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INTERNATIONAL COMMUNITY
LAW REVIEW 24 (2022) 335–357

International Community
Law Review

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# European Divergent Approaches to Protection Claims Based on the Eritrean Military/National Service Programme

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## Abstract

Drawing on data from the United Kingdom, Sweden, Germany, and Switzerland, this article shows that during the process of interpreting the refugee definition and applying it to the context of the Military/National Service Programme (MNSP), the definition is subject to various interpretations and applications. As a result, the treatment of similarly situated Eritrean asylum applications differs from one country to another. The article illustrates that asylum courts from the selected jurisdictions sideline relevant factors that classify the MNSP as slavery by failing to engage normatively with the international law definition of slavery. The findings suggest that a defective incorporation of international legal instruments in the assessment of protection claims based on slavery contributes to conflicting interpretations and applications of the refugee definition and can unduly de-legitimise Eritrean applications for refugee status as 'unwanted migrants'.

## Keywords

Eritrea – slavery – refugee definition – divergences – Europe

## 1 Introduction

On 3 October 2013, a boat carrying Eritrean refugees sank off the coast of Lampedusa, Italy, resulting in at least 368 deaths.[1] Similar events have since frequently repeated in the Mediterranean Sea. In 2021, the tally of migrant deaths was close to 2,050.[2] Some commentators have made an analogy between the contemporary Lampedusa tragedies and the 1781 *Zong* massacre, where the captain of a British slave ship threw 133 slaves overboard so he could claim them as insurance losses.[3] The fact that the Mediterranean Sea has become a place of abduction, corruption, *refoulement*, and death for refugees justifies the connection of forced Mediterranean crossings to the transatlantic slave trade.[4] Since 2012, Eritreans feature in the largest groups crossing to Europe.[5] Given that many of them flee from *slavery* in Eritrea, their subsequent transport conjures up even more the slave trade.[6]

Following the abolition of chattel slavery, the use of the terms 'modern slavery' to refer to separately defined practices developed rapidly while the legal definition of slavery set forth in the 1926 Slavery Convention receded into the background.[7] At the same time, other practices covered by the label 'modern slavery', such as human trafficking or forced labour, started to enjoy increasing attention from states worldwide, probably based on some erroneous notion that such forms of exploitation are closer to the contemporary world than slavery or that slavery has ceased to exist. The language of 'modern slavery' can be criticised for blurring the conceptual distinction between slavery and other forms of human exploitation, while it creates an unhelpful old/

1 This tragedy is known in Italy as the "Massacre of Lampedusa": Kevin Smets, Koen Leurs & Myria Georgiou, *The SAGE Handbook on Media and Migration* (2019) p. 149.

2 IOM, "Missing Migrant Project" <https://missingmigrants.iom.int/region/mediterranean>.

3 Yogita Goyal, *Runaway Genres: The Global Afterlives of Slavery* (2019) pp. 5, 6. More generally, Sharpe connects contemporary forced movements of African refugees with the slave ship: Christina Sharpe, *In the Wake: On Blackness and Being* (2016) pp. 15, 16, 21.

4 On this parallel, see generally Martin Lemberg-Pedersen, "Manufacturing Displacement: Externalization and Postcoloniality in European Migration Control", 5(3) *Global Affairs* (2019).

5 See for instance IOM, "Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence" (2017) p. 17; MSF, "Dying to Reach Europe: Eritreans in Search of Safety" (2016) p. 7.

6 The slave trade is defined in Article 1(2) of the Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 254 (1926 Slavery Convention) as "[…] *every act of* trade or *transport in slaves*", emphasis added.

7 See generally Jean Allain "The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: 'Slavery-like Practice'", 10 *Cahiers de la recherche sur les droits fondamentaux* (2012).

modern dichotomy that cause confusion about the factors that qualify as slavery today.[8] It further risks ignoring the normative relevance of the international law definition of slavery in identifying slavery cases, which becomes especially apparent in contemporary refugee jurisprudence. An in-depth analysis of jurisprudence on protection claims based on the Eritrean Military/National Service Programme (MNSP) shows that, by failing to engage normatively with the definition of slavery in the 1926 Slavery Convention, asylum courts bypass relevant factors that speak of a situation of slavery, thereby reaching defective and opposing outcomes.

In contrast to other human rights treaties, the 1951 Refugee Convention[9] has not created any mechanism with the competence to monitor states parties' compliance with the Convention, so there exists no specialised treaty body that would be able to provide a common interpretation of the refugee definition thereof. This definition, therefore, is subject to domestic judicial interpretation and application. Likewise, there is no supranational body entrusted with the supervision of the 1926 Slavery Convention; and, while prohibiting it, neither the European Convention on Human Rights (ECHR),[10] nor the Universal Declaration of Human Rights (UDHR)[11] or the International Covenant on Civil and Political Rights (ICCPR)[12] define or elaborate upon the meaning of slavery.[13] This adds a further layer of complexity to refugee

8 Annie Bunting and Joel Quirk, "Contemporary Slavery as More Than Rhetorical Strategy? The Politics and Ideology of a New Political Cause", in A. Bunting and J. Quirk (eds.), *Contemporary Slavery: Popular Rhetoric and Political Practice* (2017) pp. 10–17; Joel Quirk, "The Anti-Slavery Project: Linking the Historical and Contemporary" 28(3) *Human Rights Quarterly* (2006).

9 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 as amended by Protocol relating to the Status of Refugees (adopted 31 January 1967) 606 UNTS 267 (1951 Refugee Convention).

10 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR).

11 Universal Declaration of Human Rights (10 December 1948) GA Res 2177, UN Doc A/810 (UDHR).

12 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

13 The only body competent to resolve inter-state disputes on the interpretation or application of the 1926 Slavery Convention is the International Court of Justice (ICJ) at the request of any state party to the dispute: Article V of the Protocol amending the Slavery Convention signed at Geneva on 25 September 1926 (adopted 23 October 1953, entered into force 7 December 1953) 212 UNTS 17. Besides the ICJ, the African Court on Human and Peoples' Rights, ostensibly, is the only supranational tribunal that could provide an authoritative interpretation (albeit at regional level) of the provisions of the 1926 Slavery Convention to the extent that it has jurisdiction to deal with cases and disputes submitted to it regarding the interpretation and application of any relevant human rights instrument ratified by

status determination. Furthermore, while a substantial amount of research on human trafficking has been conducted from a refugee law perspective, slavery has gained greater attention from scholars in fields other than international refugee law. A scholarly account of slavery in terms meaningful to refugee decision makers thus remains to be done.

Taken together, the considerations above leave judges ample discretion to determine whether or not protection claims based on the MNSP fulfil the legal criteria for refugee status, i.e., a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".[14] As will become apparent, in the process of assessing protection claims based on the MNSP, the refugee definition is subject to conflicting interpretations. This has led to problematic variations among different European destination countries with respect to recognition rates. In the absence of supranational supervision and scholarly attention, the emerging jurisprudence concerning protection claims based on the MNSP/slavery remains largely confined in the shadows, away from scrutiny or critics. This article seeks to fill the existing gap in the scholarship.

As a starting point, Section 2 of this article briefly explores the application of the definition of slavery in the 1926 Slavery Convention to the MNSP. To contextualise the emergence of asylum jurisprudence on the MNSP, Section 3 first traces the changes (primarily since the 'crisis' of 2015) to policies towards Eritrean asylum applications in four European states, namely the United Kingdom (UK), Sweden, Switzerland, and Germany. The four countries were carefully selected based on two criteria: the higher number of applications lodged by Eritrean asylum applicants within said countries as compared to other European states, and the existence of both governmental policies on Eritrea and significant jurisprudential decisions on Eritrean asylum applications by higher asylum courts. Section 4 critically analyses case law pertaining to Eritrean asylum applications from the jurisdiction of the above-mentioned countries. There is insufficient space in this contribution to provide a full

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the concerned states. The same can be said in relation to the 1951 Refugee Convention. In addition, the Court of Justice of the European Union and the Inter-American Court of Human Rights are also capable to interpret the provisions of the 1951 Refugee Convention insofar as they have jurisdiction to interpret regional human rights instruments that make explicit reference to the 1951 Refugee Convention, namely the Charter of Fundamental Rights of the European Union, 2012 OJ C 326/391 and the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, respectively.

14 These terms refer to the definition of a refugee in Article 1A(2) of the 1951 Refugee Convention. In this contribution, the terms "protection claims" and "asylum applications" are used interchangeably.

analysis of existing jurisprudence on the topic; thus, the discussion focuses on how core features that classify the MNSP as slavery have been (mis)interpreted differently in the jurisprudence of the selected states. The remarkable difference in their interpretation makes the analysis well-suited. Such difference, as will be shown, depends on the manner and extent to which asylum courts engage with existing legal frameworks. The analysis in Section 4 ultimately illustrates that defective incorporation of international legal instruments can unduly de-legitimise Eritrean applications for refugee status as 'unwanted migrants'. Underpinned by international rules of Treaty interpretation, in Section 4 various arguments are put forward in support of a context-sensitive refugee definition in slavery cases.

## 2 Slavery in the Eritrean Military/National Service Programme

In talking about slavery in Eritrea, we should draw attention primarily to the findings of the UN Commission of Inquiry on Human Rights in Eritrea (COIE), established by the UN Human Rights Council on 27 June 2014.[15] Following a two-year investigation into human rights abuses in Eritrea, in its final report of 2016, the COIE concluded that the MNSP violates *inter alia* the 1926 Slavery Convention.[16] It found that, under such Programme, Eritrean officials exercise "powers attaching to the right of ownership over Eritrean citizens";[17] terms that correspond to the wording of the definition of slavery in the 1926 Slavery Convention.[18] The 1926 slavery definition has been replicated in subsequent international instruments, namely the 1956 Supplementary Convention on the Abolition of Slavery[19] and the 1998 Rome Statute of the International Criminal

15 On the adoption of the COIE and the (one-year) extension of its mandate, see <https://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/commissioninquiryonhrinEritrea.aspx>.

16 UN Human Rights Council, "Detailed findings of the Commission of Inquiry on human Rights in Eritrea" (8 June 2016) UN Doc A/HRC/32/CPR.1, para. 95.

17 Ibid., para. 234. On a discussion on the manner in which the COIE applied the slavery definition to the Eritrean context, see Sara Palacios-Arapiles, "The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination", 10(2):28 *Laws* (2021) pp. 5–10.

18 Article 1(1) of the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

19 Article 7(a) of the Supplementary Convection on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into

Court (Rome Statute),[20] becoming a widely accepted international norm, adhered to, formally, by 176 states.[21] Due to its almost universal acceptance and its presence in various treaties, the legal definition of slavery has been categorised as customary international law.[22]

Explaining how the MNSP falls within the parameters of the 1926 slavery definition, in the concluding paragraph, the COIE highlighted two factual elements relevant for classifying the MNSP as slavery. It noted that the MNSP is an indefinite service that serves primarily to (1) "boost the *economic development* of the country, profit state-endorsed enterprises" and (2) "maintain *control* over the Eritrean population".[23] The COIE's statement can be unpacked as follows. First, labour that is not of a 'purely' military character, but it is also used for the purposes of economic development, if involuntary and exacted under the menace of any penalty, amounts to forced labour contrary to international labour standards, particularly the 1930 Forced Labour Convention (No. 29) and the 1957 Abolition of Forced Labour Convention (No. 105),[24] and international human rights law.[25] Second, forced labour, if coupled with other factors, such

force 30 April 1957) 226 UNTS 3 (1956 Supplementary Convention on the Abolition of Slavery).

20 Article 7(2)(c) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

21 On a discussion on its contemporary relevance, see generally Jean Allain, "Contemporary Slavery and Its Definition in Law", in A. Bunting and J. Quirk (eds.), *Contemporary Slavery: Popular Rhetoric and Political Practice* (2017) pp. 44–63; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (2017) pp. 218–291.

22 *Prosecutor v Dragoljub Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, ICTY, judgment of 22 February 2001, paras. 520 and 539; *Prosecutor v Dragoljub Kunarac et al.* (IT-96-23 & IT-96-23/1-A), Appeals Chamber, ICTY, judgment of 12 June 2002, para. 124; *Prosecutor v Kaing Guek Eav alias Duch* (001/18-07-2007-ECCC/SC), Supreme Court Chamber, ECCC, appeal judgment of 3 February 2012, para. 131.

23 UN Human Rights Council, supra note 16, para. 234, emphasis added. These have been also echoed by the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations in its Observation (CEACR) – adopted 2017, published 107th ILC session (2018).

24 Article 2(1) of the 1930 Forced Labour Convention defines forced or compulsory labour as: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"; while Article 1(b) of the 1957 Abolition of Forced Labour Convention prohibits "using [forced] labour for purposes of economic development". On a discussion on how the MNSP falls under the international law definition of forced labour, see Gaim Kibreab, "Forced labour in Eritrea", 47(1) *Journal of Modern African Studies* (2009).

25 The European Court of Human Rights (ECtHR) has treated the Conventions cited above as a relevant source of interpretation of the prohibition of forced or compulsory labour

as the exercise of *control* over people in a way that significantly restricts or deprives them of their individual liberty, constitutes slavery under the terms of the 1926 Slavery Convention. It bears repeating, that at its core, the 1926 slavery definition reads as the exercise of "powers attaching to the right of ownership". At its simplest, the exercise of such powers, as consistently interpreted by the jurisprudence of international and hybrid criminal courts and tribunals, translate into the exercise of a "substantial degree of *control*" over people.[26] Through the exercise of control, the individual liberty of the 'slave' is restricted, which in turn enables the 'slaveholder' to, *inter alia*, enjoy, dispose, economically exploit, and/or use the 'slave' and/or their labour at their whim.[27] Importantly, control is not confined to physical control, but can be exercised through the use of force, threat of force, physical or *mental* coercion and even deception or false promises.[28] In the words of the International Criminal Court (ICC) Trial Chamber, it "cover[s] situations in which the victims may not have been

under Article 4(2) of the ECHR. See for instance *Van der Mussele v Belgium*, Application No. 8919/80, ECtHR, judgment of 23 November 1983.

26 See for instance *Duch* ECCC Appeal Judgment, supra note 22, para. 156, emphasis added.

27 The ICC Trial Chamber held that powers attaching to the right of ownership "must be construed as the *use*, *enjoyment* and *disposal* of a person who is *regarded* as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy". *Prosecutor v Germain Katanga* (ICC-01/04-01/07-3436), Trial Chamber II, ICC, judgment of 7 March 2014, para. 975, emphasis added. The Inter-American Court of Human Rights, in *Trabajadores de la Hacienda Brasil Verde v Brasil*, (Serie C No. 318), judgment of 20 October 2016, para. 271, observed that, within a phenomenon of slavery, "ownership" should be understood as *control* over a person that considerably restricts that person of their individual liberty with the intent to exploit them through the *use, management, benefit, transfer,* or *divestment* of that person (translated from the Spanish). The terms "economically exploited" were specifically used in *Duch* ECCC Appeal Judgment, supra note 22, para. 156. On an analysis of the exercise of control over Eritrean conscripts, see Sara Palacios-Arapiles, "The Exercise of Control over Eritrean Conscripts within the National Service", in M. van Reisen et al. (eds.), *Human Trafficking in Libya* (forthcoming 2022).

28 *Prosecutor v Dominic Ongwen* (ICC-02/04-01/15), Trial Chamber IX, ICC, judgment of 4 February 2021, para. 2712; *Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, ICC, judgment of 8 July 2019, para. 952; *Katanga* ICC Trial Judgment, supra note 27, para. 976; *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-T), Trial Chamber II, SCSL, judgment of 18 May 2012, para. 447; *Prosecutor v Issa Hassan Sesay et al.* (SCSL-04-15-T), Trial Chamber I, SCSL, judgment of 2 March 2009, paras. 199 and at 1325; *Prosecutor v Alex Tamba Brima et al.* (SCSL-04-16-T), Trial Chamber II, SCSL, judgment of 20 June 2007, para. 709; *Duch* ECCC Appeal Judgment, supra note 22, para. 150; *Kunarac et al.* ICTY Appeals Chamber, supra note 22, para. 119; ICTY Trial Chamber, supra note 22, paras. 542–543. For a detailed analysis, see Allain, supra note 21, pp. 37–44.

physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives".[29]

Therefore, while slavery and forced labour are two different legal categories in international law, they are not mutually exclusive; forced labour may in fact be indicative of a situation of slavery. Besides forced labour, the ICC, drawing on jurisprudence of other international and hybrid criminal courts and tribunals, has identified other relevant indicators of the existence of the exercise of powers attaching to the right of ownership over a person, i.e., slavery. These include, among others, control or restrictions of movement, measures to prevent or deter escape, restrictions on any freedom of choice, psychological control or pressure, cruel treatment, and the respective duration of such factors.[30] These factors, which also formed part of the COIE's factual assessment, characterise the MNSP.

Despite drawing *inter alia* on the 1890 General Act of Brussels relating to the African Slave Trade,[31] which stated that "[a]ny fugitive slave claiming, on the continent, the protection of the signatory powers, *shall* receive it [...]",[32] the 1926 Slavery Convention remained silent on the international protection needs of slaves. The 1951 Refugee Convention, for its part, makes no mention of slaves. Yet, given the use of slave labour on a wide scale in Nazi-Occupied Europe, slavery should at least have been on the minds of the drafters of the 1951 Refugee Convention.[33] Notwithstanding the absence of any mention of slavery in the 1951 Refugee Convention, slavery constitutes "persecution" if committed for one or more Convention reasons, namely "race, religion, nationality, membership of a particular social group or political opinion".[34] Indeed, there is greater consensus that violations of non-derogable rights, wherein the prohibition of slavery is included, reach the threshold of persecution under

29 *Ongwen* ICC Trial Judgment, supra note 28, para. 2713. Similarly: *Ntaganda* ICC Trial Chamber, supra note 28, para. 952; *Taylor* SCSL Trial Chamber, supra note 28, para. 420; *Sesay* SCSL Trial Chamber, supra note 28, para. 161; *Brima et al.* SCSL Trial Judgment, supra note 28, para. 709; *Kunarac* et al. ICTY Trial Chamber, supra note 22, para. 750.

30 As the ICC remarked, not all of these factors shall be met for a phenomenon to qualify as slavery: supra note 28.

31 See the Preamble of the 1926 Slavery Convention.

32 Article 7 of the General Act of the Brussels Conference relating to the African Slave Trade between Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Spain, Sweden-Norway, Turkey, the United States and Zanzibar (signed 2 July 1890) 173 CTS 293, emphasis added.

33 The Nazi persecutions influenced greatly the Convention's drafters who initially confined the refugee definition to refugees displaced "as a result of events occurring [in Europe] before 1 January 1951".

34 Article 1A(2) of the 1951 Refugee Convention.

the 1951 Refugee Convention.[35] Similar to the literature, commentary from the United Nations High Commissioner for Refugees (UNHCR) focuses on human trafficking. However, among its scarce references to slavery, UNHCR submits that slavery constituting a serious human rights violation, would be considered persecution under international refugee law.[36] Eritreans (and any other individual) fleeing persecution manifested in the form of slavery, thus, fall under the protection of international refugee law. Individuals fleeing slavery, moreover, shall receive immediate protection at sea. The UN Convention on the Law of the Sea provides in Article 99 that "[a]ny slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free".[37] On this basis, the Mediterranean Sea should not be a place of death but of freedom, and Europe, a place of refuge for Eritreans fleeing the MNSP.

## 3 Overview of the Changes to Policy on Eritrean Protection Claims

Parallel to the increase in the number of Eritrean arrivals in Europe in the period between 2014 and 2016 (which also coincided with the 'crisis' of 2015), the respective migration authorities in the UK, Sweden, Switzerland, and Germany restricted the asylum policies for this group, notwithstanding the lack of any tangible improvement in Eritrea. The first striking policy shift among the countries studied is that of the UK Home Office (the ministerial department of the UK responsible, *inter alia*, for immigration) in March 2015.[38] The Danish Immigration Service's fact-finding mission report on Eritrea published in December 2014 served as the principal basis for the UK Home Office's change

35 For instance, according to Article 9(1)(a) of the Directive 2011/95/EU (recast Qualification Directive), for an act to be considered an act of persecution within the meaning of Article 1A(2) of the 1951 Refugee Convention, an act must "be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]", among which the prohibition of slavery is embedded. See also James C. Hathaway, *The Law of Refugee Status* (1991) pp. 108–112.

36 UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Reissued Geneva" (2019) HCR/1P/4/ENG/REV. 4, para. 29.

37 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 394. This provision reproduces almost verbatim Article 27 of the 1890 General Act of Brussels, supra note 32.

38 Home Office, "Country Information and Guidance Eritrea: National (including Military) Service", 11 March 2015 <https://www.refworld.org/type,COUNTRYPOS,,ERI,552779c34,0.html>.

of policy, despite the fact that the former was never followed in Denmark due to the controversy behind its methodology.[39] The change in the UK Home Office policy position on Eritrea took place in 2015, the year in which the UK received the highest number of Eritrean applications so far: 3,756 applications, compared to 3,275 in 2014, and 1,431 in 2013.[40] Shortly after the UK Home Office revisited its policy, which in essence sustained that deserters or draft evaders of the MNSP *per se* were no longer at risk of persecution in case of return to Eritrea, the rate of first instance grants of refugee status for Eritrean applicants decreased to 24%, compared to 77% in the first quarter of 2015.[41] And the refusal rate rose from 8.3% in 2014, to 50.55% in 2015.[42] Arguably, the policy had a dissuasive effect on newcomers from Eritrea as, in 2016, the figure of new asylum applications from this group dropped to more than half (66%) in comparison to the previous year.[43]

For its part, the Swedish Migration Agency (*Migrationsverket*), which is the authority responsible for making first instance asylum decisions in Sweden, updated its 'legal comment' (*Rättslig kommentar*) on the examination of Eritrean asylum applications on 15 June 2016.[44] This resulted in an increase in first instance grants of subsidiary protection, from 2.3% in 2014 to 50% in 2016, while first instance grants of refugee status decreased from 97.4% in 2014 to 42.2% in 2016.[45] It bears recalling that the subsidiary protection regime was introduced in 2004 in the EU Qualification Directive to cover individuals who do not meet the definitional criteria of a refugee under the 1951 Refugee Convention but who nonetheless "would face a real risk of suffering

39 On a full analysis of the 2015 Home Office Policy and its over-reliance on the Danish Immigration Service report of 2014, see Sara Palacios-Arapiles, "The true human rights situation in Eritrea: the new UK Home Office Guidance as a political instrument for the prevention of migration", *Refugee Law Initiative Working Paper No. 14* (2015).

40 In addition, in the year ending March 2015, Eritreans represented the largest number of asylum applications in the UK: UNHCR's Refugee Data Finder <https://www.unhcr.org/refugee-statistics/>. Statistics on asylum from 2020 onwards are not considered in this contribution. It is expected that, due to the ongoing armed conflict in the Tigray Region of Ethiopia that erupted in 2020, asylum applications lodged by Eritrean citizens would be based on additional grounds than the MNSP alone.

41 Ibid.

42 Ibid.

43 Ibid. In addition, many Eritrean unaccompanied children were adversely affected by the drop in the grant rate as they were excluded from being admitted to the UK under the 'Dubs' amendment scheme.

44 SR 16/2016.

45 UNHCR's Refugee Data Finder, supra note 40.

serious harm" if returned to the country of origin.[46] Most EU member states, however, have opted for subjecting beneficiaries of subsidiary protection to less preferential treatment than to holders of refugee status; the most glaring example being the difference in the duration of residence permits.[47] The Swedish Migration Agency's revisited preference for subsidiary protection over refugee status was based on the perceived absence of a causal nexus between persecution in Eritrea and any of the 1951 Refugee Convention grounds (i.e., "race, religion, nationality, membership of a particular social group or political opinion"), which contrast sharply with the Agency's position in its previous 'legal comment' of 2013.[48] The policy change coincided with the entry into force of a temporary law on 21 June 2016 (2016:752), under which family reunification was provisionally suspended for beneficiaries of subsidiary protection, while residence permits ceased to be permanent and became temporary (3-year permits for refugees and 13-month permits for subsidiary protection beneficiaries).[49]

Just a week after the Swedish Migration Agency published its 'legal comment' on Eritrea, the authority in charge of first instance asylum decisions in Switzerland – the Swiss State Secretariat for Migration (SEM) – issued a report in which illegal exit from Eritrea and draft evasion (as distinct from desertion) ceased to be considered motives of persecution.[50] Two months later, in

46 Article 2(f) of the Directive 2011/95/EU (recast Qualification Directive). For detailed analysis, see Violeta Moreno-Lax and Madeline Garlick, "Qualification: Refugee Status and Subsidiary Protection", in S. Peers et al. (eds.), *EU Immigration and Asylum Law* (2nd ed., 2015).

47 See generally ECRE, "Asylum on the Clock? Duration and review of international protection status in Europe", June 2016 <https://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-Asylum-on-the-Clock-duration-and-review-of-international-protection-status-in-Europe_-June-2016.pdf>.

48 In the previous legal comment (RCI 16/2013), deserters and evaders of the MNSP were considered to fall within the protective scope of Article 4(1) of the Swedish Aliens Act of 2005 (which corresponds to the refugee definition in Article 1A(2) of the 1951 Refugee Convention) on the basis that desertion/evasion was construed as a political stance in line with country of origin information.

49 The law applied retroactively to persons seeking asylum as of November 2015 and remained in force until July 2021. While temporary residence permits remain today (see Chapter 5, Section 2b of the Swedish Aliens Act 2005:170 as modified on 20 July 2021), the ban on family reunification for subsidiary protection beneficiaries discontinued in 2019.

50 SEM, "Focus Eritrea Update Nationaldienst und illegale Ausreise", 22 June 2016 <https://www.refworld.org/docid/57722336f5.html>. The report was updated on 10 August 2016, and it is available at <https://www.sem.admin.ch/dam/sem/de/data/internationales/herkunftslaender/afrika/eri/ERI-ber-easo-update-nationaldienst-d.pdf.download.pdf/ERI-ber-easo-update-nationaldienst-d.pdf>.

November 2016, the former European Asylum Support Office (EASO)[51] published a country of origin information report on "national service and illegal exit" in Eritrea which the SEM itself authored.[52] Paradoxically, most of the sources cited therein, including the COIE reports, pointed to arbitrary punishment for illegal exit as well as for both desertion and draft evasion from the MNSP.[53] The SEM report is by no means an isolated attempt to curtail protection for Eritreans, rather it is placed along a continuum of various measures that have reduced access to refugee status to a bare minimum for those fleeing the MNSP. For the past decade, Eritrea has been the top country of origin of asylum applications in Switzerland; as a result, the presence of Eritreans in the country has been the focus of intense political debates. Almost certainly, the political climate played a role in the substantive changes introduced in Article 3 of the Swiss Asylum Act (AsylA) which defines who is a refugee. In December 2012, the refugee definition in Article 3 of the Swiss AsylA was modified to exclude from refugee status claims grounded on refusal to perform military service;[54] an amendment that is commonly referred to as "*Lex* Eritrea" in the political domain. Also, a new paragraph was added to Article 3, whereby asylum claims based on the applicants' conduct following their departure (such as leaving a country where this conduct is penalised or draft evasion as opposed to desertion) do not qualify for refugee status.[55] All together has resulted in an increase in first instance grants of complementary protection (referred to as 'temporary protection' in the AsylA, or so-called 'F permit') over refugee status (so-called 'B permit')[56] for Eritrean asylum applicants.[57] For instance, in 2019, the refugee recognition rate for Eritrean applicants was only 25%, while in 2013 was 76%. More worryingly, in 2019, 673 grants of temporary

51 On 19 January 2022, the European Union Agency for Asylum (EUAA) replaced EASO.

52 EASO, "EASO Country of Origin Information Report: Eritrea National service and illegal exit", November 2016 <https://euaa.europa.eu/sites/default/files/publications/COI-%20Eritrea-Dec2016_LR.pdf>.

53 Ibid., pp. 25–28.

54 Article 3(4) of the Swiss AsylA.

55 Article 3(3) of the Swiss AsylA.

56 On the differences between both permits, see generally SEM, "Brief Overview", 2019 <https://www.sem.admin.ch/dam/sem/en/data/publiservice/publikationen/info-flue-va/info-flue-va-en.pdf>.

57 See for instance Dina Barder "Who Ought to Stay? Asylum Policy and Protest Culture in Switzerland", in S. Rosenberger, V. Stern & N. Merhaut (eds.), *Protest Movements in Asylum and Deportation* (2018) pp. 71–73.

protection were lifted following a re-examination of about 3,000 Eritrean asylum cases by the SEM,[58] while the refusal rate tripled in comparison to 2016.

Also in 2016, the Federal Office for Migration and Refugees (BAMF), which is the central migration authority in Germany, amended the 'country of origin guidelines' (*Herkunftsländer-Leitsätze*) on Eritrea.[59] The amendment coincided with the period in which the number of Eritrean asylum applications in Germany reached its highest point to date; 18,854 applications compared to 10,876 the previous year (2015), or to 3,616 in 2013 and 3,168 in 2021. The policy shift resembles the Swedish one discussed earlier insofar as the rationale underpinning the change was the absence of a causal nexus between the persecution element and the reason for persecution in cases where applications are 'solely' based on desertion or draft evasion from the MNSP.[60] On 18 May 2017, the BAMF published again new country of origin guidelines on Eritrea. In the revisited version a distinction was made between desertion and draft evasion from the MNSP: while deserters would generally meet the definitional criteria of a refugee under Section 3 of the German Asylum Act (*Asylgesetz*) (which reproduces the definition of a refugee in the 1951 Refugee Convention),[61] draft evaders would only fall under the subsidiary protection regime.[62] This new understanding mirrors that of the SEM discussed above. Both amendments introduced by the BAMF resulted in a higher number of grants of subsidiary protection over grants of refugee status if compared to previous years. While in 2015, refugee status was granted in more than 95% of the Eritrean cases at first instance, in 2017 this figure dropped to 54.5% and in 2018 to 39.4%.[63] Subsidiary protection grants consequently rose from 3.9% in 2015 to 53.7% in 2018.[64] The policy change received wide criticism from national NGOs and some MPs for being "politically motivated".[65] They argued that, in reality, the

58 SEM, "Statistique en Matière d'asil", 31 January 2020 <https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/2019/stat-jahr-2019-kommentar-f.pdf>, p. 19.

59 Pro Asyl, "In Eritrea hat sich nichts verändert – umfassendes Urteil aus Großbritannien mit Strahlkraft", 27 October 2016 <https://www.proasyl.de/news/in-eritrea-hat-sich-nichts-veraendert-umfassendes-urteil-aus-grossbritannien-mit-strahlkraft/>.

60 Ibid.

61 Section 3 defines a refugee – as explicitly stated in its first paragraph – "within the meaning of" the 1951 Refugee Convention.

62 Communication with Jelena Bellmer from Pro Asyl.

63 UNHCR's Refugee Data Finder, supra note 40.

64 Ibid. In parallel, the BAMF likewise changed its policy towards Syrian asylum applications leading to similar results. See AIDA, "Country Report: Germany", 2018 <https://www.asylumineurope.org/sites/default/files/report-download/aida_de_2018update.pdf>, p. 65.

65 Informationsverbund, "Rechtsprechungsübersicht: Welcher Schutzstatus ist bei Entziehung vom Nationaldienst in Eritrea zu gewähren?", 21 June 2019 <https://www.asyl.net/

number of beneficiaries of subsidiary protection increased as a result of the family reunification rights attaching to that status getting restricted, owing to a legislative change of March 2016 whereby Germany temporarily suspended family reunification for that group.[66] Moreover, like the Swedish asylum legislation, the German Asylum Act also creates a distinction between residence permits, one-year permits for subsidiary protection beneficiaries and 3-year permits for refugees.

## 4 Critical Comparative Analysis of Judicial Decisions on Protection Claims Based on the Eritrean Military/National Service Programme

The (in the author's opinion) unsettling scenario described in Section 3 necessarily prompted Eritrean citizens to challenge, on appeal, negative decisions on their applications for refugee status. And yet, the jurisprudence that subsequently emerged – as will be explained shortly – is far from uniform.

On the one hand, courts of last resort in asylum matters in the UK and Sweden played an important role in overturning the policies adopted by their respective migration authorities bringing about further changes in policy and national practice. First, the UK Upper Tribunal Immigration and Asylum Chamber (UTIAC) and, thereafter, the Swedish Migration Court of Appeal (*Migrationsöverdomstolen*) found service in the MNSP to constitute persecution on the Convention ground of (imputed) political opinion, to the extent that the Eritrean government regards it as a "patriotic" duty[67] or a "political project".[68] The Swedish Migration Court of Appeal went further in its explana-

view/detail/News/rechtsprechungsuebersicht-welcher-schutzstatus-ist-bei-entziehung-vom-nationaldienst-in-eritrea-zu-g/>.

66 Ibid. See also Council of Europe, Commissioner for Human Rights, "Realising the right to family reunification of refugees in Europe", June 2017 <https://www.refworld.org/docid/5a0d5eae4.html>, p. 14. Since August 2018, "this suspension has been partially lifted for a monthly quota of 1,000 family members" of beneficiaries of subsidiary protection: Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, COM/2019/162 final, 29 March 2019, pp. 3, 4.

67 *MST and Others* (*national service – risk categories*) *Eritrea CG* [2016] UKUT 00443 (IAC) (*MST and Others*), para. 430. For a full analysis of this case, see Palacios-Arapiles, supra note 17, pp. 10–18.

68 UM 7734-1, 21 June 2017 (MIG 2017: 12). An unofficial English translation of some excerpts of the case was prepared by UNHCR and is available at <https://www.refworld.org/pdfid/59ad22b24.pdf>.

tion to hold that the ground of "political opinion" covers situations where an individual will face a risk of "severe punishment" for having left their country without permission;[69] "severe" being one-year imprisonment.[70] It added that such situations ought to be construed in the light of the right to leave one's own country under both the UDHR and the ICCPR.[71] Further, while neither of the two courts expressly pronounced on the ground of "membership of a particular social group", the UTIAC and the Swedish Migration Court of Appeal specified the various groups that, on return, face a real risk of persecution, which in essence include people of or approaching draft age.[72] In other words, both courts brought Eritrean deserters and draft evaders within the protective scope of the 1951 Refugee Convention. As a result, the UK Home Office and the Swedish Migration Agency updated their respective policies on Eritrea discussed in Section 3 to reflect the judicial decisions issued by the corresponding courts.[73] Consequently, grants of refugee status for Eritrean applicants have prevailed over those of subsidiary protection, or rejections ever since. For instance, in the UK, 95.3% of the total decisions made in 2019 were grants of refugee status.[74]

On the other hand, contrary to the UTIAC and the Swedish Migration Court of Appeal, higher courts in Germany and Switzerland gave the domestic measures adopted therein more leverage. In Germany, according to various first (*Verwaltungsgericht* (VG)) and second instance or so-called higher administrative courts (*Oberverwaltungsgericht* (OVG) or *Verwaltungsgerichtshof* (VGH)), the obligation to perform MNSP cannot be based on any of the Convention grounds.[75] They are generally of the opinion that, to the extent that all conscripts are affected by the same penalties and treatment, these cannot be

69 It did so by reference to the preparatory works of the previous Swedish Aliens Act of 1980, ibid.

70 The Swedish Migration Court of Appeal recalled a decision of 1994 by the extinguished Immigration Appeals Board (which up to 2006 acted as the highest authority on asylum matters in Sweden) wherein the Board had considered that *one* year's imprisonment for having committed such conduct "must be regarded as a severe punishment", ibid.

71 In doing so, it adhered to the position of the Drafting Committee of the previous Aliens Act of 1980, ibid.

72 The upper age limit of which is, according to the UTIAC, 54 for men and 47 for women: *MST and Others*, p. 156.

73 Migrationsverket, "Rättslig kommentar angående prövningen av ansökningar om asyl från personer från Eritrea efter Migrationsöverdomstolens avgörande MIG 2017:12", 29 June 2017, SR 27/2017.

74 UNHCR's Refugee Data Finder, supra note 40.

75 Yet, some first instance courts depart from it granting both desserts and draft evaders refugee status. For an analysis of the disparities of German jurisprudential decisions on Eritrean asylum applications, see Simone Rap, "Kein Flüchtlingsschutz bei

attributed any political dimension, even when the MNSP is deemed, in their words, as a "political project", nor be considered discriminatory so as for deserters or draft evaders to fall within the meaning of "membership of a particular group".[76] The Swiss Federal Administrative Court (FAC), for its part, rendered a judgment in 2017 in which it endorsed the SEM's position discussed earlier; thus, Eritrean asylum applications based 'solely' on illegal exit do not longer qualify for refugee status.[77] In 2018, the FAC rendered another judgment wherein it held that (re)assignment to the MNSP, in itself, is not capable of making a removal "unreasonable".[78] This judgment has influenced German jurisprudence.[79] The case law studied reveal that German courts adhered to foreign decisions when the latter displayed judicial restraint, yet with little or no concrete argumentation as to the rationale underpinning their choice. Not surprisingly, the judicial developments in Germany and Switzerland have given rise to an increase of not only grants of subsidiary/temporary protection but also rejections on appeal.[80]

Most of the judicial decisions on Eritrean applications surveyed for this research agree with the COIE that the MNSP is an *indefinite* service primarily used: (1) for the purposes of the country/government's *economic development* and (2) to maintain *control* over the Eritrean population. As discussed in Section 2, both factors combined have an autonomous meaning in international law: *slavery*. Nonetheless, asylum courts have (mis)interpreted both factual elements differently, thereby reaching conflicting conclusions. For instance, the UTIAC and the FAC considered the MNSP to fall within the meaning of forced labour (work exacted "under the menace of any penalty and for which the said person has not offered himself voluntarily"),[81] and outside the

Entziehung vom eritreischen Nationaldienst? Eine kritische Auseinandersetzung mit der Rechtsprechung", 8(9) *Asylmagazin* (2019); Informationsverbund, supra note 65.

76 Higher Administrative Court of Hessen, Case 10 A 1939/20.A, 23 February 2021 and Case 10 A 797/18.A, 30 July 2019; Higher Administrative Court of Saarland, Case 2 A 7/18, 21 March 2019; Higher Administrative Court of Hamburg, Case 4 Bf 546/19.A, 2 September 2021, Case 4 Bf 205/18.A, 1 December 2020 and Case 4 Bf 186/18.A, 21 September 2018; Higher Administrative Court of Münster, Case 19 A 1857/19.A, 21 September 2020.

77 Case D-7898/2015, 30 January 2017.

78 Case E-5022/2017, 10 July 2018, para. 6.2.5. For a full discussion of this case, see Palacios-Arapiles, supra note 17, pp. 18–22.

79 See for instance Administrative Court of Gießen, Case 6 K 8852/17.GI. A, 12 June 2020, and Higher Administrative Court of Hamburg, Case 4 Bf 106/20.A, 27 October 2021.

80 UNHCR's Refugee Data Finder, supra note 40.

81 The UTIAC took the definition form the *Van Der Mussele* case (supra note 25), which in turn reproduced the forced labour definition in Article 2(1) of the 1930 Forced Labour Convention. *MST and Others*, para. 229.

scope of the exceptions to forced labour in Article 4(3) of the ECHR.[82] In particular, both courts considered that, to the extent that the MNSP is used for the purposes of *economic development* (and thus, not exclusively confined to military duties), it cannot benefit from the exclusion criterion under Article 4(3)(b) of the ECHR, i.e., a service of military character *only*.[83] For the purposes of interpreting the latter provision, the UTIAC and the FAC attached significance to the International Labour Organisation (ILO)'s framework, specially the prohibition of forced labour "for the purposes of *economic development*" in Article 1(b) of the 1957 Abolition of Forced Labour Convention. Yet, while both courts agreed that the MNSP falls within the meaning of forced labour, they reached starkly opposing outcomes. Although derogable, for the UTIAC, (re)assignment to the MNSP would constitute persecution in the terms of the 1951 Refugee Convention and amounts to a "flagrant breach" of the right to be protected against forced labour since the "Eritrean system effectively extinguishes that right".[84] In reaching the latter point, the UTIAC had recourse to the jurisprudence of the European Court of Human Rights (ECtHR), which, in the UTIAC's words, has not yet applied a "flagrant denial test" in extraterritorial cases pertaining to forced labour.[85] In disagreement with *MST and Others*, the FAC gave weight to the derogable nature of the prohibition of forced labour to apply a flagrant test. To substantiate its position, the FAC argued that the MNSP needs to be understood in the context of the "Eritrean socialist economic system" and the government doctrine of "self-reliance".[86] This, in essence, contradicts the FAC's own argument that the MNSP does not fall under the exclusion criterion in Article 4(3) of the ECHR insofar as it is used for the country's economic development. The FAC's ruling led to a restrictive approach.[87] Indeed, following this decision, in Switzerland, the MNSP alone is no longer 'enough' to

82 For the purposes of Article 4(3) of the ECHR, "forced or compulsory labour shall not include: … (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations".

83 *MST and Others*, para. 401; Case E-5022/2017, 10 July 2018, para. 6.1.5.1.

84 *MST and Others*, para. 425. In the case of non-derogable rights, a "mere" violation is enough to trigger non-removal obligations, while in the case of derogable rights, the violation must be "flagrant".

85 Ibid., para. 393.

86 Case E-5022/2017, 10 July 2018, para. para. 6.1.5.2. Moreover, such claim is factually wrong; the Eritrean government benefits from foreign investment and funding from the EU, among other sources.

87 Ibid., para. 6.1.5.1.

qualify for international protection (either refugee status, or temporary protection), nor to be protected against removal.

The Administrative Court of Gießen (Germany), for its part, did not consider forced labour used for Eritrea's *economic development* (which, in its words, reads as "indefinite" "low-paid" labour for the "reconstruction of the country" and "the state") as an important indicator of the existence of a violation of the prohibition of forced labour under Article 4(2) of the ECHR.[88] On the contrary, it considered the MNSP to benefit from the exclusions or exceptions under Article 4(3) of the ECHR on the basis that it is used *inter alia* for the "reconstruction of the country". However, such type of work or service is not enumerated within any of the types permitted under Article 4(3) of the ECHR. The Court of Gießen added that, even if the MNSP were to be regarded as forced labour, the applicant needed to establish a "serious risk of a flagrant breach" of the prohibition of forced labour. In this regard, the Court of Gießen reasoned that "low-paid *work for the state* for an *indefinite* period" does not meet the threshold of a flagrant breach of Article 4(2) of the ECHR.[89] In doing so, the Court only paid attention to the FAC's decision discussed above, borrowing also from it the (flawed) argument that the MNSP is part of a "socialist economic system of self-reliance", presumably to confirm that the preferred outcome had a legal foundation. By reference to the decision of the Administrative Court of Gießen, the Higher Administrative Court of Hamburg (Germany) argued that the public works performed within the MNSP are "primarily intended to serve the general interest of promoting Eritrea's *economic development*".[90] It did so to reinforce its claim that the civil duties performed within the MNSP benefit from the exclusion criterion in Article 4(3)(d) of the ECHR, that is, "work or service which forms part of normal civic obligations". Consequently, and like the FAC, both German courts considered removal to Eritrea to be "reasonable".

Regarding the second factual element, i.e., the exercise of *control* over people, the UTIAC, for instance, considered it of relevance within its assessment of the exclusion in Article 4(3)(d) of the ECHR (normal civic obligation). The UTIAC was of the opinion that the MNSP cannot be considered to meet the exclusion criterion of the latter provision insofar as the MNSP "is a way of *controlling* the

88 Case 6 K 8852/17.GI. A, 12 June 2020.

89 Ibid., emphasis added. In its assessment of Article 3 of the ECHR, despite referring to reports from EASO and the Swiss Refugee Agency that report to a large extent torture and inhuman prison conditions in Eritrea, the Court of Gießen relied on a report by the German Federal Foreign Office, according to which there is "no indication to what extent and how systematic torture occurs".

90 Case 4 Bf 106/20.A, 27 October 2021, para. 109, emphasis added.

population".[91] The Swedish Migration Court of Appeal also attached relevance to the second factual element, albeit for different purposes than the UTIAC. The Swedish Court of Appeal explained that the policy of criminalising exit from the country is connected to the "Eritrean government's desire to *control* National Service conscripts".[92] It did explain so to reinforce its finding that persecution within the Eritrean context is based on the ground of imputed political opinion. Several Higher Administrative courts in Germany have interpreted *control* over people to mean the opposite. The Higher Administrative Courts of Hessen,[93] Saarland,[94] Hamburg,[95] and Münster[96] (Germany) have largely relied on the fact that the MNSP serves to *control* the Eritrean population together with the fact that the Eritrean government uses the MNSP to enhance the country's *economic development* and profit state-endorsed enterprises to support their (rather misleading) view that the ground of political opinion falls outside the equation of persecution in Eritrea. These courts appear to argue that due to the extent that the government controls their people to benefit economically from them, the dimension that persecution acquires in the Eritrean context is not political but rather economic, notwithstanding the Eritrean "totalitarian" state (as they label it) is the only beneficiary of the resulting economic growth. As a result, subsidiary protection is the preferred outcome in the aforementioned decisions rendered by these German higher courts.

The foregoing analysis shows that asylum courts reached opposing results by assessing core features of the MNSP by reference to different norms. The interaction between national and international norms, as illustrated above, varies among the case law of the different countries. Furthermore, in falling to engage normatively with the 1926 Slavery Convention, the courts under assessment distorted the real meaning of the *exercise of control over people for the purposes of Eritrea's economic development* under international law leading to incorrect interpretations. An interpretation of the elements of the refugee definition that is consistent with the Vienna Convention on the Law of Treaties (VCLT),[97] and in particular the principle of systemic integration in its Article 31(3)(c), binds the concerned states to have recourse to other

91 *MST and Others*., para. 423, emphasis added.

92 UM 7734-1, 21 June 2017 (MIG 2017: 12), emphasis added.

93 Case 10 A 1939/20.A, 32 February 2021; Case 10 A 797/18.A, 30 July 2019.

94 Case 2 A 7/18, 21 March 2019.

95 Case 4 Bf 205/18.A, 1 December 2020, paras. 61 and 66; Case 4 Bf 186/18.A, 21 September 2018, paras. 59 and 64.

96 Case 19 A 1857/19.A, 21 September 2020, para. 106.

97 Vienna Convention of the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

instruments applicable to them, apart from the 1951 Refugee Convention itself (or national asylum legislation to the extent that it explicitly draws on that instrument).[98] This is especially the case when the textual approach leaves the asylum decision-maker with a choice of possible meanings. Legal regimes do not exist in isolation but require intersections with other regimes in a faithful, principled, and "*reasonable*" manner.[99] On this basis, this article argues that, in assessing protection claims based on the MNSP, decision-makers shall engage not only with the ECHR or the ILO framework but also, crucially, with the definition of slavery in the 1926 Slavery Convention. All states examined in this study, namely the UK, Sweden, Germany, and Switzerland, are parties to the latter Convention and have further ratified the 1956 Supplementary Convention on the Abolition of Slavery and the Rome Statute, both of which reproduce the 1926 slavery definition. By ratifying these Conventions, they have agreed three times on the terms that define slavery. Moreover, the slavery definition therein has now reached customary international law status.[100] In addition, the prohibition of slavery under the different branches of international law, including international human rights law, has reached *jus cogens* status. This imposes a further obligation on states, which shall attain a uniform interpretation of a *jus cogens* norm.[101]

98 This interpretative approach is supported by the ICJ, according to which, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation". *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), ICJ, Advisory Opinion, 21 June 1971, para. 53. See also *Oil Platforms* (*Islamic Republic of Iran v United States of America*), ICJ, judgment of 6 November 2003, para. 41. On this principle, see generally Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (2015). On the interplay between different branches of international law, see Violeta Moreno-Lax, "Systematising Systemic Integration: 'War Refugees', Regime Relations, and a Proposal for a Cumulative Approach to International Commitments", 12(5) *Journal of International Criminal Justice* (2014). The arguments discussed in the remaining of this section build on ideas developed in Palacios-Arapiles, supra note 17, pp. 29–32.

99 Emphasis added. According to Article 31(1) of the VCLT, the terms of a treaty shall be interested in good faith and in their context. Also, the ICJ has considered that "it is necessary that [international] law be applied reasonably". *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*), ICJ, judgment of 5 February 1970, para. 93.

100 See supra note 22.

101 See generally Ulf Linderfalk, "Navigating the Legal Landscape between the General and the Specific: General Concepts as Tools of Legal Reasoning", 19(2–3) *International Community Law Review* (2017). According to the High Court of Australia, its *jus cogens* nature reinforces the seriousness of slavery and hence "the need to define it very carefully and precisely": *The Queen v Tang* [2008] HCA 39, para. 111.

Treaty interpretation, especially in the field of human rights, is evolutionary.[102] This further requires asylum decision-makers to interpret and apply the refugee definition in an evolutionary and dynamic manner, and thus, in harmony with present-day circumstances and evolving understandings.[103] The systemic integration and dynamic methods of interpretation are not mutually exclusive; they "converge".[104] With this in mind, this article further argues that such methods, jointly, bring into play the interpretation of slavery provided by the ICC to the extent that: (a) the Rome Statute, which also reproduces the 1926 slavery definition,[105] is an instrument applicable in the relations between the countries under assessment; and (b) the ICC has interpreted the (1926) definition of slavery in light of the present-day conditions and current understandings.[106] The jurisprudence of the ECtHR – which is often (solely) referred by asylum decision-makers in Europe – has mainly focused on human trafficking,[107] therefore, relying exclusively on it will leave much overlooked when seeking to ascertain whether a situation reaches the threshold of slavery.[108] Instead, the jurisprudence of the ICC could provide a

102 See for instance Gloria Gaggioli "The strength of evolutionary interpretation in international human rights law", in G. Abi-Saab, *Evolutionary interpretation and international law* (2019); Malgosia Fitzmaurice, "Human Rights and General International Law: Interpretation of Human Rights Treaties", in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013).

103 Violeta Moreno-Lax, "Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law", in J- F. Durieux and D. Cantor (eds.), *Refuge from Inhumanity: Enriching Refugee Protection Standards through Recourse to Humanitarian Law* (2014).

104 On a discussion on the convergence of both methods, see Vassilis P. Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?", 31 *Michigan Journal of International Law* (2010). Tzevelekos also argues that both interpretative techniques share the same legal basis: Article 31(3)(c) of the VCLT. Ibid., p. 660.

105 Article 7(2)(c) of the Rome Statute.

106 As discussed in Section 2, the relevant case law include: *Ongwen* ICC Trial Judgment, supra note 28; *Ntaganda* ICC Trial Judgment, supra note 28; *Katanga* ICC Trial Judgment, supra note 27. On a detailed analysis of the ICC's interpretation of slavery, see Sara Palacios-Arapiles, "Reconciling Legal Borders: The Interpretation of 'Slavery' by the International Criminal Court" (forthcoming 2022).

107 See generally Vladislava Stoyanova, "European Court of Human Rights and the Right not to be Subjected to Slavery, Servitude, Forced Labour and Human Trafficking", in J. Winterdyk, & J. Jackie (eds.), *The Palgrave International Handbook of Human Trafficking* (2019).

108 Moreover, as the author has argued elsewhere, the UTIAC, the FAC, the Administrative Court of Gießen, and the Higher Administrative Court of Hamburg, have wrongly interpreted, by misquoting jurisprudence of the ECtHR, that 'legal ownership' over people and

fruitful avenue for determining what constitutes persecution in the form of *slavery*. Lastly, the interpretative approach adopted, for it to yield accurate results, should be one that is consonant with the purpose and object of the 1951 Refugee Convention: to afford refugees the "widest possible exercise" of fundamental rights and freedoms.[109]

## 5 Conclusion

Following a two-year investigation into violations of human rights in Eritrea, the COIE found that the MNSP constitutes *slavery* as defined in the 1926 Slavery Convention. Parallel to this finding, paradoxically, migration authorities in the UK, Sweden, Germany, and Switzerland adopted policies and legislative measures that curtailed protection for individuals fleeing the MNSP. This gave rise to an increase of negative decisions on Eritrean applications for refugee status, categorising applicants as 'unwanted'. Despite deciding on whether the same phenomenon, i.e., the MNSP, constitutes persecution under the terms of the 1951 Refugee Convention, the judicial responses to appeals against first instance negative decisions vary between the different European jurisdictions. Lack of normative engagement with international legal norms is among the underlying reasons for existing divergences. Protection claims based on *slavery* bring a further layer of complexity within refugee status determination procedures which, as evidenced in this article, asylum courts in the above mentioned countries have failed to resolve. This article has illustrated how two core features of the MNSP – the exaction of labour for the purposes of Eritrea's *economic development* and the maintenance of *control* over people – have been inconsistently interpreted leading to conflicting asylum decisions and defective outcomes. It has been shown that such factual elements, combined, speak of a situation of slavery. Yet, the asylum courts studied have (mis)interpreted both factors for different purposes and to mean several things, but not slavery. In the absence of supranational supervision and scholarly attention, judicial asylum decisions on the MNSP/slavery remain to operate on discretionary terms.

An engagement with the legal definition of slavery necessarily requires a more sophisticated exercise, including looking elsewhere for guidance, as

a 'lifelong situation' are *sine qua non* of slavery, thereby reaching negative findings on slavery in the MNSP: Palacios-Arapiles, supra note 17; Palacios-Arapiles, supra note 106.

109 This goes in line with Recital 2 of the Preamble and Article 5 of the 1951 Refugee Convention, and Recommendation E of the Final Act of the Conference of Plenipotentiaries (which adopted the Convention itself).

mandated by international rules of Treaty interpretation. It requires to engage normatively with the definition of slavery in the 1926 Slavery Convention, which as this article has argued, include drawing guidance from the most authoritative jurisprudence to date to this effect, which is the one that emanates from the ICC. Conceptual incoherence shall not have place when *jus cogens* norms are at stake; instead, *jus cogens* norms shall give rise to legal certainty and, thus, to a uniform approach. The arguments put forward in this article are intended as a step towards a slavery-specific interpretation of the refugee definition.

**Funding**

This article is a deliverable of the MAPS Project, funded by the Jean Monnet Programme (2019–21) 599856-EPP-1-2018-1-IT-EPPJMO-NETWORK, Grant decision 2018-1606/001-001. A draft version was presented at the MAPS Conference: *Conflicting Responses to Refugees and Migrants in Covid-19 Europe*, Queen Mary University of London, 11 December 2020 <https://www.qmul.ac.uk/events/upcoming-events/items/maps-conference-conflicting-responses-to-refugees-and-migrants-in-covid-19-europe.html>. This work is supported by the Economic and Social Research Council (grant number ES/P000711/1).