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INTERNATIONAL COMMUNITY
LAW REVIEW 24 (2022) 285–291

INTERNATIONAL COMMUNITY
LAW REVIEW

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The (Many) Rules and Roles of Law in the Regulation of "Unwanted Migration"

Violeta Moreno-Lax | ORCID: 0000-0002-0042-7907
Professor of Law and Founding Director of (B)Orders,
Centre for the Legal Study of Borders, Mobility and Migration,
School of Law, Queen Mary University of London, London, UK
v.moreno-lax@qmul.ac.uk

Niovi Vavoula
Lecturer in Migration and Security and member of (B)Orders,
Centre for the Legal Study of Borders, Mobility and Migration,
School of Law, Queen Mary University of London, London, UK
n.vavoula@qmul.ac.uk

This Special Issue on 'Regime Interaction and "Unwanted Migration": From Hostility to Emancipation' problematises the ambivalence of law vis-à-vis 'unwanted migration', building on discussions held during the MAPS Conference of December 2020.[1] Contributors consider the treatment of 'unwanted migrants', focusing on the difficulties they encounter to access their rights and interrogating the law's contradictory role in fostering hostility, while also providing a source of protection. Within this framework, migration politics, and the related effect of interests, values and ideology in the formation of policy preferences[2] – particularly during crises[3] – constitute an accelerator of (oppressive/emancipatory) regulation and management strategies of

1 *Conflicting Responses to Refugees and Migrants in Covid-19 Europe*, Queen Mary Law School, 11 December 2020 <https://www.qmul.ac.uk/law/events/items/maps-conference-conflicting-responses-to-refugees-and-migrants-in-covid-19-europe.html>. Both the conference and this Special Issue are deliverables of the Migration and Asylum Policy Systems (MAPS) Jean Monnet Network <https://www.mapsnetwork.eu/> funded by the Jean Monnet Programme (2019–2021) 599856-EPP-1-2018-1-IT-EPPJMO-NETWORK, Grant decision 2018-1606/001-001.

2 Saskia Bonjour, 'The Power and Morals of Policy Makers: Reassessing the Control Gap Debate' (2011) 45 *International Migration Review* 89.

3 E.g. Tendayi Achiume, Thomas Gammeltoft-Hansen and Thomas Spijkerboer, 'Introduction to the Symposium on COVID-19, Global Mobility and International Law' (2020) 114 *AJIL Unbound* 312.

 | DOI:10.1163/18719732-12341490

'unwanted migration'[4] – a term we use to refer both to unauthorised migrants and asylum seekers as well as to the securitised approach pervading the techniques employed to govern them, taking account of the ways in which States utilise and adapt international legal norms to deal with the phenomenon. We use the concept in its explanatory capacity, and from the State's perspective, to encompass all categories of non-citizens that receiving countries attempt to pre-empt, repel, or exclude and who may only reluctantly be accepted for admission or allowed to remain on the basis of legal constraints, such as the principle of *non-refoulement* or human rights obligations.[5] Although most 'unwanted migrants' are typically also in an irregular situation, unwanted and irregular migration are not coterminous and should not be confounded. There are different understandings and configurations of irregularity,[6] depending on the prevailing combination of legal provisions, political interests, and ethical considerations at play. The 'irregularisation' of status, or even its criminalisation through law, constitutes a means to control (if not punish) 'unwanted migration', according to the political sensitivities of the day that crystalise in law and policy.

On this basis, the contributions to this Special Issue critically appraise international law's conflicting responses to the obstacles faced by those in search of safe haven or better opportunities and perceived as 'unwanted' by looking at the normative interactions (or lack thereof) between overlapping regimes.[7] The authors examine how legal provisions and the interrelation of the relevant legal frameworks may clash resulting in the emergence of new rules or in an interpretation or application of existing norms that limits access to effective protection, capturing the law's function as a means of normalisation of the prevention of 'unwanted migration'. Such clashes may take the form of

4 See further Jørgen Carling, 'The European Paradox of Unwanted Immigration', in Burgess and Gurtwirth (eds), *Security, Migration, Integration* (Vrije Universiteit Brussel Press 2011) 33; Martina Cvajner and Giuseppe Sciortino, 'Theorazing Irregular Migration: The Control of Spatial Mobility in Differentiated Societies' (2010) 13 *European Journal of Social Theory* 389; Christina Boswell, 'Theorizing Migration Policy: Is There a Third Way?' (2007) 41 *International Migration Review* 75.

5 This has been called the 'liberal constraint' that forces democratic States to accept undesired migration. See James Hollifield, *Immigrants, Markets and States: The Political Economy of Postwar Europe* (Harvard University Press 1992). For a legal elaboration, see Gregor Noll, 'The Laws of Undocumented Migration' (2010) 12 *European Journal of Migration and Law* 143.

6 Frank Düvell (ed.), *Illegal Immigration in Europe: Beyond Control?* (Palgrave/MacMillan 2006).

7 On regime interaction generally, see *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi (2006) A/CN.4/L.682.

productive encounters of provisions across different legal orders, which may bolster or undermine the effectiveness of rights. Exploring different configurations of regime interaction, the contributions determine how protection is (re) formulated or avoided and with what consequences across branches of regulation, between the international, the regional, and the domestic levels. The contributions question the instrumentalisation of certain norms to the detriment of others in expanding State powers and reducing individual protection, while highlighting the potentially transformative role that law may play if construed following customary rules of Treaty interpretation.[8] Through these apparently contradictory accounts, the authors underscore the paradoxical character of international law norms as both potential sources of protection and oppression, revealing their limits and complementarity when interacting across legal systems. Importantly, clashes of legal regimes with regard to the regulation of 'unwanted migration' expose the lack of a unified stance among States and within the international community in the understanding and interpretation of human rights in the migration context.

Against this background, contributors to this Special Issue demonstrate how the normalisation of deterrence at the national, regional, and international level may take the form of practices of (over)criminalisation of 'unwanted migrants', in contravention of key customary law principles, as Marta Minetti shows in her piece on the consequences of penal populism in Italy. Some domestic legal orders offer examples of isolationist systems built in contravention of basic values of international law, illustrating the consequences of 'regime (self)containment' (and the lack of regime interaction).[9] In the UK, the ongoing 'hostile environment' represents the culmination of efforts to deter 'unwanted migration' that undermine the very premises of the Rule of Law, as Sheona York posits. In the post-Brexit environment, following Andrew Pitt's line of argument, it seems that, rather than (exogenous) international human rights safeguards, only (internal) constitutional constraints may limit State discretion when attempting to curtail the freedoms of 'unwanted migrants'. Nonetheless, multi-level, cross-sector legal interactions, while promising, can lead to inconsistent outcomes. Nicolette Busuttil's contribution shows how UN human rights standards should be 'incorporated' into EU asylum law as regards the protection of 'unwanted migrants', including those with disabilities, as a vehicle to enhance their protection, whereas Sara Palacios-Arapiles' article exposes the consequences of defective incorporation,

8 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 ('VCLT').

9 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

revealing how (mis)interpretation may produce divergent results, depending on how the interaction of national, regional, and international standards is arranged. From her part, Maria-Louiza Deftou explores the judicial dialogue between the two regional Courts in Europe as a mechanism that can entrench the rights of 'unwanted migrants' through litigation and buttress common Rule of Law-based standards, whether or not the EU's accession to the European Convention on Human Rights (ECHR) takes place. Thus, the individual contributions to this Special Issue cover formulas ranging from regime isolation, to divergence, convergence, and integration, demonstrating the different uses (and abuses) of law in the regulation of 'unwanted migration', illustrating the plethora of rules and roles of law at play in any given situation.

Opening the Special Issue, Sheona York and Andrew Pitt's articles uncover the perils of isolation. '*Does the UK Home Office Care About the Rule of Law? Implications for "Unwanted Migrants"*', by York, questions the rationale of the new Nationality & Borders Act.[10] The instrumentalisation of law for the creation of a 'hostile environment' and deterring 'unwanted migration' is particularly visible in the UK, which offers a model built on regime insulation that rejects reliance on international standards. She concludes that UK policies and practice have over time displayed an increasing hostility to those norms and principles, resorting to ignorant and even brazen indifference to facts, evidence, and analysis, and widening the gap between domestic and international law in important respects.

Andrew Pitt continues the critique of the UK migration regime. '*Bordering Asylum in Post-Brexit Britain: Lessons from the UK's Detained Fast Track and the Marginalisation of International Human Rights Safeguards*' focuses on the mechanisms through which regime isolation may be achieved. Reducing possibilities for judicial review is one chief example. Indeed, many of the reforms proposed (and passed) in Britain seek to reduce the number of appeals through, for instance, the (re-)introduction of an accelerated processing for rejected asylum claims of detained asylum seekers. Pitt's contribution problematises the revival of the Detained Fast Track scheme, which illustrates the marginalisation of international human rights safeguards within the UK's domestic system in the post-Brexit era in defiance of Rule of Law standards.

Sara Palacios-Arapiles shifts attention to divergence. '*European Divergent Approaches to Protection Claims Based on the Eritrean Military/National Service Programme*' draws on data from the UK, Sweden, Germany, and Switzerland, to show that, during the process of interpreting the refugee definition and

10 UK Nationality and Borders Act 2022 <https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted>.

applying it to the context of the Military/National Service Programme (MNSP), the definition is subject to varying interpretations, as a result of which the treatment of similarly situated Eritrean asylum applications differs from one country to another. The article illustrates how asylum courts, faced with similar facts and rules, still reach opposing conclusions. Such divergence has contributed to create legal uncertainty about the meaning of 'refugee' and how this applies to claims based on the MNSP by 'unwanted migrants'. The findings suggest that a defective incorporation of international law standards unduly de-legitimises Eritrean applications for international protection.

Not only divergence penalises 'unwanted migrants'. In '*International Legal Principles, Penal Populism and Criminalisation of "Unwanted Migration": An Italian Cautionary Tale*', Marta Minetti addresses the outright criminalisation of 'unwanted migration' as a paradigmatic example of the (ab)use of law as a deterrent, and as one of the most explicit ways in which law generates, sustains, and even legitimises hostility towards 'unwanted migrants'. Relying on the example of Italy, she reveals how populism has infiltrated criminal law, leading to its instrumentalisation and the proliferation of criminal sanctions on 'unwanted migration' (and its aiders) as a means of control. The misuse of the transnational organised crime framework ultimately legitimises the violation of human and refugee rights in contravention of international law principles, thereby threatening the foundations of a law-abiding international legal order.

On the other side of the spectrum, one way in which law may display its protective potential vis-à-vis 'unwanted migrants' is through litigation at the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), as the two key judicial fora at the regional level in Europe. Maria-Louiza Deftou analyses this dual judicial system in '*The Road to the EU's Accession to the ECHR: Reshaping the ECtHR-CJEU Judicial Interaction in Cases of "Unwanted Migration"?*' The system represents a multi-layered, yet dialectic, model of protection with no formal hierarchy between its components, where both players tend to show deference to the findings of its counterpart. However, in the aftermath of *Opinion 2/13*,[11] and faced with seemingly uncontrolled 'unwanted migration' flows after the 2015 'refugee crisis', the EU judicature defended the principle of mutual trust at any cost and appeared to prioritise the protection of the EU allocation mechanism for the examination of asylum claims in a deterrence-oriented direction, instead of addressing the novel human rights challenges facing the Common European Asylum System (CEAS). Yet, their interplay, as Deftou argues, has entered a new era since the

11 CJEU, *Opinion 2/13* ECLI:EU:C:2014:2454.

renegotiation of the EU's accession to the ECHR began in 2020.[12] By analysing the case law of the two Courts, her article thinks anew their relationship to ascertain whether the evolution of the accession project has affected the protection offered to 'unwanted migrants' in Europe.

Another way in which the protective/emancipatory dimension of law can materialise is through the construal of norms in line with prevailing customary rules of legal interpretation.[13] In situations where a multiplicity of sources come into play, a 'systemic approach' is warranted.[14] This is why the current position of the UN Convention on the Rights of Persons with Disabilities (CRPD) within the EU law *acquis* regarding asylum and migration is so anomalous, as Nicolette Busuttil demonstrates in '*The UN Disability Rights Convention and EU Fundamental Rights: What Role for the Convention in the Protection of "Unwanted Migrants"?*' The CRPD constitutes the first international instrument which affirmed the equal entitlement of (all) persons with disabilities to enjoy the full range of human rights on an equal basis with others (regardless of migration status). The EU is a party to the CRPD and so is bound by it. As a result – Busuttil claims – the EU bears responsibility, within the sphere of its powers, for the realisation of the relevant CRPD obligations. Taking account of the EU's (internal) hierarchy of sources, norms on competence allocation, and a method of interpretation based on the 'cross-aggregation' of (pre-existing EU and CRPD-based international law) standards,[15] the article shows how the CRPD should interact with (homegrown) sources of EU fundamental rights to produce a 'disability fundamental rights framework' that benefits citizens and non-citizens alike, including 'unwanted migrants'. This goes beyond an effort of harmonious interpretation, ultimately requiring the substantive 'incorporation' of the CRPD's protections into the reading of EU law, unlocking the emancipatory potential of the applicable provisions.

Taken together, the contributions to this Special Issue reveal how conflicting responses may derive (simultaneously) from the legal rules, case law and policy regulating 'unwanted migration'. On the one hand, 'unwanted migrants'

12 Delegation of the European Union to the Council of Europe, 'Negotiations for the accession of the EU to the ECHR', 18 October 2021 <https://www.eeas.europa.eu/delegations/council-europe/negotiations-accession-eu-echr_en?s=51#:~:text=In%20September%202020%2C%20negotiations%20for,on%2010%2D13%20May%202022.>

13 On the continued relevance of Art 31 VCLT, see Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill 2010).

14 Art 31(3)(c) VCLT. See further Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill 2015) and references therein.

15 The proposed approach builds on the 'aggregate standards' model by Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press 2017) ch 7.

bear the brunt of exclusionary measures, aimed at deterring them, particularly as their presence is associated with threats to sovereign integrity.[16] On the other hand, 'unwanted migrants' are also rights holders, protected by international, regional, and domestic legislation and entitled to effective judicial protection. In addition, the relevant legal regimes are often intertwined, creating apparent confusion or even competition between the applicable norms.[17] This tension (and the contradictory responses it gives rise to) is thoroughly engaged with in this Special Issue, assessing how the unique position of 'unwanted migrants' leaves them exposed to a wide set of restrictive practices and legal interpretations that contribute to the normalisation of othering, oppression, and marginalisation, while paradoxically, on the other side of the spectrum, also offering potential means of liberation. Indeed, it is through law that these trends can be legally challenged and undone. The protective capacity of legal norms can be released through an interpretation that focuses on the interconnectedness of multiple systems at different levels, exploiting the emancipatory potential of their interrelation. Such an approach would benefit both 'unwanted migrants' and international law as a whole, fostering its development as a system based on the Rule of Law.

16 Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 *Journal of Common Market Studies* 751.

17 In addition, unclear, overlapping rules have been shown to create, rather than avoid, irregular migration. See Franck Düvell, 'Paths to Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13 *European Journal of Migration and Law* 275.