Introduction

A Humanitarian Prelude

During the summer of 2015, Europe faced an unimaginable situation. UNHCR had earlier in the year reported that the number of displaced persons of concern to the organization had reached unprecedented levels with close to 60 million forcibly displaced persons globally, of whom 20 million were refugees and 2 million asylum seekers.[1] The massive displacement remained, however, abstract to most people in the West, even though fundraising campaigns were organized in support of the millions in encampments in the countries surrounding Syria, and horror images were shown on television of the atrocities committed by the black-hooded men of Islamic State in Iraq and Syria.

That summer, everything changed. Boats with refugees and migrants started to reach European shores in greater numbers and the high number of persons who perished crossing the Mediterranean became evident. The moment that changed everything came when the picture of the body of a small boy, Aylan Kurdi, was disseminated on social media and in the news.[2] The image of the three-year-old Syrian boy, who was found by the water's edge on a Turkish tourist beach drowned, face down, became the symbol of the failure of humanitarianism in Europe and effectively became the wake-up call for a region-wide spontaneous movement advocating for a greater influence of humanitarian considerations on immigration policies.

It can be argued that the image of Aylan was used by the media to manipulate public opinion and to personify the migration catastrophe with something most people can relate to, a small child who had been dressed by his mother in the morning in a red t-shirt and blue trousers, and was found dead in the evening. It can also be claimed that the media was only cynically catering for a market for suffering, something that would increase the rate of viewers for their channels or newspapers.[3] It is, however, the premise of this book that there is a perceived moral duty to admit, or refrain from expelling, certain categories of persons based on humanitarian values that are deeply entrenched in religious and philosophical traditions, and that this permeates immigration policies in many countries. As a result, if the immigration policies do not take this duty into account, there will be reactions by the public, as well as by politicians and lawmakers.

[1] United Nations High Commissioner for Refugees, *World at War, Global Trends. Forced Displacement in the World*, Geneva, 2015.
[2] 'Aylan's Story: How Desperation Left a Three-Year-Old-Boy Washed up on a Turkish Beach,' *Washington Post*, 3 September 2015.
[3] S. Ahmed, *The Cultural Politics of Emotions*, Routledge, 2004, 32.

Contrasted against these humanitarian considerations are, however, states' national interests in preserving resources, maintaining cultural values and the stability of their society. When the numbers of asylum seekers and migrants in Europe rose, politicians expressed concern about the implications of the neighbouring states' policies, closed their own borders and even renounced certain types of residence permits. The image of the arrivals, who first were considered as 'refugees', changed in the public perception and the media, to negative stereotypes of 'terrorists', criminals or persons came to Europe to exploit the generous social systems. So, does that mean that humanitarianism is not a real 'norm', that it does not have a value in itself and in relation to immigration policies? It is the premise of this work that humanitarian considerations serve as a counterbalance to the national interests of states and both need to be reflected in positive law regulating immigration in order to preserve the legitimacy of a modern European state.

Humanitarian Protection and a Humanitarian Solution

If you ask an international refugee lawyer 'who is entitled to international protection', the answer would probably be rather straightforward that persons encompassed by the prohibition of *refoulement* in the 1951 Convention relating to the Status of Refugees (hereinafter; the 1951 Convention) and international customary law or the prohibition of return in the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter; the CAT) or other international conventions, like the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, are entitled to international protection.[4] If you put the same question to a European lawyer, the answer would also extend to persons qualifying for subsidiary protection in the form of protection from expulsion in accordance with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter; the ECHR) and persons fleeing armed conflict as stipulated by the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted of 29 April 2004 which was recast in 2011 in EC Directive 2011/95/EU (hereinafter; the Qualification Directive). In other regions, other instruments may come into play, for example the 1984 Cartagena Declaration on Refugees, prohibiting *refoulement* on human rights grounds.

However, if you ask a layman, the proverbial person on the street, about what categories of foreigners should be allowed to remain in their country, most would automatically think of the old or sick, persons who had resided there for a long time or had family links to their country. Western media often show heart-breaking stories of how orphaned children are sent back to post-conflict countries, or how old persons are returned to countries without

[4] Paraphrasing A. Grahl-Madsen, 'The European Tradition of Asylum and the Development of Refugee Law', *Journal of Peace Research* 3, (1966), 278. See, for example, the precedent-setting case in Hong Kong, *C. H.* v. *Director of Immigration*, CACV 59/2010, Hong Kong High Court, 26 September 2011,which prompted the set-up of a Unified Screening Mechanism in 2014 for the assessment of claims for protection of *refoulement* based on torture as defined under the Torture Convention, torture or cruel, inhuman or degrading treatment or punishment under Article 3 of section 8 of the Hong Kong Bill of Rights; and/or persecution with reference to the principle of *non-refoulement* under Article 33 of the 1951 Convention Relating to the Status of Refugees.

facilities for the aged or impaired. These stories often provoke a storm of protests and outrage among the 'ordinary citizens' and a plea for the person to be allowed to stay. A plea which, more often than not, is adhered to by decision-makers and politicians.

Since the beginning of times, there has been an implicit element of compassion in customary and religious norms justifying the acceptance of, and assistance to, persons banned from their communities or forced to leave their homes for reasons of poverty, natural disasters or other reasons outside of their control.[5] Based on a general conviction that the alleviation of suffering is a moral imperative, many states have, in their domestic practice, insisted that certain categories of persons deserve protection and assistance because of a sense that this is what humanity dictates. Humanitarianism in this context is used to describe a discretionary form of generosity of a state, rather than a standard of obligation. The consequence of states using this argumentation technique is that it creates a perception in public opinion that those who are defined as needy or vulnerable are the ones who 'deserve' help. This has sometimes proven detrimental to those with clear legal entitlements to international protection but who are considered to be less needy. The humanitarian justification implies that there is not a legal entitlement for these categories to remain, which can be claimed as a right, but it is a question left to the discretion of the state.

What the humanitarian needs warranting a permit to stay may be, vary from country to country, as do the requirements for how to qualify for this status, but some of the most common categories pertain to, first, health reasons or other forms of vulnerability, for example age, family ties, or, second, practical or technical reasons why a person cannot be removed, such as lack of identity documents or the fact that there is no functioning airport in the country of origin and therefore it is not technically possible to return or, third, persons with international protection needs where there are legal obstacles to return, but where the entitlements to residence permits are less clear, such as, for instance, persons who are excluded from international protection but who cannot return because of the protection of human rights law, stateless persons, victims of trafficking or persons displaced because of environmental factors. The first group can perhaps be called 'humanitarian protection', while for the latter two groups, the issuance of residence permits on humanitarian grounds is rather a 'humanitarian solution'.

The practice of granting humanitarian protection is most prevalent in Europe; according to Eurostat, 77,530 residence permits on humanitarian grounds were issued in nineteen European countries in 2017.[6] However, the practice is more widespread since a number of countries had not provided any data. In 2017, Germany granted the highest number of

[5] Throughout the book there will be references to the concept of humanitarianism. Humanitarianism is to a large extent a subjective notion, which may mean different things to different persons; it may signify an ideology, possibly a philosophy, and a movement. For the purposes of this book, the concept of humanitarianism will only relate to the development of a norm of humanitarianism, which serves to justify states' practice to admit and assist aliens and not to the extraterritorial activities of states in other countries through humanitarian aid, etc. This being said, most of the theory relating to humanitarianism has been developed in the context of humanitarian assistance. Some schools of thought also apply the same concepts *ex analogia* to states' domestic practices in the field of social welfare, immigration control, etc.

[6] The countries are Austria, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Slovakia, Spain, Sweden, Switzerland and the United Kingdom, https://bit.ly/2Xa13Cr. Eurostat has only recently started to gather information about residence permits granted on humanitarian grounds since it was considered to be a form of national

permits (50,420), followed by Italy (20,015) and Switzerland (7,345). The use of humanitarian protection is not restricted to Europe, but legislation in countries such as Argentina, Australia, Brazil, Canada, Japan, the Republic of Korea, New Zealand, South Africa and the United States also provides for this additional possibility to allow persons without refugee claims to stay.[7] Humanitarian protection is used to complement other recognized protection statuses and may have different labels, such as, 'exceptional circumstances', 'humanitarian reasons', 'compassionate grounds' and 'individual circumstances'. In most cases, this type of residence permit is used to inhibit returns, but in some countries, it is a form of entry permit.

From a National Practice towards Transnational Law

The practice of granting humanitarian protection does not have a clear legal basis in international law but is considered to be a purely domestic practice governed by national law and practice. It was initially used to complement refugee status in many countries as an 'umbrella provision' which captured those not falling under the refugee definition, or not interpreted to fall within the refugee definition, or as a form of amnesty to larger groups of persons in a refugee-like situation. However, as will be shown in the following chapters, what started as national practice became transnational law, in two distinct stages; first, through the evolution of a common European asylum system within the EU and, second, through the interpretation of human rights law through the jurisprudence of the European Court of Human Rights (hereinafter; ECtHR). The main emphasis of this work is on European law and practice, but since the concept of humanitarian protection is also in use in other regions, most notably in the Americas, New Zealand and Australia and, to some

protection outside of the common European asylum system. Eurostat now explains that 'authorization to stay for humanitarian reasons' means a person covered by a decision granting authorization to stay for humanitarian reasons under national law concerning international protection by administrative or judicial bodies. It includes persons who are not eligible for international protection as currently defined in the Qualification Directive but are nonetheless protected against removal under the obligations that are imposed on all member states by international refugee or human rights instruments or on the basis of principles flowing from such instruments. Examples of such categories include persons who are not removable on ill health grounds and unaccompanied minors.

[7] Argentina: Law 25/971, Article 17 'temporary residence for humanitarian reasons', Australia: Migration Act 1958, sections 351 and 417, 'Ministerial discretion powers in migration matters', Brazil: Migration Act 2017, 'temporary residence permit for humanitarian reasons', Article 14(3), Canada: Immigration and Refugee Protection Act, SC 2001, c. 27, 1 November 2001, Articles 25, 68(1) and 69(2), 'request for humanitarian and compassionate considerations', 'stay of removal order', Japan: Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951) Law No. 43 of 2006, Art. 61(2)(2), 'special permission to stay', Republic of Korea: Law No. 11298 of 2012, Refugee Act, Art. 2(3), 'humanitarian status holder' refers to an alien for whom there are reasonable grounds to believe that their life or personal freedom may be egregiously violated by torture or other inhumane treatment or punishment or other circumstances, and who is given permission to stay by the Minister of Justice in accordance with the Presidential Decree, New Zealand: Immigration Act 2009 No 51, Articles 195(6–8) and 203 'appeal of deportation order on humanitarian grounds', South Africa, Immigration Act 2002, Act No 13, Article 31(2), the minister has discretion to allow entry, sojourn and is allowed to grant permanent residence permits, the US: Immigration and Nationality Act, §212(d)(5), 'humanitarian parole'. The Attorney General may at their discretion parole into the United States temporarily under such conditions as they may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.

extent, in other Asian countries, references will be made throughout also to these examples and varieties of humanitarian protection.

The first stage of harmonization and transformation of humanitarian protection into transnational law was through introduction of subsidiary protection in the EU, which incorporated two of the categories previously granted humanitarian protection in national practice, namely, persons fleeing indiscriminate violence in situations of internal or international conflict and those who were at risk of torture or inhuman or degrading treatment or punishment in their home countries. The EU recognized that there were other categories that were granted humanitarian protection in domestic practice, but decided to defer the harmonization of these groups until the next stage of the development of a common European asylum system.

Meanwhile, applications were lodged with the ECtHR to inhibit the deportation of persons whose request for residence permits had been turned down for persons with health concerns, unaccompanied children or persons with family, or other ties, to the host country. Consequently, jurisprudence developed, harmonizing the inhibition of removals on human rights grounds beyond the principle of *refoulement,* in particular through the interpretation of Article 8 on the right to respect for private and family life. The interpretation of a broader range of human rights provisions to inhibit returns corresponded to the existing national practice in many countries to grant residence permits on humanitarian grounds and constituted the second stage towards harmonization and legalization of humanitarian protection. In their national practice on humanitarian practice, some countries lay greater emphasis on certain aspects, for example France on medical cases, the United Kingdom on family links, but through the interpretation by the ECtHR of Article 8, there has been increased harmonization of the scope, standards of evidence and criteria for assessing violations of these rights. It can be questioned why Article 8, rather than Article 3, has increasingly become the new 'humanitarian provision' and the answer most probably lies in the fact that Article 8 allows for a proportionality assessment whereby the needs and rights of the individual can be measured against the interests of the state.

A Tertiary Protection Status

Humanitarian protection has evolved from an act of charity towards recognition as a legal entitlement through the regional frameworks in place primarily, in Europe. The question remains whether this is sufficient or whether the humanitarian imperative should be further regulated to protect it from situations where national interests, or perceived national interests, take precedent and humanitarian protection is curtailed. The final question posed in the book is therefore whether there is a need to introduce a 'tertiary protection' status in international or regional law to enhance the protection of the categories granted humanitarian protection in domestic practice. Humanitarian protection is used to regulate the status of groups who have stayed in the country for a long time, in exceptional situations, such as large-scale mixed movements, on an individual basis for a number of categories on personal compassionate grounds, which have slowly merged with human rights law but where there still remain gaps in terms of interpretation and at the discretion of governments. One argument in favour of also regulating humanitarian protection is that it is not only a European practice, but is also used in other jurisdictions and in order to achieve harmonization of legal definitions, standards of evidence and transparency, humanitarian

protection should perhaps be further regulated through integration into various international instruments.

Structure of the Book

Chapter 1 on 'The Ethical Dimension of Immigration Policies' starts with a description of the main strands of philosophy and schools of thought that have influenced contemporary immigration policies, including the perception of a duty to admit persons who are in a vulnerable situation, followed by how the theories and practice relating to delivery of humanitarian assistance in other countries have influenced states' domestic policies, and, in some countries, have developed into state ideology. Humanitarianism as a norm has had a significant impact on the development of immigration policies, albeit always in competition with national interests maintaining economic and political stability and foreign policy goals in the country. It has expanded from the original notion of compassion also to increasingly include notions of human dignity and justice.

Examples are given of how the commitment to humanitarianism has influenced the asylum policies of different countries explicitly or implicitly and how different societal institutions, such as the church, the judiciary, civil society and the media, have taken a stance to ensure the prevalence of the humanitarian norm. The Nordic countries, in particular, Sweden, Norway and Finland, the UK, France and Germany were chosen for these case studies since they had very distinct humanitarian traditions that influenced the development of a transnational European concept of humanitarian protection through the referral of cases to the ECtHR and its subsequent case law.

The book continues with Chapter 2, the historical description of the 'Evolution of Humanitarian Protection within Asylum Law' in international law and, in particular, through the development of the EU *acquis* on asylum. The chapter strives to explain the linkages between subsidiary protection and humanitarian protection within the EU framework. Chapter 3, 'Humanitarian Protection or Human Rights Protection?' considers the different categories that receive humanitarian protection in national practice because of health, age, family links or other ties to the host countries, examining the arguments for both humanitarian protection and human rights protection, based on international and European human rights law. Chapter 4, 'A Humanitarian Solution for Persons with Other Recognized International Protection Needs', examines the categories that have recognized protection needs according to international law, but where the legal sources are unclear or where it is not stipulated in the international legal framework what type of residence permits they are entitled to. In domestic practice, they therefore often receive humanitarian protection in order to secure a residence permit. However, also, for these categories – victims of trafficking, persons displaced because of environmental factors and stateless persons – there is a humanitarian justification, in addition to the legal, why states should grant protection. Finally, Chapter 5, 'Humanitarian Protection: From an Act of Charity towards a Legal Obligation?' further explores the additional uses of humanitarian protection in national practice, including the regularization of groups of irregular migrants and a discretionary response to individual needs, and whether there is a need for a tertiary protection status, based on the existing practice on humanitarian protection, to be recognized and enacted.