

Konzeptionen von Flucht in Rechtsprechung, Verwaltung und Politik

Margit Ammer, Monika Mayrhofer and Florian Hasel¹
**Human mobility in the context of climate change:
 Addressing the normative protection gap in Austria**

1. Introduction

There is growing evidence that environmental change is becoming an increasingly important factor with regard to different forms of human mobility. Environmental change influences economic, social and political drivers which, themselves, affect migration. Global warming “is projected to increase displacement of people” and “[w]ith increasing climate risks, displacement is more likely to involve permanent migration” ([IPCC 2014, 16, 71](#)). In 2020, 30 million persons were newly displaced due to weather-related disasters – triple the number of those newly displaced by conflict ([Internal Displacement Monitoring Centre 2021](#)). In general, the likelihood of disaster-displacement “today is 60 percent higher than it was four decades ago” ([Internal Displacement Monitoring Centre 2015, 8](#)). As mobility in the context of climate change is taking place on a continuum between forced and voluntary forms of displacement/migration, voluntary forms of migration can also serve as an adaptation strategy ([IPCC 2014](#); [UN Committee on the Elimination of Discrimination Against Women et al. 2019](#)).

Although academics agree that most people affected by climate-change-related mobility remain in their countries and regions of origin, some of them (will) arrive in Europe, including in Austria. This is confirmed by the existence of claims for international protection in the context of disasters and climate change in the Global North ([Scott 2016, 29](#)) or the mentioning of climate-related risks in asylum procedures in European countries.² Apart from this, there has been scientific evidence showing that increases in the temperature in countries of origin correspond to increasing asylum applications in Europe ([Missirian/Schlenker 2017, 1610](#)). Nevertheless, the issue of the legal status of persons arriving in Europe remains inadequately addressed.

This chapter fills this gap and focuses on the situation in Austria. It analyzes the role of environmental factors in Austrian decisions on international protection and draws on

¹ *Margit Ammer* is a Senior Legal Researcher at the Ludwig Boltzmann Institute of Fundamental and Human Rights in Vienna. Her research focus is on European asylum law and climate-change-related mobility.

Monika Mayrhofer is a political scientist and Senior Researcher at the Ludwig Boltzmann Institute of Fundamental and Human Rights. Her research focuses on climate-change-related mobility, equality and non-discrimination.

Florian Hasel studied law and was Straniak Fellow at the Ludwig Boltzmann Institute of Fundamental and Human Rights in 2020.

² For example, Federal Administrative Court (Austria), W237 2146679-1 (13 September 2017), drought mentioned by legal representative and in legal reasoning, para 3.3.1. See also [Schloss 2021](#); [Tower/Plano 2021](#).

the first findings of the research project “ClimMobil – Judicial and Policy Responses to Climate-Change-Related Mobility in the European Union with a Focus on Austria and Sweden”. The chapter first analyzes the so-called “protection gap” at both global and regional European levels (Section 2). Secondly, it provides an overview of the latest international institutional and policy developments to address this gap (Section 3). Section 4 then presents the preliminary results of the pilot phase of the research project – in particular, the first insights into the role of environmental factors in decisions granting international protection in Austria and the role of other social categories, specifically the issue of gender. Section 5 concludes the chapter.

2. A normative gap in international law

2.1. International law

From an international law perspective, there is broad agreement on the existence of a normative gap with regard to cross-border climate-change-related displacement (McAdam 2012a, 5; 2016a, 1518, 1523). None of the international legally binding instruments in the areas of migration, flight or environment/climate change adequately deal with the legal status of persons crossing international borders in the context of climate change.

Legally binding international instruments in the area of *international environmental law* – such as the UN Framework Convention on Climate Change (UNFCCC) – regulate inter-state relations and do not contain any explicit obligations with regard to the protection of persons affected by climate-change-related mobility. However, as is shown in Section 3, the Task Force on Displacement under the UNFCCC is an important forum via which to address the gap, albeit without aiming at developing new law.

International refugee law is one source of international law which could be applied to persons moving in the context of climate change and disasters: according to the UNHCR, such persons “may have valid claims for refugee status under the 1951 Convention” (UNHCR 2020, para. 6) – albeit arguably only in exceptional cases (McAdam 2012a, 47; Kälin/Schrepfer 2012, 31–34). In order to fulfil the criteria of the refugee definition, a well-founded fear of persecution for a reason listed in the Refugee Convention must be established. One obstacle in relation to the requirement of “persecution” can be the high threshold of harm to be feared upon return, in particular if people move in the context of slow-onset processes such as droughts or sea-level rise. In addition, courts and certain scholars sometimes emphasize that persecution must emerge from “human agency” or conduct by state or non-state actors – as opposed to threats posed by the adverse impacts of environmental change (Human Rights Council 2018, 69–72). While the Refugee Convention itself does not contain such a requirement, at a regional level the EU Qualification Directive seems to do so (Article 6). Further, it is argued that most cases would not be covered because of the lacking nexus to a persecution ground except “if a State discriminates in its provision of assistance or protection or uses climate

change impacts and events as a pretext to persecute certain persons” ([Human Rights Council 2018, 70](#)). However, some scholars advocate reconsidering this approach, in particular in relation to the unequal impacts of climate change reinforcing existing patterns of discrimination (Scott 2020).

The prevailing view is that, among all sources of international law, *international human rights law* has the greatest capacity to protect people against forcible return to life-threatening circumstances or inhuman treatment ([Human Rights Council 2018, 67](#); McAdam 2016a, 1537). This is the case in particular with regard to the principle of non-refoulement derived from the right to life or the prohibition of torture and inhuman or degrading treatment – despite its limitations and obstacles ([Human Rights Council 2018, 66](#)). For instance, courts often require harm to be imminent, which is particularly difficult to fulfil in the context of slow-onset climate-change processes (McAdam 2016a, 1537–1538/[2016b, 7](#)). However, this requirement of imminence which “has been introduced into the case law” has recently been criticized since “[i]ts application is inconsistent, problematic, and difficult to justify by reference to standard principles of refugee and human rights law” ([Anderson et al. 2019, 139](#)).

Jurisprudence of international human-rights bodies has not yet regarded threats posed by climate change to be imminent or severe enough to reach the threshold of the non-refoulement principle – however, this has also not been ruled out ([Human Rights Council 2018, 67](#)). This was confirmed in a landmark decision of the Human Rights Committee in 2019 concerning the case *Teitiota vs New Zealand* in which it accepted in principle that “without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states”.³ It also held that states are obliged to take into account “new and updated data on the effects of climate change and rising sea levels”.⁴ The decision is of a “highly authoritative nature” ([McAdam 2020, 710](#)), which will influence future jurisprudence. Nevertheless, the thresholds used by the Committee for *each* element of the complainant’s claim have been criticized as too high ([McAdam 2020, 720](#)).⁵

³ UN Human Rights Committee, *Teitiota vs New Zealand*, 24 October 2019, CCPR/C/127/D/2728/2016, para 9.11. Mr Teitiota is a citizen of Kiribati, a small island state in the Pacific which is extremely affected by sea-level rise. The islands are expected to be inhabitable or submerged under water in the coming 10–15 years. Already today the population, which is to a great extent dependent on agriculture, faces difficulties regarding access to safe drinking water, increasing violent conflicts over scarce land or increasing breaches of sea walls due to rising sea levels. These facts were accepted by the Committee. In legal literature and jurisprudence, “sending states” are countries which (intend to) return a person to his or her country of origin (i.e the receiving state).

⁴ UN Human Rights Committee, *Teitiota vs New Zealand*, para 9.14.

⁵ See also the dissenting opinions of committee members Duncan Laki Muhumuza and Vasilka Sancin, UN Human Rights Committee, *Teitiota vs New Zealand*.

2.2. European level: Council of Europe and European Union⁶

The European Court of Human Rights (ECtHR) has thus far not ruled on a case with a situation like that in *Teitiota vs New Zealand*, namely a case where persons facing expulsion to a country affected by the impacts of climate change invoked the principle of *non-refoulement* in Article 2 or 3 of the European Convention on Human Rights (ECHR). However, from the existing jurisprudence it can be deduced that, in cases where the harm feared in the country upon return cannot be linked to the behavior of human actors (no “human agency”), the ECtHR demands a higher threshold of harm compared to cases where such a link can be made. In jurisprudence relating to the return of people who are ill to countries lacking the resources to deal adequately with such a “naturally occurring illness”, the ECtHR demands a “very exceptional” high standard (“only in a very exceptional case, where the humanitarian grounds against the removal are compelling”).⁷ Some scholars want to apply this approach to environment-related displacement (e.g. [Kälin/Schrepfer 2012, 36](#); [Kolmannskog/Myrstad 2009, 313](#); for a different view, see [McAdam 2012a, 66](#)). In an *obiter dictum*, the Court confirmed that it would apply this high threshold to difficult humanitarian conditions that are “solely or even predominantly attributable to poverty or to the State’s lack of resources to deal with a naturally occurring phenomenon, such as a drought”.⁸

However, some authors argue that, if evidence demonstrates that climate change has played a role in the disaster, a lower threshold test should be applied for establishing a violation of the non-refoulement principle under the ECHR because the returning state, typically a state with historically high greenhouse-gas emissions, is involved ([Scott 2014, 404](#)).

In any case, based on the jurisprudence of the ECtHR, “a distinguishing feature” that makes the situation in the receiving country “particularly deleterious on the applicant” is necessary ([McAdam 2012a, 76](#)).

The *European Union* (EU) has no self-standing policy on human mobility in the context of climate change ([Mayrhofer/Ammer 2014, 391](#); see also [Kraler/Katsiaficas/Wagner 2020](#); [Kraler/Cernei/Noack 2011, 49](#)) and “rather adapts than leads the international climate migration debate” ([Vlassopoulos 2012, 68](#)). It started, however, a reflection process on this issue through a Commission Staff Working Document (CSWD) on “Climate change, environmental degradation, and migration” accompanying the

⁶ On a regional African and Latin American level, there exist expanded refugee definitions which are of relevance to persons moving in the context of climate change and disasters (cf. UNHCR 2020).

⁷ E.g. *N. v. the United Kingdom* [GC] ECHR 2008-III 227, paras 42–43; *D. v. United Kingdom* App no 30240/96 (ECtHR, 2 May 1997), para 54.

⁸ *Sufi and Elmi v. United Kingdom* App. No. 8319/07 and 11449/07 (ECtHR 28 June 2011), para 282.

EU strategy on adaptation to climate change published in April 2013 ([European Commission 2013](#)). During the negotiations over the Global Compact on Migration, while some states were opposed to including climate-related forms of mobility, the EU was in favour of the argument “that the goal of safe, orderly and regular migration could not be achieved if a potentially very important category of human mobility remained unaddressed” ([Kälin 2019, 664](#)). The EU also endorsed the Nansen Initiative Protection Agenda (see below).

Given the absence of a specific regime applicable to climate-change-related displacement in the EU, the *EU Qualification Directive*,⁹ the first supranational codification of a complementary protection regime based particularly on the principle of non-refoulement, is the major relevant instrument.¹⁰ It regulates eligibility and status not only of a refugee but also of a person under subsidiary protection if protection on the basis of the Refugee Convention is not possible. The European Court of Justice (ECJ) has not yet explicitly taken a position on the issue of whether and under what conditions the removal of persons to a country affected by the impacts of environmental change could be covered by the concept of subsidiary protection and thereby benefit from a clearly regulated status in the Qualification Directive. In order to qualify for subsidiary protection, the return to a country would need to constitute a “serious harm”, as defined in Article 15 of the Directive. Environmental degradation or climate change is not explicitly mentioned in this provision as a form of “serious harm”. For persons moving in the context of environmental change, mainly Article 15 lit b seems to be relevant, i.e., serious harm in the form of “inhuman or degrading treatment in the country of origin”, unless armed conflict is additionally involved, to which Article 15 lit c¹¹ could apply. Article 6 of the Qualification Directive and the jurisprudence of

⁹ Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, OJ L 337, 20.12.2011, 9–26.

¹⁰ It seems unlikely that the Temporary Protection Directive 2001/55/EC (establishing minimum standards for granting temporary protection in the event of a mass influx or imminent mass influx and defining “displaced persons” in a broader way than beneficiaries of subsidiary protection in the Qualification Directive) would be applied to persons moving in the context of climate change: There was not only “during the negotiation process [...] a shared understanding that the Directive was not meant to apply to so-called environmental migrants” (Zorzi Giustiniani 2018, 334–335) but it is also unlikely that the mechanism envisaged by the Directive is triggered by a (political) decision of the Council of the EU, adopted by a qualified majority, on proposal of the Commission. So far, this mechanism has been activated only in 2022 in the context of the Russia-Ukraine war.

¹¹ Serious harm consists, according to Article 15 lit c), of “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

the ECJ on Article 15 require an “actor of serious harm” in the country to where the person is to be returned in order to qualify for subsidiary protection.¹² The provisions in the Austrian Asylum Act implementing the Qualification Directive do not explicitly mention a requirement of an actor for granting subsidiary protection. According to the wording of Sec. 8 Asylum Act, the real risk of an Article 2 or Article 3 ECHR violation must lead to the granting of subsidiary protection. The different wording of Sec. 8 Asylum Act and the provisions in the Qualification Directive caused different interpretations in Austria: in 2018, the Austrian Supreme Administrative Court (VwGH) stated that it would be contradictory to the Qualification Directive if subsidiary protection were granted although there is no causation of an Art 3 ECHR violation by actors.¹³ A couple of months later, the VwGH held, in another decision, that the granting of subsidiary protection based on Sec. 8 Asylum Act does not require an actor and the real risk of an Art 3 ECHR violation is sufficient to grant subsidiary protection status.¹⁴ The Austrian Constitutional Court (VfGH) also clarified, in three recent decisions, that subsidiary protection status must be granted if an applicant would face a “real risk” of an Art 3 ECHR violation in her or his country of origin – irrespective of whether or not this “real risk” is caused by an actor.¹⁵ In the reasoning of these decisions, the VfGH also stated that this interpretation is not contradictory to the case law of the ECJ since “member States are explicitly given the possibility to grant residence permits on other humanitarian grounds”. While the Austrian legislator apparently has not transposed the provisions of the Qualification Directive into the Asylum Act correctly, to date no amendment has been proposed regarding Sec. 8 Asylum Act and the eligibility criteria of subsidiary protection status. If Austrian law were amended and subsidiary protection granted only to those persons fulfilling the criteria of the EU Qualification Directive as interpreted by the ECJ, there would remain a group of persons who cannot be returned to their country of origin because the non-refoulement principle of the ECHR would be violated. For this group, a new (humanitarian) protection status would need to be introduced (Frik and Fux 2019, 48–53).

3. Addressing the gap at the global level: Latest developments

Despite this normative gap, there is a lack of political will to establish a new legally binding framework at the global level ([McAdam 2011, 15–18; 2012b, 5](#)). Also, a focus

¹² Case C-542/13 *M'Bodj v État belge* [2014]. According to Article 6 Qualification Directive “Actors of [...] serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b) [...] are unable or unwilling to provide protection against [...] serious harm”.

¹³ VwGH 21.11.2018, Ra 2018/01/0461 with reference to VwGH 06.11.2018, Ra 2018/01/0106.

¹⁴ VwGH 21.05.2019, Ro 2019/19/0006.

¹⁵ VfGH 04.12.2019, E1199/2019; VfGH 12.12.2019, E2746/2019; VfGH 10.03.2020, E2570/2019 u.a.

on developing new norms at a global level could distract from the “need for [...] new domestic and regional laws to facilitate migration, and/or to provide more predictable responses in situations of displacement” (McAdam 2016a, 1540–1542). Instead, state-led initiatives like the Nansen Initiative on Disaster-Induced Cross-Border Displacement (2012–2015) and the succeeding Platform on Disaster Displacement (PDD) aim(ed) to address this gap without, however, developing new law. Still, the focus of both initiatives is on South–South mobility, thus leaving mobility towards or within the Global North unaddressed (with regard to the Nansen Initiative, see [Scott 2016, 26, 28](#)).

Between 2012 and 2015 the *Nansen Initiative*, described as “a state-led, bottom-up consultative process” ([Nansen Initiative 2015a, 6](#)) intended to build consensus among states on how to address cross-border displacement in the context of sudden- and slow-onset disasters at national, regional and international levels. The outcome of this initiative is the *Protection Agenda* ([Nansen Initiative 2015a](#)), endorsed by 109 governmental delegations, including those of Austria and the EU. The Protection Agenda offers a toolbox of effective practices to prevent displacement, to help people at risk through planned relocation or the opening-up of migration pathways to other countries and to protect displaced persons. Amongst others, it mentions the reviewing of asylum applications and the granting of refugee status or similar protection under human-rights law; the exploration into whether and under what circumstances regional instruments on refugee and human-rights law can and should be interpreted as applying to cross-border disaster-displacement situations; and the reviewing and harmonization of existing humanitarian protection measures at (sub-)regional levels (Nansen Initiative 2015b, 47).

In 2016, the *PDD*, “a multi-stakeholder forum for dialogue, information sharing as well as policy and normative development”, followed up on the work of the Nansen Initiative and on the implementation of the Protection Agenda’s recommendations (PDD 2016, 2). The PDD defines as strategic priorities for the period 2019–2022, *inter alia*, the promotion of policies and normative development to address gaps in the protection of persons at risk of displacement or displaced across borders. The platform follows the Nansen Initiative’s recommendation that standard-setting activities should better take place at domestic and regional levels, e.g. it encourages the creation of bilateral/regional frameworks on the admission, stay and non-return of cross-border disaster-displaced persons (McAdam 2016a, 1518, 1533).

In the context of the Conference of the Parties (COP) of the *UN Framework Convention on Climate Change* (UNFCCC), the 2015 *Paris Agreement* led to the establishment of a Task Force (under the auspices of the Warsaw International Mechanism for Loss and Damage associated with climate-change impacts), in order “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change”.¹⁶ In 2018, the Task Force published

¹⁶ Decision 1/CP.21, FCCC/CP/2015/10/Add. 1 (29.01.2016), para 49.

a report which emphasized that “legal and/or implementation gaps exist in relation to the human rights protection of people affected by, and displaced in the context of the adverse effects of climate change” and which contains recommendations to address the protection gap ([Task Force on Displacement 2018, 20](#)).

In addition, the two Global Compacts deriving from the 2016 New York Declaration for Refugees and Migrants could become relevant in the future: while both the *Global Compact on Refugees* (GCR) and the *Global Compact for Safe, Orderly and Regular Migration* (GCM)¹⁷ address the phenomenon of climate-change-related mobility, only the Global Compact for Migration contains more-detailed rules in this regard ([Kälin 2019, 664](#)) and might have the potential to fill the gap. The GCM also recommends that the Nansen Initiative Protection Agenda and the outcome of the PDD be taken into consideration (see above). However, Austria abstained in the UN General Assembly’s vote on the GCM.

4. Addressing the gap in Austria: First results of the analysis of case law on international protection

As long as this normative protection gap persists, existing international law, in particular international refugee law and international human-rights law, has to be implemented effectively. This was also emphasized by the EU delegate at the Nansen Initiative Global Consultation Conference: “The goal now is to see how existing law can be applied more effectively to environment-induced migration, filling gaps not with more rules, but with practical guiding principles, based on sound research and comparisons of experience” (Nansen Initiative 2015b, 110–111).¹⁸ Thus, it is necessary to clarify the scope of existing legal frameworks. The legal status of people arriving in the Global North in the context of disasters and climate change remains under-explored. There is little knowledge about what role environmental factors, including climate change, play – often in interrelation with inequalities – in decisions on granting international protection in Europe *at a national level*. Only a very limited number of European countries have legislation explicitly addressing environment-related displacement. The vast majority of countries, like Austria, lack any explicit normative framework ([Nansen Initiative 2015a, 28](#)), with some granting international protection or status based on humanitarian or compassionate grounds.

In the following sub-sections, the results of the pilot phase of the ClimMobil project are discussed. In particular, we present the results of the analysis of the role of environmental factors in 30 decisions on international protection in Austria.

¹⁷ Final draft July 2018, A/CONF.231/3, adopted on 10 December 2018 by 164 governments, endorsed by UN General Assembly on 19 December 2018.

¹⁸ See also Principle 7 of the “Nansen Principles on Climate Change and Displacement”: “The existing norms of international law should be fully utilized, and normative gaps addressed” ([CICERO et al. 2011, 5](#)).

4.1. Sampling process

In order to choose a sample of relevant and available Austrian jurisprudence on international protection, keywords related to disasters as well as climate change – such as droughts, floods, disasters, cyclones, hurricanes, sea-level rise,¹⁹ – were used for the first round of our search in the “Rechtsinformationssystem des Bundes” (RIS database), a legal database of the Republic of Austria providing information on Austrian law and case law. The search was restricted to decisions of the appellate court, i.e. the Federal Administrative Court (BVwG) and its predecessor, the former Asylum Court (AsylGH) (2008–2013). Decisions of the Federal Office for Immigration and Asylum (BFA), the first-instance authority, are not available on this database.

The first screening on 10 August 2020 revealed that, since 2008, about 10,000 decisions contain one or more of the selected keywords. As this number was too high, it was decided to select only those decisions that contained a keyword in substantive chapters of the decision, in particular in chapters on the evaluation of evidence or legal assessment.

4.2 Statistical overview of the relevant case law of the appellate court

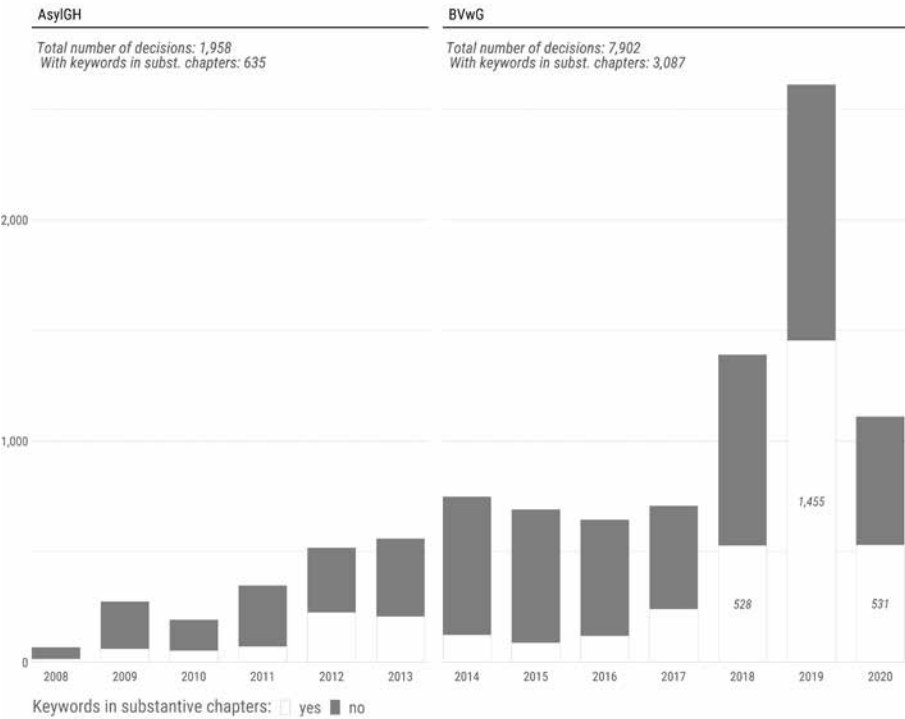
Keywords such as droughts, floods, disaster, earthquake, climate change, storms, hurricanes or cyclones are mentioned in substantive chapters of 855 decisions on international protection of the AsylGH (out of 2,002 decisions containing references to the keywords) between 2008 and 2013 and in 3,561 decisions of the BVwG (out of 9,029 decisions with references to environment-related keywords) between 1 January 2014 and 18 June 2020.²⁰

Figure 1 shows the distribution of the keywords from 2008 to 18 June 2020. There was a sharp increase in decisions with keywords between 2017 and 2018 as well as between 2018 and 2019. Most decisions by the Asylum Court (2008–2013) refer to the keywords “flood”, “disaster” and “famine”, while : most decisions by the BVwG contain the keywords “drought”, “famine” and “disaster”.

¹⁹ The German keywords used for the search were *Dürre* (drought), *Katastrophe* and *Disaster* (disaster), *Hunger* (hunger/famine), *Flut*, *Überflutung*, *Überschwemmung* and *Hochwasser* (flood/flooding), *Erdbeben* (earthquake), *Hurrikan*, *Wirbelsturm* and *Orkan* (hurricane, typhoon and cyclone), *Klimawandel* and *Erderwärmung* (climate change and global warming), *Erdrutsch* (landslide), *Anstieg des Meeresspiegels* (sea-level rise), *Waldbrand* and *Buschfeuer* (forest fire and wildfire).

²⁰ The date of the search of the database from which the presented numbers are derived is 22 March 2022. As it sometimes takes several months for new decisions to be uploaded to the database by the court, the number of decisions with relevant keywords available in the RIS database has increased since August 2020.

Figure 1: Number of decisions with keywords in decisions on international protection and in substantive parts of the decision

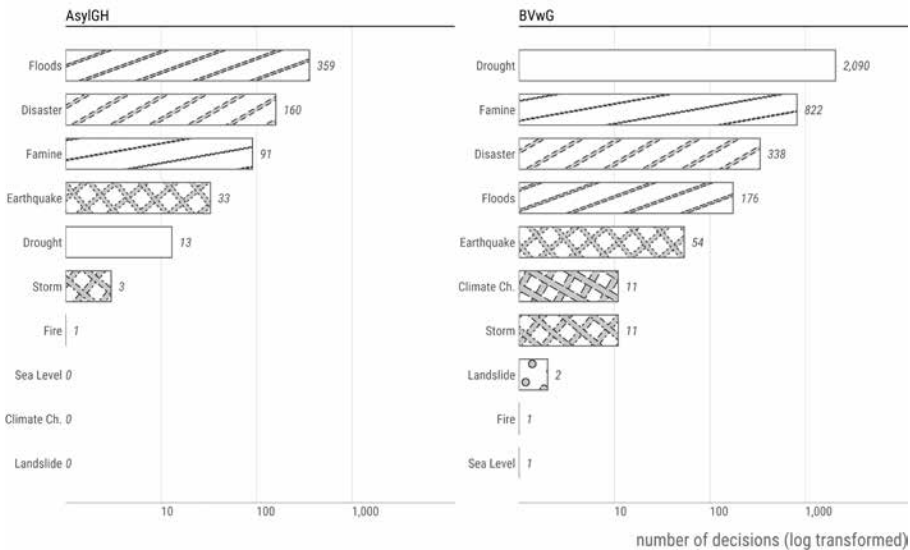


Source: [Bundesministerium für Digitalisierung und Wirtschaftsstandort 2022](#)
Notes: Periods considered: AsylGH: 1.1.2008–31.12.2013, BvWG: 1.1.2014–18.6.2020; substantive chapters: “Beweiswürdigung” and “Rechtliche Beurteilung”. Graph by Roland Schmidt.

The distribution of keywords over the years indicates an increase in the mentioning of the keywords “drought” and “disaster”. The prevalence of keywords such as “floods”, “famine”, “earthquake” and “storms” varies over the years.

The top three countries of origin concerning decisions in which keywords are mentioned in substantive parts of the decision are Afghanistan, Pakistan and Somalia.

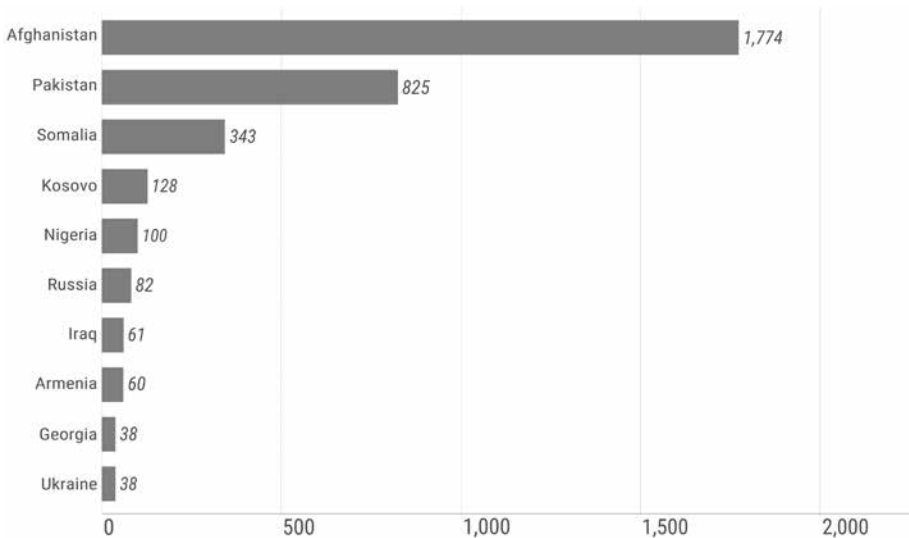
Figure 2. Number of considered decisions per keyword(s)



Source: [Bundesministerium für Digitalisierung und Wirtschaftsstandort 2022](#)

Notes: Periods considered: AsylGH: 1.1.2008–31.12.2013, BvWG: 1.1.2014–18.6.2020; substantive chapters: “Beweiswürdigung” and “Rechtliche Beurteilung”. One decision can have multiple search terms/keywords and hence appear in multiple categories. The sum of all bars is hence more than the total number of decisions. Graph by Roland Schmidt.

Droughts are mostly mentioned in decisions relating to applicants from Afghanistan and Somalia, the keyword “disaster” showing the most hits in decisions relating to applicants from Pakistan and Afghanistan, the keyword “famine” mostly mentioned in decisions relating to applicants from Pakistan and Somalia and the keyword “flood” mostly used in decisions relating to applicants from Pakistan.

Figure 3: Number of decisions per country of origin (top 10 countries)

Source: [Bundesministerium für Digitalisierung und Wirtschaftsstandort 2022](#)

Notes: Periods considered: AsylGH: 1.1.2008–31.12.2013, BvWG: 1.1.2014–18.6.2020; substantive chapters: “Beweiswürdigung” and “Rechtliche Beurteilung”. Decisions with missing country information were excluded. Graph by Roland Schmidt.

4.3. The role of environmental factors in Austrian case law on international protection

During the pilot phase, 30 decisions of the BVwG were analyzed. These decisions were rendered in the appeals proceedings on international protection relating to complainants coming from Afghanistan and Somalia between 2016 and 2020. All decisions contained a significant number of keyword hits.

In 12 out of 30 cases, subsidiary protection was granted. Neither refugee status nor humanitarian protection was granted in any of them. Environmental factors only played a role in the legal reasoning concerning the eligibility for a subsidiary protection.

In eight out of 30 cases, the asylum-seekers or their legal representatives put forward environment- or disaster-related factors during the appeals procedure. Sometimes an indirect reference to a disaster was made (e.g. reference to the “current famine” – Case 3). In Cases 11 and 13, the legal representative pointed out that the drought in Somalia had to be considered when assessing the eligibility for a protection status. Drought was also mentioned by the legal representative in the context of arguments concerning a real risk of inhumane treatment (e.g. Case 3) and in the context of an internal protection alternative (e.g. Case 7).

Table 1: Overview of the 30 decisions analyzed during the pilot phase

		15 Decisions Somalia	15 Decisions Afghanistan	Total
Gender	Female	8	2	10
	Male	6	7	13
	Family	1	6	7
Outcome Total (female/male/ family)	Refugee status granted	0 (0/0/0)	0 (0/0/0)	0 (0/0/0)
	Subsidiary protection granted	11 (8/2/1)	1 (1/0/0)	12 (9/2/1)
	Humanitarian form of protection granted	0 (0/0/0)	0 (0/0/0)	0 (0/0/0)
	Appeal dismissed	4 (0/4/0)	14 (1/7/6)	18 (1/11/6)

Source: Table created by authors.

The role of the environmental factor in the decisions, particularly in relation to subsidiary protection

While environmental factors were not mentioned at all in the assessment of whether refugee status or humanitarian forms of protection were to be granted, they were taken into account in all decisions as to whether subsidiary protection should be granted or not. In all cases, *droughts* and the *ensuing food and water shortage* and, to some extent, housing shortage (drought causing people to move from the countryside to the cities leading to a shortage of housing there) played a role. While heavy rainfall and/or seasonal floods were also mentioned in the findings (e.g. Cases 1, 2, 3, 4, 11, 12, 15, 19 and 20), only in one case did the Court explicitly refer to the floods in the legal reasoning of the decision.

In virtually all cases, it was *not the environmental factor alone* which was decisive for granting subsidiary protection status. Often it was the recurring drought in combination with the precarious security situation which would lead to a real risk of inhuman and degrading treatment (Art. 3 ECHR) and therefore to the granting of subsidiary protection status.

According to the jurisprudence of the ECtHR and the VwGH, not only the general situation in the receiving country but also the “individual situation” of the person seeking protection must be taken into account,²¹ which means that the court has to relate the risk assessment of the individual situation of the person concerned to the general human-rights situation in the country of origin. In many of the cases assessed, different aspects – including gender, the level of education, state of health, the level of wealth, minority status, age, family connections or the long absence of the complainant – were taken into account by the judges as factors relating to the individual situation.

²¹ See, for example, VwGH 31.03.2005, 2005/20/0095, para. 2.3.

Therefore, for instance, no subsidiary protection was granted in the case of “a young, healthy man” who could read and write, possessed several years of job experience, did not belong to a minority clan and had a family network who was able to support him upon return to Mogadishu. The judge stressed that “not all persons in Somalia are affected by the drought in the same way” (Case 14, p. 18) and concluded in this specific case that the complainant would not face an “exceptional situation” (for details on the real risk assessment under Article 3 ECHR see Sub-section 2.2).

Many of the decisions indicate that *gender* played an important role in the judge’s assessment in terms of who is in need of protection and who belongs to “a group of persons without particular vulnerabilities” (Case 6, p. 42) in the country of origin: Of 13 decisions concerning individual adult males, only two men were granted subsidiary protection. In contrast, nine decisions concerning individual female adults (plus one decision concerning a mother with her children) received subsidiary protection status. The “individual characteristics” of men are repeatedly described in terms such as “young, healthy and without any duty of care and of working age” (e.g. Case 4), as “single, productive men” (Case 7) or as a “healthy, mobile, single, young, hard-working and productive man” (Case 6). These characterizations play a role concerning the assessment of the individual protection needs (see above). With regard to women, factors such as a lack of education, vocational training and family support, pregnancy, age and the health situation were discussed as problematic factors concerning the assessment of their ability to provide a living for themselves (e.g. Cases 9, 10, 16, 17, 18, 29). In one case, the pregnancy, being a member of a minority clan and having no school education were mentioned as particular factors. In Case 29, concerning a woman with an infant, the risk of sexual assault by being placed in a camp for internally displaced persons upon return was mentioned.

In several cases the threat of the impact of disasters was seen to be mitigated by the existence of social or family networks who could support the applicant upon return; *vice versa*, it was argued that, given the poor prospects due to the impact of the drought, it was precisely the lack of family support which would lead to the significant probability of a real risk of inhuman or degrading treatment.

In Cases 5, 6, 8 and 17, the effects of the drought in Afghanistan in relation to *international aid programs* as well as the *economic situation* in a larger regional context were also taken into account in the real risk assessments.

Internal protection alternative (IPA)

In several decisions, the BVwG referred to the implications caused by the drought when assessing whether or not an IPA was relevant and reasonable (Article 8 Qualification Directive, Sec. 11 Asylum Act). Here, too, gender, age, health status, education level and the existence of a supporting family or social network in the country of origin were used as arguments for or against the reasonableness of such an IPA.

In particular in the Afghan cases, the Court held that there was an IPA available in (at least one of) the major cities such as Herat, Mazar-e-Sharif or Kabul. Thus, while in several Afghan cases a return to the home town/province of origin was deemed to contravene Article 3 ECHR given the poor security situation, an IPA was deemed to be relevant and reasonable. Even though the Court also found at the internal protection site that the housing and supply situation was “tense” or in general very difficult due to the impact of the drought, it argued in the cases concerning male asylum-seekers that they were “young, healthy and able to work” and that it was possible for them – even when lacking a support network (e.g. Cases 6 and 25) – to relocate there. Thus, individual characteristics were decisive.

5. Conclusions

The huge number of decisions concerning the international protection of the Austrian appellate court which mention climate change- and environment-related keywords indicates that climate-related mobility is an issue that is not only “a problem” of the Global South but is also relevant for European countries. In some of the analyzed cases, environmental factors are put forward by the applicant and/or their legal representatives.

The following insights can be drawn from the analysis of 30 Austrian decisions on international protection related to the countries of origin of Afghanistan and Somalia. Overall, environmental factors play a role in these decisions – only, however, concerning the granting of subsidiary protection.

The analyzed cases reveal that, in the context of the assessment of whether subsidiary protection is to be granted, environmental factors are always taken into consideration, together with other factors such as the security situation in the country of origin or the individual circumstances of the applicant. This is in accordance with the jurisprudence of the ECtHR relating to Article 3 ECHR (“real risk assessment”), corresponding with both the jurisprudence of the VwGH and the EU Qualification Directive. Thus, it is not the environmental issue alone which plays a role in the decision on subsidiary protection. Important factors in this regard which are labelled as “individual aspects” or “individual situation” by the Court are, for instance, gender, health status, education, age, family and other interpersonal connections, wealth and minority status. Gender, in particular – intersecting with other social categories – is assessed to be a decisive factor concerning the evaluation of who is “in need of protection” in the context of environmental/climate-change-related impacts and other “general” conditions in the country of origin. Concerning the broader situation of the country of origin, issues such as the security situation, economy, violent conflicts, international aid and support programs are appraised in the Court’s decisions. In particular, the so-called “nexus dynamics between conflict or violence and disaster or climate change” ([Weerasinghe 2019, 149](#)) plays an important role in the decisions due to the complainants’ countries

of origin (Afghanistan, Somalia), where disasters impact on social and political contexts which are characterized by a history of violent conflicts.

Based on the findings of the pilot phase, it appears that the granting of subsidiary protection in Austria can fill the gap identified above, at least to a certain extent. However, the countries of origin chosen for this pilot phase, namely Somalia and Afghanistan, are special cases because, apart from the environmental situation, the security situation also plays a crucial role. It is not clear whether subsidiary protection would be granted in the context of countries where no such difficult security situation exists. Therefore, it could be necessary to make use of other forms of protection (such as humanitarian forms of protection) or – as suggested, for instance, by the Nansen Initiative Protection Agenda – to facilitate migration as an adaptation mechanism.

In the main phase of the project “ClimMobil”, a larger sample of decisions on international protection in Austria was analyzed which enabled a more-detailed and comprehensive analysis. In addition, qualitative interviews with relevant national and international stakeholders provided additional information on policy responses to and legal options concerning climate change-related mobility into the EU in general and into Austria and Sweden in particular.

Acknowledgements

The project “ClimMobil – Judicial and Policy Responses to Climate-Change-Related Mobility in the European Union with a Focus on Austria and Sweden” was implemented by the Ludwig Boltzmann Institute of Fundamental and Human Rights (Vienna/Austria) and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (Lund/Sweden). It was funded by the Austrian Climate and Energy Fund (KR18AC0K14747, ACRP 11th Call).

References

- Anderson, Adrienne/Foster, Michelle/Lambert, Hélène/McAdam, Jane 2019: “Imminence in refugee and human rights law: A misplaced notion for international protection”, *International and Comparative Law Quarterly*, vol. 68, no. 1, 111–140. <https://doi.org/10.1017/S0020589318000398>.
- Bundesministerium für Digitalisierung und Wirtschaftsstandort 2021: *Rechtsinformationssystem des Bundes*, Wien. Retrieved on July 23, 2021 from <https://www.ris.bka.gv.at>.
- CICERO (Center for International Climate and Environmental Research – Oslo)/Norwegian Ministry of the Environment/Norwegian Refugee Council 2011: The Nansen conference. *Climate change and displacement in the 21st Century*, Oslo. Retrieved July 22, 2021 from <https://www.unhcr.org/4ea969729.pdf>.
- European Commission 2013: *Commission staff working document: Climate change, environmental degradation, and migration, accompanying the communication “An*

- EU Strategy on adaptation to climate change". SWD (2013) 138 final. Retrieved September, 8, 2021 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013SC0138>.*
- Frik, Sebastian/Fux, Jakob 2019: "Subsidiärer Schutz und die Akteursproblematik – Vorgaben für eine unions- und gleichheitsrechtskonforme Novellierung", *migralex*, no. 2, 43.
- Human Rights Council 2018: *The slow onset effects of climate change and human rights protection for cross-border migrants*, A/HRC/37/CRP.4. Retrieved September 8, 2021 from https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf.
- Internal Displacement Monitoring Centre 2015: *Global estimates 2015, People displaced by disasters*. Retrieved July 20, 2021 from <https://www.internal-displacement.org/sites/default/files/inline-files/20150713-global-estimates-2015-en-v1.pdf>.
- Internal Displacement Monitoring Centre 2021: *Global report on internal displacement 2021*. Retrieved July 20, 2021 from <https://www.internal-displacement.org/global-report/grid2021/>.
- IPCC (Intergovernmental Panel on Climate Change) 2014: *Climate change 2014: Synthesis report*, Retrieved May 24, 2022 from https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.
- Kälin, Walter 2019: "The Global Compact on Migration: A ray of hope for disaster-displaced persons", *International Journal of Refugee Law*, vol. 30, no. 4, 664–667. <https://doi.org/10.1093/ijrl/eey047>.
- Kälin, Walter/Schrepfer, Nina 2012: "Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches", *UNHCR Legal and Protection Policy Research Series*. Retrieved July 20, 2021 from <https://www.refworld.org/docid/4f38a9422.html>.
- Kolmannskog, Vikram/Myrstad, Finn 2009: "Environmental displacement in European asylum law", *European Journal of Migration and Law*, vol. 11, no. 4, 313–326. <https://doi.org/10.1163/157181609789804321>.
- Kraler, Albert/Cernei, Tatiana/Noack, Marion 2011: "Climate refugees": *Legal and policy responses to environmentally induced migration. European Parliament*. Retrieved July 20, 2021 from [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET\(2011\)462422_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET(2011)462422_EN.pdf).
- Kraler, Albert/Katsiaficas, Caitlin/Wagner, Martin 2020: *Climate change and migration: Legal and policy challenges and responses to environmentally induced migration. European Parliament*. Retrieved July 20, 2021 from [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf).
- Mayrhofer, Monika/Ammer, Margit 2014: "People moving in the context of environmental change: The cautious approach of the European Union", *European Journal of Migration and Law*, vol. 16, no. 3, 389–429. <https://doi.org/10.1163/15718166-12342062>.

- McAdam, Jane 2011: "Swimming against the tide: Why a climate change displacement treaty is not the answer", *International Journal of Refugee Law*, vol. 23, no. 1, 2–27. <https://doi.org/10.1093/ijrl/eeq045>.
- McAdam, Jane 2012a: *Climate change, forced migration, and international law*, Oxford.
- McAdam, Jane 2012b: *The normative framework of climate change-related displacement*. The Brookings Institution. Retrieved July 20, 2021 from <https://www.brookings.edu/research/the-normative-framework-of-climate-change-related-displacement/>.
- McAdam, Jane 2016a: "From the Nansen Initiative to the platform on disaster displacement: Shaping international approaches to climate change, disasters and displacement", *UNSW Law Journal*, vol. 39, no. 4, 1518–1546.
- McAdam, Jane 2016b: "Building international approaches to climate change, disasters, and displacement", *Windsor Yearbook of Access to Justice*, vol. 33, no. 2, 1. <https://doi.org/10.22329/wyaj.v33i2.4841>.
- McAdam, Jane 2020: "Protecting people displaced by the impacts of climate change: The UN Human Rights Committee and the principle of non-refoulement", *American Journal of International Law*, vol. 114, no. 4, 708–725. <https://doi.org/10.1017/ajil.2020.31>.
- Missirian, Anouch/Schlenker, Wolfram 2017: "Asylum applications respond to temperature fluctuations" *Science*, vol. 358, no. 6370, 1610–1614. <https://doi.org/10.1126/science.aao0432>.
- Nansen Initiative 2015a: *Agenda for the protection of cross-border displaced persons in the context of disasters and climate change*, Volume I. Retrieved July 20, 2021 from https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf.
- Nansen Initiative 2015b: *Global consultation conference report*. Retrieved July 20, 2021 from <https://disasterdisplacement.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf>.
- PDD (Platform on Disaster Displacement) 2016: *Addressing the protection needs of people displaced across borders in the context of disasters and climate change*. Retrieved July 22, 2021 from <https://disasterdisplacement.org/wp-content/uploads/2016/11/PDD-Leaflet-11-2016-screen.pdf>.
- Schloss, Camilla 2021: "Climate migrants – How German courts take the environment into account when considering non-refoulement", *Völkerrechtsblog*. Retrieved July 20, 2021 from <https://voelkerrechtsblog.org/climate-migrants/>.
- Scott, Matthew 2014: "Natural disasters, climate change and non-refoulement: What scope for resisting expulsion under articles 3 and 8 of the European Convention on Human Rights?", *International Journal of Refugee Law*, vol. 26, no. 3, 404–432. <https://doi.org/10.1093/ijrl/eeu036>.
- Scott, Matthew 2016: "Finding agency in adversity: Applying the Refugee Convention in the context of disasters and climate change", *Refugee Survey Quarterly*, vol. 35, no. 4, 26–57. <https://doi.org/10.1093/rsq/hdw018>.

- Scott, Matthew 2020: *Climate change, disasters, and the Refugee Convention*, Cambridge.
- Task Force on Displacement 2018: *Report of the task force on displacement*. Retrieved July 20, 2021 from https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf.
- Tower, Amali/Plano, Ryan 2021: "French court recognizes country's first environmentally-impacted migrant", *Climate Refugees*. Retrieved July 20, 2021 from <https://www.climate-refugees.org/spotlight/2021/1/15/french-court>.
- UN Committee on the Elimination of Discrimination Against Women/Committee on Economic, Social and Cultural Rights/Committee on the Protection of the Rights of All Migrant Workers and Members of their Families/Committee on the Rights of the Child/Committee on the Rights of Persons with Disabilities 2019: Joint statement on "Human rights and climate change". Retrieved July 20, 2021 from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>.
- UNHCR (United Nations High Commissioner for Refugees) 2020: *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*. Retrieved July 20, 2021 from <https://www.refworld.org/docid/5f75f2734.html>.
- Vlassopoulos, Chloé 2012: "Climate change and migration: Towards a new nexus for policy making in the European Union?", in European Parliament (ed.): *Human rights and climate change: EU policy options*, Brussels, 60–69. Retrieved July 20, 2021 from [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN_ET\(2012\)457066_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN_ET(2012)457066_EN.pdf).
- Weerasinghe, Sanjula 2019: "Overview of UNHCR study, 'In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change'", *International Journal of Refugee Law*, vol. 31, no. 1, 149–160. <https://doi.org/10.1093/ijrl/eez024>.
- Zorzi Giustiniani, Flavia 2018: "Temporary protection after disasters", in Flavia Zorzi Giustiniani/Emanuele Sommario/Federico Casolari/Giulio Bartolini (eds.): *Routledge handbook of human rights and disasters*, Abingdon, 329–345.

Victoria Reitter¹
**Statelessness in Austria and Spain:
 Displacing narratives of vulnerability**

1. Introduction

Forced migration and asylum are topics debated more hotly than ever in current public discourses. However, the phenomenon of statelessness in the context of forced migration has barely entered these debates. Although universal human rights are supposed to protect all human beings, independent of their legal status, citizenship remains the key to the effective protection of fundamental rights (Tonkiss 2017, 248). Hence, it can be argued that statelessness is the ultimate form of exclusion and that stateless individuals are particularly vulnerable and in need of protection. “Narratives of vulnerability” (Smith/Waite 2019, 2289) have gained momentum as markers of deservingness of a protection status within refugee determination procedures (RDP) and they have found their way into statelessness research. However, the notion of vulnerability is absent in the context of statelessness determination.

The United Nations High Commissioner for Refugees (UNHCR) has called for the introduction of statelessness determination procedures (SDP) in order to standardize the identification of statelessness, which is important in securing basic rights and reducing the specific vulnerabilities of stateless persons. In concrete terms, this implies that any person identified as stateless in an SDP cannot be deported and will have to receive protection and a right to citizenship of the state where they filed the case. While almost all EU member states have ratified the 1954 and 1961 *Statelessness Conventions*, only a few have adopted SDP and little is known about their implementation at the national level. This chapter focuses on the cases of Spain and Austria, in order to highlight the differences and similarities between two contrary approaches: the former has adopted detailed SDP, while the latter lacks such legislative regulations. With an ethnographic field-research design combined with expert and elite interviews with civil servants, lawyers and NGOs in Spain and Austria, this chapter elucidates civil servants’ perceptions of who is to be regarded as stateless and why from a comparative perspective. Preliminary results show that, in both countries, independent of whether SDP are applied or not, civil servants do not perceive stateless persons as having particular vulnerabilities. In particular, I am interested in how a stateless person’s deservingness of a status is legitimized in both contexts.

After outlining the causes and consequences of statelessness in Section 2, Section 3 summarizes the state-of-the-art on statelessness research and the role of vulnerability

¹ Victoria Reitter is University Assistant and PhD Fellow in the Department of Political Science and Sociology at the University of Salzburg. Her research interests include statelessness, flight migration, citizenship, public administrations and qualitative research methods.

in RDP. Section 4 describes the research design and case selection and Section 5 shows that, in the field of SDP, other narratives displace those of vulnerability. Section 6 provides a short conclusion.

2. Causes and consequences of and solutions to statelessness

The lack of state protection is a defining characteristic for both stateless persons and refugees. While the first are *de jure*, the latter are *de facto* stateless and consequently need surrogate protection by other states (Fullerton 2015). Throughout this chapter, I refer to a stateless person in the *de jure* sense according to the 1954 *Statelessness Convention* as someone who “is not considered as a national by any state under the operation of its law”.²

Statelessness can emerge due to gaps in nationality laws or to ethnic or gender discrimination in the context of state succession or due to deficient civil registration practices. The consequences of statelessness include limited access to education, health, legal housing, the labor market and marriage, the impossibility of owning property, voting and traveling or migrating in a regular way (van Waas 2009, 133–135). Usually, it goes hand in hand with the lack of documents, being ignored by the authorities and, thus, not represented in (supra-)national censuses or databases. Hence, statelessness constitutes a relatively invisible phenomenon and establishing accurate statistical overviews is a challenging task (Gyulai 2014).

While statelessness can occur *in situ*, i.e. in a sedentary context, this chapter deals with statelessness in the context of migration and asylum in which it can be both the cause and the consequence of forced displacement. The crossing of international borders may result in migrants being denied readmission to the country of habitual residence. Stateless persons are non-removable to the fullest because there is no country worldwide that is obliged to admit them if they are deported – a complicating factor already recognized by Arendt (1973 [1951]). Consequently, they are “caught in the push-pull of states equally unhappy with their presence” (Staples 2012, 107) and are at “great risk of prolonged and arbitrary immigration detention” (Bianchini 2020, 441).

Identifying statelessness can be a challenge as this “means proving that someone is not a national of any of the world’s nearly two hundred states” (Gyulai 2014, 127). Further, there is a lack of consensus on who should be regarded as stateless (Sigona 2016, 265). The UNHCR has called for the introduction of SDP to standardize the identification of statelessness “among migrant populations to ensure that they enjoy the rights to which they are entitled” (UNHCR 2020, 3). SDP are supposed to facilitate the acquisition of a protection status and, subsequently, to ease the bureaucratic path towards naturalization. There is an implicit obligation within the 1954 *Statelessness Convention*

² [Convention relating to the Status of Stateless Persons \(adopted 28 September 1954, entered into force 6 June 1960 UNTS 360\)](#).

for the establishment of SDP and, in 2014, the UNHCR launched a worldwide campaign ([#IBelong](#)); however, there is “no international binding guidance on how to identify and recognize beneficiaries” ([Bianchini 2017, 42](#)). At this moment, globally about 20 states, around half of them in Europe (among which Belgium, Bulgaria, France, Hungary, Italy, Latvia, Moldova, Slovakia, Spain, Ukraine and the UK), operate with SDP ([UNHCR 2020, 5](#)). Yet, none of these count as comprehensive and the recognized stateless person does not always derive fundamental rights from the recognition.

While the concept of vulnerability has increasingly been used in recent years to refer to the particular situation of refugees ([Lorenz 2018, 66](#)) and the perception of the “vulnerable refugee” has entered mainstream discourses in media, politics and social-welfare practices, this is not the case when it comes to statelessness.

3. Vulnerability in statelessness research

Some authors say that the possession of legal citizenship is no guarantee of access to the full range of rights and that there is a large spectrum of recognition and belonging between full and non-citizenship (Gibney 2011; Kingston 2017; Redclift 2013). Further, it is widely agreed that non-citizens can also exercise agency through “acts of citizenship” ([Allerton 2017](#)), “migrant citizenship” (Shinozaki 2015) or “subordinate inclusion” ([Chauvin/Garcés-Masareñas 2014](#)). Yet, citizenship not only “entails unconditional rights to return and stay” (Bauböck 2020, 397) on the territory of the state, its recognition also remains a key for access to supposedly universal human rights (Tonkiss 2017, 248). Without the protection and rights that come with *de jure* citizenship – i.e. without legal membership in any state in a world system organized in separate nation states (Staples 2012, 94) – statelessness is therefore often portrayed as the ultimate form of exclusion ([van Waas 2009, 134](#)).

The most famous account on statelessness is probably Hannah Arendt’s reflections after WWII that revealed the impotence of the human-rights framework. She compared statelessness with the “expulsion from humanity altogether” (Arendt 1973 [1951], 294). Later, legal scholars discovered statelessness as the ultimate human-rights case to study and consider stateless people among the world’s most vulnerable populations in need of protection ([van Waas 2009, 133](#)). A decade ago, social scientists took an interest in the field, focusing on its nexus with irregularity, agency and marginalization.³ Statelessness scholars recognize forms of inclusion apart from state membership (Staples 2012), question the binary of statelessness and citizenship (Redclift 2013) and illustrate the differential and precarious inclusion of stateless persons ([Sigona 2016](#)). Nonetheless, they never forget to stress the stateless’ marginal position ([Belton 2015](#)), highlighting

³ Two recent anthologies nicely illustrate the broad and diverse focus that social science and law cover together in statelessness research (Bloom/Tonkiss/Cole 2017; Reitter 2020a; van Waas/Khanna 2017).

the nexus with irregularity (Redclift 2013). Even though non-citizens may make claims for belonging, one should not be too optimistic about the agency of individuals “in a context of profound vulnerability” ([Allerton 2017, 266](#)).

Arendt (1973 [1951], 297) observed that increasing the regulation of the conditions for membership in social systems triggers heightened vulnerability for those at the margins. Put differently, worldwide recognition of state membership might offer value to most persons; however, simultaneously, it worsens the situation for those without state protection. “[T]he exclusionary effects of progressive inclusion” have been studied in various fields and “[a]t the very least, it seems possible to argue that the costs of exclusion rise with the institutionalization of inclusion” (Staples 2012, 116). This perspective highlights the constitutive interrelationship between inclusion and exclusion and allows us to focus on how and why boundaries are drawn as well as on their inclusionary and exclusionary effects ([Dobusch 2014, 225](#)).

While state membership is at the top of the hierarchy of rights and entitlements, the same logic applies to the conditions for non-citizens and their claims to a (protection) status and/or to legalization. One way in which civil servants differentiate between those deemed to be included and those deemed excluded happens through markers of deservingness. Next to performance-based deservingness (through cultural integration or economic performance), one such marker can also be the notion of vulnerability ([Chauvin/Garcés-Mascreñas 2014, 422](#)). In the field of RDP, narratives of vulnerability “are increasingly used to highlight distinctions between refugees who are deemed to deserve protection and those who do not” ([Smith/Waite 2019, 2290](#)). They serve to grant asylum to specific groups of refugees while expelling and excluding others who are not deemed vulnerable enough, whereby being “vulnerable” becomes a marker of deservingness based on need ([Brown 2014, 371](#)).

In both refugee and statelessness studies, the notion of vulnerability has received criticism which I address shortly. Some scholars question the way in which scientific research contributes to the labelling of “vulnerable refugees” by its specific semantics of essentializing helplessness, passive victimhood and the legitimization of interventions, thereby turning the vulnerability paradigm into a (neo)colonial approach ([Lorenz 2018, 72](#)). Others highlight the risk that drawing on vulnerability frameworks will create increasingly narrow categories and unevenly distributed labels and will re-inscribe social boundaries between migrant typologies, thereby essentializing categories (Sözer 2020, 2170). This includes a shift “from intrinsic vulnerability due to forced migration to vulnerabilities of particular forced migrants” (2020, 2167). Beyond this, being the subject of vulnerability narratives can stand in contrast to refugees’ attempts to maintain autonomy and agency ([Heidbrink 2021, 989](#)). Such narratives, thus, are not only “detrimental and damaging to those being identified and categorized as vulnerable, [...] potentially depriving people of subjectivity and agency” ([Smith/Waite 2019, 2295](#)) but also serve to exclude those who are not sufficiently vulnerable. The criticism of

narratives of vulnerability can be understood as part of the broader critique of categories which are constructed and serve political purposes, thus including some persons whilst others are excluded ([Crawley/Skleparis 2018, 51](#)). Acknowledging this critique, I show that lacking narratives of vulnerability and drawing on alternative narratives in order to legitimate access to a (protection) status can be detrimental and lead to even greater vulnerability for those affected.

Conceptualizing statelessness as the ultimate form of exclusion, this chapter asks how civil servants legitimize a stateless person's deservingness of a (protection) status. As I have shown, the notion of vulnerability is present in statelessness research across disciplines and is a common marker of deservingness in RDP to differentiate between those deemed eligible for protection status and those who are not. Before preliminary results demonstrate which inclusionary and exclusionary narratives are used in SDP, the next section describes the research design.

4. Research design and case selection

Multi-sited and ethnographic research helps to gain in-depth insights into state agencies dealing with statelessness and to empirically explore how the deservingness of a status is legitimized at the meso level. The research perspective is comparative in order to learn about the differences and similarities in two settings with contrary approaches.

Austria and Spain, the two cases discussed in this chapter, are signatories of the 1954 and 1961 *Statelessness Conventions*. Spain operates with a detailed "statelessness-specific protection mechanism, based on clear procedural rules established in law" (Gyulai 2014, 122; [UNHCR 2020](#)). In contrast, Austria has not implemented any statelessness-specific legislative regulations. In either case, not much is known about the implementation at the meso level. Statelessness in Austria is mostly dealt with by the Federal Office for Immigration and Asylum (*Bundesamt für Fremdenwesen und Asyl*, BFA) and Section V of the Ministry of the Interior dealing with Immigration, Citizenship and Civil Registry. In Spain, the Asylum and Refugee Office (*Oficina de Asilo y Refugio*, OAR) and the Ministry of the Interior are the responsible central state authorities, with the former in charge of processing and deciding on the application. Operationalizing the place-based comparison by focusing on meso-level organizations allows the investigation of the explicit (national) regulations enacted by governmental bodies, the implicit assumptions about them made by civil servants and their actually employed practices and perspectives ([Reitter 2020b](#)).

The research design is ethnographic with regard to the perspective that I take towards my field, combined with expert, elite and narrative interviews: 41 expert interviews with street-level and mid-level bureaucrats, elite interviews with high-level bureaucrats, expert interviews with non-state actors (lawyers, legal counselors, NGOs) have been conducted. Consecutive fieldwork periods stretch from January 2019 to September 2020 in Austria and from May 2019 to November 2020 in Spain. Importance was

given to writing detailed observation and interview protocols directly after the visits to public administrations ([Reitter 2020c](#)). This chapter focuses on 14 transcribed and analyzed interviews, at the time of writing; however, the preliminary results implicitly also include knowledge gathered from the remaining interviews and observation and interview protocols.

The word-by-word transcription was conducted with the software F4; the coding of the transcripts with MaxQDA. Initial coding followed Strauss and Corbin's (1998) open coding in grounded theory with inductively created codes derived directly from the material and in-vivo coding. Subsequent coding cycles involved the reduction and thematic comparison of inductively created categories and identifying links between them. The research participants' statements are contextualized in their organizational settings and interpreted from there in order to elaborate on common knowledge, structures of relevance, interpretations and constructions of reality beyond the individual (Meuser and Nagel 2009, 24). However, in order to guarantee the anonymity of my research participants, the quotes in the next section lack the names of specific department levels and gender-specific pronouns.

5. Drawing on narratives of cooperation and belonging as markers of deservingness in statelessness determination

This section discusses how Spain and Austria differ significantly with regard to the procedures they employ. As I shall show, in both contexts, narratives of vulnerability have not entered the reasoning of those civil servants of state authorities processing stateless individuals' protection applications. Instead, other narratives differentiating between deserving and undeserving persons are used. In both cases, vulnerability only plays a role for status determination when it comes to stateless refugees.

5.1. The case of Austria: "For us it is not important if s/he is really stateless but that s/he cannot be deported"

Austrian legislation recognizes statelessness neither as grounds for deserving protection nor for a right to residence ([UNHCR 2017, 74](#)). Furthermore, "the recognition of a person's statelessness by one authority or court is not binding on other authorities or courts" ([UNHCR 2017, 45](#)). Hence, stateless persons without authorized residence find themselves in an irregular situation, unable to access basic rights and at risk of detention. From 2008 to 2020, the numbers of stateless persons registered in Austria increased from 152 to 4,252 ([Statistik Austria 2020, 4](#)). Together with 747 of "unknown" and 12,043 of "undetermined nationality", there are officially 17,042 persons in Austria without a clear nationality. The data do not record irregularly resident stateless persons but only those with a residence permit and those in the asylum system ([UNHCR 2017, 37](#)). According to the BFA directorate, in the last six years 6,300 stateless individuals applied for asylum in Austria (Interview 1, Pos. 19–21). Stateless persons in Austria can

only be eligible for international protection – i.e. the granting of refugee status or subsidiary protection status, based on the EU's Qualifications Directive⁴ and the 1951 *Geneva Convention* with its *1967 Protocol*. If not considered as being in need of asylum or subsidiary protection, statelessness often translates into a status of non-deportability for which, in some cases, one can receive a "tolerated stay".⁵

The most prominent groups of stateless asylum applicants with a high likelihood of asylum or subsidiary protection status are Palestinians or Kurds with habitual residence in Syria. In the words of a BFA street-level bureaucrat, "statelessness is not an issue for people from Syria at the moment because they cannot be returned anyway" (Interview 2, Pos. 89–95). Because Austria does not recognize Palestine as a state, with "Palestinian refugees, statelessness is often very understandable" (Interview 3, Pos. 18), as a high-level bureaucrat of the Ministry of the Interior (MI) explains. However, the protection status for which this group is eligible is not based on their statelessness but, instead, on persecution. A BFA high-level civil servant complements that "citizenship *per se* is not the decisive criterion here, but the question of whether you are actually persecuted in the country of habitual residence" (Interview 1, Pos. 19, 157). Thus, only stateless persons who are refugees according to the Geneva Convention are eligible for protection status in Austria.

Considering the lack of both a definition of statelessness in nationality law⁶ and an SDP, it is not surprising that there is no common conception of statelessness and no clear demarcations between the different potentially stateless groups. For example, for some cases, civil servants argue that the category 'stateless' is erroneously applied – as, for example, in the case of state-succession-induced statelessness. State succession "remains a major source of cases of statelessness"⁷ because emerging successor states regard certain groups as belonging somewhere else. However, within the Austrian public administration, the understanding predominates that, in such cases, the terms "undetermined" and "unknown" citizenship would be the more appropriate categories. The following statement by an MI high-level bureaucrat (Interview 3, Pos. 18) exemplifies this:

⁴ [Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011.](#)

⁵ [§46a, Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln \(Fremdenpolizeigesetz 2005 – FPG\), BGBl. I Nr. 100/2005, Fassung vom 10.09.2021.](#)

⁶ [Bundesgesetz über die österreichische Staatsbürgerschaft \(Staatsbürgerschaftsgesetz 1985 – StbG\), BGBl. Nr. 311/1985, in der Fassung 10.9.2021.](#)

⁷ [Convention on the avoidance of statelessness in relation to State succession, Council of Europe, Strasbourg, 19. May 2006.](#)

Of course, there are situations when state structures collapse, etc., successor states [emerge], Yugoslavia, Russia, situations where it is quite clearly documented that the person somehow fell through this turmoil in history or was actually formally expatriated in some regime in the past. However, [...] it is actually clear that s/he is one of the two. S/He may be a Serb or a Kosovar. Croat or Serb or whatever. Russian or Ukrainian. S/He is one of the two, but if this is not documented then I believe that often the actually incorrect term “stateless” is used, although it would actually be correct to use “unclear” [undetermined, comm. VR]. Or “unknown”, if the person simply does not provide any information.

The civil servant perceives it to be a kind of “false” or incorrect statelessness, as the person must obviously belong to one of the successor states and might withhold the information necessary in a bid to resolve the case successfully. A representative of Human Rights Association Austria (*Verein Menschenrechte Österreich*, VMÖ), which offers legal advice to asylum-seekers with a return decision, describes this in a similar way: “They have never exchanged their passports, they were more or less illegally somewhere in Russia and then [they] claim that they are stateless, which in principle is not true” (Interview 4, Pos. 45). The VMÖ is not independent from but closely cooperates with the Ministry of the Interior in asylum procedures and, thus, it is not surprising that the representative, like the MI high-level bureaucrat, discerns statelessness on the grounds of state succession as self-inflicted, untrue and merely claimed by applicants.

From this it follows that stateless persons, those with “unknown” or “undetermined” nationality who are neither eligible for protection status nor for a residence title on other grounds, fall into the category of non-deportable migrants. According to a high-level civil servant in the Ministry of the Interior, it is not actually important for Austria if the person is stateless or has citizenship – what matters is his or her deportability: “For us it is not important if s/he is really stateless, but that s/he cannot be deported for whatever reason – even if s/he has citizenship” (Interview 5, Pos. 153). Within the group of non-deportable migrants, the civil servant (in Interview 5, Pos. 27) explains that the differentiation commonly takes place between those who cooperate in their return and those who do not:

So, we differentiate in Aliens’ Law between people who cooperate in the aliens’ police process and those who do not. Those who do not cooperate come into coercive detention etc. but those who do cooperate and still cannot be deported for whatever reason – and statelessness is part of that – fall into the so-called “tolerated stay” [...] This means that they ultimately stay here [in Austria].

While non-cooperation leads to different forms of coercive detention, acknowledged cooperation may lead to a “tolerated stay”. Yet, the “tolerated stay” (§46a FPG) is neither a residence title nor tied to an employment permit or protection status but is

merely a temporary suspension of deportation. Hence, the obligation of cooperation is merely a sanction-oriented policy tool of migration control, implemented to remove practical deportation barriers (Rosenberger and Koppes 2018, 6, 14). However, that the differentiation is not always easy and the application of categories can be inconsistent due to the different perceptions of credibility by case-officers is explained by another civil servant:

Those are the cases where one case officer types in “stateless” because he believes him. The other types in “undetermined” because he does not believe him that he is Palestinian, but also cannot find out where he is from or can’t prove it. These are the very typical cases that actually cannot be deported. Because what country should take him back? [...] That’s an unsatisfactory situation. But what is important is the question of what negative consequences statelessness has. In this case none. You don’t fall through the system. (Interview 3, Pos. 85)

The civil servant adds that, in Austria, no negative consequences result from statelessness, as people do not fall through the system. It is a commonly held perception among civil servants that Austria does not need a specific legal procedure for determining statelessness, as “the normal or legal immigration regime of course is also open for stateless persons” (Interview 3, Pos. 39). This argument serves as an explanation for why stateless persons are not considered to be in urgent need of protection.

To sum up, in the Austrian case deserving protection status is only discussed by the civil servants in charge with regard to asylum on the grounds of persecution and subsidiary protection on the grounds of non-refoulement. For all other cases, the statelessness or citizenship of a person does not matter; of importance is his or her deportability. Cooperating with the authorities in return processes can, in some cases, lead to a “tolerated stay”. Backed by a general perception of the Austrian migration regime that does not allow any individual to fall through the cracks of the system, narratives of vulnerability are thus displaced by narratives of cooperation.

5.2. The case of Spain: “[I]t has to be solved out of solidarity, so we are kind of connected to the Saharawi cause”

In 2001, Spain established SDP based on clear procedural and legal rules.⁸ The asylum authority OAR examines and analyzes claims and the Ministry of the Interior makes the final decision, usually in accordance with the OAR’s recommendations. Spanish legislation considers statelessness “as a ground for protection” (Bianchini 2017, 49)

⁸ [Real Decreto 865/2001 de 20 de julio, por el que se aprueba el Reglamento de reconocimiento del estatuto de apátrida. Gobierno de España, \(Königliches Gesetzdekret 865/2001 vom 10. Juli zur Verabschiedung der Verordnung über die Anerkennung des Status der Staatenlosigkeit\).](#)

and issues a permanent residence permit for stateless persons who can apply for citizenship after 10 years of legal residence. Statelessness is mainly associated with the immigration of Sahrawi from the parts of the Western Sahara formerly colonized by Spain (SADR) (Gómez Martín 2011). The official numbers, according to the National Statistical Institute, show 2,812 stateless persons in Spain in 2020 ([INE 2021](#)). Yet, as stated by the statelessness department, already the applications per year amount to 2,000–3000, of which around 90 per cent are by Sahrawi (Interview 6, Pos. 95, 107). While judicial scholars mention some limitations of the Spanish SDP ([Bianchini 2017, 49–59](#); see also Gyulai 2014), the UNHCR (2020) discusses Spain, among other countries, as a good practice example. On paper, the Spanish SDP surely fulfills several important requirements ([UNHCR 2020](#)) yet, in practice, the procedure is only applied to this one specific group. The next paragraphs demonstrate that, in Spain, the deservingness of a stateless status is associated with the possession of a specific passport, whereas all other cases are considered more complicated and decisions are postponed.

The Sahrawi are the only group whom the OAR recognizes as stateless and who thus have access to a protection status. A lawyer from Fundación CEPAIM, an NGO active in the field of migration and social exclusion, explains that, for the OAR administration, “it is only the people from Sahara [Sahrawi] who are stateless” (Interview 7, Pos. 22). Their applications are considered very easy to process by filling out specific templates. If all relevant documents are available, this can be done within 15 minutes, explains an OAR street-level bureaucrat: “It depends a little ... more or less 15 minutes. [...] if they deliver all the documents and if there is a complete application” (Interview 8, Pos. 220). A high-level civil servant of the statelessness department at OAR further specifies that the applications are easy because persons from Western Sahara carry a special passport: “They provide, like, a copy of their passport, Algerian passport, with the special number [...] and those are the people we accept as stateless” (Interview 6, Pos. 103). The passport does not imply that its holder is a citizen of Algeria or has access to other rights and entitlements there. Rather, it is issued on humanitarian grounds and serves as a travel document. Since the possession of a passport is usually tantamount to holding a citizenship, the OAR denied all such applications because of the existence of a passport. It took a ruling of the Spanish Supreme Court to change this practice and acknowledge that the passport is merely a travel document. A lawyer from CEAR (*Comisión Española de Ayuda al Refugiado*), an NGO promoting the human rights of refugees, stateless persons and migrants in need of international protection, remembers the ruling and that it took five years to implement it in the OAR statelessness determination procedures:

The [appeal] was in 2001 and all the administrative process [with the National court and the Supreme Court] lasted for 7 or 8 years. I remember very well. I think [the decision was in] 2008 but during the next five years, the asylum office continued to

reject all cases. Finally, in May 2013 the administration began to consider positive decisions for statelessness status for Saharawi people (Interview 9, Pos. 26, 38).

Interestingly, the appeal was granted by the court because of a claim by the legal representative of the stateless person “for a declarative decision [by the court] that explains that s/he is not stateless because s/he is Spanish” (Interview 9, Pos. 16), drawing on the colonial history of Spain in SADR. Thus, statelessness status was granted and this case created new jurisprudence for Sahrawi statelessness applications. The success of this reasoning can be traced back to a commonly held perception by Spaniards that “Saharawi people are Spanish people” (Interview 9, Pos. 14). An OAR high-level civil servant describes how Spaniards feel sympathetic towards the Sahrawi: “So this comes because the Saharawi cause, for some reasons many Spaniards feel like, it has to be solved out of solidarity, so we are kind of connected to the Saharawi cause” (Interview 6, Pos. 308).

However, the civil servant sees a contradiction in the now-effective premise of holding a passport: “So that is the paradox. We can’t decide on your application when you don’t show us a passport but you are supposed to be stateless so you should not have a passport (laughs)” (Interview 6, Pos. 123). S/he adds that applications without this passport are considered more complicated and would demand a thorough discussion between OAR civil servants for which there is no time:

We can’t refuse them, we can’t accept them. So, we postpone them. Most of the applications you see here in this room (s/he points to a table in the room on which folders in different colors pile up) are there because they are very, very difficult to decide. [...] Since we don’t have the means, the human means. We don’t have the time! It is impossible for us to sit, like the whole team, me, my bosses and so on, to sit and say: “Ok, what shall we do with this person?” It is impossible, we don’t have the time. So, we go leaving them...each color represents a year. These are the older ones from 2008. (Interview 6, Pos. 111)

A gesture pointing to several piles half a meter high of applications in differently colored files lying on a big worktable in the room illustrates the second group within the Spanish context: those cases that cannot be resolved and go to the “pile of shame” (*monton de vergüenza*) (Interview 6, Pos. 247f) by which s/he means shame for the administration. This second group might include both Sahrawi without this special passport and stateless persons from other countries. However, the civil servant expresses his/her opinion that, compared to asylum, the protection on grounds of statelessness is considered neither important nor urgent: “[It is] like ‘Ok, doesn’t matter, because I am not protecting you against threats or anything. I am just accepting that you are stateless’” (Interview 6, Pos. 44). Statelessness is not associated with threats or the need of a protection status, even more so as Spain is considered to be a generous host with regard to basic services for all migrants:

They are just like any other foreigner and, you know, Spanish law is like (hesitates and laughs) like, don't misunderstand this – is really nice to foreigners, like health care is covered, if you are regular or irregular [...], education is free. So, you basically live – if you are a regular migrant, you live as a Spaniard, except for voting rights for example. So, ah, people from Sahara who are here even illegally, as kids or anything, they have a normal life. As I say, don't get me wrong, I mean it is not such a huge deal (Interview 6, Pos. 165).

The statement that all persons – whether regularly or irregularly residing in the country – have access to health care and education⁹ serves as an explanation for why the statelessness problem is not considered to be of the utmost importance.

To sum up, the OAR differentiates between two groups: one deserving the statelessness protection status and another that does not. The first group are Sahrawi who deserve the status because they are considered to belong and the second group are all other migrants, whose applications are postponed. This is not perceived as problematic and deservingness is not associated with vulnerability. Backed by a general perception of Spain being a generous host and offering stateless individuals a life like any other migrant, the lacking narrative of vulnerability is displaced by a narrative of belonging that includes only a particular group.

5.3 Discussion

As shown above, Austria and Spain differ significantly with regard to their specific statelessness procedures. However, despite the different legal systems and their divergent historic trajectories, it is still possible to identify similarities in both contexts which will be elaborated on in the next section.

In both national settings, irrespective of whether SDP are applied or not, civil servants do have an image of who is to be regarded as stateless. They differentiate between those potentially stateless individuals deserving a (protection) status and those who do not. However, in neither national setting do they invoke the notion of vulnerability as we know it from discourses and research about RDP (Smith/Waite 2019). In the cases of Austria and Spain, stateless persons are not perceived to be prone to particular vulnerabilities; thus, deservingness of a (protection) status is not associated with such narratives of vulnerability. Instead, the authorities in charge legitimize status eligibility with the colonial notion of belonging in Spain and with the notion of cooperation in Austria.

⁹ Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud. Gobierno de España, (Königliches Gesetzesdekret 7/2018 vom 27. Juli über den allgemeinen Zugang zum nationalen Gesundheitssystem).

In the case of Spain, civil servants invoke the notion of belonging as a marker of deservingness for those they accept as stateless. The Sahrawi stateless population is considered to belong, considered to be Spanish and Spain seems to bear a certain responsibility and solidarity towards them on the grounds of their colonial past. All other potentially stateless persons are perceived as “normal” migrants, with no threat of persecution and, hence, their applications can easily be postponed. They potentially remain without a status over long periods of time. Thus, the notion of deserving statelessness status is associated with Saharawi people because of the specific historic trajectory of Spanish colonization in Western Sahara (belonging), while it is not associated with others.

In Austria, stateless individuals can only receive protection if they make credible claims to have been persecuted according to the reasons set out in the 1951 *Refugee Convention* or if they qualify for subsidiary protection on the grounds of non-refoulement and the EU’s Qualification Directive. Otherwise, statelessness is associated with non-deportability and deservingness of a “tolerated stay” is closely tied to the notion of cooperation with the authorities, with return procedures serving as a policy tool of migration control. All other stateless migrants are considered to be “not really stateless” but, instead, to be like any other migrants. Consequently, they may remain without a status over long stretches of time. Thus, as statelessness in Austria is primarily associated with non-deportability, the notion of deserving to stay as a stateless person is associated with being tolerated.

Further, in both contexts, civil servants stress that the situation for stateless individuals in the respective country is not problematic. In particular, as long as stateless individuals are legally in the country, they have the same preconditions and entitlements as any other migrant. What this state-authority perception of statelessness overlooks, however, is that the condition often goes hand in hand with irregularity. Bianchini (2017, 81) concludes, in her evaluation of different European practices and procedures with regard to statelessness, that in states that lack SDP, stateless persons are treated as any other migrants and are being denied the protection, rights and benefits to which they are entitled according to the 1954 *Statelessness Convention*. As I have shown, this also applies to states that have introduced SDP.

Narratives of vulnerability in the context of RDP earn legitimate criticism for being potentially detrimental – not only to whomever they include but also with regard to who is left out or excluded. Staples (2017, 179) argues that, with rising inclusionary practices, like opting for universal registration and documentation, the implications of being excluded increase. Consequently, remaining unregistered and undocumented will entail even greater vulnerability. I posit that the same argument can be applied to the context of adopting SDP. The implementation of the Spanish SDP was originally intended to create an inclusionary mechanism and make it easier for stateless persons to be identified. Ironically, in practice, whether designed improperly or implemented

inadequately, they work to exclude some stateless persons for whom the SDP are not applicable. Without a legal membership that secures rights and protection, stateless individuals already occupy a highly vulnerable position within society. However, not even deemed to deserve protection status or a “tolerated stay”, they remain without a status in the country, which exacerbates their particular vulnerabilities by forcing them into irregularity and putting them at constant risk of detention. Thus, substituting narratives of vulnerability completely for other narratives may increase the risk of remaining without a status. This is *a fortiori* true for those specific narratives of belonging and cooperation that are based on grounds unrelated to the concept of statelessness but are merely designed to narrow down the category of eligible persons.

6. Conclusion

This chapter has examined from a comparative perspective how civil servants in the Austrian and Spanish authorities legitimize a stateless person’s deservingness of a status. More specifically, it has demonstrated how the boundaries are drawn between those deserving a (protected) status and those who do not in order to display the differences and similarities of two contrary approaches: one (Spain) operating with, the other (Austria) without SDP.

Drawing on an ethnographic research design combined with qualitative interviews with civil servants, the preliminary results show that, in both countries, independent of whether SDP are applied or not, the deservingness of a (protection) status is not associated with narratives of vulnerability. While the latter dominate RSD, the notion of vulnerability is absent in statelessness determination procedures. Although the two cases, Austria and Spain, differ significantly with regard to their legal systems and their historic trajectories, they also have similarities. Civil servants in neither country invoke the notion of vulnerability nor perceive stateless persons to encounter particular vulnerabilities. Narratives of vulnerability are displaced in the case of Austria by the notion of cooperation and in the case of Spain by the colonial notion of belonging. Moreover, in both cases these distinctions are backed by the perception of having a generous national migration system. In both contexts, persons not deemed to be in need of a (protection) status therefore remain without one, exacerbating their particular vulnerabilities.

Future research on the diverse SDP practices within the EU should examine the way in which a narrative of vulnerability might be helpful to challenge or overcome the exclusionary state practices based on alternative narratives. Further, such a research agenda might also be crucial in considering the implementation of a Common European Statelessness System (CESS) comparable to the Common European Asylum System (CEAS), which would set uniform minimum standards for SDP throughout the EU in order to help to secure basic rights for stateless persons.

List of interviews cited

- Interview 1 High-level bureaucrat, Directorate of the BFA, 08.11.2019.
- Interview 2 Street-level bureaucrat, BFA, 15.11.2019.
- Interview 3 High-level bureaucrat, Ministry of the Interior, Section V for Immigration, 31.10.2019.
- Interview 4 Representative of Human Rights Association Austria (VMÖ), 17.10.2019.
- Interview 5 High-level bureaucrat, Ministry of the Interior, Section V for Immigration, 05.11.2019.
- Interview 6 High-level bureaucrat, OAR, 17.05.2019.
- Interview 7 Lawyer, Fundación CEPAIM, 31.05.2019.
- Interview 8 Street-level bureaucrat, OAR, 17.05.2019.
- Interview 9 Lawyer, Comisión Española de Ayuda al Refugiado, CEAR, 31.05.2019.

References

- Allerton, Catherine 2017: 'Contested statelessness in Sabah, Malaysia: Irregularity and the politics of recognition', *Journal of Immigrant & Refugee Studies*, vol. 15, no. 3, 250–268. <https://doi.org/10.1080/15562948.2017.1283457>.
- Arendt, Hannah 1973 [1951]: *The origins of totalitarianism*, San Diego, New York, London.
- Bauböck, Rainer 2020: 'A free movement paradox: denationalization and deportation in mobile societies', *Citizenship Studies*, vol. 24, no. 3, 389–403. <https://doi.org/10.1080/13621025.2020.1733256>.
- Belton, Kristy A. 2015: 'Rooted displacement: the paradox of belonging among stateless people', *Citizenship Studies*, vol. 19, no. 8, 907–921. <https://doi.org/10.1080/13621025.2015.1110284>.
- Bianchini, Katia 2017: 'A comparative analysis of statelessness determination procedures in 10 EU states', *International Journal of Refugee Law*, vol. 29, no. 1, 42–83. <https://doi.org/10.1093/ijrl/eex009>.
- Bianchini, Katia 2020: 'Identifying the stateless in statelessness determination procedures and immigration detention in the United Kingdom', *International Journal of Refugee Law*, vol. 32, no. 3, 440–471. <https://doi.org/10.1093/ijrl/eeaa036>.
- Bloom, Tendayi/Tonkiss, Katherine/Cole, Phillip 2017: *Understanding statelessness*, London.
- Brown, Kate 2014: 'Questioning the vulnerability zeitgeist: Care and control practices with 'vulnerable' young people', *Social Policy and Society*, vol. 13, no. 3, 371–387. <http://doi.org/10.1017/S1474746413000535>.
- Chauvin, Sébastien/Garcés-Mascreñas, Blanca 2014: 'Becoming less illegal: Deservingness frames and undocumented migrant incorporation', *Sociology Compass*, vol. 8, no. 4, 422–432. <https://doi.org/10.1111/soc4.12145>.
- Crawley, Heaven/Skleparis, Dimitris 2018: 'Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in Europe's "migration crisis"', *Jour-*

- nal of Ethnic and Migration Studies*, vol. 44, no. 1, 48–64. <https://doi.org/10.1080/1369183X.2017.1348224>.
- Dobusch, Laura 2014: 'How exclusive are inclusive organisations?', *Equality, Diversity and Inclusion: An International Journal*, vol. 33, no. 3, 220–34. <https://doi.org/10.1108/EDI-08-2012-0066>.
- Fullerton, Maryellen 2015: 'Comparative perspectives on statelessness and persecution', *Kansas Law Review*, vol. 63, no. 4, 863–902.
- Gibney, Matthew J 2011: 'The Rights of Non-Citizens to Membership', in Caroline Sawyer/Brad K. Blitz (eds.): *Statelessness in the European Union: Displaced, undocumented, unwanted*, Cambridge, 48–68.
- Gómez Martín, Carmen 2011: *La migración saharai en España: Estrategias de visibilidad en el tercer tiempo del exilio*, Saarbrücken.
- Gyulai, Gábor 2014: 'The determination of statelessness and the establishment of a statelessness-specific protection regime', in Alice Edwards/Laura van Waas (eds.): *Nationality and statelessness under international law*, Cambridge, 116–43.
- Heidbrink, Lauren 2021: 'Anatomy of a crisis: governing youth mobility through vulnerability', *Journal of Ethnic and Migration Studies*, vol. 47, no. 5, 988–1005. <https://doi.org/10.1080/1369183X.2020.1797479>.
- INE (Instituto Nacional de Estadística) 2021: 'Población extranjera por Nacionalidad, sexo y año', *Instituto Nacional de Estadística*, Retrieved July 13, 2021, from .
- Kingston, Lindsey N 2017: 'Worthy of rights: Statelessness as a cause and symptom of marginalisation', in Tendayi Bloom/Katherine Tonkiss/Phillip Cole (eds.): *Understanding statelessness*, London, 17–33.
- Lorenz, Daniel F 2018: '"All refugees are vulnerable". Vulnerabilität, Konflikte und Katastrophen im Spiegel Postkolonialer Theorie', *Zeitschrift für Friedens- und Konfliktforschung*, Sonderband vol. 2, 60–98. <https://doi.org/10.5771/9783845291307-61>.
- Meuser, Michael/Nagel, Ulrike 2009: 'The expert interview and changes in knowledge production', in Alexander Bogner/Beate Littig/Wolfgang Menz (eds.): *Interviewing experts*, London, 17–42.
- Redclift, Victoria 2013: *Statelessness and citizenship: Camps and the creation of political space*, Hoboken.
- Reitter, Victoria 2020a: '(How) can statelessness be understood and solved?', *Annual Review of Social Work/Social Pedagogy in Austria*, vol. 2, 203–212.
- Reitter, Victoria 2020b: 'Tackling the nation-state "container model" in statelessness research', *Critical Statelessness Studies Blog*. Retrieved February 10, 2021 from <https://law.unimelb.edu.au/centres/statelessness/critical-statelessness-studies-blog/Victoria-Reitter-entry>.
- Reitter, Victoria 2020c: 'How to get and keep research access: Tales from secretive fields', *Unpacking Migration Blog*. Retrieved February 10, 2021, from <https://unpacking-migration.eu/migration-governance-and-politics>.

- Rosenberger, Sieglinde/Koppes, Sabine 2018: 'Claiming control: cooperation with return as a condition for social benefits in Austria and the Netherlands', *Comparative Migration Studies*, vol. 6, no. 26, 1–18. <https://doi.org/10.1186/s40878-018-0085-3>.
- Shinozaki, Kyoko 2015: *Migrant citizenship from below: Family, domestic work, and social activism in irregular migration*, New York.
- Sigona, Nando 2016: 'Everyday statelessness in Italy: status, rights, and camps', *Ethnic and Racial Studies*, vol. 39, no. 2, 263–279. <https://doi.org/10.1080/01419870.2016.1105995>.
- Smith, Kate/Waite, Louise 2019: 'New and enduring narratives of vulnerability: rethinking stories about the figure of the refugee', *Journal of Ethnic and Migration Studies*, vol. 45, no. 13, 2289–2307. <https://doi.org/10.1080/1369183X.2018.1496816>.
- Sözer, Hande 2020: 'Humanitarianism with a neo-liberal face: vulnerability intervention as vulnerability redistribution', *Journal of Ethnic and Migration Studies*, vol. 46, no. 11, 2163–2180. <https://doi.org/10.1080/1369183X.2019.1573661>.
- Staples, Kelly 2012: *Rethorising statelessness: A background theory of membership in world politics*, Edinburgh.
- Staples, Kelly 2017: 'Recognition, nationality, and statelessness: state-based challenges for UNHCR's plan to end statelessness', in Tendayi Bloom/Katherine Tonkiss/Phillip Cole (eds.): *Understanding statelessness*, London, 173–188.
- Statistik Austria 2020: 'Bevölkerung zu Jahresbeginn 2002–2020 nach detaillierter Staatsangehörigkeit'. Retrieved February 21, 2020, from http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html.
- Strauss, Anselm/Corbin, Juliet M 1998: *Basics of qualitative research: Techniques and procedures for developing grounded theory*, Thousand Oaks.
- Tonkiss, Katherine 2017: 'Statelessness and the performance of citizenship-as-nationality', in Tendayi Bloom/Katherine Tonkiss/Phillip Cole (eds.): *Understanding statelessness*, London, 241–254.
- UNHCR 2017: *Mapping Statelessness in Austria*. Retrieved October 04, 2018, from <http://www.refworld.org/docid/58b6e5b14.html>.
- UNHCR 2020: *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*. Retrieved September 10, 2021 from <https://www.refworld.org/docid/5f203d0e4.html>.
- van Waas, Laura 2009: 'Statelessness: A 21st century challenge for Europe', *Security and Human Rights*, vol. 20, no. 2, 133–146. <https://doi.org/10.1163/187502309788254597>.
- van Waas, Laura/Khanna, Melanie J 2017: *Solving statelessness*, Oisterwijk.

Julia Mourão Permoser¹
**Democratic challenges surrounding church asylum:
 secularism and rule of law**

1. Introduction: The German Church Asylum Movement

This chapter investigates the democratic challenges surrounding the Church Asylum Movement in Germany. It focuses in particular on how church asylum generates principled political conflicts over secularism and rule of law. The notion of church asylum refers back to an ancient religious tradition of providing fugitives with refuge in sacred spaces, which has roots in the Greek and Roman empires as well as in medieval European Canon Law. The role of the Church in providing sanctuary was particularly important during the Middle Ages given the absence of an overarching legal system. As nation states developed and became more powerful, however, the legal institution of sanctuary was increasingly challenged and, by the end of the nineteenth century, it had been officially abolished in all European countries, Protestant and Catholic alike (Marfleet 2011; Shoemaker 2014).

Despite having lost its legal standing, church asylum remained part of the cultural imaginary of many Christian societies, so much that, at specific historical times, churches have mobilized this ancient tradition and offered refuge to certain groups in defiance of the legislation in force. In Europe, a large Church Asylum Movement emerged in the 1980s in Germany and has been growing ever since. The beginning of the Church Asylum Movement in the Federal Republic of Germany dates from 1983, when the Protestant parish of the Heilig-Kreuz-Kirche in Berlin Kreuzberg took in three Palestinian families threatened with deportation to Lebanon – which was experiencing a civil war – and successfully managed to prevent their deportation (Just 2014). In the years that followed, several other parishes started granting church asylum so that, eventually, a national movement was founded. In 1994 the “German Ecumenical Committee on Church Asylum” (*Ökumenische Bundesarbeitsgemeinschaft Asyl in der Kirche*, hereafter BAG) was created to coordinate the actions of the movement. The BAG is an ecumenical organization that has offices in Berlin, an executive secretariat, a board and a steering committee and represents parishes spread throughout the country.

The German Church Asylum Movement is not only one of the oldest existing such movements but also one of the biggest. The number of people benefiting from church asylum in Germany has experienced very strong growth since the 1980s and, in particular, since 2010. Until the mid-2010s, there were fewer than 100 cases per year; then

¹ Julia Mourão Permoser is Elise-Richter Senior Research Fellow in the Department of Political Science at the University of Innsbruck. Her research focuses on migration, citizenship, religion, ethics, civil-society activism and the challenges and opportunities that pluralism poses to democratic politics.

there was a dramatic increase from 79 cases in 2013 to 430 cases in 2014. Between 2014 and 2018, the numbers continued to rise, achieving the impressive figure of 1,325 cases in 2018. Recently, there has been a reduction in the numbers due to stricter regulations and a lower influx of asylum-seekers but the numbers are still high for a movement of this kind. According to the BAG, on 27 January 2021 there were 295 active cases of church asylum in Germany benefiting 508 persons, of whom 103 children ([BAG Asyl in der Kirche 2021](#)).

The practice of church asylum in Germany is not recognized by law but is tolerated by the authorities. Moreover, in 2015, the conference of the interior ministers of the Federal Republic of Germany reached an agreement with representatives of the officially recognized Christian Churches to regulate the practice. The legal standing of the practice is therefore unclear: not legally recognized but officially regulated and tolerated ([Mourão Permoser 2021](#)). Not surprisingly, this unclear legal status and its consequences for church–state relations lie at the very heart of the political controversies surrounding church asylum in Germany.

In this chapter, I take the German Church Asylum Movement as an example of a movement of solidarity that questions the restrictive turn in immigration politics in Europe on principled grounds. Migration has long been considered an issue determined primarily by material interests. Scholars investigated migration flows based on push and pull factors, labor-market demands, welfare costs or the political influence of economic interest groups. However, now, as we approach the third decade of the millennium, the issues that dominate migration politics necessitate a different analytical sensibility. They should be analyzed in terms of the normative choices which they generate. In particular, the issue of how to deal with irregular immigrants and rejected asylum-seekers poses important moral conflicts. It lies at the heart of controversies over church asylum, as well as of other solidarity movements that provide sanctuary to migrants in Europe.

My analytical framework draws insights from the public-policy literature on “morality policies” as well as from the political-theory literature on value-based conflicts and post-secularism ([Mourão Permoser 2019](#)). Its main premise is that, as with other morality policies, value-based conflicts in the migration field – such as those surrounding church asylum – reflect deep divisions within modern societies over key principles of political liberalism and, in particular, over the role of religion in secular liberal societies. Following this analytical framework, my aim in this chapter is to explore in detail the principled critiques raised against church asylum (Section 3) and the principled responses given to them by movement participants (Section 4). Moreover, I also dwell on some unforeseen entanglements to which the practice gives rise (Section 5).

In uncovering and analyzing the principled conflicts at the heart of political controversies over church asylum, I hope to show how the current immigration and asylum crisis in Europe is associated with the emergence of new movements of solidarity that, while challenging in some respects the application of certain liberal democratic

norms, do not do so by rejecting these norms but, rather, by raising legitimate concerns about the legal implications of these norms and principles when it comes to enforcing migration policy. In raising these important concerns, they both create opportunities to deepen democratic inclusion and strengthen its core values and also become imbricated in unforeseen (and often undesired) legal entanglements and inversions of roles.

Empirically, the chapter draws on a variety of sources: (1) primary documents produced by religious actors involved in church asylum, such as pamphlets, statistics, websites, position papers and book chapters; (2) media articles about church asylum published in German newspapers; (3) expert interviews with church asylum providers, church representatives and other persons involved in the Church Asylum Movement in an organizational capacity, as well as politicians and members of regional political bodies directly involved with the topic of church asylum; (4) participant observation of public and semi-public events organized by the Church Asylum Movement. In total, 18 expert interviews have been conducted thus far for the project on the topic of church asylum and the empirical research is still ongoing. Interviewees were chosen based on their degree of involvement with and position within the movement and included both people who are actively providing church asylum, people who have had a crucial role historically in building up the movement, people who are responsible for the topic of church asylum within the institutional hierarchy of the church and people who have an organizational capacity within the movement. Interviewees came from both the Catholic and the Protestant churches, as well as from the ecumenical organization BAG Asyl in der Kirche (see below). A full list of interviews conducted for the project and more information on the methodology and data sources can be obtained from the author by request. Cited interviews are listed at the end of the chapter.

2. Principled criticisms

2.1 Criticism 1: On the rule of law

Despite having many supporters, the Church Asylum Movement has also been subject to intense criticism. Churches are accused of misusing religious prerogatives to unduly infringe on state matters, essentially undermining the secular political order. They are also accused of purposefully breaking the law, placing morality above legality in the justification for their actions. Some critics even go so far as to claim that church asylum undermines the rule of law as such, arguing that the churches involved are acting systematically so as to invalidate the effects of democratically legitimated laws.

In the German context, these allegations are articulated the most explicitly by members of the far-right party Alliance for Germany (AfD), although they are certainly not the only ones holding critical views towards church asylum. The following statement by AfD politician Dirk Nockemann from Hamburg provides a useful illustration:

Today church asylum is abused in order to evade state regulations, that is, in order to eschew law and order. The church is not, however, entitled to take the law into its own hands. Church asylum is a relic of a time in which there was no state-guaranteed constitution, in which people were helplessly exposed to arbitrary violence by the state. This [church asylum] is not only presumptuous; it undermines the rule of law ([AfD Kompakt 2018](#)).²

As proponents of strict migration and asylum laws, it is not surprising that the AfD would take a critical stance towards church asylum. Nevertheless, as we see from the statement above, the main overt point of critique is not a nativist one but, rather, is that making asylum decisions should be an exclusive premise of state institutions.

Opposition to church asylum also comes from the political mainstream. One of the most prominent critics of church asylum was Thomas De Maizière, who (among other government positions) served as Germany's Interior Minister from 2013 to 2018 as a member of the ruling party Christian Democratic Union (CDU). Despite belonging to a Christian democratic party and identifying as a Christian, De Maizière repeatedly spoke out publicly against the practice of church asylum and in very harsh terms. In 2015, he generated a huge controversy (also within his party) when, in a meeting with Catholic bishops, he stated: "As Minister for the Constitution, I am principally and fundamentally against church asylum" ([Der Spiegel 2015](#)).

2.2 Criticism 2: On secularism

In a later statement, the minister added to the controversy by establishing a comparison between church asylum and the Sharia, arguing that, just as Muslims cannot adopt the Sharia in Germany, so also the Christian churches cannot place their religious prescriptions above the law ([De Maizière 2015](#)).

By making reference to the Sharia, in a context in which Islam is politicized as an anti-liberal and anti-democratic religion, De Maizière seems to be playing "the identity game" – that is, seeking to weaken sympathy for churches by comparing them to a highly unpopular religious practice (Sharia) of a religion stigmatized as foreign (Islam). Nevertheless, despite clearly intended to generate a polemic, De Maizière's critique is also premised on principles. The principled argument raised in the statement above is that church asylum hurts the principle of secularism. The comparison to Islam is also meant to show that Christian churches violate this principle in a way that would not be tolerated for other religions.

The minister is not alone in this critique. For example, in a very similar tone, the politics editor of the TV channel "Welt", journalist Till-Reimer Stoldt, wrote in an op-ed in 2018 that "Mosques should serve as examples for Christian churches" because Muslims

² This and all subsequent direct quotations have been translated from German into English by the author.

in Germany are law-obeying while Christian churches break the law by taking in rejected asylum-seekers. Recognizing that the state actually has the power to enter the churches and forcibly take out the migrants, he then asks the rhetorical question: “Why doesn’t the state do that?” His answer is that Christian churches misuse their privileged social status to offset the division of power between religious communities and the state.

No state government and no chief of police wants to be photographed as they force their way into a church with highly armed policemen and violently eject desperate screaming people from the church. Churches take advantage of this shame on the part of the state, this respect towards Christian prayer houses. This is not a question of legislation. This is a question of moral power. But, who knows, maybe the interreligious dialogue that churches cherish so much will one day lead to Christians learning something concerning this matter from their Muslim brothers ([Stoldt 2018](#)).

As with the previously quoted statement by De Maizière, irony is used here to seek to demoralize a practice that is usually associated with moral high grounds. Nevertheless, the principled critique is clear – and earnest. How do activists react to these criticisms? Do they reject secularism and the rule of law or do they relegate these principles to a secondary position in the face of more pressing moral commitments? Or are we faced here with a conflict of interpretation between actors upholding the very same principles?

3. Principled responses

3.1 Response 1: Of laws and lawfulness

The question of whether church asylum represents a breach of the law or even a threat to the rule of law divides not only civil society and politics but also the churches themselves. In a publication of the BAG celebrating the twentieth anniversary of the movement, one of the movement’s founders, Wolf-Dieter Just, describes how divisive this issue was at the time of the founding of the BAG. According to Just, critics within the religious community argued that only the state was entitled to grant asylum and that, in a democratic state, there can be no place outside the law. The same critics also argued that the aim of the protagonists of church asylum was not to help individual refugees but rather to disavow the national asylum policy (Just 2015, 50–51).

At that time, the national authority of the Protestant churches in Germany, *Evangelische Kirche Deutschlands* (EKD), published a statement criticizing church asylum and arguing that, whereas helping others is a Christian duty, if Christians engage in acts of civil disobedience, they must do so at their own risk, without involving the church (Just 2015, 52–53). Defenders of church asylum countered that the practice was not against the rule of law. On the contrary, they want to prevent the law being breached by sending asylum-seekers back to places where they will be at risk of being tortured

or even killed. Deportations to such places violate international law and the German constitution. “Parishes engaged in church asylum do not want to break the law but to protect it. Church asylum is a form of ‘subsidiary protection’ where the state has failed in its duty to protect” (Just 2015, 51).

As an outcome of the debate within the church’s own ranks, there was eventually a change in position at the highest level and, in 1997, in a joint publication of the EKD and the secretariat of the German Episcopal Conference, religious authorities endorsed the practice of church asylum, essentially adopting the arguments presented by participants in the grassroots movement:

Parishes who stand up for the realization of basic human rights do not question the rule of law but, rather, make a contribution to the maintenance of legal peace and of the fundamental values of our societies (cited in Just 2015, 54).

The argument sketched above is one of the core normative justifications for the Church Asylum Movement to this day. Many activists with whom I have spoken express the same idea: by ensuring that the constitutional commitment and normative obligation to protect human rights is not violated, they are in effect acting to defend the rule of law. The motivation to act may be derived from religious belief but the justification for their actions is grounded in the legal and normative order, not in Christian morality. Moreover, in some cases, current legislation and state policies may be in contradiction with the legal and normative order that is constitutive of the nation. In this case, activists might have to engage in civil disobedience because their actions will be against the law. As a pamphlet points out, this, however, only occurs because “state actions can in individual cases overlook or even violate fundamental legal norms” (Evangelische Kirche Berlin-Brandenburg-schlesische Oberlausitz 2017, 13). In other words: Church asylum is a response to state failure. It sets in when the state fails to act in accordance with its own legal obligations. Hence, when activists violate specific laws, they are nevertheless acting in defense of the rule of law broadly conceived.

3.2 Response 2: Of norms and duties

There is an alternative justification which is similar; however, those using it do not defend fundamental legal norms but fundamental moral values. As one activist put it:

The question is often raised as to whether this type of resistance is legal. I am so tired of this. I am a lawyer by training but I have no sympathy for this argument. One can put anything into law. Our society is based on a normative order. When a law is in contradiction to it, then it is irrelevant whether resistance to it is legal or not (public event).

This same activist told me in another context that, when she studied law, there were still books in the library of her university from the time of Nazis in which the

atrocities committed against Jews were justified in legal terms. She went on to say: "I am not a legal positivist. Just because something is legal doesn't mean it is right" (Interview 1).

In this activist's opinion, this type of activism should be open to everyone. She told me:

I don't know how you see it but I think that this special treatment of the church is problematic. As a lawyer it is not understandable for me why the churches are the only institutions that are allowed to do that [grant protection in the form of church asylum]. (...) It is irrelevant why people help and become active. Everybody should be allowed to do so. All religions have the norm of protecting life and helping others. (...) all religions and all cultures of the world uphold this norm and also all persons in our society support this norm. It is part of our underlying normative order (Interview 1).

This is obviously a very exceptional case. Most activists involved in church asylum justify their activism also with regard to their faith. Interviewee 2, for example, justified his actions as follows:

One cannot be Christian without being political. I mean, I am not the kind of person who goes to protests every day but I believe that, if you take it seriously [being Christian], then you cannot be indifferent to what happens politically. And I think that it is the duty of the church to, in humanitarian issues, well, to be a corrective to things that maybe are legal, that is, that are correct according to the law but which are not just. (...) I mean, if you will, Jesus also fought against injustice and he put himself in all kinds of dangerous situations, even though things did not turn out well for him in the end. And if the church takes this seriously and makes of it an example, then it should open up its mouth much more often. Jesus was by no means an apolitical person. (Interview 2)

In sum, whereas religion is a motivation for many Christians who see themselves as having a particular duty to fight against injustice, activists do not see their actions as antithetical to secularism or to the legal principles of Germany. However, they believe that, in specific cases, where the principles of justice to which they abide are not being appropriately enacted, they have a duty to act. The duty is sometimes conceived of as a civic duty, sometimes as a religious duty. However, religion is seen mainly as a *motivation* for action, not as a justification. Churches recognize repeatedly in their documents that they have no right to special treatment. The principle of secularism *per se* is not being questioned. Nevertheless, religious activists are conscious of the symbolic power that their buildings possess, seek to transfer the moral authority of their faith to their actions and benefit from it politically. This generates unease. Sometimes even within the movement, as we have seen, there are people who feel uncomfortable with the

fact that the state is (out of political calculations) tolerating this form of resistance from established Christian churches but not from others.

For example, recently there have been a few initiatives by private individuals and non-religious organizations to offer “*Bürgerasyl*” (citizen’s asylum), which essentially means hosting/hiding a person who is threatened with deportation in private houses or facilities ([Bürgerasyl 2021](#)). Unlike with churches, the Minister of the Interior has stressed that it is not willing to tolerate this practice ([Die Welt 2019](#)).

4. Unprincipled entanglements

The discussion above has shown that both critics and activists hold principled positions. The key principles at stake are the rule of law and secularism. None of the parties challenges these principles but there is a seriously felt normative conflict about what the defense of these principles implies. At the same time, in contrast to this image of two coherent moral poles, my fieldwork has also revealed numerous ways in which, in the actual practice of church asylum, the state and the churches are entangled in a web of irregularities, confusion of roles and the inversion of tasks. What is more, to a certain extent these entanglements represent challenges to the very same principles upon which the normative dispute is grounded.

4.1 Entanglement 1: Rule of law

The way church asylum works in Germany is somewhat complex and has changed significantly over time ([Mourão Permoser 2021](#)). Originally, the first cases of church asylum were meant to prevent the deportation of asylum-seekers to a country where they face persecution. This type of church asylum was open-ended and unregulated by the authorities. Over time, churches started taking in more and more cases of asylum-seekers whose determination procedure fell within the so-called Dublin Regulation of the European Union (EU). Dublin church asylum cases are special because their aim is not to avoid deportation to the country of origin but, rather, to force the German state to consider the asylum application in Germany. The Dublin Regulation stipulates that the member state responsible for processing an asylum application is the one which the asylum-seeker entered first on his or her way into the EU. Member states may return asylum-seekers to this country within six months of filing an application. After this period, the respective member state becomes the country responsible for the asylum claim. Thus, Dublin church asylum cases are not open-ended. Rather, they follow the specific time frame of the Dublin Regulation. The aim is to overcome the six months stipulated in the regulation so that Germany automatically becomes the country responsible for the asylum claim.

Furthermore, as mentioned in the introduction, the practice of church asylum has a dubious legal standing. As a result of a surge in such church asylum cases in 2014, the German Ministry of the Interior and representatives from the Protestant and Catholic

churches entered into negotiations and finally reached an agreement in 2015. This agreement specifies a series of bureaucratized procedures that churches have to follow when they take on a church asylum case. Among other things, the agreement stipulates that the churches must register every new church asylum case using a specific form on the very same day that the person is given shelter. Moreover, they must provide a “dossier” explaining why deportation would imply undue hardship, including proof through medical certificates and expert declarations (e.g. from psychiatrists) within two to four weeks of beginning the church asylum ([Evangelische Kirche von Westfalen 2018](#)). In exchange, the authorities made a commitment to tolerate the practice of church asylum. With this agreement, the practice of church asylum has been formalized, integrated into everyday bureaucracy and given a pseudo-legal mode of operation, even though it does not have a formal legal basis.

While church activists are required to comply with all these bureaucratic measures, the public administration acts with negligence towards its own procedures. Thus, according to activists, the administration almost never responds to the hardship dossiers presented by the churches with a decision to accept (or not) jurisdiction over the case on the basis of the arguments and proofs presented in the dossier. Instead, in most cases the administration simply does not reply to the dossiers, so that churches are obliged to actually keep the migrant on the church premises during the whole six-month period until Germany becomes *de facto* obliged to take over jurisdiction. Equally, the authorities answer to the hardship dossier with one sentence – “We do not concur with the reasons provided” – without offering any explanation. The practical outcome is the same: churches keep the migrants in precarious situations on their premises until Germany acquires jurisdiction by default. The authorities, in turn, refrain from entering the churches to enforce the law, even when they do not concur with the reasons provided by the churches in their dossiers. In other words, despite the agreement and the formalized procedures, church asylum continues to be a way to circumvent the application of the law – except that, since 2015, this is done in a formalized way and with the connivance and tacit consent of the authorities.

Another important aspect of entanglement refers to the fact that, despite every case being registered with the authorities and despite the existence of a formal agreement to tolerate church asylum, the rejected asylum-seeker has no legal status at all during his or her six months in church asylum. He or she is in a legal limbo and is therefore permanently at risk of being deported if caught by the authorities outside church premises. Church activists go to great lengths to structure the daily lives of people in church asylum so that they have to exit the premises as seldom as possible, to the point where, in some cases, every exit is accompanied by somebody from the parish. Furthermore, during the time in church asylum, because they have no official legal status, asylum-seekers are not entitled to public health insurance or to any other type of public service. This puts the migrants in a very precarious situation and generates particular

challenges for the parishes, who need to bear all the costs of eventual medical care, find a place for the children to attend private (usually religious) schools and organize therapy for those suffering from strong traumas through their own private networks.

Between 2018 and 2020, the conflict between the churches and the state authorities took yet another turn. The Interior Ministry criticized the churches for not always sending the hardship dossiers, for not ending church asylum when receiving a negative decision and for using church asylum indiscriminately rather than only in exceptional circumstances (Interviews 3 and 4). Arguing that the churches have not fulfilled their side of the agreement, the authorities then started treating asylum-seekers in church asylum as having “absconded”. If an asylum-seeker is officially categorized as having absconded, the timeframe in the Dublin Regulations extends to 18 months. This means that the churches have must bear all the costs and all the difficulties of keeping somebody on their premises for a time period of 1.5 years instead of six months which, for many parishes, is too great a commitment. Activists in turn argued that the ministry was misusing this clause in the Dublin Regulation deliberately in order to put pressure on the movement. After numerous court judgements denying the ministry’s claim that asylum-seekers whose residence address was known to the authorities could be treated as having absconded, the Interior Ministry rescinded the practice in January 2021 ([Bundesamt für Migration und Flüchtlinge 2021](#); [Informationsverbund Asyl & Migration 2019](#)).

In sum, we see how the practice of church asylum complicates the picture of a principled conflict between two moral high grounds. Although both sides are indeed principled defenders of the rule of law, in their political practice they end up contravening this principle in a number of ways. For one, although critics of church asylum argue that religious authorities are unduly taking over state functions, it is also the case that, in its toleration of church asylum, the state abdicates several of its functions and duties and tacitly transfers them to the churches. Furthermore, whereas it is true that activists use church asylum to circumvent the application of the Dublin Regulation – which, critics argue, undermines the rule of law – this practice has been formalized in an extra-judicial agreement – and with the connivance of the authorities. When a conflict emerged in 2018, it was because churches allegedly failed to comply with the extra-judicial agreement, not because they failed to comply with German or EU law. The answer of the state authorities, in turn, was not to enforce the rule of law by implementing the Dublin Regulation in full but, rather, to unduly exploit specific legal passages of it with the aim of obstructing religious activism by making church asylum more difficult to implement.

4.2 Entanglement 2: Secularism

The second disputed principle in the normative conflict over church asylum is secularism. We have already discussed several ways in which the state and the churches

are implicated in an inversion of roles and transfer of functions from the state to the churches. Nevertheless, my fieldwork also revealed a less obvious way in which the practice of church asylum leads to an inversion of roles between the churches and the state that challenges secularism – which has to do with the specific situation of converts.

For church activists, conversions are a particularly difficult phenomenon to deal with in the context of church asylum. On the one hand, asylum-seekers who converted from Islam to Christianity are faced with an additional threat if deported back to their home countries. Most asylum-seekers come from countries where there is no freedom of religion and where conversion to another religion is punished harshly. On the other hand, if the conversion took place during church asylum, this often generates suspicion by the authorities. In fact, in some cases, activists will refrain from mentioning the conversion in the hardship dossiers so as not to be accused by the authorities of “producing a reason for asylum” (Interview 2). In the cases where they do mention the conversion, it can happen that the immigration authorities question the asylum-seekers to try to assess the truthfulness of their claim to have converted. This leads to the controversial situation in which the state authorities are in the role of determining, as a result of this questioning, whether the asylum-seeker is a true Christian or not. The following passage, in which one church activist describes his experience in such a hearing, is worth quoting at length:

Sometimes the agency will try to test whether the person is really being sincere about his/her faith. Then they ask the person something like “What are the 10 commandments?” and if the person can only name two, then that’s not enough. But it is very complicated to try to test faith and to define it through knowledge in this way. Once there was a case that I followed because he was in church asylum with us before – he got baptized here and then, during the official hearing, they asked him many knowledge questions and he could only answer them more-or-less well, you know, and then the agency did not believe him, and then we said: “Hey, wait a minute, that’s not possible, now you are in charge of determining who is or is not a Christian? We do that!” (Interview 2).

The issue is by no means trivial. As media reports show, some Christian churches that have a missionary ethos have also become engaged in church asylum, as is the case of the Dreieinigkeitskirche in Berlin Steglitz which, according to its own account, has already converted over 1,000 Afghani and Iranian asylum-seekers to Christianity (Biermann 2018; Peters 2015). While the reason for these asylum-seekers to flee might not constitute a legitimate reason for asylum, once converted to Christianity, they most certainly would face persecution if deported back to Afghanistan or Iran. This places the authorities in a difficult situation: they are at once obliged to respect the autonomy of churches to decide who is a member and to ensure that this autonomy

is not misused to generate new grounds for asylum. At the same time, if churches are no longer allowed to determine who their own members are by whatever criteria they see fit, then there can indeed be no talk of secularism in the sense of separation between church and state.

5. Conclusions

This chapter has analyzed the Church Asylum Movement in Germany as a case of value-based migration politics. It is a movement of solidarity that politicizes the question of how to deal with irregular immigrants and asylum-seekers as a matter of normative principles. Specifically, church asylum pits defenders and critics of the practice against each other in a contest over the appropriate enactment of the principles of the rule of law and secularism. In both cases, activists and their critics act as principled agents, both defending the same liberal democratic principles. Nevertheless, in many ways, the practice of church asylum generates an inversion of the role of churches and the state. Church asylum activists take it upon themselves to decide who is worthy of having an application for asylum reviewed by the German authorities. The state, on the other hand, tolerates this incursion into its legal prerogatives out of political calculations and hands over all of its responsibilities for the asylum-seekers in question to the churches during the whole asylum determination procedure. Neither state nor church actively violate the law but the immigrants are, nevertheless, left in a legal limbo characterized by heightened vulnerability. By describing such instances of the blurring and inversion of roles, the chapter has also shown how the current political handling of church asylum generates situations in which both churches and state authorities end up implicated in disruptions of the very same principles that they are intent on upholding.

Acknowledgements

This research was funded in whole, or in part, by the Austrian Science Fund (FWF) [“Migration as Morality Politics”, Grant V 743-G]. I thank my research assistant Jonas Heitzer (University of Innsbruck) for his excellent work in helping me with the data collection and analysis.

Interviews cited

- Interview 1 Church Asylum Movement activist/provider (involved in an organizational capacity – Ecumenical), 29.01.2020, Berlin.
- Interview 2 Church Asylum Movement activist/provider (involved in an organizational capacity – Catholic), 31.01.2020, Berlin.
- Interview 3 Representative of the Protestant Church of Germany, 22.12.2020, Zoom.
- Interview 4 Representative of the German Bishops’ Conference, 07.01.2021, Zoom.

References

- AfD Kompakt 2018: *Mit Kirchenasyl untergräbt die Kirche unseren Rechtsstaat*. Retrieved September 16, 2021 from <https://afdKompakt.de/2018/08/28/mit-kirchenasyl-unter-graebt-die-kirche-unseren-rechtsstaat/>.
- BAG Asyl in der Kirche 2021: *Aktuelles*. Retrieved September 16, 2021 from <https://www.kirchenasyl.de/aktuelles/>.
- Biermann, Til 2018: "Konvertierte Christen sollen raus aus Deutschland", *Berliner Zeitung*, 4 February 2018. Retrieved September 16, 2021 from <https://www.bz-berlin.de/berlin/konvertierte-christen-sollen-raus-aus-deutschland>.
- Bundesamt für Migration und Flüchtlinge 2021: *Merkblatt Kirchenasyl im Kontext von Dublin-Verfahren*. Retrieved September 16, 2021 from https://www.bamf.de/Shared-Docs/Anlagen/DE/AsylFluechtlingsschutz/merkblatt-kirchenasyl.pdf?__blob=publicationFile&v=5.
- Bürgerasyl 2021: *Aktion BürgerInnenasyl: Schütze Menschen vor Abschiebung*. Retrieved September 16, 2021 from <https://aktionbuergerinnenasyl.de/>.
- De Maizière, Thomas 2015: "Missbrauch des Kirchenasyls", *Interview der Woche*, 8 February 2015. Retrieved September 16, 2021 from https://www.deutschlandfunk.de/bundesinnenminister-de-maiziere-missbrauch-des-kirchenasyls.868.de.html?dram:article_id=311001.
- Der Spiegel 2015: "De Maizière rügt Kirchenasyl", *Der Spiegel*, 30 January 2015. Retrieved September 16, 2021 from <https://www.spiegel.de/politik/deutschland/thomas-de-maiziere-kritisiert-kirchenasyl-a-1015933.html>.
- Die Welt 2019: "Horst Seehofer warnt Initiativen vor 'Bürgerasyl'" 2019, *Die Welt*, 4 April 2019. Retrieved September 16, 2021 from <https://www.welt.de/politik/deutschland/article191323749/Fluechtlinge-Horst-Seehofer-warnt-Initiativen-vor-Buerger-asyl.html>.
- Evangelische Kirche Berlin-Brandenburg-schlesische Oberlausitz 2017: *Kirchenasyl in der Evangelischen Kirche Berlin-Brandenburg-schlesische Oberlausitz* [Pamphlet], Berlin.
- Evangelische Kirche von Westfalen 2018: *Rundschreiben Nr. 14/2018*. Retrieved September 16, 2021 from https://www.evangelisch-in-westfalen.de/fileadmin/user_upload/Kirche/Was_uns_bewegt/Flucht_und_Asyl/RS_14_2018_Kirchenasyl_gesamt.pdf.
- Informationsverbund Asyl & Migration 2019: *Rechtssprechungsübersicht zum Kirchenasyl in Dublin-Fällen*. Retrieved September 16, 2021 from <https://www.asyl.net/view/detail/News/rechtssprechungsuebersicht-zum-kirchenasyl-in-dublin-faellen/>.
- Just, Wolf-Dieter 2014: 'The rise and features of church asylum in Germany: "I will take refuge in the shadow of thy wings until the storms are past"', in Randy Lippert/Sean Rehaag (eds.): *Sanctuary practices in international perspectives: Migration, citizenship and social movements*, London, 135–147.
- Just, Wolf-Dieter 2015: 'Hoffnung wo Verzweiflung droht: Die Gründung der Ökumenischen Bundesarbeitsgemeinschaft Asyl in der Kirche vor 20 Jahren', in *Asyl in*

- der Kirche in Bewegung: Geschichten und Perspektiven zum 20-jährigen Bestehen der Ökumenischen Bundesarbeitsgemeinschaft Asyl in der Kirche e.V.*, Berlin, 47–56.
- Marfleet, Philip 2011: 'Understanding "sanctuary": Faith and traditions of asylum', *Journal of Refugee Studies*, vol. 24, no. 3, 440–455. <https://doi.org/10.1093/jrs/fer040>.
- Mourão Permoser, Julia 2019: 'What are morality policies? The politics of values in a post-secular world', *Political Studies Review*, vol. 17, no. 3, 310–325. <https://doi.org/10.1177/1478929918816538>
- Mourão Permoser, Julia 2021: 'Die Kirche als Raum der Solidarität: Die Kirchenasylbewegung in Deutschland', in Niki Kubaczek/Monika Mokre (eds.): *Die Stadt als Stätte der Solidarität*, Wien, 97–118. Retrieved September 16, 2021 from <https://transversal.at/books/stadt>.
- Peters, Freia 2015: "Warum ein Pfarrer Flüchtlingen Kirchenasyl gewährt", *Die Welt*, 13 February 2015. Retrieved September 16, 2021 from <https://www.welt.de/politik/deutschland/article137430619/Warum-ein-Pfarrer-Fluechtlingen-Kirchenasyl-gewaehrt.html>.
- Shoemaker, Karl 2014: 'Sanctuary for crime in early common law', in Randy Lippert/Sean Rehaag (eds.): *Sanctuary practices in international perspectives: Migration, citizenship and social movements*, London, 15–27.
- Stoldt, Till-Reimer 2018: "Bei der Rechtsstreue können die Kirchen von Muslimen lernen", *Die Welt*, 24 March 2018. Retrieved September 16, 2021 from <https://www.welt.de/regionales/nrw/article174852601/Kirchenasyl-Bei-der-Rechtstreue-koennen-die-Kirchen-von-Muslimen-lernen.html>.