

Bast | von Harbou | Wessels

Human Rights Challenges to European Migration Policy

The REMAP Study



HART
PUBLISHING



Nomos

Schriften zum Migrationsrecht

edited by

Prof. Dr. Jürgen Bast, Universität Gießen

Prof. Dr. Ulrike Davy, Universität Bielefeld

Prof. Dr. Anuscheh Farahat, Universität Erlangen-Nürnberg

Prof. Dr. Andreas Fischer-Lescano, Universität Bremen

Prof. Dr. Marie-Claire Foblets,
MPI für ethnologische Forschung, Halle

Prof. Dr. Thomas Groß, Universität Osnabrück

Dr. Konstanze Jüngling,
Akademie der Diözese Rottenburg-Stuttgart

Prof. Dr. Winfried Kluth, Universität Halle-Wittenberg

Prof. Dr. Nora Markard, Universität Münster

Prof. Dr. Daniel Thym, Universität Konstanz

Prof. Dr. Mattias Wendel, Universität Leipzig

Volume 36

Jürgen Bast | Frederik von Harbou | Janna Wessels

Human Rights Challenges to European Migration Policy

The REMAP Study



HART



Nomos

The **Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-8244-4
ePDF (Nomos) 978-3-7489-2674-0

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-6486-4

Library of Congress Cataloging-in-Publication Data

Bast, Jürgen / Harbou, Frederik von / Wessels, Janna
Human Rights Challenges to European Migration Policy
The REMAP Study

Jürgen Bast / Frederik von Harbou / Janna Wessels
292 pp.

Includes bibliographic references.

ISBN 978-1-5099-6486-4 (hardcover Hart)

Second revised edition 2022

© Jürgen Bast / Frederik von Harbou / Janna Wessels

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8244-4 (Print)

ISBN 978-3-7489-2674-0 (ePDF)

ISBN 978-1-5099-6486-4 (hardcover Hart)

DOI <https://doi.org/10.5771/9783748926740>



Onlineversion
Nomos eLibrary



This work is licensed under a Creative Commons Attribution – Non Commercial – No Derivations 4.0 International License.

Preface

This study is co-authored by three researchers originally based at Justus Liebig University Gießen (JLU), Germany. Jürgen Bast is Professor of Public Law and European Law at this university. Frederik von Harbou and Janna Wessels were Postdoctoral Researchers when the project started in 2018; by now, they have become Professor of Law at the University of Applied Sciences Jena (EAH) and Assistant Professor of Migration Law at Vrije Universiteit Amsterdam (VU) respectively. From the beginning we have been supported by Saskia Ebert, who started as an undergraduate student assistant. After having received her law degree, she left the REMAP team in January 2021 to work for the Refugee Law Clinic at the JLU.

The REMAP study was generously funded by Stiftung Mercator. We are grateful for the professional support, the Foundation's appreciation of independent research, and its flexibility when the pandemic affected the original timetable of the project. Stiftung Mercator's continuous support has made it possible for us to publish this volume under a Creative Commons license with Nomos and Bloomsbury, which kindly accepted and skillfully processed the manuscript.

We also gratefully acknowledge the support from a panel of experts composed of academics and practitioners, who shared their experience in a series of workshops and gave most valuable comments on earlier versions of the study (for a full list of experts, see the Annex). The input from our friends and colleagues was so profound that we are somewhat reluctant to assume exclusive responsibility for the content. Of course, all remaining errors are ours.

The first edition of the study was presented to the public in October 2020, in cooperation with the German Institute for Human Rights (DIMR). The earlier version focused on access to asylum, deprivation of liberty, procedural rights, non-discrimination, and the infrastructure necessary to render the Human Rights of migrants effective. These chapters have been updated and partly revised for the present second edition. Our findings on the protection of social and family ties of migrants and of their economic and social rights – with particular attention to the situation of irregular migrants – are presented for the first time in the context of this edition. It represents the state of our legal knowledge by the end of 2021.

The authors, April 2022

Table of Contents

Introduction: Nature and Purpose of this Study	15
0.1 Why re-mapping the role of Human Rights in European migration policy?	15
0.2 What is our understanding of ‘Human Rights’?	17
0.3 What do we mean by ‘European Migration Policy’?	19
0.4 What do we mean by the ‘challenges’ identified in each chapter?	22
0.5 What are the sources of the ‘legal evaluation’ provided in each chapter?	23
0.6 What is the nature of the ‘recommendations’ provided in each chapter?	25
Chapter 1 – Ensuring Access to Asylum	28
1.1 Structural challenges and current trends	29
Trend 1: Avoiding jurisdiction through cooperative externalization of mobility control	30
Trend 2: Contesting jurisdiction by failing to comply with Human Rights obligations	36
Trend 3: Transferring jurisdiction by referring migrants to other States	39
1.2 Legal evaluation	41
1.2.1 General legal framework regarding access to asylum	41
1.2.2 Specific issue: Attributing responsibility for acts of third countries	44
1.2.3 Specific issue: ‘Push-backs’ on the High Seas and at land borders	47
1.2.4 Specific issue: Entry of vessels into the territorial waters and disembarkation at EU ports	49
1.2.5 Specific issue: Limits to ‘protection elsewhere’	52

Table of Contents

1.2.6	Specific issue: Allocating asylum jurisdiction within the EU (Dublin system)	55
1.2.7	Specific issue: International obligations to provide for safe and legal access to asylum?	57
1.3	Recommendations	60
	Recommendation 1: Strictly condition cooperation with third countries on Human Rights compliance	60
	Recommendation 2: End push-backs and closure of ports	61
	Recommendation 3: Establish a high standard for the assumption of safe third countries	62
	Recommendation 4: Keep the Dublin system flexible to effectively ensure access to asylum	62
	Recommendation 5: Establish safe and legal pathways to asylum in the EU	63
Chapter 2 – Ensuring Liberty and Freedom of Movement		64
2.1	Structural challenges and current trends	65
	Trend 1: More frequent and systematic use of detention for a wider range of reasons	67
	Trend 2: Increasing use of area-based restrictions not amounting to detention	70
	Trend 3: Persistent pattern of problematic conditions of detention	74
2.2	Legal evaluation	75
2.2.1	General framework: The rights to liberty, to freedom of movement, and to adequate treatment	75
2.2.2	Specific issue: Detention grounds	88
2.2.3	Specific issue: Border Procedures	95
2.2.4	Specific issue: Area-based restrictions	100
2.2.5	Specific issue: Detention conditions	105

2.3	Recommendations	110
	Recommendation 1: Enact horizontal provisions on detention grounds	110
	Recommendation 2: Prohibit ‘border procedures’ based on detention	111
	Recommendation 3: Specify legal safeguards for area-based restrictions	111
	Recommendation 4: Ensure adequate conditions in immigration detention and reception centers	112
	Recommendation 5: Prohibit detention of persons in situations of particular vulnerability	112
	Chapter 3 – Guaranteeing Procedural Standards	114
3.1	Structural challenges and current trends	115
	Trend 1: Denial of procedural standards for decisions on admission	117
	Trend 2: Deportation procedures without adequate procedural guarantees	120
	Trend 3: Blurring accountability by agencification of EU migration policy	121
3.2	Legal evaluation	124
	3.2.1 General framework	124
	3.2.2 Specific issue: Application of procedural standards on visa decisions	129
	3.2.3 Specific issue: Decisions on territorial admission at land and sea borders	132
	3.2.4 Specific issue: Scope of procedural safeguards in the Return Directive	133
	3.2.5 Specific issue: Monitoring of deportations by EU Member States	136
	3.2.6 Specific issue: Accountability of EU agencies	136

Table of Contents

3.3	Recommendations	140
	Recommendation 1: Provide comprehensive procedural safeguards for visa applications	140
	Recommendation 2: Clarify and strengthen procedural guarantees at the borders	141
	Recommendation 3: Guarantee sufficient procedural rights when terminating residence	141
	Recommendation 4: Guarantee a right to an effective remedy against EU agencies	142
	Chapter 4 – Preventing Discrimination	143
4.1	Structural challenges and current trends	144
	Trend 1: Increasing sectoral divergence within the Europeanized fields of legal migration	146
	Trend 2: Contradictory policy choices in respect of the asylum status in the EU	148
4.2	Legal evaluation	149
	4.2.1 General framework: Three objectionable grounds of distinction among migrants (‘race’, nationality, immigration status)	149
	4.2.2 Specific issue: Privileged and non-privileged nationalities in EU migration law	157
	4.2.3 Specific issue: Differential treatment in respect of social assistance	160
	4.2.4 Specific issue: Differential treatment among beneficiaries of international protection	165
4.3	Recommendations	171
	Recommendation 1: Systematically ensure non-discrimination regarding social assistance	171
	Recommendation 2: Eliminate any discrimination among persons granted international protection	172
	Recommendation 3: Follow a legislative approach guided by the ‘Leitbild’ of status equality	173

Chapter 5 – Preserving Social and Family Ties	174
5.1 Structural challenges and current trends	176
Trend 1: Requirements of socio-cultural integration are used to deny family reunification	176
Trend 2: Settled migrants are subject to security-driven policies of expulsions	178
Trend 3: Efforts to enforce irregular migrants’ return disregard their social and family ties	182
5.2 Legal evaluation	185
5.2.1 General framework: protection of migrants’ family and social ties	185
5.2.2 Specific issue: integration requirements restricting family reunifications	190
5.2.3 Specific issue: protection of settled migrants’ right to abode	194
5.2.4 Specific issue: obligations to regularize irregular migrants	197
5.3 Recommendations	203
Recommendation 1: Prohibit integration requirements that amount to violations of the right to family reunification	204
Recommendation 2: Facilitate access to the status provided by the Long-term Residents Directive	204
Recommendation 3: Develop a comprehensive legislative framework on regularizations	205
Chapter 6 – Guaranteeing Socio-Economic Rights	208
6.1 Structural challenges and current trends	210
Trend 1: Policies to prevent movements of asylum-seekers within the EU build on planned destitution	210
Trend 2: Measures to enforce returns rely on creating ‘hostile environments’	212
Trend 3: Persistent pattern of exploitation of irregular migrants in informal labor relations	215

Table of Contents

6.2	Legal evaluation	217
6.2.1	General legal framework regarding human dignity of margizens	217
6.2.2	General legal framework regarding labor rights of irregular migrant workers	224
6.2.3	Specific issue: Human Rights limits to sanctioning ‘secondary movements’	228
6.2.4	Specific issue: Human Rights limits to sanctioning non-cooperation in return proceedings	232
6.2.5	Specific issue: Human Rights obligations to combat exploitation of irregular migrants	236
6.3	Recommendations	240
	Recommendation 1: Stop using restrictions to socio-economic rights to sanction ‘secondary movements’ of asylum seekers	241
	Recommendation 2: Provide equal treatment between asylum seekers and irregular migrants in respect of socio-economic rights	241
	Recommendation 3: Adopt a rights-based approach toward undocumented irregular migrants to better protect them from exploitation and forced labor	242
	Chapter 7 – Fostering Human Rights Infrastructure	243
7.1	Structural challenges and current trends	244
	Trend 1: Criminalization of civil society actors supporting migrants	244
	Trend 2: Populist pressure on judges protecting the rights of migrants	248
	Trend 3: Challenges to the ECtHR as a guardian of migrants’ Human Rights	251
7.2	Legal evaluation	253
7.2.1	General legal framework regarding Human Rights infrastructure	253

7.2.2	Specific issue: Criminalization of private actors involved in SAR activities and other migrants' Human Rights defenders in civil society	255
7.2.3	Specific issue: Requirements to strengthen migrants' Human Rights defenders	258
7.2.4	Specific Issue: Obligations and options to ensure the independence of judges deciding on migration law cases	260
7.3	Recommendations	263
	Recommendation 1: Strengthen migrants' Human Rights defenders by amending the Facilitation Directive and adopting consistent EU supporting policies	263
	Recommendation 2: Take a firm stance on violations of EU migration law	264
	Recommendation 3: Strengthen the role of the ECtHR as a 'migrants court' by acceding to the ECHR	265
	Summary	267
1.	Ensuring Access to Asylum	268
2.	Ensuring Liberty and Freedom of Movement	271
3.	Guaranteeing Procedural Standards	276
4.	Preventing Discrimination	279
5.	Preserving Social and Family Ties	282
6.	Guaranteeing Socio-Economic Rights	284
7.	Fostering Human Rights Infrastructure	287
	Annex: Panel of Experts	291

