

1 GLOBAL, INTERNATIONAL AND STATE DIMENSIONS OF MIGRATION

Problems of International/Domestic Enforcement

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“In terms of legal protection, once migrants are within the jurisdiction of a member state, their human rights need to be upheld regardless of their legal status.”
Secretary General of the Council of Europe, Report “State of democracy, human rights and the rule of law – A security imperative for Europe” (Council of Europe, April 2016): 91

1.1 INTRODUCTION

In the modern era of globalization, one cannot remain neutral to the present violations of human rights, terroristic attacks, acts of extremism, aggression or xenophobia. The scale and impact of migration re-defined the stable formula and relationship between the fundamental values of diversity, sovereignty and modern statehood. Presently, numerous academic works discussing different migration-related topics are authored, meanwhile, the attitude of academics to migration has deeply changed.

The level of forced migration and labour mobility heightened the importance of state support for refugees and asylum seekers in the framework of an inclusion-friendly policy: a modernized policy aiming to help create a positive, complex system, focusing on public needs, social standards and migrants’ expectations. The assessment of the problem of equal treatment to migrant workers and national minorities is justified by the fact that it exists on several levels of the migration process: the global, international and domestic levels. This article was rewritten several times in view of opinions and analyses of American and global policies prevailing at the beginning of 2017. As such, the article aims to shed the light on several series of questions:

- how does the integration of migrants influence societal security?,
- to what extent are constitutional principles (democracy, rule of law, etc.) relevant to the migration crisis?,

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- are geographical measures and humanist values applicable to their treatment in current regional migration scenarios?;
- how to apply modern approaches to protect the rights of refugees and forced migrants?, etc.

1.1.1 *Exposure to Migration Issues, Global Citizenship and the Role of Migration Scenarios in Global Constitutionalism*

In 2016 the unpredictable flows of migrants and refugees towards European countries became a collective problem, exerting pressure on notions of sovereignty and security in every democratic state in the world.

In light of the emerging threats to geographical measures and humanist values, it is important to stress the relevance of *national identity* and *the protection of national cultural values*, underlying multilevel governance institutions and the necessity of restoring democratic values. Due to the unfortunate events of the past three years ‘the relationship between human rights law (HRL) and international humanitarian law (IHL) became closer and closer.’¹

However, the way different cultures perceive migration problems diverges dramatically. The problem of the ‘fragile state’² is regarded as a global problem, causing migration. Governments and authorities in a ‘fragile state’ cannot maintain law and order, protect the lives and human rights of their citizens within the country and beyond.

The current migration crisis has prompted a drastic transformation of the relevant legal approach and practice all over the world. These problems need conscious work on the part of the international community to safeguard the ideals of democracy and the rule of law in a globalized sphere. Furthermore, for young legal scholars it is important to understand to which extent constitutional principles are relevant to migration issues.

The concept of global constitutionalism in the context of global governance may contribute to a better proper understanding of the constitutionalist reconstruction of the international legal order, through the application of constitutionalist principles relevant to legal orders all over the world.³ Global constitutionalism is considered as an ideology and exceptional interdisciplinary experimental approach that is rooted in legal reality. It aims to resolve current global political problems with the help of constitutional principles (rule of law, democracy, human rights protection, separation of powers, etc.). The research is focused on studying the topic of global constitutionalism at the current level

1 ELIZABETH KARDOS KAPONYI, ‘The Developments of the International Human Rights Law with Specific Regard to the European Human Rights System’. in *Hungarian Yearbook of international law and European Law*, 2015, p. 9.

2 See the 12th annual Fragile State Index 2016, available at: <<http://fsi.fundforpeace.org/>>.

3 See e.g. A.PETERS, ‘The Merits of Global Constitutionalism’, in *Indiana Journal of Globl Legal Studies*, Switzerland, 2008, pp. 397-411.

of its development. The theoretical model of global constitutionalism includes modern progressive thinking and tends to present an experimental attitude to international constitutional law, broadening democratic legitimacy and promoting peaceful dialogue.

Liav Orgad made a highly interesting statement in his proposal:

‘Immigration, more than anything else, has revived the question of constitutional identity. Immigrants encourage nation-states to define themselves. Perhaps for the first time in human history, nation-states currently offer, or attempt to offer, a *legal* definition of their identity.’

L. Orgad quotes George Orwell, who rightly observed, that “it is only when you meet someone of a different culture from yourself that you begin to realize what your own beliefs really are.” “To a large extent”, says L.Orgad, “the substance of the requirements “we” demand of “them” is about “us.” It mirrors the qualities that “we” value in others and reflects the essentials that define “us” as a nation.⁴

It is worth noting, that there is no global governance system relevant to migration issues and

“there is no single system at the global level for managing migration. While there is an international refugee protection regime, there is no global system for other types of mobility, such as forced migration or labor migration. Additionally, migration policy is most often set and enforced at the national or regional levels, even if standard-setting at the international level can impact outcomes elsewhere.”⁵

1.1.2 *Current Effects of International Migration: How Does the Integration of Migrants Influence Societal Security on the Regional Level?*

In the 21st century modern information technologies and social media influence migrants and refugees, shaping their identity and social attitudes. Modern developments in international law affect socio-cultural values within the states and may result in social crisis. The main issue is that the rights of migrants cannot be separated from human rights, furthermore, minority rights are also human rights. For his part, A. von Bogdandy writes:

4 See LIAV ORGAD, *Global Citizenship Law: International Migration and Constitutional Identity*, available at: <https://www.wzb.eu/sites/default/files/downloads/erc_short_description.pdf>.

5 A. CROWLEY, K. ROSIN, ‘Migration Governance and Enforcement Portfolio Review’, May, 12, 2016, available at: <http://soros.dcleaks.com/fview/President/2016/international-migration-initiative-governance-and-enforcement-may-12-2016/imi_governance-enforcement-prd-5.12.2016.pdf>.

‘...However, the legitimacy, maybe even the legality, of the *diversity governance* regarding the transformation countries depends on Article 6(1) TEU requiring the protection of minority rights; the majority of the commentators thus sees it as rooted in the notion of democracy...’⁶

In 2016 A. von Bogdandy proposed a new idea – to provide for a European legal space instead of further European integration (the ever closer union).

In two respects, our understanding of European law should move forward. Firstly, the domestic and comparative components of European law are not of secondary but of primary importance. Second, the core idea of European law is no longer more and more integration (ever closer union) but to provide a common legal space that advances common aims under common values. This common legal space is then presented as a functional equivalent to an overarching European legal order. In this conceptual set-up, European law pursues three objectives: it denotes the puzzling complex of interdependent legal orders; it articulates the ambition of its conceptualization; and it frames corresponding doctrinal reconstructions. It thus provides an analytic tool that aims to provide a full picture by encompassing national, supranational, and international elements. At the same time, it has a distinct normative objective.⁷

The study presented in this article is based on the concept presented by Prof. A. von Bogdandy at the beginning of the 21st century. A. von Bogdandy was one of the authors to investigate cultural aspects of European Union integration from a constitutional and international law perspective. A. von Bogdandy sees the role of the EU as global promoter of cultural diversity. Nowadays, focus on the term ‘identity’ means that cultural diversity gains new normative dimensions. Remarkably, in 2008 A. von Bogdandy mentioned that

‘The notion of cultural diversity confronts in particular two problems of international minority protection: first the concern for cultural diversity is, in contrast to the protection of minorities, already at first view a concern of everyone, also of the majority, which opens up new potentials for consensus. Secondly, the notion of cultural diversity allows for the presentation of new and immigrant groups as worthy of protection better than the predefined term of minority, and thus enables expansion of the scope of international law.’⁸

6 Ibid., p. 257.

7 A. VON BOGDANDY, ‘The Transformation of European Law: The Reformed Concept and Its Quest for Comparison’ in *MPIL Research Paper Series* No. 2016-14, p. 2.

8 A. VON BOGDANDY, ‘The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship’ in *The European Journal of International Law.*, Vol. 19 no. 2, pp. 245-246.

von Bogdandy also mentions the achievement of the public good of ‘cultural diversity’ –

‘Should it prove to be a general principle of international law, in the sense of either Article 38(1)(b) or (c) of the ICJ Statute, the concept of cultural diversity could support the further development of the right to self-determination into a limit on transmitting culture related competences.

...the nations in the Union do not constitute minorities in the sense of the provision, since in the Union there is no compact majority, no majority culture, and above all no supporting nation. The typical danger, emanating from a culturally homogeneous majority constituting a group capable of acting, is missing.’⁹

By Charlotte Bretherton and John Vogler the Treaty on European Union (TEU)¹⁰ established the EU’s mien as an ‘island of peace’, as an ‘overarching framework which would facilitate partial integration of foreign and security policy, immigration policy and aspects of internal state security’.¹¹

Understanding the societal character of migration and its possible impacts on policy-making in the EU, it is important to write about another analytic tool: the societal security concept, that is considered to be productive ‘as a reaction to new-generation war-fare (Ukraine, Syria), but still needs a clear explanation by academics.’¹²

The cross-fertilization of migration and societal security is a matter of opinion. In one view, the more intensive migration is – the higher the perception of national and ethnic worth becomes.

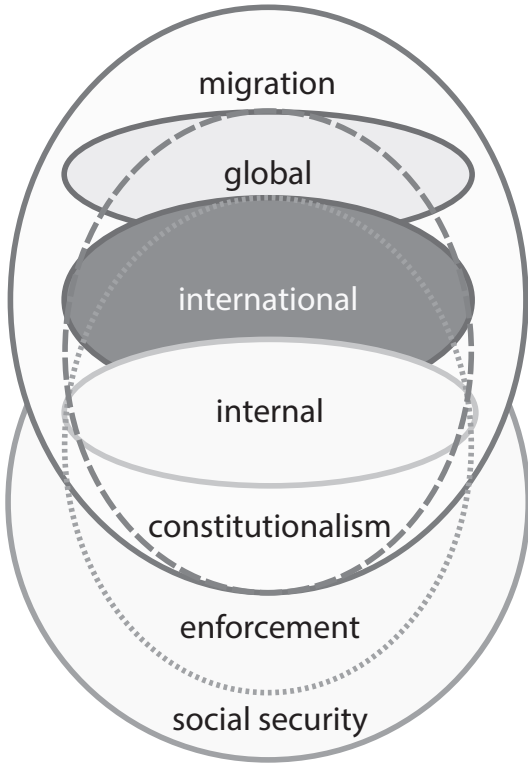
9 Ibid. pp. 254-255.

10 Treaty on European Union. Source consolidated version OJ C 326 of 26 October 2012, p. 13 last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ I. 112 of 24 April 2012, p. 21., available at: <<http://eur-lex.europa.eu/>>, 1998-2017.

11 C. BRETHERTON, ‘The European Union as a global actor’, Charlotte Bretherton and John Vogler., Routledge, 2002, p. 17.

12 Z.OZOLINA, ‘Societal Security: Conceptual Framework’ in *Societal Security: Inclusion-exclusion dilemma*. A portrait of the Russian-speaking community in Latvia., Zinante Publishers, 2016, p. 16.

Figure 1.1 Visual aid of interplay of crosscutting levels of migration (oval – global, international, internal) (by Yel. Lvova)



The visual aid above shows, that intensive processes of global migration are considered to be an important subject of international and global constitutionalism, providing an additional impulse to state (internal) constitutionalism. Migration and social security are separate macro-spheres. Unfortunately, we see that migration flows dominate the international and internal enforcement of social benefits threatening the development of social capital/social security on the regional level (e.g. in the EU).

Main statistical findings show that the highest number of first time asylum seekers in the third quarter of 2016 was registered in Germany (with over 237 400 first time applicants, or 66% of total applicants in the EU Member States), followed by Italy (34 600, or 10%), France (20 000, or 6%), Greece (12 400, or 3%) and the United Kingdom (9 200, or 3%). These 5 Member States together account for nearly 90% of all first time applicants in the EU-28.¹³

¹³ Asylum statistics report, Data on asylum extracted on 14 December 2016 and data on population on 8 December 2016, available at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report>.

Modern challenges have left international scholars skeptical and in doubt as to how migrants should be integrated to the benefit of society and the economy. Since integration of migrants is based on numerous normative acts,¹⁴ it is worth citing the report, prepared for the Brookings Institution and the American Academy in Berlin by a research team at Harvard Kennedy School:

‘At the most basic level of common morality, it is wrong for desperate people fleeing war and persecution to drown in sight of safety: it is wrong for traffickers and criminals to flout the border controls of established states. It is wrong for states to roll up razor wire to prevent human beings from claiming universal rights those states have consented to; it is wrong for states with traditions of hospitality and generosity toward refugees to surrender these principles out fear. A just and well-ordered asylum system is a bedrock of international morality and a critical guarantee of international peace.’¹⁵

For this reason the Research Team suggests that,

‘Europe, ..., must transition from unilateral border protection measures toward a thoroughgoing strategic engagement with the societies on its Mediterranean frontier. Specifically, Europe should work with its Mediterranean neighbors to contain uncontrolled migration flows, while also developing legal temporary migration streams to address its own demographic deficits and their development challenges. In this way, the crisis can be slowly transformed into new partnerships that will address the imbalances that cause migration flows in the first place.’¹⁶

Moreover, it is important to build a global society with strong modern ‘societal bridges’ from local communities to migrants, refugees and others. The preliminaries of such an *inclusion-friendly policy* may become a foundation for such ‘societal bridges’.

It is important to understand that it is extremely difficult to design one *general inclusion-friendly policy framework*. Inclusion-friendly policy should be considerate; otherwise it may suffer from an ‘inclusion paradox’, resulting from the gap between the interests of

14 International Covenant on Civil and Political Rights; Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live; International Convention for Migrant Workers and Their Families, Convention Relating to the Status of Stateless Persons, Convention on the Nationality of Married Women, Convention on Reduction of Statelessness, Convention and Protocol Related to the Status of Refugees, Framework Convention for the Protection of National Minorities, etc.

15 MICHAEL IGNATIEFF, JULIETTE KEELEY, BETSY RIBBLE, KEITH MCCAMMON, ‘The Refugee and Migration Crisis: Proposals for Action, U.N. SUMMIT 2016, p. 7, Brookings, 2016, available at: <<https://www.brookings.edu/research/the-refugee-and-migration-crisis-proposals-for-action-u-n-summit-2016/>>.

16 Ibid.

majorities and minorities.¹⁷ Future research of societal security cases will reveal which are the best practices of an inclusive-friendly policy to follow, e.g. series of “Future of Europe debates” across Europe’s national Parliaments, cities and regions in the framework of the White Paper on the Future of Europe, presented as a European Commission’s contribution to the Rome Summit.¹⁸

1.1.3 *Enforcement of Migrants’ Rights and Domestic Laws to Assist Internally Displaced Persons (IDPs) in Ukraine*

While Member States of the EU are trying to solve the problem of non-refoulement¹⁹ and integration of forced migrants²⁰ and refugees on a domestic level, proposals to grant a legal right to work and to increase the number of refugees at schools are renowned, citizens’ rights protection will make it easier to apply in non-members states, e.g. Serbia, Turkey, Ukraine.) ‘Forced migration and refugee policy pose enormous political challenges for democratic leaders. They must convince electorates frightened by terrorism that generosity toward strangers is not only humane but prudent. They must convince their fellow citizens that generous refugee and asylum policy, together with assistance to other states burdened with refugee flows, actually makes their country safer.’, stands in the report entitled ‘The Refugee and Migration Crisis: Proposals for Action’.²¹

Forced by Crimean secession and armed conflict in Eastern parts of the country, Ukraine witnesses an additional problem: the integration of so called ‘internally displaced persons’ (IDPs). This problem is recognized as a sensitive topic in Ukraine.

The question then is ‘how to prove permanent residence registration’, the most important issue for the IDPS, since financial support, as well as rights and freedoms of IDPs were tied to the paper document, confirming permanent residence registration. This rendered the system of social protection of IDPs originating from Crimea and Eastern re-

17 For more see C. HOUTKAMP, ‘Inclusion in the 21st Century: an Exploration of Policy Opportunities and Challenges’ in *Societal Security. Inclusion-Exclusion Dilemma. A portrait of the Russian-speaking community in Latvia*. Ed. Zaneta Ozolina, Zinatne Publishers, 2016, pp. 42-23.

18 White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025, European Commission COM(2017) 2025 of 1 March 2017, Publication Office in Luxembourg, 2017, 31 p.

19 EMN Asylum and Migration Glossary (2014) defines ‘non-refoulement’ as a “a core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion..” For more see: Art. 33 of the Geneva Convention of 1951 and relative Protocol of 1967; articles: S. TREVISANUT, ‘The Principle of Non-refoulement at Sea and the Effectiveness of Asylum Protection’ in *Max Planck Yearbook of United Nations Law*, 12 (2008), S.205-246, NORA MARKARD, ‘The Right to Leave by the Sea: Legal Limits on EU Migration Control by Third Countries’ in *European Journal of International Law*, Vol. 27 #3, p. 616.

20 E. NYKÄNEN, ‘Fragmented State Power and Forced Migration’, Leiden, Boston: Nijhoff, 2012, p. 17.

21 MICHAEL IGNATIEFF, JULIETTE KEELEY, BETSY RIBBLE, KEITH MCCAMMON, ‘The Refugee and Migration Crisis: Proposals for Action’, U.N. SUMMIT 2016, p. 7, Brookings, 2016, available at: <<https://www.brookings.edu/research/the-refugee-and-migration-crisis-proposals-for-action-u-n-summit-2016/>>.

gions of Ukraine highly problematic. It became clear that the registration system of IDPs needs further amendments and should be recorded in electronic form.

The decision to create the Unified information database on internally displaced persons (UIDB) was adopted by the Law ‘On Ensuring Rights and Freedoms of Internally Displaced Persons’,²² establishing guaranties for the rights, freedoms and legitimate interests of IDPs. According to the Law, an internally displaced person – citizen of Ukraine – will enjoy his or her voting right at the elections of the President of Ukraine, members of Parliament of Ukraine, state referenda through a change in voting place without changing his or her voting address as provided in part three of Article 7 of the Law of Ukraine “On State Register of Voters” (art. 8).²³

Provisions on how to create, manage and provide the access to the information held in the Unified information database on internally displaced persons are applied in accordance with the Decree of the Cabinet of Ministers of Ukraine adopted on 22 September 2016.²⁴

Unfortunately, the UIDB still suffers from soft-ware defects, from internet connection problems and errors, owing to the lack of skills of managing employees. Nevertheless, proper UIDB functionality will create good conditions for IDPs to

‘have their personal account registered in the database, access to which will be provided using an electronic key. At this stage, any IDP can independently update information on their needs through their personal account.’²⁵

As for social security in Ukraine, it is very important to continue working on the clarification of finance indicators, transfers within the state and local budgets, which are of great relevance considering the number of IDPs arriving from territories where public authorities are temporarily unable to fulfil their duties. These indicators must be analysed in light of the updated information provided by the Unified information database on internally displaced persons in Ukraine.

22 Zakon Ukraïny “Pro Zabezpechennja Prav I Svobod Vnutrishnjo Peremishennuh Osib (Law of Ukraine On Ensuring Rights and Freedoms of Internally Displaced Persons), dated 20 October 2014 № 1706-VII, available at: <<http://zakon2.rada.gov.ua/laws/show/1706-18>>.

23 Zakon Ukraïny ‘Pro Dergzavnuj Rejestr Vubortsiv’, dated 22 February 2007, # 698-V (Law of Ukraine “On State Register of Voters”), available at: <<http://zakon3.rada.gov.ua/laws/show/698-16>>.

24 Postanova Kabinety Ministriv Ukraïny № 646 “Poriadok stvorennia, vedennia ta dostupu do vidomostej Jedynoji informatsijnoji bazy danuh pro vnutrishnio peremischenyh osib”, (Edict of Cabinet of Ministers of Ukraine “On the order of formation, management and providing the access to the information of the Unified information database on internally displaced persons), dated 22 September 2016, Ofitsijnyi Visnyk Ukraïny, 2016 p., № 77, 14, item 2566, code of the act 83287/2016.

25 See Report on the results of monitoring use of the Unified Information Database of Internally Displaced Persons by Divisions of Social Protection for the Population in Dnipropetrovsk, Donetsk, Zaporizhzhia, Luhansk and Kharkiv regions, dated 10-13 October 2016, available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/report_unified_information_database_of_idp_0.pdf>.

UIDB shall provide public servants with the access, such as employees of the Ministry of Social Policy, the DSPP and the State Border Service and other public authorities and public organizations. While NGOs and volunteers will not have access to IDPs' personal data, they will nevertheless be able to use the database to search for targeted groups of IDPs in order to assist them and record information on their activities.

Besides IDPS problem, there are several other threats to societal security in Ukraine. While solving the question of protecting the rights of its Russian-speaking citizens, Ukraine is trying to build a tolerant society in spite of its totalitarian historical past and a population made up of different religious affiliations (Muslims, Catholics and orthodox). Another problematic issue is the migration of women. Ukrainian women constitute the largest group migrating to Poland in search of work (female migrant workers – 'zarobitchanku') or just looking for a better life. As a result of migration they encounter problems of housekeeping, raising their children, supporting their husbands, while suffering discrimination at the same time.

NGO's play central role in increasing societal security. Local NGOs, that are represented internationally (on the level of UN, European and governance institutions) influence decision-making, sustain projects and implement migrant's rights as human rights and encourage the passing of laws and measures promoting equal rights for migrants, empowering of female migrants, equal pay for migrants, while also helping to solve questions regarding their membership in civil society and public institutions, trade unions.

Local programs that help prevent the discrimination of IDPs may be realized by the best practice of consulting local citizens, forming of civil or consulting councils, web-pages with comments on the work of public authorities. For example, Ukraine needs the Law "On the list of administrative services" with a caveat, that the right to give certificates to IDPs will be considered as an administrative service.

The certificate on registration as internally displaced person (hereinafter: the certificate) shall be issued by social protection department of the local state administration at the day of submitting the application, and shall be signed and verified by an authorized official of this department, free of any charge either for the primary issuing of such certificate, or re-issuance in case of loss, damage or expiry. The certificate shall be valid during six months from date of issuance. In case conditions referred to in Article 1 of the Law are met, the validity of the certificate may be extended for another six months. For this purpose, the person must once more approach the competent social protection department of the relevant local state administration at the place of stay.²⁶ A special order for registering immobile groups of IDPs may be made by e.g. meeting with a social worker following an online or phone application. A special decision on the electoral right of IDPs may be adopted.

26 Zakon Ukraïny "Pro Zabezpechennja Prav I Svobod Vnutrishnjo Peremishennuh Osib" (Law of Ukraine On Ensuring Rights and Freedoms of Internally Displaced Persons), dated 20 October 2014 № 1706-VII, art. 4 p. 8 available at: <<http://zakon2.rada.gov.ua/laws/show/1706-18>>.

Internally displaced persons shall enjoy same rights and freedoms as other persons in accordance with the legislation of Ukraine and international agreements. Their discrimination upon exercising any rights and freedoms based on their internal displacement shall be prohibited (art. 14 of the Law). It is important to stress, that the more comfortable IDPs become with locals, and vice versa, the easier it is to communicate and work together to achieve results in self-government.

1.2 CONCLUSION

The upshot of the arguments set out in the article shows that there are several aspects of migration that are undisputed. Nevertheless, certain questions, such as: how to apply modern approaches to the self-determination of refugees and forced migrants? and what are the main measures of non-discriminatory treatment in current regional migration scenarios? – remain open.

At the same time, migration is not only based on self-perpetuation within the economic and political framework of social developments. Migration is a historical tendency that ‘holds on its speed’, resulting in the gradual development of a special global society. Our modern world is in need of not only democratic and republican constitutionalism, but also cosmopolitan and universal ideas of human rights protection – from global constitutionalism to universal law. On a domestic level governments take responsibility for migrants, refugees and internally displaced persons. That is why societal and social security actions in international and state governance must, even under extreme conditions, be based on the rule of law and respect for the human rights of people searching for assistance.

