

Migration, smuggling, and categories of threat

Reception of crisis migrants in Europe under evolving asylum and border regimes

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On October 3, 2013, the small Italian island of Lampedusa burst across the world's front pages: long a key arrival point for migrants traveling to Europe from North Africa, on that day the island and its surrounding waters became the scene of an especially horrific accident aboard a migrant boat at sea. Survivors described how they had lit a blanket on fire to signal for help after their boat's engine broke down; the fire ignited the engine, and the boat capsized as its passengers tried to flee.¹ The final death toll was over 300, and several hundred more exhausted survivors were cared for over the next few days by emergency reception services on the island.² The incident drew the world's attention to the desperate conditions faced by some of the tens of thousands of people who attempt to enter Europe each year undetected at land or sea borders. It also highlighted the administrative burden borne by those member countries of the European Union whose geographical locations designate them as principal receiving countries for arriving migrants.

In the months following the accident at Lampedusa, the conversation around migration, danger, legality, and European rescue obligations in the Mediterranean region continued to grow. Numerous similar events were widely covered in the world press, often in short dispatches following the same recurrent fact patterns³: diverse groups of migrants, including older people, children, and pregnant women, coming from very poor countries; unseaworthy and systematically overloaded boats; the frequent absence of life jackets, satellite phones, and other safety equipment onboard; and, especially, the apparent involvement of smugglers and traffickers. To the extent that the European receiving countries, faced with continually increasing

¹ Yardley and Povoledo 2013.

² Yardley 2013.

³ These patterns of description hold across the last several years, across numerous types of sources reporting from a wide range of political positions, and across several languages. For examples from the *New York Times* alone, from the year 2014 alone, see (non-exhaustively) Reuters 2014 (January), Pianigiani 2014 (March), and Associated Press 2014 (August). For more recent coverage, see e.g., Binnie 2015 in English and AFP 2015a in French.

numbers of arrivals at sea, made any attempts to analyze the causes and the politics behind these larger and apparently shockingly poorly planned new flows, the explanation they settled on was essentially a criminological one: smuggling “gangs,” assumed as a matter of business practice to act with systematic disregard for the safety and best interests of their human “cargo,” were acting to facilitate new migration movements that seemed more precarious than ever before.

Illegal entry and stay are unusual as violations of law in that it is relatively difficult to conceptualize them as crimes causing discrete, readily identifiable, and practically remediable harms.⁴ In most contexts, “punishment” for these violations takes the form of deportation or expulsion, and of any detention or confinement immediately preceding and functionally necessary to those actions. Normally, understanding the undocumented entrant as a criminal requires understanding both the immigrant and the receiving society abstractly, as ideas: the *idea* that any person can enter without the prior authorization of the state and without its knowledge harms the *idea* that the state is sovereign in its own borders and territory.⁵ But the association between immigrants and instability, precariousness, and crime is made easier, much more immediate and more popularly accessible, when the presence of immigrants can be systematically and vividly associated with the lurid concepts of contraband, of traffic, of “people-smuggling” as a prior act of violence – against the person, against sovereignty and against the law.

These associations are all the more unfortunate because they target some of the world’s most vulnerable people, and they target many of them with particular inaccuracy. Not all of those

⁴ Specific domestic practices regarding criminalization vary across the European Union. In the Netherlands, for example, illegal entry as such does not constitute a criminal violation. See Engbersen, van der Leun and de Boom 2007. In the UK, the sole act of “entering without leave” is punishable by a fine or by imprisonment for up to six months, and French law provides for a fine and up to one year’s imprisonment. Enforcement practice in both countries, however, prioritizes administrative action over criminal prosecution in the overwhelming majority of cases. See, on the UK, Crown Prosecution Service 2015 and Aliverti 2013, and on France, Tchen 2014, pp. 512-514.

⁵ Dauvergne 2004; Kyle and Koslowski 2011; White 2007.

who cross borders without documentation actually break the law when they do so. Asylum-seekers, in particular, are granted the right to stay in a country from the time they first make their request until a decision on that request is issued, regardless of whether they have entered illegally or not, and no undocumented entrant can be expelled, deported, or pushed back from a border until they have had the opportunity to make an asylum claim. This means that at least part of the technically undocumented population within a destination country at any given time has an officially acknowledged right to remain there, and may eventually acquire longer-term or even permanent legal status. Asylum is, essentially, an *ex post* recognition by a destination state, following its domestic adjudication procedures, of the internationally recognized treaty-delineated status of “refugee,” which is considered to have attached to its holder from the first moment that person fled their country under “persecution.”⁶ This means that asylum-seekers have to be protected as potential refugees until they are proven to be otherwise; until proven to be otherwise, they have to be safely received and, at a minimum, given refugees’ guarantees against *refoulement* to their home countries or to other places where they might be in danger.

Many asylum-seekers in Europe have traveled huge distances to reach technologically fortified and heavily patrolled borders that are some of the most difficult in the world for anyone to cross undetected; for people fleeing conflict and repression, engaging the professional services of a well-connected smuggler is often a functional necessity,⁷ without which any movement into any safe country would be effectively impossible. The moral economy of people-smuggling – a criminal act which opens to many vulnerable people what is often their sole possible route to safety – is not quite as straightforward as it initially appears.⁸

⁶ See 1951 Convention Relating to the Status of Refugees, Art. 6.

⁷ Koser 2011; Morrison and Crosland 2001.

⁸ Spener 2011.

This complexity of situations and circumstances, and the respect it should imply for dislocated and vulnerable people in positions of significant legal uncertainty, does not, however, seem to be translating well into European public discourse on immigration, into political representations or formulations of the immigration “problem,” or into law and public policy designed to address that “problem” at any level. As Europe develops unsubtle discourses emphasizing the criminal, terroristic, and cultural “threat” posed by unmanageable, dehumanized, and inherently overwhelming “waves” of arrivals, important distinctions are being lost between groups of migrants with very different types of status and very different types of rights.⁹ Policy actors are losing space to think more creatively, more humanely, and more generously about ways of addressing large-scale crisis migration as a new reality of their world.

This paper offers a study, across several levels and from several perspectives, of European border management and asylum policy in crisis. The analysis explores the effects of changes to existing migration patterns triggered by the 2011 “Arab Spring” uprisings. The paper provides a discussion of some aspects of the European institutional and legal context which have shaped the response to these migrations, and it explores the various pressures for policy change that they have helped to create. Drawing on official statistics available through the end of 2014, the paper moves on to evaluate specific changes in the numbers of asylum grants, rejections, and removals (not necessarily related to asylum) in the U.K. and France, two major European destination states. It goes on to place those developments in the context of reforms recently made to or planned for domestic immigration laws as migration, illegal entry, and asylum have become increasingly intertwined and politicized in both countries. The paper concludes with an evaluation of some of the key policy possibilities for reform and cooperation in the short and medium term, and a warning against the risk that receiving states might seek to derogate further

⁹ Pickering 2007.

from their international obligations to rescue, receive, and respect the rights of refugees and other vulnerable migrants.

I. Historical, Institutional, and Legal Context

Large-scale crisis migration to Europe from the developing world is not an entirely new phenomenon. War, civil and political unrest, food and water stress, and socioeconomic stagnation and widespread unemployment have all acted as powerful migration “push” factors, and their effects on global migration patterns have been magnified by the existence of increasingly extensive and widely accessible worldwide travel networks. Following the dissolution of the Soviet Union in 1991, Western European asylum systems underwent a significant reorientation: after decades of dealing primarily with asylum-seekers citing specific personalized histories of political persecution in Europe’s socially repressive but relatively wealthy Second World states, they now began receiving a much more diverse population of people fleeing much broader environments of violence and “persecution” that fit much less neatly into the classic Geneva Convention definitions.

Different countries constructed different regimes in response to these changes. One common policy option, in the case of specific conflicts producing large flows to specific destination countries, was to implement temporary protection regimes granting guarantees against expulsion to all nationals of designated countries present in a destination territory, without the need for asylum adjudication under high Geneva Convention standards but generally only for as long as the conflict in the countries in question lasted. This was done in the early 1990s in numerous countries throughout Europe, notably for citizens of the former Yugoslavia.¹⁰ Throughout much of the 1990s, France maintained a special legal pathway known as “territorial

¹⁰ Humanitarian Issues Working Group 1995.

asylum,” which principally benefited Algerian nationals targeted by Islamists in their country’s civil war. Territorial asylum required individualized adjudications and grant rates were significantly lower than those for “Conventional” asylum, but the standards – based primarily on the existence of an imminent individualized threat to the life of the applicant¹¹ – opened refugee status in France to many additional people fleeing situations of conflict and generalized violence, who probably would have fallen outside the very specific categories of protection laid out in the Geneva Convention.

Already, the outlines of the contemporary European debate on immigration and asylum were coming into sharp relief: as the numbers of applicants and arrivals from poorer countries increased, there was growing concern about the possibility that some migrants’ journeys were motivated primarily by a desire to enjoy Europe’s relatively generous social benefits, and their access to these began, in many countries, to be correspondingly limited. Arriving immigrants were also drawn into developing European domestic debates on integration, cultural assimilation, enclave settlement patterns, and crime. In 2003, France eliminated its territorial asylum regime, amid critics’ claims that asylum had been allowed to become simply “a vector of irregular immigration.”¹²

This language expresses a concern that would-be economic migrants might be instrumentalizing and exploiting European asylum procedures in systematic ways. It draws on one of the most powerful figures in the illegal-immigration imaginary: the “queue-jumper,” careless of rules, who leapfrogs ahead of others to claim a place to which they aren’t rightfully entitled and which they haven’t properly waited for or earned. Asylum-seekers submit themselves to an intensive and time-consuming adjudication procedure, and the status they are

¹¹ Mazzella 2005.

¹² *ibid.*

granted (unless later adjusted) is not normally permanent – and yet once their numbers and national origins started to change so radically in Europe, they began discursively to be considered “queue-jumpers” too, to be seen as people looking for an alternative route to legal presence without a truly legitimate reason to claim it. This was – and is – especially the case for those asylum-seekers who arrived at their destinations without complete documentation or prior authorization. Illegal entry is not normally supposed to prejudice an asylum claim, which means that undocumented immigrants can and do make asylum claims in anticipation of or immediately following apprehension, and they cannot be deported or expelled until these claims are resolved.

In the 1990s, as migration patterns changed and as the numbers of arrivals, apprehensions, and asylum claims increased, some observers concluded that asylum procedures were being used tactically and cynically by immigrants in crisis, solely as a means of forestalling imminent deportation. The classically recognized distinctions between migrants became less and less politically sustainable; it grew less and less tenable in the public mind to conceive of asylum-seekers as a separate class of immigrants, legitimately privileged with a special process and rights on the basis of the exceptional conditions of personalized danger which had originally obligated them to leave their home countries.

Simultaneously with these shifts in migration patterns and in popular perception, the European Union itself was being radically transformed in ways that would have important consequences for the direction and design of policies on migration, border control, and asylum. The 1991 Treaty of Maastricht on the European Union created the EU as a formal entity and endowed its institutions (the Parliament, the Commission, and the Council) with their legal personalities and substantive policymaking responsibilities. Immigration and external border control were incorporated into the Council’s executive-level responsibilities for “Justice and

Home Affairs” (JHA).¹³ The 1997 Amsterdam Treaty on the Functioning of the European Union formalized and detailed these immigration-related competencies¹⁴ – and arguably provided Union law in these areas with much greater force and legitimacy.¹⁵ The treaty clarified that Union members were obligated to elaborate, within five years, common policies on entry, visa, and residence for non-EU nationals as well as on asylum (including identification of the state responsible for examining a claim and common minimum standards for the reception of asylum-seekers and the evaluation of claims).¹⁶ These measures acquired particular urgency as the Union worked to eliminate internal migration controls as part of its larger project to extend and deepen the common market; the Schengen area of free movement, originally created in 1985 between five of the Union’s leading members, was extended by the Treaty of Amsterdam¹⁷ to nearly all EU states (with the very important exceptions of the UK and Ireland, which cooperate on some judicial and enforcement matters but are not members of the Schengen external border arrangements).¹⁸

Throughout the late 1990s and the early 2000s, member states further developed their common treaty standards in the domains of immigration and asylum policy, and worked to create institutions to put those standards into practice. In 1990, the Dublin Convention (known since 2003 as the Dublin Regulation or as “Dublin II”) created a burden-sharing system to aid in the identification of the single European Union state responsible for adjudicating each asylum claim.¹⁹ Controversially, the system establishes the principle that the first state where an undocumented asylum-seeker can be shown to have entered the Union is generally responsible

¹³ Koslowski 2011.

¹⁴ Treaty of Amsterdam. Art. 2(15)..

¹⁵ Hailbronner 1998.

¹⁶ Treaty of Amsterdam, Art. 2(15).

¹⁷ Triandafyllidou and Maroukis 2012, pp. 20-21.

¹⁸ European Union 2009.

¹⁹ Triandafyllidou and Maroukis, p. 83.

for adjudicating that person's claim.²⁰ Because this aspect of the system implies that an asylum claim might need to be transferred away from the European state where an applicant now lives and back to a different state which is judged to have legal responsibility for it, and because European states can generally only examine asylum claims made by individuals physically present within their territory, the Dublin system also empowers European states to transfer asylum-seekers among themselves. Throughout the 2000s, these "Dublin transfers" of asylum-seekers from other EU members contributed to the already-overwhelming adjudication caseload faced by popular first-arrival states like Greece.²¹

On October 26, 2004, European Council regulation 2007/2004 established FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders. FRONTEX is a small, specialized agency and its mandate is limited: it performs risk analyses and gathers data on flows and crossings, and it provides operational assistance, training, and technical support for enforcement missions in EU member states which request such help. The agency is specifically designed not to impinge on border enforcement as a competency traditionally considered part of member states' domestic policing powers.²² FRONTEX and its tactics have, however, received significant criticism, with both academics²³ and advocacy groups expressing concerns that the agency's interdiction practices may be preventing migrants from lodging legitimate asylum claims or leading to their *refoulement* to unsafe countries in violation of international law.

FRONTEX is very active in the Mediterranean: past missions have included maritime support along major clandestine migration routes into Spain (particularly via the Canary Islands),

²⁰ Wihtol de Wenden 2013, p. 30.

²¹ *ibid.*, pp. 63-64.

²² Ekelund 2014.

²³ see e.g., Trevisanut 2009, Moreno-Lax 2011.

Greece, and, currently, Italy.²⁴ The agency's latest Italian mission, known as Triton, began in November 2014 with an initial planned duration of three months and a total budget of slightly over 9.3 million euros.²⁵ The mission replaced "Mare Nostrum," a much larger rescue operation launched following the October 2013 disaster at Lampedusa and managed exclusively by the Italian government, with a mandate to intervene in international waters and relatively generous funding of 9 million euros per month.²⁶ Human-rights advocates have strongly criticized Triton's comparatively limited resources and more enforcement-oriented, less rescue-based approach, which they claim has already resulted in deaths at sea.²⁷

Growing interdiction capacities at both the national and European levels have been complemented by additional supranational regulations instituting new systems of registration and surveillance for border-crossers and asylum-seekers. Beginning in 2000, the EU created and implemented the Eurodac system, a digital fingerprint repository for asylum-seekers and captured illegal entrants, designed initially to facilitate identification of asylum-seekers and prevent duplication of asylum requests in multiple states. The system has been renewed and modified repeatedly, and member-state police authorities can now also access information in Eurodac in the context of major domestic criminal investigations (especially those related to terrorism). When the Union revised the Dublin II regulation in 2013, it also chose to substantially expand Eurodac's remit, requiring that fingerprints be taken as a matter of policy from all irregular migrants apprehended by member states at or within their borders. (Previously, this was done only for irregular migrants who made protection claims.) Many migrants are aware

²⁴ FRONTEX 2015a.

²⁵ FRONTEX 2015b. In February 2015, this mission was extended through the end of the year. European Commission 2015.

²⁶ Association Européenne pour la Défense des Droits de l'Homme 2015.

²⁷ See, for example, remarks of UNHCR and Council of Europe officials quoted in Aloisio 2015: "The EU needs effective search and rescue. Triton does not meet this need."

that the Eurodac system exists and that Eurodac files are often used to verify their countries of origin prior to deportation or to identify their countries of first European arrival prior to a Dublin transfer, and many of them go to great lengths to avoid having their fingerprints taken, including by refusing to consent to the fingerprinting process or by damaging their fingerpads in an attempt to make recognition impossible.

The revision to Dublin II that accompanied the 2013 Eurodac updates was a rule change designed to improve the EU's "burden-sharing" system for determining asylum-adjudication responsibility and to remedy inequities seen to have placed asylum-seekers' fundamental rights at risk. The regulation, number 604/2013, permits "determining states" not to implement Dublin transfers when they believe that "there are systemic flaws in the asylum procedure and in the reception conditions for applicants" in the responsible state that could place the asylum-seeker's fundamental rights in jeopardy.²⁸ This was in response particularly to concerns about detention conditions in Greece, where grant rates had consistently been so low as to raise basic questions about the quality and accessibility of the process afforded to applicants. In an important 2011 decision, *M.S.S v. Belgium and Greece*,²⁹ the European Court of Human Rights held that Belgium had violated an Afghan asylum-seeker's human rights (especially the right to protection from *refoulement*) by transferring him to Greece to make his asylum application. Since then, numerous European courts and human rights organizations have continued to call on determining states not to return asylum-seekers to Greece; in the UNHCR's most recent report on the Greek asylum system, issued in December 2014, the agency maintained its existing recommendation that EU member states refrain from effecting transfers of asylum-seekers to Greece under the

²⁸ EU Regulation No 604/2013, Art. 3.

²⁹ *M.S.S. v. Belgium and Greece*, 2011.

Dublin regulation.³⁰

2013 also saw an elaboration of the EU's existing policy on minimal conditions of reception for asylum-seekers, which has been under development since 2003 and which has also had important fundamental-rights implications. The Council's original 2003 directive, number 2003/9/EC, required member states to take measures within their national laws "to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence."³¹ The directive generally granted significant latitude to member states, but did contain substantive requirements in a handful of particular areas: member states were to provide essential health care to all asylum-seekers and access to education for minor asylum-seekers or minor children of asylum-seekers, and they had additional obligations to try to maintain the integrity of family groups and to "take into account the specific situations" of people considered to be especially vulnerable under EU law, including children, pregnant women, sick and disabled people, and victims of torture or violence.³² The 2013 "recast," number 2013/33, of this directive contains a much-expanded discussion of detention in the asylum context, including the circumstances under which it is permitted, the rights of assistance and appeal guaranteed to detained asylum-seekers, and the minimal standard of living that must be provided in detention facilities. Detention is normally meant to be a last resort; member states are required first to explore any less coercive options that may exist under their domestic law. The directive specifically provides that an applicant can only be detained when necessary for the determination of their identity or of the state responsible for examining their claim; when detention is specifically necessary for the processing or adjudication of their claim; when they pose a threat to public order or national security; when their right to enter the country has not yet been

³⁰ United Nations High Commissioner for Refugees 2014.

³¹ Council Directive 2003/9/EC, Art. 13.

³² *ibid.*, Art. 17. On the evolution of the concept of vulnerability in EU asylum law, see generally de Bauche 2012.

established; or when they are in removal proceedings and the state has “objective” grounds to believe that any asylum application they make is frivolous and intended only to prevent deportation.³³ It also shortens the period of time that must elapse before a member-state is required to allow an asylum-seeker to have access to the labor market, from the 12 months provided for in the 2003 directive to a period of only nine months.³⁴ This change is especially important because strict restrictions on the ability to work, combined with very small support subsidies from receiving countries and the very limited availability of many essential in-kind resources such as housing, often combine to make life extremely materially precarious for many asylum-seekers.

The Union’s member states also have important obligations under international law. These have shaped domestic responses to migrant flows and have acted in many instances to constrain destination-state impulses toward exclusion and harsh enforcement. They also tend, even where formalized in treaties and conventions, to be powerful primarily as norms or customs, notoriously hard to enforce against sovereign nations exercising long-recognized traditional police powers in the domains of border surveillance and immigration.

The 1951 Geneva Convention Relating to the Status of Refugees establishes the internationally operative minimal conditions of “persecution” on which a claim to refugee status can be based. These are limited by the text and its standard interpretations to a personalized individual history or a “well-founded fear” of violence or discrimination on the basis of race, nationality, ethnicity, political opinion, or “membership in a particular social group” (generally discrete, ascriptively identifiable by others, and distinguished by characteristics that are considered to be innate or not easily changeable). These guidelines – products of a post-World

³³ Directive 2013/33/EU, Art. 8.

³⁴ *ibid.*, Art. 15.

War II and early Cold War political environment which gave conceptual priority to historical European experiences of conflict, violence, and dislocation – are widely considered to be very strict, and, although there is significant variation, grant rates in rich industrialized countries throughout the world are low overall. In their own asylum laws, individual countries can be more generous than the Convention is, but in practice most transpose the Convention’s language wholesale. The European Union’s own Council directive 2004/83 takes up the Convention’s substantive protection standards, establishes minimal procedural requirements which member states must observe in examining requests, and enumerates minimal support resources which must be provided to refugees who are ultimately granted status in conformity with the Convention.³⁵ This directive was updated in 2011 to expand particularly the notions of “internal protection” (whether protection from persecution is, in fact, available in a claimant’s home country); “protection needs arising *sur place*” (that is, within the destination country as a result of ongoing or renewed persecution, which can contribute to existing grounds for asylum under the Geneva Convention); and in order to clarify the required causal link between a claimant’s membership in one of the Convention-listed protection categories and any persecution suffered by that person.³⁶

Both directives also reaffirmed, in strictly compulsory language, the guiding Geneva principle of *non-refoulement*: a state that sends a protected person back to any country where that person faces a substantial risk of persecution or personal harm commits a violation of international law. The right of *non-refoulement* itself is not limited to refugees, which means, in practice, that many destination states also host significant populations of people who do not qualify or who have failed to qualify as refugees under the Geneva Convention’s guidelines but

³⁵ Directive 2004/83/EC.

³⁶ Directive 2011/95/EU.

who cannot legally be deported to their home countries or removed to many third countries. In principle, receiving states are required to offer “subsidiary protection” – temporary legal status and protection from removal – to all applicants who meet *non-refoulement* thresholds, including applicants who fail to establish a right to Conventional refugee status. In examining protection claims, therefore, European adjudicators generally choose between full Geneva Convention status, subsidiary protection, any specific form of temporary protection or territorial asylum available to the applicant under the destination country’s law, any type of applicable humanitarian status (which may be granted, for example, to seriously ill individuals for the length of their medical treatment or to individuals with immediate family members in the destination country), and simple rejection, after which a deportation order is generally issued and the applicant is generally considered to be legitimately subject to detention and expulsion by the police authorities of the destination country.

In the case of migrants arriving by boat, primarily at the coasts of Spain, Italy, and Greece, member-state obligations under the United Nations Convention on the Law of the Sea (UNCLOS) also become relevant. Under UNCLOS, state authorities are subject to some restrictions on their territorially based rights to board vessels, search them, detain their passengers, and forcibly divert them into their own or third-country ports. (Many of the small boats which carry unauthorized migrants are flagless, a fact which has been interpreted by some European destination states as freeing them from some of the specific UNCLOS obligations they would normally bear to flagged ships. These sorts of interpretations are contested.³⁷ Many other migrant boats – especially those used recently by smugglers transporting larger groups in the Mediterranean – are repurposed aging merchant craft, flagged in small countries with lax verification procedures, and then repurchased at low prices and in poor condition by

³⁷ Moreno-Lax 2011.

smugglers.³⁸) UNCLOS establishes requirements of rescue and aid to ships in distress at sea, and associated customary law protects the right of such ships to enter the territorial waters of coastal destination states in search of “refuge” in emergencies. Maritime border surveillance operations undertaken by members of the European Union both separately and together within FRONTEX have, however, resulted on various occasions in non-assistance to vessels in distress, and in “pushbacks” of vessels containing likely asylum-seekers to dangerous countries in possible violation of the intervening states’ *non-refoulement* obligations.³⁹ Italy, notably, concluded and implemented a bilateral accord with Muammar Qaddafi’s Libya under which migrant boats leaving Libya were systematically returned there, while Libya, a non-party to the Geneva Convention, continued to commit serious human-rights violations and remained unable to protect sub-Saharan migrant workers, especially, from widespread acts of racist violence on Libyan territory. The European Court of Human Rights eventually ruled that Italian “pushbacks” under the accord violated imperative principles of EU human rights law forbidding *refoulement* and collective expulsion.⁴⁰ More recently, Greece has also been accused of executing pushback operations in the Aegean Sea towards Turkey, some of which have, according to witnesses and advocacy groups, destabilized migrant ships and endangered the lives of people on board.⁴¹

International law on transborder crime, trafficking, and smuggling has taken on greater importance for European destination states as their enforcement capacities have grown. Although many of the statistics are inherently imperfect, Europe is known to be an important destination for smuggling and trafficking⁴² of migrants of all types (including “economic” migrants seeking

³⁸ Fouteau 2015. See the cases of the *Ezadeen*, flagged in Sierra Leone, and the *Blue Sky M* (Moldova), two freighters set on autopilot for the Italian shore and then abandoned while crowded with migrant families. Povoledo and Cowell 2015.

³⁹ Moreno-Lax 2011.

⁴⁰ On this 2012 case, *Hirsi Jamaa et al v. Italy*, see Hessbruegge 2012.

⁴¹ Amnesty International 2014; Larsson 2015a; Triandafyllidou and Maroukis 2012, p. 98.

⁴² United Nations Office on Drugs and Crime 2011, pp. 19-25; Shelley 2014, p. 2.

work or improved living conditions, would-be asylum-seekers, irregular crisis and conflict migrants generally, and people whose situations blend elements of some or all of these types). The relevant United Nations instruments – the Convention on Transnational Organized Crime (2000) and its associated protocols on smuggling and trafficking in persons – obligate UN member states to develop domestic laws and enforcement structures dedicated to the interdiction of human trafficking and smuggling activities. UNCTOC and its protocols were elaborated at the close of a decade of intense discursive focus on smuggling and illegal migration at the international and intergovernmental levels; the association, in particular, between the practice of smuggling and the phenomenon of “transnational organized crime” – equated in the popular mind with the vivid lore of powerful, pyramidally structured “mafias” and “gangs” – erases, however, much of the fine-grained experience of smuggling as it is actually practiced in much of the world: who provides this service, who consumes it, and why it exists.

The UNCTOC protocols establish the now-classic operative distinction between “smuggling” and “trafficking,” which is based essentially on the degree of coercion employed and on the extent of the migrant’s own participation in or control over aspects of the travel process. Though edge cases are easy to find (highly professional smugglers with “good” reputations, who honor guarantees of arrival and utilize elaborate payment systems designed to limit migrants’ personal vulnerability en route; gang-involved traffickers who sequester their victims, commit physical violence against them, and force them to work in inhumane conditions in black-market manufacturing or in the sex industry), many other migrants’ experiences fall on a continuum. It is, for example, common for “smuggled” migrants throughout their journeys not to know exactly where they are or exactly what kind of specific travel arrangements have been made for them, not to have possession of their own travel documents, and to be more or less

forcibly confined in “safe houses” or other hiding places while they await subsequent stages of their trip. They may not be “coerced” in the strong sense of the word, but they may in any given moment have very little control over what happens to them. Similarly, migrants who end up “trafficked” or exploited en route or at destination may leave with some initial understanding that they are exchanging their travel to Europe for labor on terms defined by the trafficker, and some (e.g., some sex workers) may even have a sense of the specific nature of the work that awaits them.⁴³ Convention-defined “smuggling” can also turn into Convention-defined “trafficking” – that is, a migrant’s situation can become more coercive or more dangerous – at any point during the trip. Journeys to western Europe from many origin countries in southern Africa and Asia are so long that, before arrival, a migrant has usually moved in and out of the custody of numerous groups of local smugglers (some of whom specialize in particular borders, such as the Evros River region in Greece, or in particularly difficult regions, such as the Sahara Desert or the northwest Iranian mountains). Some groups may be more violent than others, or “big smugglers” may exercise only weak supervision of their subsidiaries’ tactics across the network. It is also common for migrants, having first arranged to pay their smugglers’ high fees, to encounter difficulties in financing day-to-day survival needs as their journeys drag on. Many migrants pause and work clandestinely for some period of time in order to gather the necessary funds to continue, while others may take up small jobs for smugglers or individuals connected with them. Depending on the nature of these jobs, the nature and level of compensation provided, the migrant’s general living conditions and situation of personal safety, and the possibility of finding alternate work, this situation may approach or become labor trafficking.

Paradoxically, the rapid development after 2000 of legal frameworks emphasizing prosecution for smugglers and traffickers resulted in some cases in a simultaneous redirection of

⁴³ Kyle and Koslowski 2011. The following section also draws on Triandafyllidou and Maroukis 2012, pp. 105-106.

attention away from the needs of the people identified as their victims. In much of Europe, there is no exact equivalent to U.S. “T visas,”⁴⁴ which grant secure temporary status to trafficking victims and, ultimately, a path to green-card eligibility and permanent status; as required by the UNCTOC trafficking protocol, European destination countries offer documentation and protection from expulsion to victims who cooperate with criminal investigations of their traffickers, but this assistance is provided at the discretion of law enforcement personnel, does not typically grant any clear path to longer-term status even though the people involved would often be in great danger if they had to return to their home countries, and is unavailable to people whose traffickers are not, cannot be, or are no longer subjects of law enforcement attention.

No distinct legal framework exists in Europe to conceptualize victimization or harm done to a migrant or the migrant’s structural position of vulnerability within a (non-trafficking) smuggling relationship; a migrant who enters a country irregularly and with “professional” assistance is, in the European legal conception, either trafficked (which requires proof of a relatively high degree of coercion or exploitation, and, again, offers no guarantee of stable status at destination) or an “illegal immigrant,” knowingly complicit in the smuggling as a criminal act. The populations of people using smugglers to enter Europe are mixed populations: they contain many people fleeing generalized situations of conflict and violence, who, if they could arrive in Europe, would likely be protected there on *non-refoulement* grounds, as well as many people fleeing “persecution” with the intention to seek asylum, whose claims must be presumed legitimate, until shown to be otherwise, from the first moment they are outside their country.

The lurid imagery of smuggling and its implications of voluntary choice – a form of independent contractual agency supposedly exercised by the “purchasers” of smuggling “services” – contributes to a perception of moral complicity located in the “purchasers.” In turn,

⁴⁴ Shelley 2014, p. 14.

this perception affects the ways European destination societies construct the images of irregular migrants that inform domestic public debate, political discourse, and eventual policy development. Rather than acting on a humanitarian impulse to receive and welcome people in situations of great difficulty, some of whom may already possess or eventually be able to establish legal rights to remain, destination societies can instead rely on anti-smuggling and anti-trafficking enforcement discourses to construct concepts of undifferentiated, overwhelming “waves” of migrants, whose presence is inherently unjustified and represents both a kind of theft, a “queue-jumping,” and a threat to their internal stability and the sovereignty of their law.

II. Key Migrant Routes, Patterns of Movement, and Changes since 2011

Smuggled migrants come to the EU from dozens of major sending countries; the principal Mediterranean transportation networks extend from Tehran in the east and Nairobi, Mogadishu, Accra, and Dakar in the south all the way north into Sweden and the United Kingdom and west into Spain and Portugal.⁴⁵ From West Africa (Senegal, Mauritania, and Morocco) migrants generally try to reach Spain; the Canary Islands, which are Spanish territory located in the Atlantic Ocean just off the West African coast, had been a popular destination throughout the early 2000s due to their relative accessibility to people traveling from Africa, but since 2006 they have also been the site of one of FRONTEX’s showcase maritime surveillance missions. Some migrants wishing to reach Spain directly now travel north across the Mediterranean from northern Morocco to the southern Spanish coast, and those who cannot cross by sea sometimes attempt to enter the Spanish enclaves at Ceuta and Melilla by land. This is immensely difficult and sometimes dangerous, as the enclaves, surrounded by high razor-wire fences, are heavily patrolled by both Spanish and Moroccan border police, who have in the past been accused of

⁴⁵ International Center for Migration Policy Development et al 2014.

involvement in pushback incidents and expulsions of migrants from within the territory of the enclaves.⁴⁶ As Spain has become harder to reach, points of departure for migrants traveling from North Africa have shifted to poorly policed coastal areas in Libya and Tunisia; Malta, by virtue of its location, is a destination for some, but the goal for many is Italy – specifically the islands of Lampedusa and Pantelleria, located in the Strait of Sicily.

The flows of people using the African routes are of mixed nationality. Throughout much of the second half of the twentieth century, undocumented arrivals from the southern Mediterranean were overwhelmingly of North African origin⁴⁷; the people migrating now are largely coming from sub-Saharan Africa (from Senegal, Mali, Guinea, Ghana, Nigeria, Ivory Coast) and from parts of East Africa affected by conflict and poor governance (Somalia, Ethiopia, Eritrea). This means that migration networks extend across the whole continent: local smugglers bring migrants along traditional trade routes through the Sahara Desert, via oasis towns like Agadez in Niger, Tamanrasset in Algeria, and Sabha in Libya. In firsthand accounts of their experiences, many migrants describe the particular risk and violence which characterized the desert stage of their journey.⁴⁸

Many migrants traveling with smugglers to Greece from the east come by boat across the Aegean Sea from the western Turkish coast near Izmir; they arrive on the Greek islands (Samos, Lesbos, and others) and typically try to continue on to the mainland and Athens by ferry.⁴⁹ For much of the 2000s it was also possible to cross to Greece from Turkey via the land border in the Turkish northwest, along the Evros River; with EU assistance Greece has now constructed a high, policed fence that has made the dry section of this border largely impassable, but migrants

⁴⁶ IRIN News 2014.

⁴⁷ De Haas 2008.

⁴⁸ United Nations Office on Drugs and Crime 2011, p. 104.

⁴⁹ Triandafyllidou and Maroukis 2012, p. 66.

continue to try to cross by boat in the places where the river itself marks the boundary between the two countries. The Evros is a deep river with strong currents, and migrants (including a number of children) have drowned here as well as on the open sea.⁵⁰

The routes from Turkey are widely used by Syrians, Iraqis, and Afghans fleeing conflict, as well as by Bangladeshis, some Indians, and especially Pakistanis (who have a developing history of local diaspora establishment and network migration in Greece). There are also smaller numbers of North Africans taking advantage of relatively generous Turkish visa policies. For people coming from countries east of Turkey, Iran is often a key stopping point; migrants pass through Tehran, move north into predominantly Kurdish areas in the mountains near Salmas, then cross the Turkish border near Lake Van, heading for Istanbul or Izmir. This route can be extremely dangerous; migrant witnesses have reported violent mafia activity – including kidnapping, imprisonment, and torture – principally in Iran, Istanbul, Izmir, and even in some areas of Athens.⁵¹

Within Schengen Europe, migrants' paths diverge. It is rare for a smuggler to ensure a migrant's passage all the way from their country of origin to their desired destination in northern or western Europe – usually the smuggler who brings the migrant into the EU only takes them as far as the country of first arrival, leaving them to decide whether to stay or to make other arrangements to continue. In principle, the Dublin Regulation obligates all asylum-seekers to apply in the country of first arrival; those who don't, or who do and fail, and who are subsequently apprehended, are usually given thirty days to leave the country voluntarily. During this time, most simply try to move into another Schengen country, evading the police as they go. Some EU countries are known to be far worse for migrants than others; life in Greece, in

⁵⁰ Larsson 2015b.

⁵¹ Triandafyllidou and Maroukis 2012. See generally chapter 5, pp. 116-149.

particular, is so precarious that many move on as quickly as possible, and especially try to avoid being apprehended and having to make an asylum application there (which is overwhelmingly likely to fail⁵²). The UK has a reputation among migrants for a fairer asylum process and better conditions, but to arrive there one has to pass unapprehended through a series of high-police-capacity states where conditions are perceived to be much less friendly.

Smugglers and migrants are extremely sensitive to changes in local enforcement climates that can make certain routes more or less sustainable, and one notable characteristic of “mixed migration” in the Mediterranean region is how rapidly it tends to evolve. The adoption of maritime routes to the Canary Islands from Morocco followed the abandonment of earlier routes to Spain through the Strait of Gibraltar; stepped-up Spanish border patrol efforts in the Mediterranean had essentially eliminated the Gibraltar crossing and pushed migration routes west toward the Canary Islands. As enforcement and monitoring in Morocco improved, embarkation points for the Canaries continued to move southward, as far as Mauritania and northern Senegal. The shifts away from Spain and toward Italy and Greece as preferred arrival countries reflect a similar process of adjustment. In this vein, a number of scholars of the European border emphasize the extent to which the border has become mobile and “deterritorialized” – the *ad hoc* ways in which enforcement and surveillance functions have been “outsourced” to transit countries, so that the border as a powerful physical phenomenon, with its real effects on migrants’ lives and safety, is felt, perceived, and lived by those migrants to extend far beyond the places where it has been drawn on maps.⁵³

⁵² In the year 2013, Greece had the lowest rate of first-instance positive decisions on international protection applications in the European Union, at 4% (Conventional asylum, subsidiary protection, and humanitarian protection applications combined). Grant rates after appeal were higher but remained among the lowest in the major recipient countries, especially for Conventional asylum (granted in under 10% of cases). European Asylum Support Office 2014, p. 24, 26.

⁵³ Weber and Pickering 2011, Reid-Henry 2012.

The wave of political uprisings which occurred across much of North Africa and the Arab world beginning in 2011 helped to redraw parts of the regional mixed migration map. Some of the most obvious changes were in the composition of migrant groups: there were short-term spikes in the numbers of Tunisians, Libyans, and some Egyptians fleeing the instability in their countries. As the situation in Syria has worsened, the refugee population associated with that conflict has continued to grow. Recent journalistic accounts focusing on the Greek-Turkish border have also noted the significant presence of Iraqis in migrant populations there⁵⁴, fleeing the violence caused by the presence of Islamic State fighters and the prolongation of the civil conflict in their country. As North African governments collapsed throughout the spring and summer of 2011, many of the people most affected were the sub-Saharan workers and transit migrants living, especially in Libya, in situations of varying degrees of legal “regularity.” Many of these migrants, effectively stranded without the option of returning to their home countries, have tried to continue on across the Mediterranean to Europe.

More fundamentally, the uprisings affected migration “opportunities”⁵⁵ across the region, freeing up times and spaces in which local police were relatively less active, and routes could operate more openly, in many of the key North African transit countries, and also creating and empowering new actors with new interests and forms of involvement in migration. Many migrants recently arrived in Italy from Libya, for example, describe the role of militia groups in that country in helping to smuggle them; some scholars and researchers on Libya believe migrant smuggling is a primary source of income for many armed groups and a foundational element of Libya’s regionally fragmented, highly politically influential illegal economy.⁵⁶

⁵⁴ Langlois and Vigoureux 2014.

⁵⁵ Fargues and Fandrich 2012.

⁵⁶ Shaw and Mangan 2014.

The linkages between migration and numerous forms of violence and instability abroad have played a powerful role in shaping European constructions of who migrants are, why they come to Europe, and how legitimate their presence is. Terrorism, in particular, has been an important element of European discourses on migration management and border control; in the post-9/11 world the terrorist coming to prepare an attack is essentially the archetype of the dangerous would-be migrant states seek to be able to identify and to exclude from entry to their territory. “Mixed” migration flows from conflict zones contain large numbers of people with diverse experiences whose various motives for migration may be difficult for border authorities to disentangle rapidly and reliably. These flows may be figured in receiving states as especially threatening because of the perceived greater likelihood that “dangerous” people coming from “dangerous” places could “slip through the cracks” or seek in some way to disguise themselves among the higher numbers of legitimate arrivals.

A revealing tabloid controversy in February 2015, for example, centered on a supposed strategy by the Islamic State in Iraq and Syria to overwhelm Europe with up to 500,000 migrants from Libya, and then possibly to introduce its own operatives onto the continent disguised as refugees.⁵⁷ Despite the obviously farfetched nature of this rumor, politicians within Europe have not hesitated to make specific allusions to terrorism and terrorist presence when discussing growing migration flows. In March 2015, *La Repubblica* quoted Greek Defense Minister Panos Kammenos’s declaration that “if Europe leaves us in the [economic] crisis, we will flood it with migrants, and even worse for Berlin if in that wave of millions of economic migrants there will be some jihadis of the Islamic State too.”⁵⁸

⁵⁷ See e.g., Roberts 2015 in the *Daily Mail* and Ernst 2015 in the *Washington Times*. McDonald-Gibson 2015 evaluates the sources of this story and notes that there is no evidence ISIS has ever pursued or is actively pursuing such a strategy.

⁵⁸ This English translation is provided in Pozzebon 2015.

Separately from their specific concerns about terrorism and security, European states may also feel that the particular obligations they owe to migrants in need of protection must necessarily be diminished by the sheer number and variety of crises which now place such significant burdens on their own domestic reception capacities. The November 2012 words of the then-French Interior Minister, Manuel Valls, continue to resonate, along with the overall sentiment they express: “We cannot take in all the world’s misery.”⁵⁹

III. Politicization, Migrant Marginalization, and Challenges to Reception Mechanisms

After years of steady growth, the numbers of asylum applicants to the EU increased sharply in 2011 and have continued rising since then.⁶⁰ These increases have had significant consequences for the adjudication burdens placed on already-fragile systems in first-arrival states, and also for wealthier destination states’ abilities to meet housing and support commitments⁶¹, leading to a general vulnerabilization of migrant living conditions within the Union in parallel with the apparently more dangerous and unstable conditions under which migrants arrive. This has affected the popular image of who migrants are, how they affect order and quality of life in destination societies, and what kinds of procedural guarantees, protection, and social assistance they should receive.

Conditions in Greece remain exceptionally poor, both for asylum-seekers and for other unauthorized and smuggled migrants: housing, especially in Athens, is limited and unsanitary,

⁵⁹ See AFP 2012. This phrase – itself a paraphrase of a remark made by then-Prime Minister Michel Rocard in 1989 – is very well-known in France and has been taken up on numerous subsequent occasions, including by Valls himself, most notably in the context of the Roma.

⁶⁰ Juchno and Bitoulas 2011; Eurostat 2015a.

⁶¹ Due to resource limitations in France, dedicated state housing is currently provided to only one-third of asylum-seekers legally entitled to receive it. At the end of 2013, 15,000 people were on waiting lists across the country and the average wait time for housing was about a year. See Human Rights Watch 2015. Shortages are less of a problem in the UK, where the arrangement of housing for asylum-seekers is sub-contracted to local and private-sector providers on an as-needed basis. See Gittins and Broomfield 2013, p. 9. This system has, however, given rise to some concerns about healthfulness and consistency of housing quality. See e.g., BBC 2014a.

leading many people to try to sleep on the streets and in public places. Greece is in economic crisis and jobs are very difficult to find, even for those migrants who have diaspora connections or who are authorized to work (e.g., asylum seekers after the expiration of the required legal delay). In both Greece and Italy, unauthorized migrants are a visible, vulnerable presence, concentrated in particular places (at points of arrival such as the Greek Aegean and Italian Mediterranean islands, and in particular neighborhoods in big cities like Athens and Rome), where their numbers have strained limited local support resources and, in some cases, led to instances of violence between migrant populations and “locals.”⁶² In these contexts, municipal and local-level governments have an important role to play in shaping the tolerability of migrants’ living conditions; even when not specifically framed or intended as migration policies, city regulations pertaining to such issues as housing rights, use of public space, and workplace regulation can have significant effects on migrants’ lives. When the city of Athens, for example, barred people documented as asylum-seekers from informal work as resale merchants as part of a broader municipal campaign against street markets beginning in 2009, the city removed an essential survival option from a minimally employable population that had very few other choices outside of “subsistence crime” (selling drugs, stealing, or running errands for smuggling groups).⁶³

Many migrants struggling in Greece (and, to a lesser extent, in Spain and Italy) try to take advantage of the open Schengen borders to move on to countries where they have personal or diaspora connections, where they expect to be able to find work or have arranged for it in advance, or where – if not yet apprehended – they believe their chances of obtaining asylum may

⁶² For a particularly striking example see Nadeau 2014 on the violent and highly racialized November 2014 riots which forced the closure of a reception facility for unaccompanied minors in Rome’s Tor Sapienza neighborhood. Communal violence is also a significant problem in Athens, especially in areas of the city where poor housing forces migrants to live and sleep outside.

⁶³ Triandafyllidou and Maroukis 2012, pp. 158-159.

be better. Smuggling routes extend throughout the EU, following ferry lines from one coast to another (from Igoumenitsa in Greece to Brindisi, Ancona, or Venice in Italy; from Calais in France to Dover in England) as well as the major roads into the cities, with migrants often traveling hidden in freight trucks or using falsified documents to access existing public transportation facilities. In the latter case, migrants are generally obligated to pay smugglers for assistance, especially when they themselves have limited local connections and resources, but many do move independently or with small groups of friends. Nearly everywhere as they move, their positions remain vulnerable, legally and physically exposed: housing and shelter are difficult to come by, and without access to work it can be a struggle to finance day-to-day survival needs. These “transit” migrants typically try to keep low profiles and remain undetected as they move toward their destinations, but in some places there are such concentrations of unauthorized travelers that their presence becomes highly visible, a local political reality. This is true not only of the cities and of certain neighborhoods within the cities, but also of many of the major international transit points. After an open camp at Patras in Greece, near the ferry to Italy, was dismantled in 2009 following tensions with the local community, migrants attempting the crossing took to staying on a nearby beach and sheltering in abandoned railroad cars; at the Igoumenitsa ferry port, would-be crossers camp in hiding in the hills and fields overlooking the water.⁶⁴ The area known as the Sangatte “jungle,” near Calais in northern France, has been raided multiple times in the last decade⁶⁵; Calais continues to host a fluctuating population of around 2,000 transit migrants who live either in improvised circumstances in and around the city itself or in limited support structures managed by local community organizations.⁶⁶ The

⁶⁴ *ibid.*, pp. 161-165.

⁶⁵ see e.g., Fassin 2005.

⁶⁶ The situation in Calais receives extensive coverage in local and national press in the UK and France. See e.g., Baumard 2015.

“management” of these migrants has become an important urban-planning problematic at the local level, as well as a political irritant in the bilateral relationship between Great Britain and France.⁶⁷ What is politically significant about these migrants is the combination of their visibility and their extreme marginality: the fact that, in the wealthy endpoint states of western Europe, which claim to have legal systems in place to receive them, regulate them, and occasionally even regularize some of them, they continue to occupy and circulate, apparently uncontrolled and uncontrollable, in public space.

The visibility of exposed, vulnerable, transient migrant populations has led to a problematization of irregular migration as a quality-of-life issue in many European communities – or, to make the articulation with crime even more explicit, as a “broken-windows” issue. This has facilitated the adoption in discourse of a set of constructed images of overwhelming, uncontrolled, and inherently inassimilable “waves” of migrants who are treated as if they have little connection to their destination countries and little legitimate justification for being there.

Statistical analysis of associations with the term *immigrant* in British press coverage has found that it nearly always occurs in the context of unauthorized entry, understood as an act of lawbreaking or crime.⁶⁸ More qualitative analyses of coverage in France have highlighted a similar tendency to pick up and play on existing tropes of migrants as criminal and culturally threatening.⁶⁹ Coverage in the UK (especially from tabloid-type sources identified with the political right) also focuses quite a bit on fraud and the supposed value of the benefits granted to asylum-seekers and refugees (with the suggestion that these are very generous or that migrants

⁶⁷ In 2014 remarks before the British Parliament, Natacha Bouchart, the mayor of Calais, claimed that the perception of generous reception policy in the UK was responsible for the large flows of migrants through the area around the English Channel. The British, for their part, say that the French are not doing enough to prevent illegal arrivals in their territory. See e.g., BBC 2014b.

⁶⁸ Martí Solano 2012.

⁶⁹ Garcia 2008; Zamith 2014.

who do not have stable status in the UK nevertheless enjoy a high material quality of life thanks to government support).⁷⁰ The UK's relationship to Schengen and continental Europe is another focus of press coverage: to the extent that national authorities are seen as willing to police the UK's borders appropriately, the open European borders and supposed failures of European and member-state authorities to secure them are sometimes portrayed as opening the UK to flows of immigrants to which it would otherwise be less exposed. In France, the material failings of the asylum system are so well known that any sensationalized press discourse about benefits as such is almost nonexistent (though there is some discussion about small fraud, fraudulent claims, and "false" asylum-seekers who lie or make unjustified claims). French coverage tends to focus instead on immigration's perceived effects on local communities, on crime, and on resource constraints imposed by growing numbers of new arrivals. In both countries, coverage is notably episodic – centered around particular *faits divers* such as arrests or trials of smugglers, disasters, or episodes of violence committed among or against migrants – and it is keyed toward enforcement actors, discourses, and outcomes: the latest numbers of border crossings or apprehensions, the newest legislation or reform effort.⁷¹

The quantity of press coverage is not in itself surprising: despite its complexity, immigration and asylum law is a highly salient and highly politicized subject of debate and amendment in many EU countries. The discussion below focuses on France and the United Kingdom.

⁷⁰ One widely cited example is the abundant tabloid coverage given to the case of a recognized Somali refugee who, along with his family, was apparently granted an unusually valuable public housing allotment in 2011. In press coverage, this refugee's status was systematically confused with that of an in-process asylum-seeker, and even with that of an "illegal immigrant." See e.g., sidebar in S. Doughty 2013 ("£2M home for Somali asylum seeker") and, for background, British Refugee Council 2012, p. 4.

⁷¹ Vincent 2014 notes the risk that journalists might find themselves complicit in producing one-sided views on immigration whenever one political party or viewpoint is in a position to set the enforcement agenda or monopolize enforcement action.

Summary Statistics on Applications, Decisions, and Removals

United Kingdom

	2010	2011	2012	2013	2014
Total (new) asylum applicants	24,365	26,940	28,985	30,820	31,945
Total Geneva Convention grants (final)	6,010	4,015	3,920	3,770	2,645
Total Geneva Convention grants (first instance)	4,495	5,515	6,555	7,525	8,990
Total first-instance rejections	20,200	15,735	14,195	14,020	16,000
Total final rejections	14,360	10,435	8,290	8,735	8,915
Removal orders (non-EU citizens)	53,700	54,150	49,365	57,195	n.d.

France

	2010	2011	2012	2013	2014
Total (new) asylum applicants	52,725	57,335	61,455	66,265	64,310
Total Geneva Convention grants (final)	4,245	4,930	4,290	4,270	n.d.
Total Geneva Convention grants (first instance)	4,080	3,340	7,070	9,140	11,980
Total first-instance rejections	32,515	37,600	51,185	51,010	53,685
Total final rejections	17,815	28,470	30,575	32,110	n.d.
Removal orders (non-EU citizens)	76,590	83,440	77,600	84,890	n.d.

Sources: Eurostat 2015a, 2015b, 2015c, 2015d. “First-instance” refers to the first level of substantive examination of the asylum-seeker’s claim by any adjudicator. “Final” refers to decisions at the highest level of appeal normally accessible to asylum-seekers, usually a review board or court.

The data are illustrative, even at this level of generality, of the significantly different immigration contexts the two countries face, and of the different policy approaches they’ve adopted. The UK numbers show a pattern suggestive of overwhelmed institutions: initial grant numbers rise slightly, as they might be expected to do along with significant increases in numbers of applications, while final grants decrease dramatically. First-instance rejections drop and then steady out slightly, and removal orders spike in the years 2011 and 2013. In France, both final and first-instance rejections rise steadily and dramatically, and removal numbers show the same peaky pattern they do in the UK, though at much higher levels (France alone accounts for a fifth of removal orders issued in the EU). The data also show the importance of the year 2011; the numbers of asylum applicants to France, in particular, jump, and while first-instance rejections in the UK decrease by almost 25%, they increase in France by almost two-thirds.

In both countries, immigration and asylum are regulated by omnibus immigration, nationality, asylum, and residency laws. These are revised regularly, in legislative processes that attract extensive public commentary and media attention. The most recent such update occurred in the UK in 2013 (finalized in 2014) and in France beginning at the end of 2014 (with finalization expected in the spring of 2015). The UK reforms do not explicitly concern asylum or asylum-seekers; the French legislation does. In both countries, the laws are framed overwhelmingly – in the press, and by the politicians who have advocated for them – as responses to fraud and crime, and to the need to modernize national systems assumed to be struggling or failing.

The UK legislation was strict, and was framed in the public discourse as strict. A fact sheet prepared by the Home Office to introduce the legislation to the public proclaimed that “as things stand, it is too easy for people to live and work in the UK illegally and take advantage of our public services.[...] This is not fair to the British public and it is not fair to legitimate migrants who want to come and contribute to our society and economy.”⁷² The legislation eliminated most existing avenues of appeal against removal for most types of migrants (though appeal rights were preserved for asylum-seekers) and it introduced new provisions to facilitate removals and broaden the use of biometrics in identification. It also imposed an extremely controversial obligation on private landlords to take steps to verify the immigration status of their tenants, and introduced regulations designed to make it more difficult for immigrants without legal status to acquire drivers’ licenses or open bank accounts in the UK. Following a history of attempts by the UK government to circumscribe the scope of Article 8 of the European Convention on Human Rights, which protects the right to “respect for private and family life” and historically underlies family-reunification rights throughout much of European migration law, the legislation provides,

⁷² Home Office 2013.

notably, that “little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.”⁷³

The substance of the reforms proved highly contentious: the parliamentary Joint Committee on Human Rights released two critical reports, academics called the new measures “draconian,”⁷⁴ and migrant advocacy organizations mobilized against them. Press coverage was heavy and partisan: the *Telegraph*’s headline praised the bill as a “new law to end human rights farce,” suggesting that the Article 8 reforms especially would make it easier for the UK to deport “foreign criminals.”⁷⁵ The *Guardian*, for its part, focused critically on remarks made by Home Secretary Theresa May which emphasized the bill’s intention to “create a really hostile environment for illegal migrants.”⁷⁶

That articulation of the bill’s goals fits particularly well within a broader punitive trend in UK immigration law, including law relevant to the treatment of asylum-seekers. The most recent changes in this domain have focused on resolving large caseloads (in some cases dating back to 2007) and reforming administrative procedures,⁷⁷ but earlier reforms made by Parliament to the immigration and asylum laws point to a project of consistently increasing limitation on the types and numbers of people eligible for protection and on the support and assistance that can be provided to them in the UK. The concept of the asylum claim which could be presumed “without foundation,” with the applicant granted only restricted appeal rights, was introduced in UK law in 1993, and in 1996 this expedited evaluation procedure was extended (not without controversy) to claims from designated “safe countries of origin.”⁷⁸ Asylum-seekers are not authorized to

⁷³ Clayton 2014, p. 26.

⁷⁴ *ibid.*

⁷⁵ Hennessy 2013.

⁷⁶ Travis 2013.

⁷⁷ Gower and Hawkins 2013.

⁷⁸ Clayton 2014, p. 13.

work in the UK until the expiration of the EU-mandated delay (and then only in “shortage occupations”), which means that most are forced to rely on any financial means to which they may independently have access (negligible in most cases) or on state “destitution” support.⁷⁹ In the UK, this support is provided at a level which is below even the level of assistance given to participants in domestic welfare programs; research across the country has found that significant majorities of asylum-seekers live in poverty, struggle to feed themselves and their households, and are negatively affected by provisions of law which allow the state unilaterally to assign them their housing, in some instances separating them from vital education and healthcare resources.⁸⁰ Refused asylum-seekers remaining in the country live in particular destitution, with no status and almost no support: state assistance was withdrawn from single adults in this situation in 1999 and from families with children in 2004.⁸¹ (A separate program of relief does exist for those who demonstrate an inability to return to their home country, are in the process of returning, or prove compelling humanitarian need. Most refused asylum-seekers do not qualify for this program and are entirely without access to government assistance.) UK government officials have been relatively explicit about their intentions in pursuing such policies: “those not prioritised for removal [...] should be denied the benefits and privileges of life in the UK and experience an increasingly uncomfortable environment so that they elect to leave.”⁸²

The latest reform in France aims to expand certain procedural protections granted to asylum-seekers (providing greater access for advocates in detention areas; giving suspensive effect to appeals that did not previously prevent removal), but it also gives the state the authority to assign

⁷⁹ In 2015, the level of weekly assistance to be provided, in the form of vouchers, to meet the “essential living needs” of a single adult asylum-seeker without other means of support in the U.K. was £36.95. This sum has not changed substantially since 2000, when the current system was created. Asylum Support (Amendment) Regulations 2015.

⁸⁰ Allsopp, Sigona and Phillimore 2014.

⁸¹ Clayton 2014, p. 19.

⁸² Home Office 2007, quoted in Allsopp, Sigona and Phillimore 2014.

housing to asylum-seekers by region and permits the removal of all benefits from asylum-seekers who refuse such assignments.⁸³ Advocates of the law argue that such a housing policy would permit an improved distribution of the already limited and insufficient places available, and by de-“regionalizing” the settlement of asylum-seekers and refugees (40% of whom live in the Ile-de-France region, in and around Paris), allow cases to be handled more efficiently by the local police and asylum authorities.⁸⁴ It can now take up to two years, on average, for an asylum case to move through the system, from initial application to confirmation of the decision on appeal, and the legislation aims to reduce this to nine months in most cases. The possibility of recourse to so-called “accelerated” asylum proceedings – expedited adjudications with limited appeals and no access to social assistance for applicants – is therefore extended to a wider range of cases, with adjudicators and local officials granted a very important margin of appreciation in deciding which cases attract which procedural rights. Human-rights advocates are skeptical of this law, and consider it to be primarily enforcement-oriented.⁸⁵

The law seeks primarily to address administrative weaknesses in the asylum system which are seen as producing two structurally problematic results. The combination of very high caseloads, long adjudication times, and a set of minimal legal protections which require the French state to continue to assist destitute former asylum-seekers even after their cases have been definitively refused has given rise to a situation in which a certain number of already-limited housing places and other support resources are being used to help people who have, absent some major eventual reform or regularization effort, no foreseeable chance of obtaining stable status in France.⁸⁶ For some observers, this is a waste in and of itself, and represents a burden to the state

⁸³ Ministère de l'Intérieur 2014.

⁸⁴ Létard and Touraine 2013, p. 6.

⁸⁵ B. Doughty 2015; see also e.g., Ligue des Droits de l'Homme 2014.

⁸⁶ Létard and Touraine 2013, p. 24.

from people who have proven themselves unable to establish any legal right to presence in the country. A related problem, which is also articulated by many more “humanitarian”-oriented observers and by many on the political Left, is the resulting crowding-out of “legitimate” in-process asylum-seekers from the housing and essential means of assistance to which they are entitled, as well as the possibility that the quality of adjudication decisions and protection offered could decrease as caseloads continue to grow. The declared primary purpose of the new law is to shrink adjudication times and improve the allocation of resources.⁸⁷ This is to be done partly by shifting a greater number of cases into expedited procedures, and the argument is that, as resources are rebalanced, this will improve the quality of the protection and assistance that can be granted to everyone. It also establishes a presumption that many asylum-seekers’ cases are not or may not be legitimate, and that these can and must be dealt with more quickly in order to preserve the system overall.

At every level, from the supranational to the national and the local, European policy problematizes crisis migration, asylum migration, border crossing and visible transit movement. In constructions of who migrants are, what kinds of “risks” they pose, and what kind of public “burden” they represent, it is the places they come from and the means they use to travel – in short, the very same structural factors that make many Mediterranean-region migrants to the EU especially vulnerable – that act to delegitimize their presence at destination.

Unauthorized entry and transit movement, often using smuggling services, acts of fraud, or other criminalized modes of “deception,” affect the political and public calculus in receiving states as to whether migrants (either individually or viewed sociotropically, as a group) deserve protection, shelter, status, and assistance. The perceived need for this calculus becomes

⁸⁷ Mazetier 2014, p. 19.

especially acute when limited state resources are tested by numbers of people which, as the data show, are high as a baseline, increase over time, and spike in response to exogenous events.

The language and conceptual framings employed in Europe in discussions of Mediterranean crisis migration emphasize urgency, emergency, extremity, the impossibility in which existing structures (from FRONTEX to the French and British asylum systems) find themselves in “facing” or “coping with” migration flows. “Emergency” language has particular discursive power because it can be used to justify shortcuts – normal asylum and border-control procedures, with the protections they are written to contain in Europe against arbitrariness, against brutality, and against precipitation in decision-making, become much harder to justify in all their perceived cost and complexity. The impulse to reform or change existing policy in order to respond to situations of crisis is not always, in and of itself, restrictive or punitive; the specific political climate or set of attitudes surrounding the particular issue under debate affect the nature and content of the approach that is ultimately taken. Specific perceptions of asylum-seekers, unauthorized entrants, and smuggled migrants matter; they shape the range of political options available to authorities who find themselves increasingly obligated to take action.

IV. Conclusion

As processes of marginalization and vulnerabilization of migrants and asylum-seekers continue in Europe, the temptation appears to be growing for member states to find ways of derogating from their international human-rights obligations. Pushback behavior by Spain at its land borders in Morocco and Greece at both its land and sea borders may continue as long as the police forces and governments involved deny that it happens. Spain may be looking for a legislative way to carry out summary removals of individuals arriving in its enclave territories,

without having to offer them assistance or access to asylum procedures.⁸⁸ The EU is also considering opening centers to process some asylum applications abroad; this has the potential to improve adjudication and lower pressure on national systems, but since the required administrative and legal frameworks would need to be built from scratch and oversight exercised at a distance, there is a possibility of inconsistency in outcomes,⁸⁹ and the fact that the proposal is being made now may speak more to the Union's desire to find ways of slowing "inflows." Throughout these efforts, the Union's own institutions and its members can access the powerful legitimizing discourse of the "fight" against smuggling and illegal immigration as a fight against violence, against crime, and against symbols of visible instability in public space. This is not a discourse that lends itself to fine-grained distinctions between the already-complex situations of individual migrants, and it is not a discourse that encourages local publics to welcome them or treat them as legitimate members of destination-country societies.

⁸⁸ Garea and Ramos 2015.

⁸⁹ Traynor 2015.

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