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INTERNATIONAL MIGRATION AND REFUGEE LAW

Does Germany's Migration Policy Toward Syrian Refugees Comply?

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In memory of every life lost throughout the Syrian Crisis

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Abstract

Germany will spend around $6.6 billion to cope with an estimated 800,000 refugees expected to have entered the country in the year 2016; this reality indeed extending further into 2017. Despite this overwhelming number of people entering the country, Chancellor Angela Merkel stated that there is *"no legal limit to the number of asylum seekers Germany will take in in the coming years."* The announcement by Merkel's coalition government arrived following Germany and Austria opening their borders to the large numbers of refugees making their way north and west from the Middle East, Africa and elsewhere. In particular, this statement came after the Syrian refugee crisis created the biggest refugee crisis the world has seen since the Second World War.

Germany is seen as the immigration hub of Europe. It also happens to be the second most popular destination for immigrants after the United States of America. Germany is also the country in Europe with the highest numbers of foreign nationals to date.

Germany established a new immigration law in 2005 was born out of a realization that it was coming to terms with a demographic crisis stemming from an ageing population and further complimented by a sharp decline national birth rates. In foresight, and within this unfortunate context, migration was seen by much of the German political class as an economic necessity, and the answer to the German economic and demographic time bomb.

Between the years 2009 and 2014, annual net migration in Germany rose from 100,000 to 580,000 individuals. Moreover, the inflow of foreign nationals increased from 266,000 to

790,000 individuals. As of January 2015, approximately 10% of residents in Germany were foreign nationals, with around 12% born outside the country. Naturally, these figures have all risen significantly following Merkel's decision to allow what has reached one million refugees and migrants into Germany across 2016 and moving into 2017.

Moving from this reality, the research will focus on the importance of the compliance of Germany's migration policy with International Refugee and Migration Law, as it is crucial for the country's survivability and move forward throughout this phase of its history. The importance of the research lies in whether or not Germany's migration policy towards the Syrian Refugees in particular complies with its duties toward international law embodied in the treaties and conventions it has committed to.

Key words: Migration, Refugees, Germany, European Union, Policy, International Law

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Chapter I

Introduction

Annually, millions of individuals seek the protection of international refugee law, rendering it one of the most significant international human rights mechanisms which exist to date. Throughout the development of international refugee and migration law, the only international legal norms which apply to refugees at global level in particular, remain the 1951 UN Convention Relating to the Status of Refugees as well as its 1967 Protocol. To date, The Convention on Human Rights and its Protocol have been ratified by 150 UN member-states. Under the conditions of the post-war era, The Convention was drafted applying only to individuals who were identified as refugees as a result of events occurring before the 1st of January 1951 in Europe. The 1967 Protocol subsequently came to remove this temporal and geographical limitation.[1]

Within the field of migration, refugees are considered a separate class of immigrants who deserve specific measures of protection, as per international law, by the host state. Based upon Article 1 of the 1951 Convention, and as modified by the 1967 Protocol, a refugee is defined as an individual who "*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail*

[1] McAdam, J. (2007). Complementary Protection in International Refugee Law. Oxford University Press, Retrieve at: http://www.iarlj.org/general/images/stories/docs/flyer_-_mc_adam_complementary_protection_in_international_refugee_law.pdf

himself of the protection of that country"[2] The definition generally denotes that more than one *qualifying condition* applies to an individual to be considered as a refugee. This entails the following criteria: (1) Physical presence outside home country; (2) well-founded fear of persecution (being at risk of harm is insufficient reason in the absence of discriminatory persecution); (3) incapacity to enjoy the protection of one's own state from the feared persecution.

Originally, this definition was intended to exclude internally displaced persons, economic immigrants, and victims of natural disasters. The definition was also made to exclude individuals fleeing violent conflict but not subjects of discrimination which amounts to persecution.

Moreover, the obstacle of exclusivity of the definition outlines, in turn, the reality that a refugee is not an asylum-seeker. The United Nations High Commissioner for Refugees (UNHCR) defined an asylum seeker: *'someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated'*. In the cases of mass refugee influxes toward a specific region due to a local, regional, or international conflict in particular, the reasons for fleeing usually are justified and evident. Consequently, in dire circumstances, there is no capacity to conduct individual interviews; and these individuals are often declared *prima facie* refugees.[3]

[2] Edwards, A., Stevens, D., Lambert, H., Juss, S., Shah, P., Guild, E., ... & Gilbert, G. (2013). International Refugee Law.

[3] Harthaway, J. C. & Nevey R. A., (1997). Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, pp. 115-145, Harvard Human Rights Journal. Retrieve at: http://heinonline.org/HOL/LandingPage?handle=hein.journals/hhrj10&div=8&id=&page=

The History of the Right to Asylum

International Human Rights Treaties, and International refugee law neither clarify an entitlement to asylum for the individuals concerned, nor do they inflict an obligation upon states to grant asylum to individuals fleeing persecution. To make this delicate balance clearer, individuals have a right to *seek* asylum, not necessarily be *granted* asylum. Furthermore, states have the right to grant asylum, without being bound to any obligations or enforcements. The 1951 Convention[4] (or The Geneva Convention) does in no way guarantee asylum-seekers the right to be granted refugee status. Even in cases where individuals fulfil all the necessary conditions to be considered refugees. The final decision as to whether or not a refugee status is granted remains at state discretion. However, states are "obliged" to refrain from actions that would purposely, directly, or indirectly, endanger asylum-seekers, especially endangerment resulting from returning these individuals to their country of origin; however, whether or not there are consequences or means of making states conform to these standards, remains a gray area in International Law. In the maintenance of their sovereignty, every state is free to institute their own tailored conditions upon which they would grant asylum – stemming from and reinforced by the fact that, in theory, no state is entitled to interpret the Geneva Convention authoritatively, different from other international human rights treaties. The UNHCR has the duty to *supervise* its application. This in no way gives the UNHCR the authority to, in turn, enforce

[4] The 1951 Refugee Convention is the key legal document that forms the basis of our work. Ratified by 145 State parties, it defines the term 'refugee' and outlines the rights of the displaced, as well as the legal obligations of States to protect them. More at: http://www.unhcr.org/1951-refugee-convention.html

mandatory interpretations. The Convention has always left its interpretation to domestic law-makers and national courts.[5]

Due to their overwhelmingly vulnerable situation, asylum-seekers are at many instances, forced to enter their country of refuge (host country) illegally. As stated previously, the Convention[6] does not require that states grant asylum-seekers entry to their territory; however within the frame-work of the non-refoulement principle, entering a state party to the Convention illegally does not forfeit protection (Article 31). Individuals who enter their host country illegally may still meet the requirements to be granted refugee status if they meet the relevant criteria outlined by the state in question. However, the question does remain about whether or not states' capacities to intercept large influxes of refugees into their borders are not only plausible, but whether or not it interphases with their rights as a sovereign state to begin with. Refugees illegally present within the territory of the host country must not be penalized for their illegal entry should they be (Article 31):

- Entering directly from the territory where their lives or freedom were threatened and if they report themselves immediately to the authorities,
- Showing good reason for their illegal entry.

Restrictions upon their internal movement may be imposed until their case is reviewed and their official status is granted. As for refugees, legally present in the territory, Article 26 of the Convention grants them the right to select their area of residence as well moving freely within the border of their host state. The UNHCR has clarified that it believes the detention

[5] Ibid
[6] 1951 Geneva/Refugee Convention