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## **Embassy Decision for Refugees instead of Illegal Smuggling RiBVerwG Prof. Dr. Harald Dörig**

### **A. Introduction**

At present, more than 51.2 million people are fleeing worldwide.<sup>1</sup> That's the highest number since the end of the second World War. The numbers continue to rise - inter alia due to the conflicts in the Middle East. One third of the refugees flee abroad, two-thirds are internally displaced within their own country. Main receiving countries are the neighbors of the sources of conflict. But also the number of refugees aspiring to come to Europe rises, the main host country is Germany. In 2014 a number of 173.072 new asylum seekers were registered in Germany, which were 57 per cent more than the year before.<sup>2</sup> For 2015, the Federal Ministry of the Interior expects a further significant increase to 400,000 or 600,000 applicants. Most refugees arrive with the help of smugglers, in 2014 no less than 170,000 as illegal migrants crossing the Mediterranean sea. More than 3,000 of them drowned. The smugglers earn 5000-7000 USD per person.<sup>3</sup>

In the following there shall be presented the legal foundations for the access of refugees to Europe, the criteria for granting protection and the jurisdictional rules on asylum procedures within the EU. Then, the author points to an alternative to perilous escape in the form of the Embassy decision in the countries of origin.

### **B. Legal basis for access of refugees to Europe**

The rights of refugees are governed by different legal sources. The international safeguards can be found in the Geneva Convention of 1951 (GC).<sup>4</sup> 145 countries worldwide joined the GC, including all EU Member States. The convention also forms the foundation ("cornerstone") for the well-established Common European Asylum System (CEAS) - as the ECJ has pointed out in several fundamental judgments.<sup>5</sup> Within this regulatory framework the criteria for granting refugee status are defined as well as the rights granted to asylum seekers and refugees. This includes in particular the prohibition to return a refugee to a country where his life or freedom is threatened on account of race, religion, nationality, membership of a particular social group or political opinion (prohibition of refoulement).

The Convention - as well as the asylum rules of the European Union and national legislation - does not grant a right of access to a particular shelter State, there must be only ensured that no refoulement takes place to a country of persecution.<sup>6</sup> This

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<sup>1</sup> Data provided by UNHCR on 10 June 2014

<sup>2</sup> German Federal Office for Migration and Refugees, Schlüsselzahlen Asyl 2014 (16. February 2015)

<sup>3</sup> German Federal Office for Migration and Refugees, Entscheiderbrief 2/2015, p. 6 et seq

<sup>4</sup> Geneva Convention for Refugees of 28 July 1951, BGBl. II 1951, p. 559

<sup>5</sup> See f.ex. ECJ, Judgment of 5 September 2012, C-71/11 und C-99/11, „Y und Z“, para. 47

<sup>6</sup> See Hailbronner, Asyl- und Ausländerrecht, 3. ed. 2014, p. 380 para. 1223; Noll in: Zimmermann, The 1951 Convention - Commentary, Oxford 2011, Art. 31 para. 1; diss. Eichenhofer, ZAR 2013, 135, 140

follows from the fact that the entering a country of refuge without a visa is considered to be illegal, even if life or freedom of the refugee is at risk (Art. 31 GC). In addition, the Convention imposes obligations on the States only concerning "refugees within their territories" (f.ex. in art. 4 GC), but not in relation to refugees outside their own territory. However, the obligation not to send back a person to the persecuting country exists already when applying for asylum at the State's border, because the State exercises territorial power already by rejecting a person at the border. And even if it is not yet clear whether the asylum seekers at the border fulfill the requirements for recognition as refugees, this can certainly not be ruled out. In this respect the prohibition of refoulement leads to a procedural protection also in support of an only potential refugee.

The European Convention on Human Rights (ECHR) grants the right of entry under Art. 3 para. 2 of the 4th Protocol to the ECHR only to nationals of the State of entry.<sup>7</sup> The European Court of Human Rights (ECtHR) has indeed affirmed for third country nationals no right of entry, but a responsibility to protect when they are rescued by vessels of the Member States on the Mediterranean. This protection obligation implies that the rescued persons may not be returned to countries where they face inhuman treatment within the meaning of Art. 3 ECHR.<sup>8</sup> The core reasoning of the ECtHR that a State exercises sovereignty by returning a person can be transmitted on refugee law. This means that the obligations of the GC exist vis a vis all asylum seekers, which are located on the territory of a signatory state or whose border forces or crews have been called for help. However, it does not exist in favor of those persecuted persons who are still residing in their countries of origin or in transit countries. Therefore, it is so far the goal of refugees striving for Europe, not to get stranded in North Africa, but to reach the territory of a European State.

The same legal situation exists for the EU asylum regulation, for the German constitutional right to asylum and for statutory national refugee law.

### **C. Criteria for granting asylum**

The criteria for granting asylum can be found in the German Asylum Procedure Act (AsylVfG) which implements the legal protection arising from EU law and from international law. With an amendment of 2013, development was completed, in which the German national law was brought into line with higher-ranking European Union law.<sup>9</sup> The Union regulations are based on the GC and complement and clarify it.

### **I. The EU regulatory framework**

By the Treaty of Amsterdam of 1997<sup>10</sup> EU law has transferred the asylum policy from the national sphere of competence to the the European Community. The new competence standards enabled the harmonization of national laws and thus formed the first phase of the Common European Asylum System.<sup>11</sup> On this basis, a Directive

<sup>7</sup> See Hoppe in: Karpenstein/Mayer, EMRK, 2012, Art. 3 AP IV para. 4; Eichenhofer, ZAR 2013, 135, 137

<sup>8</sup> ECtHR, Judgment of 23 February 2012 (GC), No 27.765/09, „Hirsi Jamaa/Italien“ paras. 81, 134 and 180

<sup>9</sup> Gesetz zur Umsetzung der Richtlinie 2011/95/EU of 28 August 2013, BGBl. I S. 3474

<sup>10</sup> Treaty of Amsterdam of 2.October 1997, BGBl. 1998 II S. 386; see Winkler in: Bergmann/Lenz, Der Amsterdamer Vertrag, 1998, p. 45 et seqq.

<sup>11</sup> See Hailbronner, Asyl- und Ausländerrecht, 3. ed. 2014, p. 43 et seqq.

on Minimum Standards for the Reception of Asylum Seekers (Reception Conditions Directive) was adopted in 2003, in 2004 a Directive defining the criteria for refugee status (the Qualification Directive) followed and in 2005 a Directive on asylum procedures (Asylum Procedures Directive). In 2003 the Dublin Regulation was adopted which determines the Member State within the EU which is responsible to decide on the asylum claim of the different applicants.

With the entry into force of the Lisbon Treaty in December 2009<sup>12</sup>, the second phase of the CEAS began. Based on Art. 78 para. 2 TFEU a higher degree of approximation of the laws shall now be achieved with the aim of creating a uniform asylum status valid throughout the Union.<sup>13</sup> On this basis, the three Asylum Directives named above have been recast<sup>14</sup> as well as the Dublin Regulation<sup>15</sup>. The Qualification Directive of 13 December 2011<sup>16</sup> defines the criteria for granting refugee status. If the requirements for refugee status are not met, subsidiary protection status may be granted pursuant to Art. 15 of the Qualification Directive, for example in the case of risks resulting from violence in an armed conflict.

## II. The conditions for granting protection

The term 'refugee' is defined specifically by the Qualification Directive, as is the case in the GC. Required is a well founded fear of persecution and a lack of protection against it in the home country. Persecution consists of an act of persecution (Art. 9) and a recognized reason for persecution, as exhaustively listed in the Directive (Art. 10). An act of persecution is defined as a severe violation of a core right, typically a serious violation of a fundamental human right as it is protected by the ECHR. This includes torture, serious inroads in life, limb and liberty, under certain conditions also interventions in religious freedom, sexual self-determination and political activity, as well as the deprivation of nationality. An act of persecution can consist in the accumulation of various discriminatory measures when they are sufficiently severe to affect the asylum seeker in a similar manner as in the case of serious violation of a core human right. These criteria have been adopted by the German legislator by using the same wording in Section 3 a AsylVfG.

While serious violations of life, limb, liberty and torture are among the already long-established acts of persecution, economic hardship or dangers through natural disasters do not suffice to justify refugee status. What is needed is always a violation of rights, based on a targeted action of an persecutor. The threat of such a violation must then be based on one of the reasons listed exhaustively in Art. 10 Qualification Directive, which are reasons of race, religion, nationality, membership of a particular social group or political opinion. Inherent in the act of persecution is always an element of discrimination, while protection against harm which is not based on an exclusionary behavior is granted by EU rules on the so-called 'subsidiary protection' and supplementary national prohibitions of deportation. For example, Art. 15 c

<sup>12</sup> Treaty of Lisbon of 13 December 2007, BGBl. 2008 II p. 1038, 1039

<sup>13</sup> This goal has not yet been achieved, see German Federal Administrative Court, Judgment of 17 June 2014 - 10 C 7.13 - para. 29

<sup>14</sup> Directive 2011/95/EU of 13 December 2011 (Recast of Qualification Directive), Directive 2013/32/EU of 26 June 2013 (Recast of Asylum Procedures Directive), Directive 2013/33/EU of 26 June 2013 (Recast of Directive on Reception Conditions)

<sup>15</sup> Regulation (EU) No. 604/2013 of 26 June 2013, ABI. EU 2013 L 180/31

<sup>16</sup> ABI. EU 2011 L 337/9

Qualification Directive grants protection against the specific harm inflicted by an armed conflict.

This means that f.ex. Syrians have great opportunities to be granted at least subsidiary protection in the EU Member States due to the prevailing civil war. When supplemented by an exclusionary feature which highly increases the danger for Christians living there, the conditions for recognition as a refugee are met in most cases. So in 2014 about 73 percent of the Syrian asylum seekers in Germany were granted refugee status and additional 15 percent subsidiary protection status.<sup>17</sup>

In addition to protection as a refugee or subsidiary protection authorized by the Qualification Directive, there are further national forms of protection. So Sweden grants national protection to those foreigners, who cannot return to their home country because of an environmental disaster.<sup>18</sup> And the German Residence Act grants complementary national protection to those persons, who in the case of deportation face a serious danger for life and limb - for example due to lack of access to food or because of worsening of a serious illness which cannot be adequately treated in the home country.<sup>19</sup>

#### **D. The responsibility for asylum procedures within the EU**

Since the EU is considered as a legal area with largely uniform standards for refugees and persons eligible for subsidiary protection the Dublin Regulation of 2013<sup>20</sup> (previously by the previous regulation of 2003) regulates which Member State is responsible for examining an asylum application. The asylum seekers thus cannot choose the country of refuge, but a particular EU Member State is assigned to be responsible to decide on the application, typically the State in which the asylum seeker has entered the EU for the first time (Art. 13). If the country of first entry cannot be found out, the state is responsible, where the foreigner has first applied for asylum (Art. 3 para. 2). Special rules apply, inter alia, for unaccompanied minors and applicants who have family members in a particular Member State.

An asylum seeker who has entered the EU in Greece or Italy, but went on traveling to Germany and applied for asylum there, would have to be sent back to these countries in order to perform the asylum procedure, if necessary forcibly deported to those countries. Since Germany is surrounded by EU neighboring countries, it should really be few asylum procedures there. The brunt would be expected for the Mediterranean countries. However, this is not the case. Rather, most asylum applications worldwide are filed and processed in Germany. During the year 2013 127.000 asylum seekers presented their request in Germany, but only 8,225 in Greece, 27,930 in Italy and 4,500 in Spain.<sup>21</sup> Also in relation to the population of all those countries Germany took significantly more asylum seekers than most Mediterranean countries. This is partly due to the fact that countries such as Italy were overwhelmed with the registration of refugees, so they further traveled in

<sup>17</sup> Reply of German Federal Government of 19 December 2014, BT-Drs. 18/3627, p. 17

<sup>18</sup> Chapter 4 Section 2 Nr. 3 Swedish Aliens Act of 25 September 2005; see also Brouers, ZUR 2012, 81, 85

<sup>19</sup> German BVerwG, Judgment of 22 March 2012 - 1 C 3.11 - BVerwGE 142, 179 para. 34; Judgment of 31 January 2013 - 10 C 15.12 - BVerwGE146, 12 para. 38

<sup>20</sup> Regulation (EU) No. 604/2013 of 26 June 2013, ABl. EU 2013 L 180/31

<sup>21</sup> German Federal Office for Migration and Refugees, Entscheiderbrief 7/2014, p. 2 on the basis of Eurostat data.

countries north of the Alps in large numbers, and when they lodged their application for asylum there it was no longer detectable, through which EU country they had come to the European north. But even if the use of the Eurodac database revealed a hit for another country and Germany subsequently requested these countries to take back those asylum seekers, which concerned over a total of 35,000 cases in 2014, in fact only about 4,000 asylum seekers could be transferred to the relevant Member State.<sup>22</sup>

One reason for the small number of transfers to the relevant Member States are administrative problems in takeover process, in particular in the Mediterranean countries. However, the second reason lies in the systemic deficiencies of the asylum systems of individual Member States, which prohibit the transfer from Germany for legal reasons. Such systemic shortcomings have been affirmed by the ECtHR for Greece in its judgment of January 2011.<sup>23</sup> The Court has come to the conclusion that the local asylum procedures have significant structural defects so that asylum seekers would have very little chance that their application would seriously be examined by the Greek authorities. In the absence of an effective remedy the asylum seekers were ultimately not protected against arbitrary deportation to their country of origin. In addition, the accommodation of asylum seekers is so insufficient that this would lead to homelessness or to housing in overcrowded rooms, in which the affected persons, sleeping on the bare ground, would have to drink water from the toilet and were given no opportunity to move to fresh air. The Court evaluated the accommodation of asylum seekers as a degrading treatment in breach of Article 3 ECHR, which excludes a transfer to Greece. Germany has responded to this judicature as early as 2011 with a ban on deportations to Greece.

However, Greece is not the only problem state. Civil right organizations have complained deficiencies in procedure and accommodation also in Italy, Malta, Hungary, Bulgaria and Romania, and individual chambers of administrative courts have pronounced a prohibition to transfer asylum seekers to these countries. The ECtHR has issued a limited transfer ban with regard to Italy, but so far not for other EU countries. For Italy, the Court has decided in November 2014 that the reception and accommodation of asylum seekers in Italy has faults, but these cannot be compared with the failure of the Greek system.<sup>24</sup> For the particular case of the intended transfer of a family with six minor children to Italy, however, the Court has obliged the transferring Member State to seek an individual assurance of Italy that the family will be properly accommodated and the family unit will be preserved. According to a following decision of the ECtHR this does not apply for the transfer of a single young man, whose delivery to Italy is not precluded by Art. 3 ECHR.<sup>25</sup>

Unlike the ECtHR, the ECJ in its judgment of December 2011 emphasized the 'principle of mutual confidence', which is an inherent principle of the Common European Asylum System and especially of the Dublin Regulation.<sup>26</sup> According to that principle it must be assumed that the treatment of asylum seekers in all Member

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<sup>22</sup> German Federal Office for Migration and Refugees, Aktuelle Zahlen zu Asyl, Februar 2015, p. 8

<sup>23</sup> ECtHR, Judgment of 21 January 2011 - No 30696/09 - „M.S.S./Belgien und Griechenland“ esp. paras. 223 - 332

<sup>24</sup> ECtHR, Judgment of 04 November 2014 (GC) - 29217/12 - „Tarakhel /Schweiz“ paras. 115 und 120 et seq.

<sup>25</sup> ECtHR, Decision of 13 January 2015 - 51428/10 - A.M.E./Niederlande, para. 35 et seq.

<sup>26</sup> ECJ, Judgment of 21 December 2011 - C 411/10 und C 493/10 - „N.S.“ para. 79

States complies with the requirements of the EU Charter on Fundamental Rights, the Geneva Convention and the ECHR. Nevertheless, not every infringement of a fundamental right by the Member State responsible can affect the obligations of the other Member States to comply with the common provisions. At issue here is 'the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System'.<sup>27</sup>

It is part of the rules of the CEAS that a protective status awarded in one EU Member State precludes the application for international protection in another Member State, at least if that is regulated by law in the Member State. In Germany this is the case since 1st December 2013 (Section 60 para. 1 sentences 2 and 3 Residence Act). The Asylum Procedures Directive of 2013 (Art. 33(2)(a)) expressly authorizes Member States to install such a regulation.<sup>28293031</sup>

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### **E. Introduction of an Embassy Decision for Refugees as an Alternative to illegal Smuggling**

As explained in Chapter B, neither the Geneva Convention nor EU law grant refugees an access to Europe. This is an expression of the principle of sovereignty of States that make their own decisions on the admission of third parties to their respective territories. As sufficient possibilities of legal access to Europe are missing, criminal smugglers exploit the plight of people who are looking for a way to a future without violence and persecution. To counteract this unsatisfactory situation, alternatives for legal entry to Europe have to be opened for the truly vulnerable. Suitable for this purpose appear external procedures for granting access to Europe under conditions which will be displayed below. Access to such procedures may be offered in the countries of origin and on transit routes of refugees.

According to the findings of Frontex, the European border management agency, more than 276,000 migrants have illegally crossed the EU's external borders in 2014, 170,000 of them took the dangerous route across the Mediterranean.<sup>32</sup> This is more than double compared to the year 2013. In addition, there exists a high number of unreported cases. Most persons concerned were lead to Europe by smugglers. More than 3,000 of them died on the dangerous sea route, nearly 5,000 were saved.<sup>33</sup> The illegal smuggling of migrants to destination countries such as Europe or North America has become a billion dollar business. People smuggling has become the most lucrative business of organized criminal gangs after the drug trade.<sup>34</sup> Public authorities try to fight people smuggling through increased prosecution of traffickers

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<sup>27</sup> Supra para. 83

<sup>28</sup> omitted

<sup>29</sup> omitted

<sup>30</sup> omitted

<sup>31</sup> omitted

<sup>32</sup> EU Kommission, Information of 13 January 2015: Smuggling of Migrants in Europe and the EU response, MEMO/15/3261

<sup>33</sup> See EU Fundamental Rights Agency, Legal entry channels to the EU for persons in need of international protection, FRA Focus 02/2015, p. 2

<sup>34</sup> See Nicola/Musumeci, Bekenntnisse eines Menschenhändlers. Das Milliardengeschäft mit den Flüchtlingen, 2015, p. 48; Winfried von Bredow, Schattenseite der Globalisierung, FAZ of 7 March 2015

and reinforced control measures.<sup>35</sup> But one cannot prevent human trafficking totally just as drugs and arms trafficking.

People confronted with violence and persecution in their home countries can be offered alternatives to illegal entry to Europe already on the basis of existing law. One suited measure is 'resettlement'. Under this procedure certain countries agree to accept a certain number of people from conflict areas without conducting a formal asylum procedure. So Germany has received a total of 2,500 Iraqi refugees from 2009 to 2010 and has in 2013 and 2014 agreed to accommodate 20,000 Syrian refugees whose admission now has been largely completed.<sup>36</sup> The persons to be resettled are recommended to the German Federal Office for Migration and Refugees by the UN High Commissioner for Refugees (UNHCR), by the German Laender or in special cases by the German Foreign Ministry or by the Federal Ministry of the Interior. The Migration Office makes the admission decision. The people first receive a temporary residence permit for two years, which is renewable and can lead to a permanent residence.

The second alternative is to carry out external procedures for examining the need for protection of refugees, as in processing centers in North Africa. It was proposed by the former German Federal Minister of the Interior Otto Schily in 2004, but in the end not realized.<sup>37</sup> Now a new attempt was made by the present German Minister of the Interior and discussed at the EU summit in March 2015.<sup>38</sup> The process centers could be run by UNHCR, which in fact, has many years of experience with the status determination of refugees. Many countries outside Europe have entrusted this task to UNHCR. In 2013, the UN agency has performed nearly 200,000 of such procedures.<sup>39</sup>

The implementation of external procedures for determining the protection needs of refugees in third countries outside Europe is so far in compliance with law, as asylum seekers are not entitled to access a country of refuge at their choice, and are not entitled to cross the frontiers to Europe.<sup>40</sup> However, such external processing must comply with the rule of law standards and it must be ensured that asylum seekers face no risks during the assessment procedure.<sup>41</sup>

External procedures can have different legal quality. They can be designed as real recognition procedures carried out from by the European Asylum Support Office (EASO)<sup>42</sup> in processing centers in selected African and Asian countries. The outcome of the procedure would then have binding effect within the EU. In the case of a negative decision future asylum applications of the persons concerned would be

<sup>35</sup> See EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM(2012) 286 final

<sup>36</sup> German Federal Office for Migration and Refugees. Humanitäre Aufnahme (1st March 2015), [www.bamf.de](http://www.bamf.de)

<sup>37</sup> The concept of the former Federal Minister of the Interior are summarized in a note (without date) which is published in: Bröcker, Die externen Dimensionen des EU-Asyl- und Flüchtlingsrechts im Lichte der Menschenrechte und des Völkerrechts, 2010, Anhang p. 2 et seqq.

<sup>38</sup> See Süddeutsche Zeitung of 14 November 2014 „Europäische Asylpolitik in Afrika“, FAZ of 13 March 2015 „EU streitet über Lager in Afrika“

<sup>39</sup> Michael Kagan, RSDwatch of 11 September 2014

<sup>40</sup> See Bröcker, above footnote 37, p. 242

<sup>41</sup> See Garlick, International Journal of Refugee Law 2006, 601, 611 et seqq.

<sup>42</sup> See Regulation (EU) Nr. 439/2010 of 19 May 2010 establishing a European Asylum Support Office, ABI. EU 2010 L 132/11

allowed only within the narrow framework of 'subsequent applications' (Art. 40 Asylum Procedures Directive). A crucial problem is that in the case of a binding effect of such procedures an effective legal protection against negative decisions would have to be offered, for example, before the court of first instance of the European Union pursuant to Art. 46 Asylum Procedures Directive. The ECtHR requires an effective, not necessarily judicial remedy for boat refugees rescued in the Mediterranean sea before they may be brought back to North Africa.<sup>43</sup> The method of a binding external processing would resemble the strongly criticized Australian practice of external asylum procedures, where asylum claims of boat people are processed and decided in centers on the island state of Nauru and in Papua New Guinea, that is in countries outside the national territory, according to the rules of the Geneva Convention ('Pacific Solution').<sup>44</sup>

Another legal quality have such external procedures which only offer a complementary path to the internal national protection systems. In this configuration, they encounter no fundamental concerns.<sup>45</sup> They could be carried out by UNHCR on behalf of the EU - f.ex. in Egypt, Tunisia or Morocco. A negative decision of UNHCR should then have no legal consequences for a recognition procedure within the EU Member States, if the asylum seekers should reach their territory. This model is obviously favored by the German Federal Ministry of the Interior. However, it remains the practical problem, that a consensus within the European Union is needed and a new infrastructure has to be built for the implementation of such processing centers in Northern Africa. In addition, many refugees will choose other escape routes than through those countries where EU processing centers would be set up.

Another alternative to illegal smuggling is the issuing of humanitarian visas to asylum seekers by German embassies and consulates. This alternative is legally without doubt and at the same time works within already existing organizational structures. Even under current law foreigners can be granted a residence permit for the purpose of admission from abroad for reasons of international law or on urgent humanitarian grounds (Section 22 German Residence Act). The entry is then possible on the basis of a national humanitarian visa. For the issue of such visas the German missions abroad are responsible. After arrival in Germany the visa is then converted into a residence permit.<sup>46</sup>

Germany has diplomatic missions in 148 countries around the world. The same applies to the other EU member states. It is therefore possible that asylum seekers contact the German Embassy in their home countries (in case of war in neighboring countries) and put forward their request for protection there. The Embassy staff will then - at least after an appropriate training - examine the merits of the protection claims in a manner comparable to the processing experience of UNHCR. When the request for protection is justified, a humanitarian visa may be issued for the purpose of entry to Germany. However, the issue of such visas - as the existing resettlement

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<sup>43</sup> ECtHR, Judgment of 23 February 2012 (GC), No 27.765/09, „Hirsi Jamaa/Italien“ paras. 205-207

<sup>44</sup> See the agreements of Australia with Nauru and Papua New Guinea of August 2013, accessible under: <http://www.dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Pages/people-smuggling-and-trafficking.aspx>

<sup>45</sup> Consenting Noll/Fagerlund/Liebaut, Study on the feasibility of processing asylum claims outside the EU, Brüssel 2002, p. 63 et seqq.; Bröcker, footnote 37 above, p. 317 et seqq.

<sup>46</sup> See Section 22.1.2 of the Allgemeinen VV zum Aufenthaltsgesetz of 26 October 2009, GMBI. 2009, 877

schemes - will realistically be only possible for certain quotas to be determined annually.

The possibility of obtaining protection through the German diplomatic mission should have no exclusionary effect on the performance of a regular asylum procedure in Germany. Rather, it represents a complementary access path to the granting of protection in Europe. However, a negative embassy decision because of lacking protection needs will open the foreigner's eyes for the fact that his chances of recognition in Germany are low. But the diplomatic mission may inform the persons concerned also on the possible need for skilled workers in Germany and show them ways of legal immigration for the purpose of taking up employment.

If the foreigner chooses, despite the negative decision of the embassy, to enter Germany illegally, the German authorities can in any case establish the identity of the person concerned on his visa file in the Central Register of Foreigners. However, for this purpose a change of the German law would be helpful, so that the Embassy may not only take the fingerprints of the applicant but also store them, as it is already prescribed for Schengen visas in the European Visa Information System (VIS).<sup>47</sup> The rules on the storage of fingerprints for national visas should be equalized to those of the Schengen visas. This counteracts the recommendation of people smugglers to asylum seekers to disguise their identity by destroying their passports and identity documents before arrival in the EU with the effect that it is difficult to transfer them back to their country of origin after a negative outcome of the recognition process.

France has already gained experience with the practice of issuing humanitarian visas. In 2010 it issued such visa to victims of the earthquake in Haiti and to Christians from Iraq. From 2012 to January 2015, France has also issued 1,400 appropriate visas to Syrians, so they could enter France and operate their asylum procedure there.<sup>48</sup>

## **F. Result**

Germany has become the main host country for refugees in Europe. Most of them come with the help of people smugglers. To fight the crime of people smuggling as for humanitarian reasons, it is necessary to open alternatives for a legal entry to those people who really need protection. To reach this goal, complementary offers for an access to Europe have to be made such as the granting of humanitarian visas by the German diplomatic missions, which are available in 148 countries around the world. The embassies examine the merits of the protection claim and issue humanitarian visas in case of a positive outcome of the assessment - within annually determined quota. The process could be initially tested by pilot projects in selected German embassies. The ability to operate a regular procedure of refugee status determination in Germany is not affected by the Embassy procedure.

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<sup>47</sup> See Art. 9 Nr. 6 of the Regulation (EC) No. 767/2008 of 9 July 2008, ABI. EU 2008 L 218/60

<sup>48</sup> European Fundamental Rights Agency, Legal entry channels to the EU for persons in need of international protection, FRA Focus 02/2015, p. 10

