewpoint of the global work space is centred on international labour standards, principles and recommendations on fair recruitment, and universal values of equal treatment and non-discrimination. Nearly all nations are now impacted by the global economy's growing dependence on international migration. The majority of

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<sup>50</sup> Kathleen Newland, "Protection at Sea: Addressing Irregular Maritime Migration", Migration Policy Institute, <https://www.migrationpolicy.org/news/protection-sea-addressing-irregular-maritime-migration>

<sup>51</sup> ICRMW, Article 5

current international migrants who reside outside of their country of origin are migrant workers and their families. For migratory workers, their families and communities in both the country of origin and the country of destination; migration may be a pleasant and uplifting experience. Yet, many people continue to move without access to regular migration channels. Migrants might fall in irregular situations in a variety of ways. They could enter countries legally, but if they overstay their visas, they become irregular and end up working illegally in the formal or unofficial sector of the economy. They could come without proper documents or they might lose their regular migrant status as a result of being unemployed or failing to follow the rules and requirements for their permission to stay. Their bids for asylum could be denied, or they might find themselves in an unusual circumstance as a result of bureaucratic delays in processing visa or permission requests. The frequency of irregular labour movement varies by area, and in certain nations, populations of migrant workers are more numerous than in others. Border closures and movement restrictions due to the COVID-19 pandemic also have affected irregular migration stocks and flows in several ways.

As part of a larger five-year ILO plan of action, the Governing Body of the ILO has created a compendium of practises on minimising irregular labour migration and strengthening the rights of migrant workers in an irregular situation. The conditions that might push migrant workers into irregularity are described in the ILO Compendium on Protecting the Rights of Migrant Workers in Irregular conditions and Addressing Irregular Labour Migration.<sup>52</sup> It aims to stimulate creative approaches that decrease the susceptibility of migrant workers to exploitation and human rights abuses, including violations of fundamental values and rights at work. All of the practises included in this compendium are compliant with ILO guidelines and

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<sup>52</sup>United Nations Network on Migration (UNMN), “Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability”, Guidance Note, July 2021, [https://migrationnetwork.un.org/sites/default/files/docs/guidance\\_note-\\_regular\\_pathways\\_for\\_admission\\_and\\_stay\\_for\\_migrants\\_in\\_situations\\_of\\_vulnerabilty\\_final.pdf](https://migrationnetwork.un.org/sites/default/files/docs/guidance_note-_regular_pathways_for_admission_and_stay_for_migrants_in_situations_of_vulnerabilty_final.pdf)

other pertinent global standards. The Compendium is not intended to be an ‘encyclopaedia’ but rather a living document that is frequently updated with new examples and experiences. It aims to promote the exchange of best practises among nations, social partners, and other relevant actors and to help the Global Compact for Safe, Orderly, and Regular Migration (GCM) achieve its goals. The majority of public attention is usually drawn to stories about migrant workers who are working irregular hours and who pass away or suffer injuries while travelling or at work. The vulnerability of migrant workers in irregular situations can also be caused by other reasons or situations of irregularity, such as being denied access to the labour market, being detained, or facing the possibility of deportation, frequently in conjunction with personal traits. These factors may intertwine; change over time or ‘exacerbate each other.’<sup>53</sup>

How does irregular labour migration take place in the first instance? Some views suggest that the main cause of irregular labour migration is “less a disregard of regulations by migrants than a continuing inequality within and between countries, and the failure of states to create adequate migration regimes to meet economic demand”.<sup>54</sup> The presence of discrepancies between entrance regulations and labour market demands contributes to the exacerbation of challenges faced by migrants in their efforts to maintain lawful status, with bureaucratic complications further complicating the process. There are several pathways leading to irregularity. Migrants have been observed to cross borders via established channels, yet subsequently exceed the duration of their visas. Consequently, they find themselves engaged in unauthorised labour within either the formal or informal sectors. Alternatively, some migrants enter foreign territories without possessing valid documentation, while others may have forfeited their lawful status due to

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<sup>53</sup> Ibid.

<sup>54</sup> Irena Olemaniuk (ed), Stephen Castles and others, “Irregular Migration: Causes, Patterns and Strategies”. In *Global Perspectives on Migration and Development: GFMD Puerto Vallarta and Beyond*, 180–229, Global Migration Issues, Vol. 1. Berlin: Springer, 2012.

unemployment or failure to adhere to specific permit prerequisites. Migrants may potentially encounter an irregular status as a result of their asylum request being denied, failure to comply with the need to depart from the territory, unsuccessful deportation efforts, or administrative shortcomings in processing visa applications or permits within a reasonable timeframe. Nevertheless, although a portion of migrants may consciously opt for irregular travel, the majority of migrants often possess limited agency in relation to the intricate determinants that dictate their migratory status. In the majority of instances, individuals find themselves in an atypical circumstance without any fault on their part.<sup>55</sup>

### **3.2 Protection of Human Rights of Irregular Migrant Workers in Mixed Migration**

The irregular nature of migration tends to make migrant workers more susceptible to discrimination, human rights abuses, including employment rights, as well as trafficking and other forms of exploitation. It may lower wages for all workers and ultimately disrupt the labour market. Because of their irregular status, migrant workers may be forced into informal employment, where they risk the danger of being exploited, face lack of social protection, and struggle to find positions that match their skills. People who work in low-skilled or precarious jobs confront additional obstacles and are more likely to have their labour rights violated. Certain sectors for instance, have a strong association with gender, hence mirroring and amplifying gender prejudices and inequalities within the workforce. Women migrants who are staying irregularly may be more vulnerable to oppressive working circumstances, harassment and assault based on gender, or other intersecting forms of discrimination.

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<sup>55</sup>International Labour Organization (ILO), “Protecting the rights of migrant workers in irregular situations and addressing irregular labour migration: A compendium”, *International Labour Organization*, 2021.

Every individual is entitled to human rights, regardless of their immigration status. To successfully prevent irregular labour migration, effective management and collaboration at all levels must be based on respect for their human rights, notably their labour rights. To this goal, a variety of international human rights and labour laws and norms are applicable. The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998), the ILO Centenary Declaration on the Future of Work (2019), the ILO ‘Global Call to Action for a Human-Centered Recovery from the COVID-19 Crisis that is Inclusive, Sustainable, and Resilient’<sup>56</sup> provide crucial guidance for policy makers as well as workers’ and employers’ organisations.

The protection of human rights, especially the fundamental rights of workers, is consistently emphasised, stressing the need for compliance with international law. The fundamental UN human rights treaties safeguard the human rights of migrant workers and their families. According to the UN Special Rapporteur on the Human Rights of Non-Citizens, these accords have received significant ratification and exhibit limited differentiation between individuals who have citizenship and those who do not, including those in an irregular immigration status. Chapter III of the ICRMW contains explicit provisions that acknowledge and safeguard the distinct rights and freedoms of migrant workers who are in an irregular situation. The presence of prevailing disparities and discriminatory behaviours, particularly based on factors such as race, gender, or religion, within individuals’ countries of origin, might serve as a significant motivating factor for their decision to migrate. Simultaneously, the presence of intolerance and xenophobia can result in discriminatory practises against migrant labourers inside host nations. Individuals who find themselves in an irregular migration status have an elevated likelihood of experiencing exclusion and discriminatory practises, particularly when they are seen or treated as criminals. This is mostly due to their vulnerable position

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<sup>56</sup> Ibid

and the apprehension they feel over potential deportation or reprisal from their employer. Moreover, the act of criminalising individuals with irregular migrant status has the potential to foster discriminatory practises and is incongruent with the principles of promoting tolerance, as highlighted by the United Nations Human Rights Council in 2009 (para. 13).<sup>57</sup>

The principles of equality and non-discrimination are essential notions that are integrated into international human rights frameworks and diverse employment standards. These principles are integral to the established standards on rights at work by the ILO and are safeguarded by the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).<sup>58</sup> The principle of non-discrimination, as stated in Article 7 of the ICRMW requires that migrant workers, regardless of their legal status, should receive treatment that is no less favourable than that afforded to nationals in various aspects of their work, including but not limited to remuneration, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of employment, and other conditions of work that are covered by national laws and practises.<sup>59</sup> This also encompasses terms of employment such as minimum age requirements and restrictions on employment. The presence of irregularity should not serve as a justification for employers to neglect their legal or contractual responsibilities, as stated in Article 25 of the ICRMW.<sup>60</sup>

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<sup>57</sup> UN-HRC (UN Human Rights Council), Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Working Group on Arbitrary Detention, UN Doc.A/HRC/10/21, 2009, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/10/21](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/10/21).

<sup>58</sup> ILO, n 54

<sup>59</sup> ICRMW, Article 7

<sup>60</sup> ICRMW, Article 25

### **3.3 ILO and Collaborative Mechanisms to Protect Irregular Migrants**

The monitoring and enforcement of the rights of migrant workers in an irregular situation involve various mechanisms such as bilateral cooperation, engagement of national and provincial agencies, consultation with employers' and workers' organisations, and the voluntary contributions of stakeholders as well as civil society organisations. These mechanisms also encompass the provision of services to irregular migrant workers. The available evidence suggests that the successful coordination of processes, actors, and actions occurs when there is a prioritisation of the rights of migrant workers above other policies. The successful resolution of pressing issues and the safeguarding of the rights of migrant workers in irregular circumstances, both within their home countries and abroad is possible to achieve via the collaborative efforts of governments and social partners. In several instances, governments in countries of origin have engaged in collaborative efforts with social partners to effectively administer essential social assistance and 'monitor and report' instances of misconduct within the workplace/community.

In the United States, the Department of Labor established the Inter-agency Working Group for the Consistent Enforcement of Federal Labor Employment and Immigration Laws. The primary objective of the Working Group is to identify policies and processes that facilitate the efficient implementation of federal labour, employment, and immigration legislation. The group comprised governmental entities responsible for the oversight of labour, national security, and judicial matters, as well as administrative authorities dedicated to labour relations and equal employment opportunity. The working group aims to enhance understanding among workers, worker representatives, advocates, and employers regarding the interplay between immigration law enforcement and labour and employment law enforcement. It seeks to improve the procedures for preventing the deportation of undocumented workers who assert workplace claims and for granting them



temporary work authorization during on-going workplace investigations or proceedings. Additionally, the working group aims to establish channels of communication that are open and transparent for stakeholders to engage with enforcement authorities.<sup>61</sup>

In a collaborative effort, foreign workers' organisations from Thailand, Nepal, and Indonesia partnered with the Hong Kong Federation of Asian Domestic Workers Unions and the International Domestic Workers Federation (IDWF)<sup>62</sup> to produce a comprehensive report on the adherence to the Hong Kong Government's labour inspection code and the protection of migrant domestic workers in the Hong Kong Special Administrative Region (SAR) of China. The research discovered many instances of non-compliance during the first year of implementing the Code. It recommended the installation of more stringent enforcement measures and emphasised the need of safeguarding the rights of migrant domestic workers. This proposal aimed to establish an alliance that would address the concerns of both local and foreign employees.

The phenomenon of irregular travel leads to migrant workers becoming entangled in perilous situations and being subjected to various types of exploitation, including forced labour and human trafficking (similar situation faced by other categories of migrants in mixed flows). The lack of legal documentation is widely recognised as a significant determinant in assessing the likelihood of coercion, forced work, and human trafficking, since the fear of being reported and deported is a crucial contributing factor. According to Article 11 of ICRMW (1990), State parties are obligated to implement appropriate measures to combat any instances of forced or compelled labour involving migrant workers.<sup>63</sup> The ILO Protocol of 2014 to the Forced Labour

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<sup>61</sup> ILO, n 54

<sup>62</sup> Since 2018, the International Domestic Workers Federation (IDWF) has been participating in bi-annual meetings between the Ministry of Labour and Social Affairs of the Qatari Government (ADLSA), the ILO, and other Global Union Federations (GUFs), including the International Transport Workers Federation (ITF), UNI Global Union, a global federation for the services sectors and Building and Wood Workers' International (BWI).

<sup>63</sup> See ICRMW, Article 11

Convention, 1930 recognizes that migrants have a higher risk of becoming victims of forced or compulsory labour.<sup>64</sup> In order to effectively avoid forced and compelled labour, it is imperative to implement measures that safeguard migrant workers against potential instances of abusive and fraudulent practises throughout the recruiting and placement process, according to Article 2(d). One of the most effective strategies for safeguarding the rights of migrant workers in an irregular circumstance is to provide them with a platform for expression. The preservation of freedom of association and collective bargaining serves as crucial mechanisms for attaining enhanced work conditions and remuneration. It is imperative that all migrant employees are afforded the opportunity to exercise their trade union rights without being subjected to any form of harassment. Apparently, migrant workers who find themselves in an irregular situation frequently encounter legal or practical obstacles that prevent them from participating in or establishing trade unions. Additionally, they may face restrictions in assuming leadership roles within trade unions or lack safeguards against discrimination based on their involvement in trade union activities.<sup>65</sup>

Trade unions have the capacity to effectively advocate for the protection and advancement of labour rights among irregular workers through several means. The European Trade Union Confederation (ETUC), in collaboration with Union Migrant Net and Platform for International Cooperation on Undocumented Migration (PICUM), has collectively put up a series of suggested measures for trade unions to consider in their efforts to effectively mobilise undocumented migrant workers. For instance, trade unions have the potential to formulate targeted policies that facilitate the inclusion of undocumented workers into their ranks. They can establish a specific objective of organising and recruiting undocumented workers, as well as provide information and services to migrant workers, irrespective of their legal status.

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<sup>64</sup> Preamble to the ILO Protocol

<sup>65</sup> ILO, n 54

Additionally, trade unions can engage in mediation or collective actions to address labour-related issues affecting undocumented workers. It is crucial for unions to incorporate information on the rights of undocumented workers into their educational programmes and include these rights in their collective bargaining agenda to ensure equitable treatment and prevent exploitative practises. Furthermore, unions can collaborate with employers to establish shared messages and collaborate with non-governmental organisations (NGOs) and community organisers dealing with migrants' rights to exchange resources, develop joint initiatives, provide training and advocacy, and enhance outreach efforts (ETUC, Union Migrant Net, and PICUM). The establishment of collaborative efforts between trade unions in both source and destination countries can prove advantageous in effectively resolving gaps in protection. The ILO has provided help for the establishment of agreements that adhere to a standardised model agreement for trade unions. The model agreement proposes joint action to promote:

“...tripartite consultation and decision-making mechanisms to address situations related to the status of migrant workers, social protection aspects and possibly encourage measures facilitating the regularization of the status of migrant workers trapped in irregular situations.”<sup>66</sup>

The Austrian Confederation of Trade Unions administers a facility specifically designed to cater to migrant workers who find themselves in an irregular circumstance, including individuals who have fallen victim to human trafficking. The Malaysian Trades Union Congress (MTUC) has engaged in cross-border collaborations with the Vietnam General Confederation of Labour (VGCL) to facilitate the education of Vietnamese migrant workers and establish connections with the Vietnamese Embassy in Malaysia. Additionally,

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<sup>66</sup> “Model Trade Union Agreement on Migrant Workers’ Rights”, 8<sup>th</sup> December, 2008, <https://www.ilo.org/dyn/migpractice/docs/208/Model>

these efforts have aimed to address disputes and enhance the VGCL's capacity to engage in policy dialogue within Vietnam.<sup>67</sup>

In Malaysia, there exists a migrant worker hotline created by the United Nations that serves as a referral system for individuals who have experienced sexual harassment and other forms of violence. This hotline directs victims to Tenaganita, a renowned NGO in Malaysia that specialises in supporting migrant workers. Tenaganita possesses the necessary knowledge and resources to offer assistance and services to employees who have been subjected to abuse. The primary organisation providing trade union assistance for undocumented employees in Austria is the NGO Association for Unionised Assistance for Undocumented Employees. The organisation offers information, counselling, and assistance in addressing worker grievances, often in collaboration with non-governmental organisations (NGOs) that specialised in supporting individuals affected by human trafficking, such as the Intervention Centre for Trafficked Women.<sup>68</sup>

The promotion of due process and the provision of 'access to justice' for migrant workers in irregular situations sometimes serve as focal points for endeavours undertaken by workers' organisations and NGOs in countries of destination. Additionally, they provide a substantial contribution to the monitoring and safeguarding of the rights of migrant workers who find themselves in an irregular situation. Protocol 29 of 2014 to the Forced Labour Convention, 1930, and the Forced Labour (Supplementary Measures) Recommendation, 2014 provides access to justice for migrant workers in an irregular situation. It obligates members to ensure that:

“...in accordance with national laws, regulations and practice, that all victims, either by themselves or through representatives, have effective access to courts,

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<sup>67</sup> ILO, n 54

<sup>68</sup> Ibid

tribunals and other resolution mechanisms, to pursue remedies, such as compensation and damages.”<sup>69</sup>

The table below lists out several measures to facilitate access to justice for migrant workers in irregular situations.

Some of the measures to facilitate access to justice for migrant workers in irregular situations have been elucidated with examples for a clearer understanding of the efforts of ILO in this regard.

- **Recognizing the legal validity of an employment relationship and/or employment contract with respect to the migrant worker in an irregular situation:** In Spain, for instance, the lack of a residence or work permit for a foreign employee does not invalidate the employment contract with regard to the employee's rights, nor does it prevent the employee from receiving benefits derived from the provisions of international instruments for the protection of workers and other benefits to which they may be entitled, provided that they are compatible with Spanish law.
- **Adopting legal provisions that claims can be pursued regardless of whether the migrant worker leaves the country:** Case in point is the EU. In the majority of EU member states, migrant workers who are in irregular situation have the ability to file claims against their employer in order to seek compensation for unpaid wages, even after they have returned to their place of origin. Twenty European Union member states have adopted this particular approach.
- **Avoiding requirements for service providers to report offences of migration status, and even clarifying the duty not to report migrants in an irregular situation to ensure that migrants access basic social services:** After consulting with medical experts, the Committee for the Rights of Foreigners of the Council for Human Rights in the Czech Republic came to the conclusion that it is against the law and not advisable to report migrants who are in an irregular situation to the police when they seek medical attention.
- **Ensuring that migrant workers in an irregular situation are aware of their**

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<sup>69</sup> Article 4 (a) of the Protocol 29 of 2014 to the Forced Labour Convention, 1930

**rights and receive advice and legal aid, and assistance with interpretation, by public action or governments’ engagement of social partners or NGOs to help ensure these rights:** The Slovenian Association of Free Trade Unions has been contracted by Slovenia’s Ministry of Labour, Family, Social Affairs, and Equal Opportunities to provide free legal aid and other professional assistance to migrants in judicial, administrative, and criminal matters. The organisation also conducts regular advocacy to protect the most vulnerable groups from abuse and in case of rights violations.

- **Ensuring effective and speedy dispute resolution with ability to obtain redress:** The Commission for Conciliation, Mediation, and Arbitration (CCMA) was established and implemented in South Africa as a means of integrating alternative dispute resolution methods, specifically conciliation and arbitration techniques. This initiative aimed to provide accessible, efficient, and prompt resolution of disputes for workers who possess limited resources, including migrant workers in an irregular situation. Regardless of the absence of a formal contract, the CCMA has jurisdiction over any individual, including a migrant worker with irregular status, with whom an employment relationship exists. *Discovery Health Ltd. v. CCMA et al.* (CLL Vol. 17, April 2008).<sup>70</sup>

### **Table 3: Efforts of ILO to facilitate access to justice**

**Source:** ILO, “Protecting the rights of migrant workers in irregular situations and addressing irregular labour migration: A compendium”, International Labour Organization, 2021.

## **Section 4**

### **4.1 The Global Compact for Safe, Orderly and Regular Migration**

The United Nations General Assembly orchestrated the New York Summit on Large Movements of Migrants and Refugees in September 2016. This was the first inaugural attempt to tackle the challenges associated with ‘mixed

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<sup>70</sup> Discussed in Ivan Israelstam, “Recent Labour Court case shows general assumption’s fallacy”, in Your guide to labour law in South Africa.

migration' on a global level, a phenomenon that has increasingly manifested in international migration and has sparked controversy within the realm of international politics. The Global Compact for Safe, Orderly, and Regular Migration and the Global Compact on Refugees were both ratified in December 2018 as a consequence of the consultation process that was initiated by the summit. According to several observers, the compacts play a fundamental role in facilitating widespread international cooperation on mixed migration.

The GCM enumerates the importance and necessity of cooperation between states to address the reality of global migration. The Compact does not create new rights; rather it pulls together existing rights and provides a collaborative framework for working towards improved implementation for a specific group of people –the migrants. The application of international human rights legislation entrenched in international agreements, to all, including migrants, is causing tension despite the fact that these existing conventions already protected human rights non-discrimination. The goal of international human rights accords is to establish a standard below which no state can treat individuals (including migrants). Furthermore, the Compact contains other standards and norms that, while not strictly obligatory, may be extremely essential in guiding State activity. Although the Compact may not have legal force, States are nonetheless required to abide by it politically. It offers proof of the State's political goals, its international obligations, and the agreements it has made to operate within certain parameters. The Compact is the result of discussions facilitated by States and was approved by States at the UNGA. It is made up of 'commitments' and 'actionable objectives' that signatory States have agreed to uphold. Furthermore, the Global Compact has been implemented by States who demonstrate clear political purpose and approval, according to paragraph 41 of the Compact. Therefore, in order to operate 'in

good faith’, the countries must make sure that national laws and policies do not clash with the commitments made by the Compact.

The first International Migration Review Forum (IMRF) took place on 17-20 May 2022, following extensive and rigorous preparations undertaken by United Nations member states, the UN system, civil society, local governments, and various other stakeholders. Considerable expectation surrounded this occasion, as it was the inaugural gathering of the worldwide community following the two-year period of COVID-19 pandemic. The purpose of this gathering was to evaluate the advancements made in the execution of the GCM. The IMRF, which took place under the auspices of the UNGA, culminated with the adoption of a Progress Declaration by all member states involved in the negotiations.<sup>71</sup>The provision of four round tables facilitated discussions including the many objectives of the Global Compact, with the aim of evaluating the advancements achieved in its implementation across all tiers. The UN Secretary-General compiled background materials for the round tables with the assistance of the United Nations Network on Migration. The round table itself encompassed keynote talks, a panel discussion, and concluded with an interactive debate. During the roundtable discussions, governmental bodies and relevant parties presented instances of advancements achieved in the execution of the Global Compact. These examples encompassed efforts to mitigate the repercussions of the pandemic. Numerous speakers offered their reflections on how the pandemic has brought to light deficiencies in migration governance. They emphasised the importance of expanding the implementation of effective strategies that prioritise human rights, as well as adopting comprehensive measures that involve both the government and society as a whole. The significance of collective

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<sup>71</sup> John K. Bingham, Eva Sandis, and Sophie van Haasen, “An essential step forward down a long road: Taking stock of the first IMRF”, *Mixed Migration Review* 2022.



responsibility, as demonstrated through collaboration and unity in addressing difficulties, was emphasised too.<sup>72</sup>

The GCM is widely recognised by participating Member states as the overarching framework for governing international migration. This is evident from the significant number of governments involved, as well as the Rabat Declaration of 25<sup>th</sup> March 2022 in which Member states reaffirmed their unwavering support for the GCM and emphasised the need for increased efforts to expedite its implementation and achieve the Sustainable Development Goals (SDGs). This observation is particularly noteworthy when taking into account the fact that the GCM is a document that does not impose legally binding obligations. However, significant gaps in the implementation of the Global Compact were highlighted in the Progress Declaration.

The inclusivity and participatory nature of the IMRF faced challenges, since it predominantly depended on statements rather than fostering substantial engagement among member states and other stakeholders. Moreover, the multi-stakeholder hearing organised by the IMRF, which took place just before to the commencement of the IMRF, did not succeed in garnering the participation of states. Consequently, this event primarily served as a platform for non-state stakeholders to engage in discussions between themselves, rather than facilitating the crucial opportunity for direct interaction with states. Numerous stakeholders, including certain states, have voiced their apprehensions and put forth specific suggestions for enhancement. These suggestions encompass the establishment of designated platforms for interaction among stakeholders, including migrants and member states, the implementation of formal mechanisms to engage with stakeholder groups, as exemplified by the Global Forum on Migration and Development, and the expansion of access for local governments. Presently, local governments are

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<sup>72</sup>International Migration Review Forum (IMRF), Summaries of the Plenary, Round Tables and Policy Debate”, 17-20 May 2022, United Nations Headquarters.

unable to access the IMRF unless they are affiliated with national delegations.<sup>73</sup> As narrated by Colin Raja of the Civil Society Action Committee:

“Instead of moving towards safe, orderly, and regular migration, migration became more turbulent, more irregular, and more dangerous and deadly. We were applauded for being “frontline responders” and “essential workers”, and yet many migrant workers had their labour rights routinely violated [...] So we’ve dutifully come here in the hopes of raising our collective voices and proposing better ways forward. And yet even the process of coming here became a monumental task: many of our leaders from the global South could not get visas, [...] and local government—key allies in GCM implementation—cannot even be in this room today. Indeed, civic space within these UN walls is shrinking.”<sup>74</sup>

## **4.2 Non-Governmental Organisations: Their Response to Mixed Migration**

According to Article 11 of the European Convention on Human Rights and Article 22 of the International Covenant on Civil and Political Rights, individuals possess the entitlement to freedom of association, hence enabling the establishment of Non-Governmental Organisations (NGOs). The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations stipulates that the legal personality and capacity of an NGO shall be recognised in other Member States, if that NGO has “a non-profit-making aim of international utility”<sup>75</sup> and unless its activity “contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others, or jeopardises relations with another State or the maintenance of international peace and security.”<sup>76</sup>

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<sup>73</sup> Mixed Migration Review, 2022

<sup>74</sup> Ibid.

<sup>75</sup> Mr Domagoj Hajduković, “Rights and obligations of NGOs assisting refugees and migrants in Europe”, *Parliamentary Assembly Report*, September 2020

<sup>76</sup> Ibid.

When organisations are faced with situations that involve ‘novelty, ambiguity, or uncertainty’, they are unable to depend only on their current reserve of knowledge. Instead, they must engage in the processes of ‘adaptation and innovation’<sup>77</sup>. This phenomenon is predominantly observed in the outer regions of organisations, since it is in these areas where an organisation’s frontline personnel provide services, encounter operational challenges, and directly engage with individuals referred to as ‘customers’ or ‘clients’. During the period of crisis at the border, several international organisations, non-state actors, and European agencies engaged in improvisations to develop novel approaches to knowledge acquisition and action. According to a senior Frontex official, “the crisis resulted in the acquisition of significant practical expertise.”<sup>78</sup> The substantial increase in the number of migrants entering the European Union in 2015, with Greece serving as the primary maritime entry point for irregular migrants, exposed the lack of preparedness on the part of both the Greek state and EU leaders. Consequently, this situation greatly enhanced the importance of informal and formal actors, including civil society migrant organisations, in addressing the needs of migrants.<sup>79</sup>

Both IOM and NGO’s collaborate on a vast variety of migration management issues throughout the globe. IOM’s collaboration with NGO’s is defined in Article 1(2) of its constitution, according to which the Organization:

“...shall cooperate closely with international organizations, governmental and non-governmental, concerned with migration, refugees and human resources in order, inter alia, to facilitate the co-ordination of international activities in these fields. Such cooperation shall be carried out in the mutual respect of the competencies of the organizations concerned.”<sup>80</sup>

Counter trafficking, assisted voluntary returns, human rights and health of the migrants, gathering crucial information are some very important areas where Civil Society Organizations (CSO’s) assist the global governmental

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<sup>77</sup> Nele, n.19

<sup>78</sup> Ibid

<sup>79</sup> Kalogeraki, 2019

<sup>80</sup> Article 1(2) of the Constitution of International Organization for Migration (IOM)

organisations. They exert a great influence on the policies on migration especially irregular migration. The role of these CSO's definitely has been very significant and they have assisted migrants at all levels, be it providing all kinds of relief to refugees and migrants, or supply of essential services. They have also made several important studies on the flow of irregular migrants, their arrival and return, and how countries are managing these flows. They have a significant role to play in policy-making as well. With regard to partnership with the UNHCR, at the end of 2011 the UN High Commissioner for Refugees, António Guterres, called for a review of the quality of partnership between UNHCR, IFRC (International Federation of Red Cross) and NGO's and launched a process known as the "High Commissioner's Structured Dialogue." The goal of the Dialogue was to achieve mutual respect and trust demonstrated by open communication, transparency in decision making, and clear accountabilities between UNHCR and respective partners.<sup>81</sup>

The NGO Committee on Migration is a coalition of NGOs that convenes monthly in New York City to advocate for individuals who are migrating, and holds consultative status with the United Nations Economic and Social Council (ECOSOC). The organisation serves as a representative body for prominent NGOs involved in migration issues at UN meetings and events. Previously it played a significant role in assisting with the preparations for the High-Level Summit on the Large Movements of Refugees and Migrants in September 2016. Currently, it is actively involved in monitoring and participating in the on-going discussions around the UN Global Compact for Migration.<sup>82</sup>

In recent times, States and international organisations are heavily relying on NGO's for the implementation of policies pertaining to mixed migration apparently because states lack the instruments to enforce policies without their

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<sup>81</sup> See International Council of Voluntary Agencies (ICVA)

<sup>82</sup> Nele, 2018

assistance.<sup>83</sup> NGO's are commonly perceived to hold three distinct forms of authority, which empower them to actively participate in the formulation of policies and the establishment of practises especially in present challenging scenarios. These forms of authority include expert authority, moral authority, and logistical authority.<sup>84</sup>

There are several factors which explain the dynamism and changing role of NGO's. When state policies face mounting challenges, opportunities arise for NGO's to step in and relieve the burden of those challenges. Furthermore, alterations in geopolitical power dynamics and domestic politics, such as the onset or end of the Cold War, have a significant impact on the role played by NGO's. The endorsement of objectives of NGO's by prominent political powers such as the United States or the European Union, enhances the influence and significance of NGO's. The primary counterparts of NGO's predominantly consist of nation-states, which significantly shape the frameworks within which NGO's operate. Neoliberalism also espouses the perspective that the interests of the state are most served by the delegation of work to NGO's. Furthermore, their function is influenced by societal developments too.<sup>85</sup>

#### **4.3 NGO's and International Organisations: A Collaborative Mechanism**

The goal of discussing the role of NGO's in this chapter is not to reiterate their unquestionable importance, and the insurmountable task that they perform as frontline supporters to vulnerable migrants. There is a plethora of literature available on that. However, the aim is to understand the relation (of both competition and cooperation) between NGO's and International

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<sup>83</sup>It should be noted here that States are considered the primary actors within the realm of international affairs, and it is only via their consent to delegate some of their sovereign powers that other actors may attain influence.

<sup>84</sup> For details, see 'Marlou Schrover, Teuntje Vosters and Irial Glynn, "NGOs and West European Migration Governance (1860s until Present): Introduction to a Special Issue", *Journal of Migration History*, 2019, p. 194'

<sup>85</sup> Marlou, et.al, p. 215

Organisations (IO's) or Inter-Governmental Organisations (IGO's). Often the line between their role, the work they perform, their representation and organisation with regard to governing mixed migration remain blurred. Before coming down to the practical scenario, let us first remind ourselves of the potential difference between a Non-Governmental Organisation and an International Organisation.

NGO's provide aid to those who are disadvantaged, lacking access to basic necessities, or in need of immediate financial support due to health-related problems or other unforeseen circumstances. IGO and NGO are distinct entities. NGOs play a significant role in promoting and fostering the values of humanity and peace. In contrast, IGO's primarily focus on addressing significant issues that arise at a worldwide level. The distinguishing factor between both lies in their membership composition. IGO's are international entities that consist of member states, whereas NGO's are associations comprised of private individuals. Over the course of time, NGO's have increasingly been interconnected with each other, and with IGO's.<sup>86</sup> This interconnectedness has led to a greater resemblance among these organisations, mostly due to the processes of shared advancements under comparable limitations, financial interdependence, and the establishment of formalised relationships. The interconnection between NGO's in several instances has bolstered their influence, although it has also resulted in a blurring of distinctions between NGOs themselves, as well as between NGO's and IGO's.

In addressing the complexities of mixed migration, coordination between NGO's and IO's has become increasingly important. Scholars commonly contend that despite the increasing involvement of IO's and NGO's in

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<sup>86</sup> "How is an IGO and an NGO different?", <https://vakilsearch.com/blog/difference-between-ngo-and-igo/#:~:text=IGOs%20refer%20to%20intergovernmental%20organisations,to%20health%20issues%20or%20mishaps>.

addressing various aspects of global mobility, there remains a notable absence of a comprehensive framework that effectively integrates the governance of diverse dimensions of cross-border mobility, such as travel, labour migration, and displacement.<sup>87</sup>

Presently, there exists a dispersion of institutional capabilities among several entities, resulting in notable deficiencies in authority. One example is the UNHCR, which is entrusted with the responsibility of safeguarding the rights and well-being of refugees and those seeking asylum, acting as the custodian of the 1951 United Nations Refugee Convention. The IOM, in contrast, lacks comparable authorities for individuals who are in transit but do not meet the legal criteria outlined in the Refugee Convention. Despite establishing formal connections with the United Nations, the IOM remains an organisation that operates on a project basis without a normative mandate. Other IGOs focus on specific aspects of global mobility, such as labour migration schemes, remittances, border governance, human trafficking, female migrants and refugees, children on the move, and the protection of human rights, especially the rights of migrants. As a result, there is currently a lack of a comprehensive multilateral framework and a singular inter-governmental organisation with a distinct purpose to oversee all facets of global migration.

IO's do have the capacity to engage in global decision-making processes by supporting multilateral discussions and conferences. They can also serve as custodians of international treaties or act as implementing agencies, responsible for carrying out internationally agreed upon initiatives and projects at the operational level. However, in present circumstances when 'mixed migration' has caught global attention due to its complex dynamics leading to numerous policy challenges, an increasing cooperation and coordination between IO's and NGO's is the need of the hour. Given the inherent ambiguity and lack of clear legal-political regulations surrounding

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<sup>87</sup> Nele, n 7

mixed migration and its governance, frontline workers, in their capacity as active agents, are compelled to engage in negotiations on the implications and complexities of managing mixed migration. They have a crucial role in comprehending the involvement of IO's in the governance of mixed migration.<sup>88</sup>

When individuals engage in fieldwork, they are promptly faced with the complex issue of mixed migration. Although they depend on mandates and utilise organisational finances to effectively handle the intricate process of managing mixed migration in practical settings, it is important to note that they do not just serve as implementers. Due to the inherently fluid and indeterminate characteristics of controlling mixed migration, policymakers are compelled to employ improvisational strategies in order to devise effective approaches for managing mixed flow. By engaging in experiential learning in their daily activities, individuals develop the necessary competencies to effectively perform their professional duties, even when faced with organisational boundaries. Best practises and professional standards are developed by relevant stakeholders, significantly influencing the governance of mixed migration.

Within the framework of mixed migration, governing practises refer to the coordinated, systematic, and effective measures used to control the unlawful movement of individuals beyond a national boundary. These practises arise and evolve via the active participation of professionals associated with various public and private global migration organisations within the interconnected institutional ecology of mixed migration. This occurs within local communities of practise. In their daily interactions, these professionals engage in collaborative efforts to acquire knowledge and engage in discussions on how to effectively manage the movement of individuals across borders, despite the lack of complete global regulations and official directives. In light of their

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<sup>88</sup> Ibid.



expertise and implicit understanding of migration, they engage in a competition to choose the most effective approach to tackle this complex issue.

A case study has been included here in order to provide a befitting example of the benefits of coordination among IO's, NGO's and other working groups during crisis. The Greek national COVID-19 vaccination initiative was initially lacking inclusion of vulnerable refugee and migrant communities. Therefore, a plan was initiated in January 2021 as part of the state-wide COVID-19 vaccination campaign to increase the immunisation rates among refugees and migrants, regardless of their legal status. This intervention was implemented on a national scale, encompassing receiving facilities, open and closed refugee camps, refugee accommodation centres, and community settings. The primary focus of this initiative was to cater to those who lacked a social security number or the requisite documentation required to avail themselves of healthcare services. A temporary social security number was established for the exclusive purpose of COVID-19 vaccination for migrants through a sequence of ministerial orders. Subsequently, individuals were able to avail themselves of COVID-19 vaccination services provided by NGO's (such as Médecins Sans Frontières, Médecins du Monde – Greece, PRAKSIS, Hellenic Red Cross, and the Syrian American Medical Society) in municipal clinics or mobile clinic units. The successful execution of this initiative was made possible through the extensive collaboration among governmental entities, regional and local authorities, international organisations, the National Public Health Organisation responsible for implementing the PHILOS programme – Emergency Health Response to Refugee Crisis, and NGO's of course. Despite encountering several hurdles, the success of this project effort will certainly be attributed to the effective channels of

communication and collaboration/cooperation that existed across ministries, state actors, international organisations, and NGOs involved.<sup>89</sup>

Médecins Sans Frontières (MSF) or Doctors Without Borders, is a globally recognised medical humanitarian group that operates independently and offers emergency medical aid to people at risk in over 70 countries across various regions including Africa, the Americas, Asia, the Caucasus, Europe, and the Middle East. This humanitarian aid is designed to assist individuals whose existence is jeopardised by many factors such as violence, neglect, or catastrophic events, predominantly arising from armed conflicts, epidemics, starvation, limited access to healthcare, or natural calamities.<sup>90</sup> In its capacity as a humanitarian organisation, MSF offers medical assistance to mixed migrant and refugee populations, irrespective of the legal status of patients. MSF operates on the principle that there are no individuals classified as ‘illegal people’ or ‘illegal patients’. The interventions implemented by MSF are a quick reaction to individuals who are in dire need of humanitarian assistance.<sup>91</sup>

More than 80,000 individuals have received assistance from MSF search and rescue teams in the Central Mediterranean. MSF’s current search and rescue vessel is the *Geo Barents*. Between June 2021 and May 2022, the ship made 11 voyages and carried out 47 rescue missions, saving 3,138 individuals and retrieving the remains of an additional 10 drowned mariners. 6,536 medical consultations for primary care, sexual and reproductive health, and mental health were conducted by MSF staff on board.<sup>92</sup>

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<sup>89</sup>“Promoting the health of refugees and migrants: experiences from around the world”, Geneva: *World Health Organization*, 2023.

<sup>90</sup> See Médecins Sans Frontières (MSF)

<sup>91</sup> Katharine A Derderian. and Liesbeth Shockaert, “Responding to ‘Mixed’ Migration Flows: A Humanitarian Perspective”, *Sur International Journal on Human Rights*, Vol. 6, No. 10, pp. 105-114, 2009, SSRN: <https://ssrn.com/abstract=1567440>

<sup>92</sup> Médecins Sans Frontières (MSF), “Left to drown at the southern European border”, <https://www.msf.ie/article/left-drown-southern-european-border>

## Section 5

### Current Response to Mixed Migration

The global governance of and response to mixed migration involves a range of legal regimes impinging on several actors simultaneously; shared understandings about the nature of mixed migration, including motivations and drivers; and the existence of different bilateral, regional and global arrangements for addressing the phenomenon and the complexities and fatalities associated with it. One most apparent cause of concern is the case of missing migrants. This is one problem that calls for highlighting ‘states’ obligations to address a long-neglected and large-scale calamity.’ Some important initiatives in this regard are- the 2018 Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys; the 2019 Guiding Principles for the Search for Disappeared Persons which are based on the International Convention for the Protection of All Persons from Enforced Disappearance and other relevant international instruments; and certain clauses of the 2018 Global Compact for Migration.<sup>93</sup>

The underlying principles of these recent texts are derived from the 1949 Geneva Conventions and subsequent human rights treaties, which mandate that during times of armed conflict, deceased individuals must be systematically searched for, gathered, recorded, identified, and buried in a respectful way. Ideally, the remains should be returned to the bereaved families. Currently, these concepts are being implemented in humanitarian contexts that do not include armed conflict. The huge number of migrants who are either missing or deceased as a consequence of irregular migration has acted as a catalyst to stimulate fresh initiatives. The attainment of new criteria for evaluating states in this context can be said to have been accomplished.

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<sup>93</sup> Chris Horwood, “Raising the bar: New international instruments, scientific disciplines, and practice related to missing migrants”, *Mixed Migration Review*, 2022.

However, the endeavour to enforce adherence necessitates immense exertion, specialised knowledge in the domain of empathetic science, endurance as well as significant political and financial investments and international cooperation. Currently, the promotion of these endeavours is not primarily undertaken by individual nations, but rather spearheaded by international organisations, non-governmental organisations, and academic institutions.

Within the framework of Objective 8 of the GCM, participating governments are committed to “save lives and establish coordinated international efforts on missing migrants.”<sup>94</sup> It is imperative to incorporate measures for data gathering pertaining to dead migrants, with the aim of ensuring their traceability subsequent to burial, in strict adherence to globally recognised forensic standards. The signatories also expressed their agreement to build transnational coordination channels in order to expedite the identification process and provide information to families.

Comprehending the extent of the problem of missing migrants becomes difficult due to the covert nature of irregular migration and the lack of documents for identification or records associated with the deceased individuals. Frequently, the unavailability of witnesses is observed, since those who could have provided testimony might have also perished during the same journey or relocated prior to the arrival of investigators at the location. In many instances, family members may lack awareness about the migration of their dear ones, including the specific migration path undertaken. In other cases, the absence of human remains or the occurrence of tragic events in high seas raises jurisdictional and responsibility concerns, leading to delays or inaction. The problem aggravates even more in a mixed flow. In mixed migratory movements, a lot of migrants and refugees perish through accidents, sickness, geographic or climatic problems, criminal negligence, or even

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<sup>94</sup> United Nations, “Global Compact for Safe, Orderly and Regular Migration”, 2018

murder. Numerous more are trafficked and vanish into unknowable situations of forced work or sexual exploitation.<sup>95</sup>

Thus, the gravity and sensitivity of the problem requires multi-level collaboration among international agencies and civil society organisations. In many cases, they have been actively engaged in addressing the needs of families and enhancing search capability and information exchange. In the year 2021, the International Committee of the Red Cross (ICRC) spearheaded the development of three novel tools pertaining to missing migrants as part of its comprehensive worldwide Missing Persons Project. They are Guidelines on Coordination and Information-Exchange Mechanisms for the Search for Missing Migrants; Guiding Principles on Interaction with Families of Missing Migrants; and Core Dataset for the Search for Missing Migrants.<sup>96</sup>

A striking paradox is worth noting in the global context, wherein numerous governments that provide financial support and actively engage in the identification of deceased migrants are also the very governments that enforce stringent migration policies, impede regular channels for mobility, curtail opportunities for seeking asylum, restrict search and rescue efforts, and penalise individuals who offer assistance to migrants. The lack of government-led and collaborative search-and-rescue activities in maritime settings highlights a concerning disregard for this issue. Specifically, in the context of Europe and the Mediterranean region, search-and-rescue operations have been significantly reduced in recent years, and whatever private efforts that do exist are consistently and intentionally impeded. The responsibility of fulfilling the lofty aspirations outlined in the documents lies not just with civil society, academia, and international bodies, but also with states and their governments, who must now assume a more proactive role.

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<sup>95</sup> Horwood, n. 89

<sup>96</sup> Ibid.

## **Conclusion**

The successful management of large-scale migration and refugee influx, whether at the national or regional level, necessitates the establishment of appropriate institutional frameworks that can effectively address the intricate challenges and demands that arise; particularly in cases of massive, unexpected, mixed migration flows. While we have clear-cut definitions and provisions enshrined in legal instruments with regard to protection of the most vulnerable population, the reality is far more complex especially when one looks at or works in context of mixed migration. Moreover, refugees and other migrants are increasingly relying on risky journeys even today, moving along dangerous routes and exposed to similar kinds of human rights violations and interactions with smugglers, or facing detention. By virtue of being exposed to the same risks, these vulnerable people exhibit very similar needs and therefore the million dollar question arises: should assistance focus on needs-based delivery rather than focusing on status-based delivery? This question reflects the very essence of the concept of mixed migration and since we are not diverted towards 'normalising the extreme', it can be concluded that consistent focus on 'needs-based' assistance to vulnerable migrants in mixed flow through effective collaboration and thoughtful application of legal frameworks, will aid in avoiding human rights violations in future.

## CONCLUSION TO THE THESIS

In a globalised society, drawing a clear distinction between the terms ‘refugee’ and ‘migrant’, although important, is extremely difficult in practise, and this distinction has traditionally been formed with the assumption that refugees have a preferential status in international law. However, when viewed from a different perspective, it actually undermined the concept of ‘migrants’, with negative implications for policy, analysis, and the protection of individuals on the move. The large and mixed movements of people that occurred since the beginning of the neoliberal economy in the 1990’s, made it increasingly difficult to distinguish between refugees and asylum seekers on the one hand and migrants on the other. In the current situation, it therefore makes sense to maintain the category of ‘refugee’, while progressively ensuring that other vulnerable categories of migrants receive similar protection that they require and deserve under international human rights norms.

The fact that various categories of people move together, directed us towards the phenomenon of ‘mixed migration’ and complex flow. In mixed migration, we discussed a plethora of ‘mixed’ reasons/driving forces for migration involving various categories of people who travel through the same route, using the same means of transport and arriving at the same destination in most cases. These classifications were not mutually exclusive; migrants fit into many categories at once or switch between them while migrating. It was at this point that mixed migration became even more complex. Therefore, the challenges that mixed migration entailed as well as the current responses observed while dealing with irregular mixed flow, was the central focus of the research. Such challenges were understood in two aspects: one was in terms of understanding mixed migration or rather clarifying the meaning and connotations of mixed migration, and second was the effectiveness of the current policy measures, need for revamping existing laws and frameworks

and promoting extensive collaboration among stakeholders that could be more suitable to deal with large number of migrants in mixed flow. Other than this, the study also delved deep into the applicability of the International Refugee Law to contemporary human mobility, comprehended the nature of irregular movement specifically by examining the involvement of smuggling and trafficking in facilitating such movement, and tried to understand the underlying causes of malfunction of the European asylum system especially in the context of the 2015 surge in migration towards the Mediterranean. The present research also attempted to understand the laws, conventions and international organisations that are applicable, relevant and work on mixed migration and how a well-designed collaboration among Non-Governmental Organisations (NGO)'s and International Organisations (IO)'s can avoid migrant deaths at sea, ensuring their dignity and safety while in transit.

### **Detailed Analysis of the Chapters**

To achieve the aforementioned aims of research, the entire thesis was divided into five chapters, the analysis of which has been provided below:

Chapter I titled, 'The Global Refugee Policy and International Refugee Regime', reflected upon the legal definition (the 1951 Convention definition) of refugees, an understanding of forced migration and the subsequent birth of international refugee law. It explored few debates over the use of the terms 'refugees' and 'migrants' under forced migration studies for conceptual clarity. It has discussed the contemporary evolving role of the UNHCR in complicated refugee situations and how it should reform its policies and expand its mandate to cover the various categories of vulnerable migrants requiring same protection as refugees (notably migrants in mixed flow). It has also addressed the real crisis and contemporary challenges that refugees are facing, and to what extent refugee law has been able to protect persecuted individuals in a 'mixed' flow. It analysed the current nature and quality of international



refugee regime and attempted to understand whether the refugee law is in practice expanding its mandate to protect vulnerable migrants in mixed migration, or is actually extending primary support to the 'nation states'.

Chapter II titled, 'Mixed Migration: Motive, Route and Implications' focused on the emergence, definition, and understanding of the term 'mixed migration' and explained the motivational elements/factors for mixed flow. The main routes for travel used by the irregular migrants on the move towards the Mediterranean (Eastern, Western and Central Mediterranean routes) were analysed with a special focus on the Eastern Mediterranean Route. The chapter referred to the motivational elements/factors for mixed flow and explained how irregular movement is related to the phenomena of mixed migration. It also brought to light the implications of the 'motivational element' in mixed migration and how can this policy challenge affect the migrants as well as their genuine protection needs. In this context, few case studies were reviewed revealing the risks and numerous problems faced by migrants in such 'mixed' situation. The chapter also highlighted the dual crisis faced by irregular migrants during COVID-19. The chapter finally culminated into notable findings on the motives for travel, conditions in which migrants are forced to travel; and concluded the discussion highlighting 'why' and 'how' mixed migration as a recent policy concept holds significant relevance within the broader context of forced migration and refugee studies.

Chapter III titled, 'Smuggling and Trafficking of Humans in Mixed Migration' focused on human smuggling and trafficking in persons within mixed migration and discussed them as part of Transnational Organized Crimes. It highlighted the convention protocols related to both the crimes and also the profiles of smugglers and smuggled migrants. The common routes used for migrant smuggling were also discussed. The chapter studied the interrelation between the two very different crimes related to migration- human trafficking and smuggling of migrants. It additionally highlighted the possible

implications of an overlap between the two different crimes. The profiles of ‘other facilitators’ apart from the main smuggler, who are equally involved in migrant smuggling (knowingly or unknowingly) and a review of fatalities in the Mediterranean while being smuggled and the steps taken by concerned European authorities in mitigating the situation at sea was also explored. The chapter delved into facts related to the role played by the smuggler in the journey of a migrant. It looked into the perspectives of both the smuggler and the migrant in situations of mixed migration, in order to get a more nuanced understanding of the dual role of the smuggler as a ‘protector’ and a ‘predator.’ It also stated the strategic politicisation of migrant smuggling and trafficking and its wider policy implications. Finally, it studied the role of smugglers and traffickers at the time of the pandemic as well as the multiplicity of crisis situations faced by the irregular migrants and critically analysed the contribution of States and organisations concerned in the protection of human rights of those who fall prey to organised crimes.

Chapter IV titled, ‘The European Asylum System and Mixed Migration’ discussed the historical development of EU laws related to asylum and migration and the consequent development of the Common European Asylum System (CEAS). In addition to the revamp of the CEAS, the flaws in certain regulations related to the asylum system and the evident fallouts of the Dublin regulation too have been highlighted. The chapter reviewed measures taken by the EU through the CEAS for the process of reception, resettlement/relocation and detention of refugees, particularly irregular migrants entering the region. It also mapped the practical experiences with regard to these processes by discussing case studies and case laws related to the same. Most notably, it aimed to draw attention towards lack of solidarity and parity among Member States as far as application of these processes are concerned. Wide gaps between policy-making and policy-implementation are evident in EU asylum system. Despite the development of the CEAS, there is

still no legislative framework which can present a durable solution to the plight of migrants arriving in mixed flows, lacking legal status but genuinely requiring protection. Lack of solidarity among EU Member States is a consistent problem in this regard. The chapter has therefore evaluated the role of States in protecting the migrants in mixed flow. The restrictive policy measures of Turkey and Greece (before and after the pandemic) were discussed as case studies, since these have been the main countries of transit and destination respectively for irregular migrants approaching the Eastern Mediterranean region (most affected by the overhaul of migrants during 2014-15). The nexus between 'planned political agendas' and 'political dilemma' of State authorities behind restrictive policy measures that were primarily responsible for a failed humanitarian assistance to irregular migrants in mixed flow were assessed. The chapter touched upon the Ukraine crisis and the resultant influx of refugees in order to evaluate the current response to migration. The chapter finally explored the possibilities of avoiding a major humanitarian crisis in future by focusing on a 'solidarity mechanism' by States involved.

Chapter V titled, 'Response to Mixed Migration: Laws, Policies and Organisations' attempted to understand the laws, policies and international organisations relevant to mixed migration along with a reference to the conventions and agreements through which States are obligated to protect the human rights of all migrants facing risks and vulnerabilities (irrespective of their status). Although the ultimate responsibility for the protection of the rights of migrants as per international law lies primarily with States, the non-state actors like international NGO's have and are persistently working with government agencies as frontline supporters to improve current policies and services available for the vulnerable migrants in order to guarantee their safety and dignity. Both IOM and UNHCR have sections on mixed migration, and new institutions have begun to take shape, notably at the regional level for

governing the phenomenon. The chapter then focused on the cooperative mechanisms among IO's and civil society which demonstrated that global response through states, non-state actors and IO's have begun accepting mixed migration as an emerging reality and also as a potential problem for global governance on irregular migration. Lastly, the chapter assessed with examples, that how such response has helped in formulating policies, designing appropriate innovative programmes and gathering effective responses for ameliorating the problems associated with mixed migration.

### **Research Findings**

The study has made an attempt to respond to the research questions posed in introduction to the thesis. The research questions and their response have been stated below:

*How to assess the current nature and quality of International Refugee Law and its applicability to situations of mixed migration?*

There are several instances to portray that refugees have always existed due to factors like wars, political upheavals, ethnic discrimination, religious strife, and a wide range of human rights abuses. Such factors force people to leave their homes and move to other so called 'safe' places. In order to assess the current nature and quality of the refugee law, it becomes primarily important to recapitulate the historical background of its emergence and what were the factors that led to the birth and 'need' of an international refugee regime. An important indicating factor is the 1951 Convention relating to the Status of Refugees which is the basis for International Refugee Law, and its 1967 Protocol. They are the main legal documents governing the movement of refugee and asylum seekers across international borders. Assessing these frameworks brought to light several weaknesses of the current nature of refugee law. Firstly, the 1951 Convention definition of a 'refugee' is not 'all-inclusive' because it leaves out several groups of people who are facing similar

risks after being displaced due to factors such as climate change, food insecurity, and terrorism. There are questions raised on whether the provisions are valid in the contemporary time, or can be possibly modified to cater to the growing needs and vulnerability of other categories of forced migrants who are still being governed by the 1951 convention and 1967 Protocol.

While discussions on the 'in-appropriateness' of the 1951 Convention has been brought to the table several times and the global North has been utilising unconventional terms to describe the refugee status; there are certain regions in the global South that are still characterised by the absence of any official legal framework for the protection of asylum seekers and refugees. They have not ratified the 1951 Convention or the 1967 Protocol. Few of the justifications for why countries in South Asia were hesitant to ratify the 1951 Convention were found. The majority of State-provided justifications seemed to be unconvincing. However, there is little motivation for South Asian nations to ratify the Convention at a time when it was not being adhered to by the very states that developed and adopted it. For instance, while Bangladesh has been under enormous pressure to provide shelter to millions of Rohingya refugees; the more affluent and less populated countries of the Global North are adopting newer strategies to deter refugees, primarily by adjusting their immigration policies and twisting International Refugee Law, International Human Rights Law and International Humanitarian Law.

The next indicator is the development of the Global Compact for Refugees (GCR). Although the GCR recognises the importance of international law, especially that pertaining to human rights and refugee law, it does not actively participate in it. International law is given some mild touch by the GCR, which mentions its importance in the beginning but does not actually take it into account throughout the rest of the document. It was argued that the chance to remind States of their responsibilities towards refugees was missed since the

GCR was not more deeply anchored in international law. Moreover, it does not explicitly acknowledge that international human rights law applies to refugees. A reference to the content of the GCR buttressed this reality.

While governments who accept refugees have the legal responsibility to aid and protect them, other countries' legal obligations to step in and help relieve this burden are less apparent. States also have a collective duty to protect refugees by finding durable solutions to the refugee crisis, but unfortunately, the 1951 Refugee Convention does not regulate it. Regarding the question of refugee protection and the duration of such protection, the Convention implies that its rules apply only where there is a valid 'fear of persecution'. As a result, if such a fear is no longer there, the State of asylum is once more free to decide on the immigration status of the subject, i.e., to allow her/him to stay in the nation or to have her/him removed. In fact, the State is no longer obligated by the requirements of the Convention if the person is no longer considered a refugee. In essence, refugee protection is transient; the Convention even has provisions for cessation in that regard.

Recognising that irregular movement may include refugees, asylum seekers, and other categories of people with particular protection requirements, (such as trafficked people, stateless people, and unaccompanied or separated children in mixed flow) is particularly important while considering legislative frameworks and policies to address irregular arrivals. The development of refugee law has actually emerged as a 'means of control' over the refugees. The foundational assumptions upon which it was constructed prioritise the rights of the State over those of the refugee. The refugee law in all its treaties and legal documents puts prime emphasis on protecting 'state sovereignty'. From the standpoint of pursuing a refugee protection regime that prioritises the needs of the refugee, it is a system that is fundamentally 'flawed' and 'un-reformable.'

Additionally, the phenomenon of mixed migration deemed the present international instruments and mandates (particularly the 1951 UN Convention and its 1967 Protocol) as grossly inadequate to satisfy the demands and conditions of humanitarian protection in rapidly changing dynamics of international migration. Existing national and international laws are proving insufficient to address the rising protection demands caused by mixed migration and its complexities. The present refugee laws' restricted scope and rigidly defined requirements fail to provide appropriate protection to any of those who are in a refugee-like situation and deserve humanitarian protection, but are excluded. The above study thus critically assessed the nature and quality of International Refugee Law and came to the conclusion that it is flawed in so many aspects-pertaining to its failure to extend protection to refugees (for which it was essentially framed) and other categories of people on the move, unable to resolve the problem of providing durable solutions to protracted refugee situations and its failure in legally binding States in matters of protecting the most vulnerable even in times of the pandemic (when the fundamental principle of non-*refoulement* was abrogated).

*What are the implications and policy outcomes of considering migrants' 'motivations' in situations involving irregular cross-border migration?*

When we talk about mixed migration, we discuss various categories of people travelling through the same route, using the same means of transport and arriving at the same destination in most cases. Every person has some motivation or the other that compels her/him to leave the country of origin and settle in some other country where circumstances are more favourable. Even refugees who leave their homes are fleeing some kind of conflict and persecution. After a detailed discussion on the emergence and development of mixed migration, the study showed that migration can be mixed in two senses: firstly, the motives of individuals for travel can be diverse and multifaceted; secondly, the nature of certain population movements or migratory

communities might exhibit a diverse range of characteristics *en route* as well as within host countries.

Few people deliberately leave their country of origin, their home, people, culture, traditions and settle in a different place completely new to them. However, they do not do it unless circumstances force them to do so. Many opt to undertake the journey due to economic problems in their countries of birth and search for a comparatively better future in a wealthier country of destination. Others are forced to leave due to prevailing unfavourable situations; refugees and asylum seekers, for instance, are escaping conflict or persecution in their home countries. Coming to the status of these 'other' migrants, some may be unaccompanied or separated children, stateless persons, stranded migrants or even victims of trafficking. The categorisation of migrants is not always mutually exclusive, since individuals may belong to many categories simultaneously, or change from one category to another over their journey. Refugees flee their countries to escape violence and persecution, but once they are in a country of asylum, they also start to prioritise rebuilding livelihoods for their families, as well as to support those they may have left behind. Refugee and labour/economic migration can also interlock where utilization of similar routes and channels is concerned. Refugees may turn into economic migrants by entering the labour market. It is at this point that mixed migration becomes even more complex and challenging.

While migration from Afghanistan is more heavily influenced by war and instability, migration from West Africa is mostly motivated by economic factors. These reasons, however, fluctuate depending upon the diverse paths that individuals from the same nation or area choose. People travelling from the Horn of Africa to Yemen and Saudi Arabia, for instance, do so mostly for economic reasons, but those travelling from the Horn to North Africa and Europe do so in part due to violation of basic rights. To be more specific, it is extremely difficult to interpret the genuine factors which motivate or compel



people to migrate. The reason is that not every migrant is ready to disclose why she/he chose to migrate and some may even make up concocted stories. There were instances where Pakistanis falsely portrayed themselves as Afghan refugees who fled the region due to extreme violence and torture by the Taliban, and migrated towards Europe. However, there are migrants, who actually escape violence and persecution and need immediate assistance and protection that a refugee would receive in case of persecution.

As mentioned earlier, mixed migration centres around two main criteria: firstly, the diverse characteristics of population movements or the diverse makeup of population flows; and secondly, the intricate personal motives that often drive individuals to relocate or migrate. If the prioritisation of humanitarian concerns and the fulfilment of States' legal duties towards migrants are to be emphasised, it is advisable to favour the previous interpretation of mixed migration. The legal responsibilities that States have for individuals who are in the process of migrating should generally be applicable irrespective of the specific reasons behind their decision to migrate. The relevance of individual motives is usually recognised in the context of refugee law. However, in instances involving mixed migration, these motivations are not considered significant during the first interaction between the State and individuals on the move; instead, everyone in such situations is required to conduct an independent investigation, regardless of their personal reasons for moving. The same goes with International Humanitarian Law.

Also, the appropriate course of action in addressing mixed migration should be guided by states' adherence to their international legal responsibilities towards individuals in transit. The examination of these responsibilities revealed that the conceptualisation of diverse motives for engaging in mixed migration did not yield significant benefits, since these motivations generally do not impact the obligations of States towards individuals in transit. Regrettably, alternative interpretations of mixed migration that encompass individual

motives presented a contrasting viewpoint. Such interpretation had significant risks within the prevailing political landscape, when several states are actively striving to curtail their responsibilities towards those seeking refuge and better prospects. The inclusion of migrants' motivations in discussions would inadvertently shift public focus towards the economic factors that caused migration. To clarify, by directly examining the factors that drive migration, it would create the impression that such migration is unnecessary and therefore, not justified.

The assertion that mixed migration should be understood primarily as a multifaceted amalgamation of population movements does not imply that individual reasons are never significant. Motivations hold significant relevance, particularly in the context of the commitment made by States in the New York Declaration to explore avenues for promoting secure, organised, and regular migration. This commitment encompassed various aspects such as the creation of employment opportunities, facilitation of family reunification, and provision of education-related prospects. However, it was uncommon for the policy framework of mixed migration to be applied in cases of normal migration. Instead, humanitarian organisations utilised it within the framework of irregular migration, when a significant number of persons had urgent protection requirements.

Migrants possess an inherent entitlement to have their needs fulfilled, irrespective of their unique motivations for relocation. The manner in which protection needs are addressed should be guided by individual factors, such as motivations. For instance, in the case of an unaccompanied child relocating to a specific country for reuniting with family, it is imperative to facilitate their reunion in that location. However, it is important to note that the legal obligation of a State towards a migrant should not be contingent upon individual circumstances. The legal frameworks nonetheless, demonstrate that States always have legal duties towards migrants, irrespective of their

individual motivations for travel. It was rightly suggested that the focus on root causes/motivations driving migration can be ‘misleading’. While some root causes like civil war or conflict, or some environmental factors behind migration could be addressed, the personal factors can never be put on the table for discussion and policy implementation as they are extremely diverse and can vary from one individual to another. Undue focus on them could delay the provision of humanitarian assistance to vulnerable migrants, leading to more suffering and deaths at sea.

*How does Transnational Organized Crimes such as Human Smuggling and Trafficking in Persons operate in situations of mixed migration?*

The global network of organised criminal activity, better known as Transnational Organized Crime (TOC) poses a significant and growing threat to national and international security, with negative consequence for public safety, health, working of democratic institutions, and economic stability throughout the globe. The organised crimes of ‘Human Smuggling’ and ‘Trafficking in Persons’ have been on the top of international political agendas as people are observed to be moving faster, more frequently and in much greater numbers than ever. Moreover, such movements were increasingly ‘mixed’ which raised greater concerns for safeguarding human rights of every migrant (irrespective of the status) travelling irregularly.

The act of facilitating undocumented migration is a multifaceted criminal offence that exhibits interconnections with several other illegal operations—including document forgery, human trafficking, and human rights violations, among other forms of unlawful smuggling. Smugglers employ a variety of payment methods, ranging from internet to underground banking networks, where money is paid and retrieved upon completion of the agreed-upon service. There emerged a newer challenge for law enforcement and judicial authorities in dealing with human smuggling known as ‘digital smuggling.’

where smugglers increasingly use digital services and tools, such as mobile applications and social media. In the context of migrant smuggling, social media networks and channels are employed in a variety of ways. One frequent application is when several social media platforms act as ‘consumer forums.’ Migrants frequently use social media platforms to study the smuggler and the journey they are about to take because there is frequently a large gap between the information supplied to them and the reality in the industry.

Larger smuggling networks involve a number of other actors, apart from the smuggler who are related in carrying out the smuggling operation. In a ‘smuggling hub’, apart from the smuggler, there are coordinators, transporters/guides, spotters, messengers, suppliers and service providers who are involved in the facilitation of the entire process of smuggling. Mostly, corrupt public officials such as border police, soldiers, immigration officials, employees in embassies and consulates, port police and other actors are paid a bribe to turn a blind eye towards the entire process. In addition, there may be people who participate in facilitating the process of migrant smuggling without even being aware of the fact that they play a role in it (for instance a taxi driver who unknowingly transports smuggled migrants for a normal fee).

There have been enormous efforts in the form of policy responses, search and rescue operations and application of Convention protocols- all directed towards the fight against migrant smuggling and trafficking; or to be more specific, towards the declared ‘war’ against both these crimes in order to end them. However, that has in fact aided in diverting attention away from the wider and more serious problem; which is ‘mixed migration’ or irregular migration. Unless we do not comprehend the perspectives (of both the smuggler and the migrant) that could open up a different story altogether and pay attention to underlying issues; it would be extremely difficult to tackle the problems associated with smuggling and trafficking in the context of mixed migration.

The first problem pertains to the portrayal of smugglers and traffickers as the only villains. It is a common perception in international, national and regional policy statements that human smugglers are heartless criminals, almost single-handedly responsible for the very existence of irregular mixed migratory flow and for all abuses of refugees and migrants. However, this might not be true in certain instances. According to the findings derived from the research conducted by the Mixed Migration Centre's 4Mi (Mixed Migration Monitoring Mechanism Initiative) programme, a notable majority of 56 per cent of the respondents expressed their concurrence with the assertion that smugglers played a facilitating role in their pursuit of migrating to a different nation. This included a significant subset of 14.9 per cent who strongly affirmed this sentiment. Furthermore, it was found that 41.7% of the participants identified their smuggler as a professional smuggler, while 31.2% referred to them as a travel agency. Merely 9.2 per cent of respondents classified their smugglers as individuals engaged in illegal activities. The prohibition and prosecution of smuggling has a significant selective effect on the economic model for smuggling. The dangers increase and the profile of those participating, necessarily change when smuggling is viewed as a serious crime. This is especially true in Europe, North America, and Australia, where smuggling involves a rising danger of detection, detention, and punitive penalties notwithstanding the low detection rates.

The second problem lay in the fact that in order to justify increasingly criminalised reactions to migrant smuggling and to irregular migration itself, human smuggling was frequently conflated with crimes like human trafficking and terrorism. Even well-intentioned persons, who provide refugees and migrants with necessities like food and water while on their journeys, risked the danger of being prosecuted in some nations. The criminalisation of migrant smuggling expands to target refugees and migrants themselves and even lead to the prosecution of people who assist them out of simple goodwill

rather than for monetary gain. However, in the framework of human smuggling, abuses committed against refugees and migrants frequently take place in an atmosphere of impunity with the participation and collaboration of governmental officials. Policy measures never adequately address the role of such collaborative mechanism and corrupt practises that augment human smuggling.

The third problem is politicisation of human smuggling where phrases like ‘self-smuggling’ and ‘state-sponsored smuggling’ have expanded the vocabulary and demonstrated how terminology can be used to imply political connotations. Self-smuggling had emerged as a trend in Tunisia where instead of paying human traffickers, increasing numbers of Tunisians were buying their own boats and organizing ‘do-it-yourself’ ocean journeys to Europe. In 2021, when Belarusian officials encouraged and helped thousands of migrants and refugees transit their country in order to join the EU, ‘state-sponsored smuggling’ became a topic of public discussion. The action was a part of Belarus’ efforts to purposely annoy the EU in what might also be described as a combative type of migration diplomacy in order to gain their attention. The refugees and migrants served as mere pawns in a political crisis that was effectively being played out on the migratory chessboard. The North Atlantic Treaty Organization (NATO)’s charge that Belarus was carrying out a ‘hybrid attack’ against the EU further exemplified the contentious terminology surrounding the subject. In such instances, the phrase ‘state-sponsored smuggling’ was more appropriate to describe the purposeful actions of Belarusian officials.

Once it is ascertained and accepted that the ‘war’ against smuggling and trafficking of humans in mixed migration is not just the war against the smuggler and trafficker, and that there are several other grey areas that needs to be highlighted and addressed; then better policy outcomes can be

guaranteed in order to deal with the larger aspect of TOC in cases of mixed migration.

*How to understand and analyse the failure of European asylum system and migration policies in view of the 2015 migration crisis?*

While conducting a study on the European asylum system and policies for immigration, there were several indicators to highlight the pertinent factors that led to the failure of the EU to deal with the large influx of migrants during the 2015 migration crisis. The migratory pressure on Europe exposed the weaknesses of the Common European Asylum System (CEAS), necessitated the need for its reform of as well as for greater solidarity and fairer ‘sharing of responsibility’ among Member States. Furthermore, the aforementioned incident brought to light the inherent limitations of the Dublin Conventions, a set of regulations that allocate the duty of handling asylum applications to the initial EU Member State where the asylum seeker enters.

At the EU level, Dublin was designed only for small numbers of asylum applications. Large numbers make it impossible for authorities to comply with the maximum duration of procedures and lower the quality of transfer requests. At the individual level, the system was also criticized for failing to take sufficient account of individual interests (e.g.- language, social ties, and job prospects) of asylum-seekers. The Dublin Regulation signified that there were political as well as technical flaws in the regulations, for instance, ‘unclear rules and a design that works only for small numbers of asylum seekers’. Consequently, by applying the Dublin regulation, asylum applicants arriving on the island of Lesbos<sup>1</sup> could not be transferred to other countries for protection, resulting in overcrowding in the camps that led to a massive fire in the Moria Reception Centre.

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<sup>1</sup> Lesbos is an island located in the north-eastern Aegean Sea.

Wide gaps between policy-making and policy-implementation were evident in EU asylum system. The primary emphasis of EU policy in recent years was more on averting the influx of migrants, delegating responsibility to nations situated outside the EU (policy of externalisation), and diminishing the level of refugee assistance within the EU. It was crucial to highlight the possible weaknesses of the CEAS pertaining to the fact that it was not the 2015 migrant crisis that initially exposed the structural weaknesses in the CEAS and the stages of asylum processes in the EU. Such ‘deficiencies’ (both legal and operational) were inherent to the very nature of the CEAS. However, detailed discussions on the asylum procedures of reception and resettlement exposed a very pertinent fact that the weakness actually lay somewhere else: in the absence of solidarity among EU member States.

The shortcomings of the CEAS were distributed across four stages of the asylum system-registration, reception, asylum procedures, and adjudication, but they were inextricably linked, in the sense that delays and anomalies in one stage would have repercussions for others. Certain Member States were unable or unwilling to register all people who entered their territory at the registration stage, owing to migrants’ unwillingness to produce fingerprints at times and a lack of capacity at others. Several national governments failed to put EU law obligations into practise during the reception stage, with some asylum systems chronically underinvested and many without the flexibility of the design to respond to shifting intakes. Under the strain of an increasing number of applications, some Member States also struggled to apply the asylum procedures outlined by the CEAS in a timely and consistent manner, resulting in backlogs and inconsistencies. Finally, Member States differed greatly in how they adjudicated asylum requests, with applicants of a common nationality almost guaranteed to get refuge in one Member State but just a tiny chance in another. For example, Afghans were hardly recognised in Bulgaria but their reception and recognition in Italy was very high.



The consequences of these flaws are far-reaching. When Member States fail to implement tough legal measures, a gap between law and practise emerges and deepens, resulting in increasingly worse situations for asylum seekers as they pass through inefficient systems. Delays in registering or adjudicating asylum requests might prevent applicants from gaining access to vital services such as health care and education. These delays could have a significant influence on the capacity of persons granted refuge to assimilate into the host society. Inefficient and uneven systems also caused European citizens to lose trust in their governments' ability to handle asylum flows, resulting in crisis-driven choices which countered the fundamental principles of the EU.

While several member States of Northern and Western Europe had decades of extensive expertise in designing and operating receiving systems, a significant part of Europe suffered from severe underinvestment. Successive administrations demonstrated an inability and/or unwillingness to allocate funds required to construct receiving infrastructure (e.g., detention centres) and lacked sufficiently educated workers. In other circumstances, this was only a symptom of the larger problem (e.g., insufficient funding or corruption issues). In others countries, underinvestment was part of a more deliberate plan to keep migrant influx low by discouraging asylum seekers from arriving or remaining in deplorable conditions. The consequent result was a gap between legislation governing reception and practise that always existed in the European Union. This financing vacuum could be partially filled by EU funds like the Asylum, Migration and Integration Fund (AMIF), that too only if Member State-level action was present. In order to increase reception capacity, EU actors would need to acquire political pledges from the countries receiving these funds. They would also need to develop a monitoring system to monitor Member States' compliance with their obligations.

Evidently, EU's migration crisis had exposed a deficiency of solidarity among member States in their approach towards migration management. Along the

southern border of the EU, for instance, member States wanted institutionalising relocation quotas and increasing shared accountability for migrant arrivals, but the Visegrád group<sup>2</sup> members rejected any kind of solidarity system. While northern and western European nations frequently underlined their greater openness to small relocations, they appeared more concerned about preventing secondary movements. The European Commission was simultaneously pressing for changes that would expand the role of ‘safe third countries’ in accepting migrants. Since the EU’s relocation plans were still temporary and lacked clarity in its process, these nations worried that they might end up serving as a ‘holding area’ for the bloc’s undesirable migrants. Even with regard to Search and Rescue (SAR) operations, disembarkation, or relocation- member States’ approach neither did showcase cooperation on migration and asylum, nor did they create any clear laws, practices or protocols.

*What are the applicable international laws and policy frameworks relevant to mixed migration?*

The complexity of migration dynamics, particularly in the context of mixed migration, posed significant challenges in the formulation of various laws and policies. The issue of determining individuals who should be granted refuge and the criteria upon which such decisions should be based, is only one of various inquiries that emerge. Moreover, concerns regarding the specific benefits and rights that should be granted to particular categories of migrants post-admission are frequently posed to the governments of receiving States in instances of mixed flow. The primary concern arises from the inherent conflict between the nature of migration policy and the attributes of migratory movements. As previously stated, a multitude of variables such as the need for

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<sup>2</sup>The Visegrád Group (V4) is a loose regional framework for cooperation among the four Central European nations of Poland, the Czech Republic, Slovakia, and Hungary. These nations are connected not only by proximity to one another and by a similar geopolitical situation, but also, and perhaps most importantly, by a shared past, present, culture, and values.

employment, concerns for personal safety, the aspiration to reunite with family, and the pursuit of educational opportunities, may serve as the underlying motivations for migration. Consequently, a variety of policy measures are necessary to effectively tackle these concerns. The basis of such measures comes from the various international laws that are applicable in situations of irregular mixed flow.

Clearly established guidelines address the management of a wide range of migrants that include migrant women, men, and children, refugees, stateless individuals, migrant workers, and those who are victims of trafficking. International human rights law, international labour law and standards, international refugee law, international criminal law, international humanitarian law, international consular law, and international maritime law constitute the fundamental pillars of international law that serve as the foundation for the resultant laws, policies, and practises on migration. In dealing with mixed migration, the legal framework and the legal status of the individuals involved are of key significance. Globally, the requirements of the 1951 Refugee Convention are crucial, while for the European Union, the Common European Asylum System (CEAS) and its relevant regulations and directives are important, along with migration-law directives particularly on the issues of family reunification, immigration of highly skilled individuals and seasonal workers.

Laws that apply directly to refugees are also the same laws that would obviously apply to all other categories of people on the move, irregularly. The International Refugee Law is one which is relevant (the 1951 Refugee Convention and the principle of *non-refoulement*). Another very basic but extremely important law is the International Human Rights Law (IHRL). The rationale behind this is that in mixed migration, migrants who adopt irregular pathways to travel are actually putting their entire lives at risk, only because they are suffering tremendous violence and persecution in their country of

origin, or other forms of risk or danger. Therefore it is the duty of States to be obliged to the provisions of the law and protect migrants even if they have not been recognised as refugees by law. The 1951 Convention does not offer the same level of protection that the IHRL does in terms of the quality of care required for refugees. It defends rights like the freedom of association and expression that the 1951 Convention is silent on. These rights are especially crucial for refugees, who frequently leave their nations due to their political opinions. When a certain right is addressed by both international refugee law and international human rights law, the later usually upholds the right to a higher level. The human rights *non-refoulement* regime, commonly referred to as 'complementary protection', encompasses additional or supplementary safeguards against *refoulement* beyond those provided by refugee law. This protection is established through the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Individuals, who do not meet the criteria for refugee status, nevertheless harbour concerns of being subjected to torture or cruel, inhuman or degrading treatment or punishment in their country of origin, can avail themselves of this form of protection. The protection for liberty under the International Covenant on Civil and Political Rights (ICCPR) holds significant importance in the context of mixed migratory scenarios.

International Humanitarian Law (IHL) refers to the specific field of public international law that is relevant and applicable during periods of both international and non-international armed conflicts. During their journeys, refugees and migrants in mixed flow may encounter situations of armed conflict. In this scenario, IHL has the potential to play a significant role in safeguarding their well-being. The on-going wars, such as the one in Libya, might be classified as non-international in nature. Therefore, in addition to any relevant customary regulations, the sole body of IHL that is effectively

applicable is Common Article 3. Common Article 3 is typically applicable to those who find themselves involved in a non-international armed conflict during their journey, as long as they are not actively engaging in hostilities. The provision stipulates that citizens must be treated in a compassionate manner, without any kind of discrimination. The provision of care for those who are injured or sick, as well as the prohibition of acts of violence against their lives and physical well-being, should be ensured.

Where discussions on laws and conventions applicable/relevant in situations of mixed migration are concerned, then the Convention against Transnational Organized Crime, also known as the Palermo Convention needs special mention. It was supplemented by three protocols, known as the Palermo Protocols. Two of these are directly relevant to mixed migration: the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children' (the Trafficking Protocol) and the 'Protocol against the Smuggling of Migrants by Land, Sea and Air.' The convention protocols deal with exploitation and smuggling which are their primary concerns. Exploitation is an inherent element of human trafficking, typically linked to the sexual exploitation of women and children.

The sea serves as a crucial mode of transportation for goods, and remains particularly significant for human beings, whose value surpasses all material possessions. Governments are now striving to enhance their endeavours in combating irregular migration, given that migrant smugglers and human traffickers have resorted to increasingly perilous routes and methods of transportation for the purpose of smuggling people. This makes the Law of the Sea relevant to mixed migration and three of its conventions are crucial in this regard: the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Maritime Search and Rescue (SAR), and the United Nations Convention on the Law of the Sea (UNCLOS).

In this research, cross-border irregular migration was acknowledged as an issue of expanding scope and complexity. Multiple initiatives to deal with it at the global level are found to be undertaken over the past few decades. It is a very contentious area of policy where moral, economic, and security interests clash and where it becomes challenging for States to choose which global public good its governance should achieve. While we do have clear-cut definitions and provisions enshrined in legal instruments with regard to protection of the most vulnerable part of the population, the reality is far more complex especially when one looks at or works in the context of mixed migration. Moreover, refugees and other migrants are increasingly relying on risky journeys even today, moving along dangerous routes and being exposed to similar kinds of human rights violations, including interactions with smugglers, or facing detention. By virtue of being exposed to the same risks and vulnerabilities, these people exhibit very similar needs. It is here that the million-dollar question arises: should assistance focus on needs-based delivery rather than focusing on status-based delivery? This question reflects the very essence of the concept of mixed migration and since we are not directed towards 'normalising the extreme', it can be concluded that consistent focus on 'needs-based' assistance to vulnerable migrants in mixed flow through effective collaboration and thoughtful application of legal frameworks, will definitely aid in avoiding human rights violations in future.

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