Integration and Citizenship of Irregular Migrants in Frontier States: A Socio-Legal Approach to A Human Rights Problem

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Abstract

In this Article we focus on nationality as a form of citizenship in modern nation-state formation. Two major models of approaching citizenship—civil/territorial and ethnic/genealogical—linked to two different processes of nation-state formation—*jus soli* and *jus sanguinis*—are examined. We draw from the anthropological 'modernist' approach to nationalism and international law, focusing on immigrants as well as other categories of aliens (asylum-seekers, ex-colonials and *gastarbeiter)* that experience exclusion/inclusion in nation-states. We hold that while "multiculturalism" has become the political expression of a more pluralistic approach to nationhood, nation-state politics nevertheless have formed various approaches to nationalism which have affected immigration policy in various ways. For example, a handful of frontier states use buffer zones for irregular migration. This model of immigration policy simply creates large-scale and long-term detention centers, which by extension cannot expedite asylum applications. If more, let alone all, wealthy states served as frontier states, the need for inhumane buffer zones would be eliminated and, as the Greek integration paradigm exemplifies, some migrants would stand a good chance of being integrated.

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I. INTRODUCTION

The literature on irregular migration flows typically focuses on the plight of migrants as they traverse international frontiers, their legal distinction from the status of refugee, conditions of detention pending determination of their status,[1] and ultimately how the authorities of their desired destination intend to legitimize their stay, if at all. Indeed, migrants' desired destinations are quintessential to understanding why they would risk their lives in the first place. What naturally goes unnoticed in this process is the relationship between the frontier states[2] and the migrants arriving there with hopes of settling elsewhere. Scholarship examines frontier states as transit stops of a temporary duration,[3] even though in practice many of these frontier states have retained migrants and their families for several years; what started out as temporary camps were transformed into permanent shanty towns where migrant families give birth to new family members who go on to attend local schools and immerse themselves in the local language. This state of affairs is hardly isolated and is fast becoming the norm in frontier states such as Italy, Greece, and Turkey. When migrants find themselves in a frontier state for several years without the prospect of further movement, they naturally seek to fortify their status, typically by applying for permanent residence or citizenship. Neither of these is straightforward, nor simply a matter of ticking the right boxes. This Article focuses on Greece because it sits at the crossroads of Asia and Africa and is a natural gateway to Europe for immigrants from both continents. At the same time, Greece

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[1] The UN Special Rapporteur on the Human Rights of Migrants has emphasized that the hostility towards irregular migration is expressed through the externalization of migration control policies and criminalization of labor migration. *See* Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶13–59, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008).

[2] The term "frontier" is not applied here in the sense of "the political division between two states or to the division between the settled and unsettled regions of the state . . . [which] implies a 'transition zone, which stretches inwards from the [state] boundary and merges imperceptibly with the state core.'" Nanda R. Shrestha et al., *Frontier Migration and Upward Mobility: The Case of Nepal*, 41 ECON. DEV. & CULTURAL CHANGE 787, 787 (1993). The term "frontier" in this paper best reflects "the country of first arrival" as depicted in Regulation 604/2013, albeit there is a finite number of frontier states or sub-states in a particular region, such as Texas in the case of South and Central American immigration and Greece, Italy, and Spain in Europe. *See* Council Regulation 604/2013, art. 3, 2013 O.J. (L 180) 31, 37 (EU) [hereinafter Dublin III].

[3] *See* Franck Düvell, *Crossing the Fringes of Europe: Transit Migration in the EU's Neighbourhood* 5, 19 (Univ. of Oxford, Working Paper No. 33, 2006); María-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited*, 18 INT'L J. REFUGEE L. 571, 582 (2006).

is a natural immigration border for the European Union (EU), which has invested heavily in Greece serving as a buffer zone to migrants aiming to settle further north, despite the 2015–17 EU relocation initiatives by the EU Council to relocate a capped number of irregular immigrants.[4] By way of illustration, in accordance with Article 79 TFEU, the EU has adopted an elaborate common policy for tackling irregular migration. In this regard, it has established rules on control and surveillance,[5] a mechanism for collecting, processing, and exchanging visa data,[6] and established FRONTEX, an agency for border surveillance that plays a key role in supporting border control authorities.[7] Hence, Greece offers a paradigm of a frontier state that unwittingly, as far as migrants are concerned, is meant to serve as a long-term waiting station for migrants entering Europe,[8] but which ultimately becomes a permanent "home" for many migrants and their families.

While during the nineteenth and early twentieth century there were few restrictions on the freedom of aliens to settle in countries other than their own, particularly in the new world and territories under colonial rule, in the aftermath of World War I this was no longer the case.[9] Whereas migration was now very much limited and controlled by receiving states according to their own labor needs, the uprooting caused by World War II solidified the need for special protection for persons

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[4] *See* Council Decision 2015/1523, Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece, 2015 O.J. (L 239) 146 (EU) [hereinafter Council Decision 2015/1523]; Council Decision 2015/1601, Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 248) 80 (EU) [hereinafter Council Decision 2015/1601]; Bruno De Witte & Evangelia (Lilian) Tsourdi, *Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union:* Slovak Republic and Hungary v. Council, 55 COMMON MKT. L. REV. 1457, 1457–58 (2018).

[5] Council Regulation 562/2006, Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders, 2006 O.J. (L 105) 1, 9 (EC) [hereinafter Schengen Borders Code].

[6] Council Regulation 767/2008, Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short-Stay Visas, 2008 O.J. (L 218) 60 (EC) [hereinafter VIS Regulation]; Council Decision 2004/512, Establishing the Visa Information System (VIS), 2004 O.J. (L 213) 5 (EC).

[7] Council Regulation 2007/2004, 2004 O.J. (L 349) 1 (EC) [hereinafter Council Regulation 2007/2004] (establishing a European Agency for the management of national cooperation at the external borders of the member states of the European Union); Council Regulation 863/2007, Establishing a European Agency for the Management of National Cooperation at the External Borders of the Member States of the European Union, 2007 O.J. (L 199) 30 (EC).

[8] *See* Joined Cases C-715/17, C-718/17, & C-719/17, Comm'n v. Poland, Hungary and the Czech Republic, ECLI:EU:C:2020:257 (Apr. 2, 2020) [hereinafter Joined Cases] (implementation of relocation decisions). Not surprisingly, several EU states refused to adhere to the EU Council's relocation decisions. *See* Council Decision 2015/1523, *supra* note 4; Council Decision 2015/1601, *supra* note 4. The Court of Justice of the European Union (CJEU) found such actions to be in violation of EU law. *See* Joined Cases, *supra.*

[9] *See generally* E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 11 A.J.I.L. UNBOUND 142 (2017) (highlighting the colonial and post-colonial dimension of migration).

forced to abandon their own country on account of persecution.[10] Persons subject to such persecution are classified as refugees under the 1951 Convention relating to the status of refugees (Refugee Convention),[11] whereas migrants are those that traverse international frontiers while lacking the element of persecution. Migrants may further be classified as regular, in which case they satisfy the entry requirements of the receiving state, or irregular, on the basis that their entry is illegal because they are not refugees and they do not possess the receiving country's consent for entry.[12]

In between refugees and migrants, one finds further sub-categories. Persons who are not necessarily subjected to actual persecution, but whose flight is necessitated by a natural (e.g., tsunami or earthquake) or man-made (e.g., war) disaster, may either traverse to a different part of their own country or to another country. Where flight is the result of a man-made or natural disaster and the person does not cross an international border for fear of persecution, they are characterised as an internally displaced person (IDP). Conversely, the status of a person fleeing abroad from the effects of any of the aforementioned disasters is inconsistent.[13] Everyone caught in a war zone, particularly civilians, is susceptible to the risks associated with armed conflict, but such risks in and of themselves do not amount to persecution. Therefore, as a general

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[10] Prior to the landmark 1951 Refugee Convention, the League of Nations adopted two other instruments to deal with stateless persons and refugees leading up to WWII, namely the 1933 Convention relating to the international status of refugees and the 1938 Convention concerning the status of refugees coming from Germany. *See* Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 3663; Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 192 L.N.T.S. 4461.

[11] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]. While the 1951 Refugee Convention is the universal instrument for the classification of refugee status and rights thereof, other exceptional and people-specific classifications do exist. *See, e.g.*, UNRWA, Assistance to Palestine Refugees: Interim Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, ¶ 15, U.N. Doc A/1451/Rev. 1 (1951) (The UN Relief and Works Agency for Palestine (UNRWA), for example, took the position that "[f]or working purposes, the Agency has decided that a refugee is a needy person, who, as a result of the war in Palestine, has lost his home and his means of livelihood. A large measure of flexibility in the interpretation of the above definition is accorded to chief district officers to meet the many border-line cases which inevitably arise.").

[12] Although states are under no obligation to accept irregular migrants, exceptionally, Directive 2008/115/EC stipulates that in deciding to return irregular migrants member states must consider the child's best interests, family life, the applicant's health and the principle of non-refoulement. *See* Council Directive 2008/115, art. 5, 2008 O.J. (L 348) 98 (EC) [hereinafter Returns Directive] (setting out common standards and procedures for returning illegally staying third-country nationals).

[13] Exceptionally, in accordance with Article I(2) of the 1969 OAU (now AU) Convention concerning the specific aspects of refugee problems in Africa, the definition of a refugee encompasses, in addition to the 1951 Refugee Convention, "events seriously disturbing public order." Convention Governing the Specific Aspects of Refugee Problems in Africa, art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45; 1951 Refugee Convention, *supra* note 11, at 152. Poverty and its root causes are never given any consideration in this interface. *See* Ilias Bantekas, *Wealth and Growth-Based Policies Augment Global Poverty and Erode Human Rights: A Return to Human-Centered Thinking*, 1 INT'L HUM. RTS. L. REV. 30, 35–38 (2012).

rule, war victims are subject to the protection established by international humanitarian law (IHL), otherwise known as the laws of war, which include the obligations of the warring parties to respect civilians and distinguish at all times between civilian and non-civilian objectives. In *Adan v. Secretary of State for the Home Department*, the House of Lords refused to grant asylum to a Somali fleeing his country's civil war, considering that the civil war did not give rise to a well-founded fear of persecution even if the war was fought on religious or racial grounds.[14] Such persons may be granted exceptional refuge (but not refugee status) on humanitarian grounds.[15] Several courts have taken the view that if the violence in a conflict zone is persecutory in nature and individualized, then any person subject to it may validly be entitled to subsidiary protection.[16] The UN High Commissioner for Refugees endorsed and elaborated on this position in the guidelines on international protection adopted in 2016.[17]

Another category of persons falling outside the legal definition of "refugee" internationally are those rendered stateless, whether by choice or compulsion, as long as their flight was not the result of persecution; otherwise, a stateless person may also be classified as a refugee.[18] While international law has always allowed states to control the entry of aliens into their territory as well as maintain their authority to confer nationality, the legal effects of the latter authority against other states are regulated by international law.[19] As a result, it is impermissible for states to strip persons of their sole nationality (thus rendering them stateless),[20] as this

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[14] *See* R v. Sec'y of State for the Home Dep't, ex parte Adan [1998] 1 AC (HL) 293, [311].

[15] Council Directive 2004/83, art. 15I, 2004 O.J. (L 304) 12 (EC) [hereinafter Qualifications Directive]. *See also* Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2009 E.C.R. I-00921, ¶ 35 (holding that the existence of a serious individual threat may be established where the degree of indiscriminate violence in an armed conflict "reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country . . . would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat . . . .").

[16] *See* Minister for Immigr. & Multicultural Affs. v. Abdi [1999] FCA 299 (26 March 1999) ¶¶ 37, 39 (Austl.). *See also* QD v. Sec'y of State for the Home Dep't [2009] EWCA (Civ) 620, [33] (holding that, for the purposes of Article 15(c) EU Qualifications Directive, one would have to show that incidents of indiscriminate violence "were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm . . . to civilians generally."). In general terms, Articles 15(b) and (c) of the EU Qualifications Directive covers non-targeted harm. *Id.*

[17] U.N. High Comm'r for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, ¶ 9, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016).

[18] *See generally* MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS (2019) (stating that stateless people fleeing persecution may be classified as refugees).

[19] *See* Nottebohm Case (Liech. v. Guat.), Judgment (second phase), 1955 I.C.J. Rep. 4, 20–22 (Apr. 6).

[20] *See* U.N. Convention Relating to the Status of Stateless Persons, art. 12, ¶ 1 Sept. 28, 1954, 360 U.N.T.S. 117 (relating to the status of stateless persons, which concerns the

is also the case with persons residing in a state over several generations or the entirety of their life, but who are denied the nationality of their country of residence and who possess no other nationality. For example, the Bidoon people in Kuwait have lived there since time immemorial and constitute ten per cent of the country's population, but have not received Kuwaiti nationality.[21] Given that no country is obliged to provide asylum to a stateless person that does not meet the relevant criteria,[22] concerned persons would effectively be under the protection of no country, and hence, would be forced to enter the territory of other nations illegally. In addition, receiving states would be forced to bear any attendant financial cost, particularly regarding maintenance. With all the various sub-regimes of migration (e.g., refugees, migrants, smuggled or trafficked persons, etc.), it is easy to lose sight of the most fundamental of rules, namely that all aliens at international borders are entitled to the enjoyment of fundamental human rights.[23] As a corollary to refugee and migration phenomena, it is impermissible for states, as a matter of international law, to refuse entry to their nationals.[24] This rule is particularly important in situations where refugees or other persons in flight wish to return following after the cessation of the conditions that caused them to flee.[25] As is the case with Palestinians outside of Israel, the application of this rule becomes more complicated when considering situations where a new state comes into existence and whereby certain people were never its nationals. In these situations, international law resolves the problematic application of the rule.[26]

Frontier states (those experiencing refugee and irregular migration) serve at least two purposes: (a) to act as buffer zones of migration to preferred destinations and; (b) to facilitate the migration policies of developed states by providing a (temporary) solution to the burden-sharing dilemma associated with irregular migration. A key policy concern is that of burden, or responsibility sharing, which has a significant impact on both the fate of asylum applications and the

rights of such persons in their country of residence); *see also* U.N. Convention on the Reduction of Statelessness, art. 8, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter Convention on the Reduction of Statelessness] (prohibiting the rendering of a person stateless).

[21] *See Kuwait: Bidoon,* MINORITY RTS. GRP. INT'L, https://minorityrights.org/minorities/bidoon [https://perma.cc/6R55-RU6H].

[22] In fact, the general rule under international law is enshrined in Articles 3 and 4 of the International Law Commission's Draft Articles on Expulsion of Aliens, according to which states are entitled to expel aliens in pursuance of a lawful decision and in conformity with international human rights law. *See* Int'l Law Comm'n, Draft Articles on the Expulsion of Aliens, with Commentaries, arts. 3, 4, U.N. Doc. A/69/10 (2014).

[23] *See* Recommended Principles and Guidelines on Human Rights at International Borders, ¶ 3–4, U.N. Doc. A/69/CRP.1 (July 23, 2014).

[24] G.A. Res. 2200A (XXI), art. 12(4), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

[25] *See* Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1129–30 (1998).

[26] For an Israeli perspective, see Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees,* 16 ISR. Y.B. of HUM. RTS. 103, 113–20 (1986).

treatment of applicants. Despite the intense media spotlight in the West regarding massive refugee flows to Europe, the actual number of refugees in Europe is minimal. Of the 25.4 million refugees registered by the UNHCR in mid-2018, 3.5 million were hosted by Turkey, 1 million by Lebanon and Iran, and an additional 1.4 million by Uganda and Pakistan.[27] During the same time, the European continent hosted 2.6 million refugees, which accounted for approximately 9.7% of the global refugee population.[28] While it is true that states in the global north accept a significant number of refugee applications themselves and agree to grant asylum to some refugees, in many nations in the southern hemisphere, the numbers of refugees rendering the burden ratio is staggering. The situation is further compounded by countries that ignore their obligations under the Refugee Convention and routinely return vulnerable refugees while fully aware of the risk of execution, such as China with North Korean refugees.[29]

The effects of uneven responsibility sharing on the refugees' fundamental rights are nowhere more evident than in Europe.[30] This has led to several initiatives. At the UN level, it is worth mentioning two UN Global Compacts: one on migration[31] and another on refugees.[32] Both seek to improve migration, governance, and cooperation with respect to refugees.[33] The EU operates its own internal system under the so-called Dublin Regulations (currently Regulation III), whereby an asylum seeker, subject to certain exceptions, must be sent to the EU state of first arrival by the EU state to which he has subsequently moved in order to lodge an asylum application.[34] Given that asylum seekers in Europe arrive at its

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[27] *Figures at a Glance,* UNHCR, https://www.unhcr.org/figures-at-a-glance.html [https://perma.cc/5XHY-SZ5M].

[28] UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017, 13 (2017), https://www.unhcr.org/5b27be547.pdf [https://perma.cc/HZ53-XDGW].

[29] *See* Russell Aldrich, *An Examination of China's Treatment of North Korean Asylum Seekers,* 7 N. KOR. REV. 36, 36-37 (2011) (stating that China views fleeing North Koreans as "economic migrants").

[30] *See* Evangelia (Lilian) Tsourdi, *Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System*, 24 MAASTRICHT J. EUR. & COMPAR. L. 667, 675 (2017); Philippe De Bruycker & Evangelia (Lilian) Tsourdi, *In Search of Fairness in Responsibility Sharing*, 51 FORCED MIGRATION REV. 64, 64 (2016).

[31] *See Global Compact for Migration*, UN: REFUGEES AND MIGRANTS, https://refugees migrants.un.org/migration-compact [https://perma.cc/WJA8-CJCJ].

[32] *The Global Compact on Refugees*, UNHCR (2018), https://www.unhcr.org/towards-a-global-compact-on-refugees.html [https://perma.cc/8P8B-AZ7N].

[33] *See generally The Global Compacts on Refugees and Migration*, UNSW (Jan. 23, 2019), https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Factsheet_Global%20Compacts_Jan191.pdf [https://perma.cc/AS7Y-D8S5] (providing background information).

[34] *See* Council Regulation 343/2003, art. 10, O.J. (L 50) 1, 5 (EC) [hereinafter Dublin II Regulation] (establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national); Dublin III, *supra* note 2, art. 3(2) (iterating this rule subject to the exception listed).

external frontiers on foot or by boat, it is evident that the Dublin system disproportionately disadvantages countries such as Greece, Spain, and Italy. In "meeting" their obligation these countries routinely and systematically violate the rights of detained migrants and refugees, particularly as it pertains to the length and quality of detention conditions and access to justice.[35]

Following this brief introduction and the interplay between frontier states and global refugees as well as irregular migration policies and burden sharing, this Article will attempt to address and highlight the status and aspirations of migrants stranded in said frontier states. Hence, the remainder of the paper is organized as follows. Section Two will discuss the notion of citizenship and nationality from the perspective of citizenship studies. Section Three examines immigrant identity and inclusion in urban anthropology, with a particular focus on Greece and the identify of migrants that have settled there. Section Four goes on briefly to address citizenship more broadly from a socio-legal lens, so as to provide the launching pad in Section Five for the much broader legal discussion on the notion and regulation of nationality and residence under international law. Finally, Section Six explores how Greek law and practice has given rise to a frontier state paradigm, where the granting of both residence and nationality to long-term immigrants is inconsistent with the wording of the law, leading to some degree of discrimination.

II. CITIZENSHIP AND NATIONALITY

Prior to the examination of the immigrants' civic position within a national context, one ought to examine the notion of "citizenship" in relation to the way it is linked to the notion of "nationhood." Such a clarification would lead us to consider the two models of nationhood linked to two different processes of formation according to a "modernist" approach presented by Smith.[36] These, according to Smith, would be the "Western" model of nation which is fundamentally civic and territorial and is found in certain Western states and often transplanted overseas, and the "Eastern" model, a rather more ethnic and genealogical one, usually found in Eastern Europe and Asia.[37] In the first model, as it is suggested by Smith:

> [T]he nation is a territorially bound entity, compact and unitary. It is also an association based on common laws and institutions . . . [where] [a]lthough individuals may opt out of particular nations, they must belong to *a*

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[35] F.H. v. Greece, App. No. 78456/11, ¶ 40–56 (July 31, 2014), https://hudoc.echr.coe.int/eng?i=001-146130 [https://perma.cc/HGK8-4UWS]; K.R.S v. UK, App. No. 32733/08, at 18 (Dec. 2, 2008), https://hudoc.echr.coe.int/eng?i=001-90500 [https://perma.cc/L9GT-EYC5] (noting that a transfer to Greece under the terms of the Dublin II Regulation presumes that Greece shall respect the person's rights under the ECHR).

[36] Anthony D. Smith, *The Politics of Culture: Ethnicity and Nationalism*, *in* COMPANION ENCYCLOPEDIA OF ANTHROPOLOGY 706, 706–33 (Tim Ingold ed., 2d ed. 2002).

[37] *Id.* at 717.

> nation. Moreover, members are in principle equals before the law: they have common rights and duties as 'citizens' . . . [and] their citizenship of the nation (as opposed to the state) is conferred by . . . participation in a common 'civic' culture or 'civil religion' inculcated by a public, standardized mass education system.[38]

On the other hand, as Smith notes, in the more ethnic and genealogical model of nation, "the emphasis falls upon presumed ties of common descent and the associated myths of genealogical origin. Such a conception gives more weight to vernacular culture, mainly native languages, rituals and customs."[39]

Such an ethno-religious community, among others, has been constituted by the Orthodox Greeks under Ottoman rule, where a "pattern of salvation religion with its sacred texts, liturgies and priesthoods, transmitting the values, memories and traditions of the *ethnic* down the generations, has been the chief mechanism of ethnic survival."[40] Other modernist scholars have laid emphasis on both aspects (civil-territorial and ethnic-genealogical) of the ethnic bases of modern nations. By considering them as "imagined political communities"[41] with "invented traditions" that imply continuity with the past;[42] "mental construct, whose 'objective' manifestations in locality [and] ethnicity give [them] credibility";[43] "communities of foreigners" that later developed into bodies "of associates living under one common law and represented by the same legislature";[44] or civil societies increasingly inseparable from the state within which they operated.[45] These two models of nationhood could possibly coexist by reinforcing each other and being operative at different levels: the ethnic-genealogical nationhood at the cultural and private level and the civic-territorial nationhood at the political. Nevertheless, the two models can also be conflicting, with the former facing "inwards to the unique cultural values of the community while, simultaneously seeking the benefits of Western modernity,"[46] and the latter facing the dilemmas: "[H]ow far can mere 'territory' and 'citizenship' produce social cohesion and a sense of distinctive identity? . . . Can [territorial nations] evolve a 'civil religion' over and above the

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[38] *Id.* at 717–18 (emphasis added).

[39] *Id.* at 718.

[40] *Id.* at 719.

[41] BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (1983).

[42] *See* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 1–2 (Eric Hobsbawm & Terence Ranger eds., 1983).

[43] ANTHONY P. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 108 (1985).

[44] ELIE KEDOURIE, NATIONALISM 15 (1961).

[45] Eric Hobsbawn, *Mass-Producing Traditions: Europe, 1870–1914*, *in* THE INVENTION OF TRADITION, *supra* note 42, at 263.

[46] Smith, *supra* note 36, at 724.

different, constituent ethnic cultures?"[47] This last question can be addressed by considering the ethnic definitions of the nation.

In modern nation-states, the civil-territorial process of nation formation does not leave much space for ethnic autonomy that would conflict with the requirements for all citizens to integrate into the new national state: "The new ideologies of political nationalism required all the members of a 'nation-state' to be united and homogenous, and this produced quite new conflicts in most states which were, after all, composed of several ethnic communities."[48] Civic nationalisms, like the French one, considered other sources of citizenship (ethnic or genealogical) different from the 'civic ideal,' illiberal, and anti-democratic, while German and Greek nationalisms were basically ethnically conceived.

The influx of immigrants, asylum-seekers, ex-colonials, and *Gastarbeiter* in many European nation-states caused the need for a different, more pluralistic approach to nationhood in those states, transforming the debate about citizenship. Soysal suggests that "[t]he postwar era is characterized by a reconfiguration of citizenship from a more particularistic one based on nationhood to a more universalistic one based on personhood."[49] Furthermore, "[e]ducation's individual-oriented ideology and organization help to construct citizenship as the primary political status across the lines of class, regional, ethnic, and gender differences."[50] Greece, as one of these states, with an immigrant population representing 10% of its total population at the time of writing, has begun to lose its character as a 'monoethnic' and 'monolingual' nation-state, on which nationalists have worked so hard for the last century.[51] These flows of people in pursuit of work have pluralised the cultural and ethnic composition of Greece, "thus shattering the illusion of homogeneity and closure on which the modern nation, as imagined community, was founded."[52] Greece has done very little for the civic incorporation of immigrants, and naturalisation rates remain very low and refer to those who can prove to being ethnic Greeks: "The very first attempt to draw up a citizenship law relied on a perception of membership of the Greek nation as identical to membership of the Greek

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[47] *Id.*

[48] JOHN HUTCHINSON & ANTHONY D. SMITH, ETHNICITY 11 (1996).

[49] Yasemin Nuhoğlu Soysal, *Toward a Postnational Model of Membership*, *in* RACE AND ETHNICITY: COMPARATIVE AND THEORETICAL APPROACHES 291, 291 (John Stone & Rutledge Dennis eds., 2003).

[50] Yasemin Nuhoğlu Soysal & David Strang, *Construction of the First Mass Education Systems in Nineteenth-Century Europe*, 62 SOCIO. OF EDUC. 277, 279 (1989).

[51] Panos Hatziprokiou, *Immigrants' Integration and Social Change: Greece as a Multicultural Society*, LONDON SCH. ECON. & POL. SCI. 2ND SYMP. ON MOD. GREECE 1, 6–7 (June 10, 2005), https://ec.europa.eu/migrant-integration/sites/default/files/2018-06/Panos_Hatziprokopiou_paper.pdf [https://perma.cc/HTE7-23RK].

[52] John L. Comaroff, *Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution*, *in* THE POLITICS OF DIFFERENCE: ETHNIC PREMISES IN A WORLD OF POWER 162, 171 (Edwin N. Wilmsen & Patrick McAllister eds., 1996).

state."[53] This *jus sanguinis* notion of citizenship characterizes those nation-states that have followed the ethnic-genealogical pattern of nation-state formation according to Smith's approach presented above.

The major issue in relation to 'citizenship' has been the rights and privileges that derive from it and who could satisfy the criteria to enjoy them. Historically, this has been defined by the type of membership one enjoys in a particular nation-state, while the criteria for membership differed each time according to the type of nationalism. Soysal suggests, however, that the boundaries of membership in the post-national model of citizenship are rather fluid.[54] There are, for instance, a growing number of dual nationality acquisitions, which formalize this fluidity. At the same time, changes in the transnational order have transformed the organization of international state system.[55] Nevertheless, this does not mean that nation-states are less predominant than before; to the contrary, they still attempt to control immigrant influx through restrictive immigration policies: "Nation-states remain the primary agents of public functions, but the nature and parameters of these functions are increasingly determined at the global level."[56] Thus, Smith and Hutchinson suggest that "[m]ulti-culturalism has become the political expression of a more pluralistic approach to nationhood in Western polyethnic states, though such tendencies have also generated nationalist reactions to ethnic minorities."[57]

III. CITIZENS AND FOREIGNERS, INCLUSION AND EXCLUSION THROUGH THE LENS OF 'CITIZENSHIP,' 'ETHNICITY,' AND 'IDENTITY'

From a demographic perspective, migration is one of three processes that change populations, with the others being fertility and mortality. It is universally acknowledged that the balance of births over deaths (known as net natural increase), not net migration, is the major contributor to population growth.[58] Between 1960 and 2010, the global South suffered a net migration loss of 92 million people, which is equivalent to 2% of its 3.85 billion growth within this period. During the same period, the 92 million net migration gain in the global North was equivalent to 28% of its 324.5 million population increase.[59] While in the North the net natural increase is slower as compared to net immigration, the opposite is true in the South, although there is limited data concerning immigrant flows in poorer nations. Demographers and immigration experts agree that the

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[53] Konstantinos Tsitselikis, *Citizenship in Greece: Present Challenges for Future Changes*, *in* MULTIPLE CITIZENSHIP AS A CHALLENGE TO EUROPEAN NATION-STATES 145, 145–46 (Devorah Kalekin-Fishman & Pirkko Pitkänen eds., 2007).

[54] Soysal, *supra* note 49, at 292.

[55] *Id.* at 293.

[56] *Id.* at 296.

[57] HUTCHINSON & SMITH, *supra* note 48, at 12.

[58] Richard Bedford, *Contemporary Patterns of International Migration*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 17, 17 (Brian Opeskin et al. eds., 2012).

[59] *Id.*

various patterns of migration (i.e., temporary, permanent, transiting, mobility, etc.), as well as how this is achieved (particularly irregular migration), make it almost impossible to indicate the extent to which a particular population has been impacted by immigration. The closest we can come is through an assessment of the number of people in a state who were born in another state (so-called immigrant stocks). With these considerations in mind and given the processes of globalization, oppressive migration policies are incongruous with increased labour demands and the insignificant demographics involved.

Regulation of international migration and the effect of growing ethnic diversity on the societies of immigration countries have been central issues in migration theory for the study of mass population movements.[60] The social meaning of ethnic diversity depends on the receiving country's previous experience in migration and the immigration patterns of inclusion and exclusion are modelled by the policies applied towards immigrants in relation to residence permits, citizenship, and rights. As King and Mai suggest, following Castles' argument, the process of inclusion or exclusion is a process of granting full membership or denying full membership thus differentiating between "full members of the new global order" from poor undocumented immigrants who are marginalized.[61] According to their immigration policy, countries range extensively between two extremes: those recognizing permanent settlement and granting minority cultural and political rights and those that reject the prospect of permanent settlement.[62] The latter see pluralism as a threat to national unity and in these countries the integration of immigrants is a difficult, long-lasting process which seldom leads to full inclusion.

The term "social exclusion" has also become part of the language of European social policy since 1988 and, as Miles and Thränhardt note, the dynamics of inclusion and exclusion of migrants as a specifically European process have been expressed via political and economic integration and issues of citizenship.[63] Thus, while currently there is no need for the mass migration of unskilled labour, the practice of exclusion is becoming a utilitarian, economic consideration as well as a racist conception of "otherness."[64] Castles et al. suggest that Albanian immigrants in Greece seem to counter a sort of "differential exclusion," meaning that the migrants are accepted and incorporated in certain fields

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[60] STEPHEN CASTLES ET AL., THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD 18 (5th ed. 2014).

[61] RUSSELL KING & NICOLA MAI, OUT OF ALBANIA: FROM CRISIS MIGRATION TO SOCIAL INCLUSION IN ITALY 13 (2008) (quoting Stephen Castles, *Globalization and Migration: Some Pressing Contradictions*, 50 INT'L SOC. SCI. J. 179, 182 (1998)).

[62] CASTLES ET AL., *supra* note 60, at 19.

[63] Robert Miles & Dietrich Thränhardt, *Introduction: European Integration, Migration and Process of Inclusion and Exclusion*, *in* MIGRATION AND EUROPEAN INTEGRATION: THE DYNAMICS OF INCLUSION AND EXCLUSION 1, 3 (Robert Miles & Dietrich Thränhardt eds., 1995).

[64] *Id.* at 3–5.

of society (e.g., the labour market), while access to other fields (e.g., social security, citizenship, political participation, etc.) is essentially refused to them.[65]

Portes suggests that opponents of migration in receiving societies fear the profound cultural and structural transformations that migration may cause: "[T]he fears expressed by opponents of immigration commonly portray a . . . movement[] rising out of the poorer nations of three continents and overwhelming the social systems and the culture of the developed world."[66] He states that migration has been analysed as a *cause* of change from a cultural perspective (emphasising its potential for value/normative transformation), as well as from a structural one (highlighting its demographic and economic significance).[67] He also points out that the depth of the processes of change attributed to migration vary from effects that "simply scratch the surface of society, affecting some economic organisations, role expectations, or norms" to effects that "may go deep into the culture, transforming the value system, or into the social structure, transforming the distribution of power."[68]

In an article discussing the history of state migration policies, Castles, citing Fahrmeir et al.,[69] points out that until World War I "[s]tates took an active interest in 'their' emigrants and in the immigrants who crossed their borders, and used various means of classifying international migrants as 'desirable' or 'undesirable'."[70] In the nineteenth century, there had been greater freedom of movement due to democratic revolution and industrialization. At the same time, though, there was need to register national belonging and personal identity since "[t]he emergence of the welfare state reinforced the distinction between citizens and foreigners."[71] Migration history has shown that the various factors in shaping state policies "are so complex that states tend towards compromises and contradictory policies" and that past migration experiences have often had their own "unintended consequences."[72] Castles argues that this is due to several reasons, such as competing social interests and the ways that such policy processes are made to work: "An important underlying reason is the contradiction between the national logic of migration control and the transnational logic of international migration in an epoch of globalization."[73] He suggests that previous

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[65] KING & MAI, *supra* note 61, at 14.

[66] Alejandro Portes, *Migration and Social Change: Some Conceptual Reflections*, 36 J. ETHNIC & MIGRATION STUDIES 1537, 1545 (2010).

[67] *Id.*

[68] *Id.* at 1544.

[69] ANDREAS FAHRMEIR ET AL., MIGRATION CONTROL IN THE NORTH ATLANTIC WORLD 2 (2003).

[70] Stephen Castles, *The Factors that Make and Unmake Migration Policies*, 38 INT'L MIGRATION REV. 852, 856 (2004).

[71] *Id.*

[72] *Id.* at 854.

[73] *Id.*

approaches to migrants as either "permanent settlers" or "temporary sojourners" "were premised on the idea that people would focus their social existence on just one society at a time and would therefore owe their allegiance to just one nation-state."[74] Contemporary transnational communities, though, seem to allow various forms (economic, political, social, or cultural) of cross-border activities, thus, often overcoming barriers imposed by states.

A. Ethnicity and Identity in the Nation-State Formation Process

In general, the study of ethnicity involves the study of identity systems, class systems, systems of political and economic domination and change, maintenance and crossing of boundaries, etc. Barth has made the point that ethnicity is a form of social organization, a way of organizing cultural difference, and the establishment of a boundary between *us* and *them* on the basis of difference.[75] Other anthropologists see ethnicity as being produced within the process of state formation,[76] where "various groups establish and fight over symbolic conventions, strive for legitimacy, and fix inter-group relations and the distributions associated with them."[77] "Culture," "tradition," and "authenticity" become key notions for the formation of identities on the part of the state-makers, built on the myth of "homogeneity." According to Verdery:

> The kind of self-consistent person who 'has' an 'identity' is a product of a specific historical process: the process of modern nation-state formation . . . . [A]ny given person can 'have' only *one* identity of a certain basic kind (ethnic, national, gender). 'Identities' are crucial tags by which state-makers keep track of their political subjects; one cannot keep track of people who are one thing at one point, another thing at another.[78]

Situational ethnicity where ethnic identities are flexible and situationally adaptive are common in the third world, rather than the first, where identities are less flexible due to the nation-state formation process that emphasizes a single kind of belonging.[79]

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[74] *Id.* at 863.

[75] FREDRIK BARTH, ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE 15–16 (1969).

[76] JOHN W. COLE & ERIC R. WOLF, THE HIDDEN FRONTIER: ECOLOGY AND ETHNICITY IN AN ALPINE VALLEY 8 (1974); KATHERINE VERDERY, TRANSYLVANIAN VILLAGERS: THREE CENTURIES OF POLITICAL, ECONOMIC, AND ETHNIC CHANGE 4 (1983); FIONA WILLIAMS, SOCIAL POLICY: A CRITICAL INTRODUCTION 92 (1989).

[77] Katherine Verdery, *Ethnicity, Nationalism, and State-Making: Ethnic Groups and Boundaries: Past and Future*, *in* THE ANTHROPOLOGY OF ETHNICITY: BEYOND 'ETHNIC GROUPS AND BOUNDARIES' 33, 45 (Hans Vermeulen & Cora Govers eds., 1994).

[78] *Id.* at 37.

[79] *See* E.R. LEACH, POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE 125 (Athlone Press 1970) (1954); Michael Moerman, *Ethnic Identification in a Complex Civilization: Who Are the Lue?*, 67 AM. ANTHROPOLOGIST 1215, 1215–29 (1965).

Ethnicity here is seen as a performative social behavior[80] on the part of the immigrants, as a social construction which is not only constantly formed by the people themselves in everyday social interaction, but also via the administrational discourse of belonging to one ethnic group or the other, which is internalized by both the host people and the immigrants. Thus, of particular importance is how immigrants view matters of citizenship, ethnicity, and identity construction in relation to issues of social mobility and social inclusion in the host country.

Construction of identity is "an emic category of self and mutual identification . . . discursively sustained through social interaction . . . ."[81] Attribution of identity on the part of the Greeks, on the other hand, examined in the light of "ethnicity," "involves an attribution of identity to a minority by the majority; a relation and process intimately connected to issues of power, hierarchy, stratification, indeed to the nation-state."[82] This dual process of identification is very much affected by the ideologies about nationalism and ethnicity held by both parties: the immigrant and the host community.

In the case of Greece, ethnicity has played a vital role in the immigration policy where a "hierarchy of Greekness" is reflected in the provisions taken for immigrants of Greek ethnic origin,[83] while non-ethnic-Greek immigrants were denied such provisions.

IV. NATIONALITY FROM THE PERSPECTIVE OF INTERNATIONAL PUBLIC POLICY

The granting of nationality is an intrinsic, if not quintessential, characteristic and entitlement of the nation-state.[84] Although, as will be explained in more detail, it is also a reflection of sovereignty (i.e., non-state entities cannot confer nationality or other forms of citizenship) and is subject to some sensible limitations. As a result, the granting of nationality has been,[85] and remains, state-centric, but it would be far too

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[80] *See generally* Mariangela Veikou, *The Performative Construction of the Ethnic Identity: Greek-Albanian Immigrants and their Everyday Experience at the Neighborhood of a Greek City*, *in* IMMIGRANTS IN GREECE 157 (Miltos Pavlou et al. eds., 2001) (Greece) (discussing the ethnic and national identity considerations in Greek immigration policy).

[81] Gazmend Kapllani & Nicola Mai, '*Greece belongs to Greeks!' The Case of the Greek Flag in the Hands of an Albanian Student*, *in* THE NEW ALBANIAN MIGRATION 153, 156 (Russell King et al. eds., 2005) (citing Michael Moerman, *supra* note 79, at 1215–19).

[82] Alan Rew & John R. Campbell, *The Political Economy of Identity and Affect*, *in* IDENTITY AND AFFECT: EXPERIENCES OF IDENTITY IN A GLOBALISING WORLD 1, 11 (John R. Campbell & Alan Rew eds., 1999).

[83] Anna Triandafyllidou & Mariangela Veikou, *The Hierarchy of Greekness: Ethnic and National Identity Considerations in Greek Immigration Policy*, 2 ETHNICITIES 189, 189 (2002).

[84] Richard Perruchoud, *State Sovereignty and Freedom of Movement*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 123, 123–25 (Brian Opeskin et al. eds., 2012).

[85] Empires must certainly be distinguished because they must necessarily find a threat that is common to all their subjects. The Romans, for example, distinguished between the law applicable to Roman citizens (which was conferrable) and that which was applicable between non-Romans or between non-Romans and Romans, namely the *jus gentium*. This

simplistic to explain it in those terms, particularly given the phenomena that *prima facie* tends to contradict this notion. Firstly, in-depth inter-state socio-economic integration of the type encountered in the European Union (EU) has been demonstrated to develop a distinct supranational citizenship, at least in terms of rights and duties, not so much in form. This European citizenship allows persons of various nationalities to freely travel, seek work, healthcare, schooling, and residence, among others, in any country within the EU.[86] Such entitlements are typically conferred upon a state's own nationals and hence European citizenship—a notion that in legal terms should be distinguished from nationality, which is only conferred by the state—is constructed on the basis of a broad range of rights, minus the formal conferral of nationality. Nonetheless, the rights bestowed upon nationals are equal to those conferred upon non-nationals.[87]

Equally, the perception of the state as an administrative entity is pertinent to any discussion relating to the dismissal of formal nationality. Post-colonial regimes in Africa, for example, were eager to claim that their borders were largely the result of former colonial boundaries (the so-called *uti possidetis* principle), which did not, however, reflect ethnic, clan, and other affiliations.[88] Indeed, no heed was taken of nomadic peoples or of the need to provide some degree of homogeneity to these new nations. Not surprisingly, high on the post-colonial agenda was the call to either re-draw or abolish boundaries in favour of a transnational, pan-African union, a *sui generis pax Africana*.[89] Despite the best of efforts, however, the reality was that once a state, with its administrative mechanisms, is set up, it is naturally driven to move in order to sustain itself. Taxes need to be collected on a monthly basis, civil servant salaries must be paid, schools must function, foreign policy must go on, etc. When a relatively poor state, thereafter, considers opening its borders to millions of people of the same race[90] or ethnic origin, it is not simply conferring nationality; it is opening the floodgates to masses of impoverished peoples which will hamper its public finances and disrupt its social rubric.

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is not dissimilar to the legal arrangements found in the non-metropolitan territories of nineteenth century empires, particularly the British.

[86] M.J. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, 39 LEGAL ISSUES OF ECON. INTEGRATION 273, 277-91 (2012).

[87] RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 81–82 n.148 (2d ed. 1983).

[88] *Id.* at 158. *See also* Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. YB INT'L L. 74 (1997).

[89] *See* MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES 163–87 (2007).

[90] Contrary to the dismissal of the notion of "race" and "racial" in most social sciences and the humanities, in international law, particularly with respect to international crimes such as genocide and human rights law, as is the case with refugees and discrimination, race has a very precise legal meaning and as such is extensively employed by the courts. The same is true in respect of "aliens." *See* Ilias Bantekas, *Explaining Mass Atrocity through Culture: The Missing Link for International Criminal Justice?*, 39 BERKELEY J. INT'L L. (forthcoming 2022).

One should not view post-colonial Africa as the sole paradigm. The reunification of East and West Germany is a solid example of when two countries with the same ethnic composition, divided during the lifetime of their peoples and under particularly dire circumstances, are faced with social and financial backlash and concerns. The wealthier West Germans were apprehensive of paying increased taxes to bring their poorer, East German compatriots to the same standard of living.[91] The notion, therefore, that countries are eager to confer nationality *en masse* to people of the same ethnic, racial, religious, or other conviction is a myth due to the socio-economic difficulties this entails, particularly where an increase in population is not followed by concrete financial benefits, such as succession to additional territory. The current trends on the conferral of nationality, therefore, are not antithetical to the empirical data which demonstrate that countries are susceptible to expanding their nationality pool only when they can derive concrete financial benefits from the new immigrants.[92] The USA, Australia, and Canada provide excellent paradigms of this trend, whose immigration policies are based on attracting the most talented, most innovative, best educated, and relatively young persons from across the globe.

Indeed, based on the above observations, the fundamental criterion for any immigration policy in the twenty-first century is primarily financial and social—although one should not underestimate domestic politics, particularly in situations where a dominant ethnic group demands unity with its brethren living in another state. The conferral of nationality is but an incentive in this process and, given the relative affluence of the immigrant under these circumstances, their social integration is not considered problematic.

V. THE REGULATION OF NATIONALITY AND RESIDENCE UNDER INTERNATIONAL LAW

As has already been stated, the conferral of nationality lies in the exclusive domain of the state and its organs. By conferral, of course, we mean in respect of persons who already possess a distinct nationality from that of the conferring state (otherwise known as naturalisation), given that Article 15 of the Universal Declaration of Human Rights already guarantees the right of all persons to a nationality.[93] It would, no doubt, be irrational to *demand* that states confer their nationality on aliens, as then every state would be under the same compulsion, leading to a vicious cycle.[94] Hence, the granting of nationality upon aliens is an

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[91] ERIC OWEN SMITH, THE GERMANY ECONOMY 67–80 (1994).

[92] THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICY HARMONIZATION AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION 12-131 (Guy S. Goodwin-Gill & Hélène Lambert eds., 2010) (discussing the British experience with asylum claims).

[93] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948) [hereinafter UDHR].

[94] H.F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 123-29 (1959).

entitlement of the state subject to its exclusive discretion.[95] Although states are free to grant nationality to whomever they wish,[96] the legal effects of such conferral are assessed not on the basis of the state's domestic law, but rather upon international law.

The concept of effective nationality traces its roots to the *Nottebohm* case decided by the International Court of Justice (ICJ) during the 1950s, at a time when the politics of nationality were highly contentious in international affairs.[97] The ICJ ruled in the *Nottebohm* case that although states were free to confer their nationality on any person, the legal effects of such conferral were only to be assessed only by reference to international law.[98] This effective nationality has been bypassed by transnational corporate entities and foreign investors in their own personal capacity to engage in bilateral investment treaty (BIT) shopping with a view to acquiring as many investment guarantees as possible. This process has effectively decreased the significance of diplomatic protection that was prevalent until the mid-1950s,[99] and has rendered nationality slightly more fluid. Investment tribunals have shown reluctance to apply the *Nottebohm* test (albeit intimating that such a test may be relevant in exceptional circumstances) involving a genuine link for two reasons: firstly because it was originally adopted to deal with diplomatic protection and secondly because it is not required by the International Centre for Settlement of Investment Disputes (ICSID) Convention[100] or most BITs.[101] In *Champion Trading v. Egypt*, three of the claimants possessed dual Egyptian and U.S. citizenship.[102] The tribunal was reluctant to be drawn into a discussion pertaining to the effectiveness

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[95] Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284, 298, 327 (1963).

[96] As well as prescribe the method/principle by which nationality may be assumed, that is by either *jus sanguinis* or *jus solis*, or a mix of the two. This is a matter of state practice that is not circumscribed or regulated by international law.

[97] *See* Nottebohm Case (Liech. v. Guat.), Judgment (second phase), 1955 I.C.J. Rep. 4, 20–22 (Apr. 6).

[98] *Id.* at 120.

[99] *See, e.g.*, Mavrommatis Palestine Concessions (Greece v. UK), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); Panevezys-Saldutiskis Railway (Est. v. Lith.), Judgment, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); as well as of course, Barcelona Traction, Light and Power Co., (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 79 (Feb. 5).

[100] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature,* March 18, 1965, 575 U.N.T.S. 160 [hereinafter ICSID Convention].

[101] In U.S. Bilateral Investment Treaty (US BIT) practice, as is the case with Art. 1(c) of the U.S.-Bolivia BIT, the determination of nationality is based on the law of each state. *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Bol.-U.S., Apr. 17, 1998, S. TREATY DOC. 106-26 [hereinafter U.S.-Bolivia BIT]. In the Letter of Submittal to Congress of the U.S.-Bolivia BIT, it was further explained that "[u]nder U.S. law, the term 'national' is broader than the term 'citizen.' For example, a native of American Samoa is a national of the United States, but not a citizen." *Id.* at VI.

[102] Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, at 8 (Oct. 21, 2003).

of the claimants' U.S. nationality, emphasizing that such a criterion was not required under the ICSID framework.[103] In general, investment tribunals faced with investors enjoying dual nationality have not resorted to prioritizing one over the other on the basis of an effective nationality or dominance test, as the ICJ did in the *Nottebohm* case.[104] Rather, they are content to accept both nationalities as effective and apply the one encompassed by the BIT invoked by the claimant.[105] Such a stance has been followed by tribunals even in situations where the claimant does not reside (habitually or ordinarily) in its country of nationality.[106] These decisions demonstrate a clear deference to the sovereign power of states to confer nationality. Be that as it may, the ICJ has held that under general international law, at least, a shareholder's country of nationality cannot exercise diplomatic protection on his behalf in respect of a company incorporated in a different country.

The ICJ noted, however, that the *lex specialis* regime of BITs and international investment agreements (IIAs) provided more concrete solutions in favor of such shareholders.[107] Thus, it is no wonder that the aforementioned carve-outs have given rise to questions about the nationality of an investment on the basis solely of the citizenship of its shareholders.[108] The limitation in the *Diallo* judgment does not exist in international investment law, however, on account of the mechanism of "foreign control," as identified in article 25(2)(b) of the ICSID Convention and because many BITs and IIAs explicitly provide for an independent right of action on the part of both majority and minority shareholders.[109] In such situations, as Dolzer and Schreuer point out, it is not the locally incorporated company that is treated as an investor, but

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[103] *Id.* at 17–18.

[104] *See* Nottebohm Case (Liech. v. Guat.), Judgment (second phase), 1955 I.C.J. Rep. 4, 20–22 (Apr. 6); Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 GEO. WASH. INT'L L. REV. 788, 798 n. 79 (2004); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L.J. 1, 11–15 (2009); Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Award on Jurisdiction, ¶ 55 (July 7, 2004).

[105] Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, ¶¶ 60–62 (July 26, 2001).

[106] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶ 30 (Dec. 6, 2000); Ioan Micula, Viorel Micula and Others v. Romania (I), ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 103 (Sept. 24, 2008). It should be noted that habitual residence as opposed to nationality is the sole jurisdictional requirement in other conflict of laws instruments, such as in Council Regulation 2201/2003, 2003 O.J. (L 338) 1–3 (EC) (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation 1347/2000).

[107] Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. Rep. 582, ¶¶ 61, 87–98 (May 24).

[108] *See* Ben Juratowitch, *Diplomatic Protection of Shareholders*, 81 BRIT. Y.B. INT'L L. 281, 283 (2010).

[109] *See* ICSID Convention, *supra* note 100, art. 25(2)(b).

rather the actual participation in the company under consideration.[110] Most contemporary BITs define investments broadly as encompassing shares, stocks, or other interests in a company.[111] As a result, it was not a far leap for an ICSID panel in *CMS v. Argentina* to dismiss the respondent's claim that CMS, as a minority shareholder to an investment in Argentina, did not possess *locus standi* under the US-Argentina BIT.[112] This principle has also been extended to cases of indirect shareholding through intermediary companies.[113]

There are situations where nationality is inferior, or at least produces far less legal effects, in comparison to residence or habitual residence. By way of illustration, jurisdiction in respect to transnational matrimonial disputes in the EU under the terms of Article 3 of the Brussels II*bis* Regulation,[114] is determined by reference to the habitual residence of the respondent.[115] Habitual residence provides a number of privileges, including residence rights,[116] choice of jurisdiction for legal proceedings, and others. As the courts have correctly accepted, a person may be a habitual resident in one country and at the same time be a resident of several other jurisdictions. In this case, there can be only one habitual residence for the purpose of matrimonial jurisdiction under Brussels II*bis*.[117] For the purposes of Brussels II residence need only be habitual,

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[110] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 57 (2d ed. 2012).

[111] See, e.g., the definition of "investment" in Article I of the 2012 U.S. Model BIT (2012), art. 1.

[112] CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 48 (July 17, 2003).

[113] *See* Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 41–52 (Aug. 2, 2004); CEMEX Caracas Invs. B.V. & CEMEX Caracas II Invs. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 141–60 (Dec. 30, 2010).

[114] Council Regulation 2201/2003, *supra* note 106, art. 3 (repealing Council Regulation 1347/2000 2003 (EC)).

[115] Alegría Borrás, *Chapter II Jurisdiction*, *in* BRUSSELS IIBIS REGULATION 86 (Ulrich Magnus & Peter Mankowski eds., 2012).

[116] So-called golden visas are offered by many states around the world as an enticement for persons who invest over a certain amount (usually through the purchase of real estate) in the host state. Residence under such schemes is indefinite and hence encompasses the majority of privileges (but certainly not all) associated with nationality. *See generally* Kristin Surak & Yusuke Tsuzuki, *Are Golden Visas a Golden Opportunity? Assessing the Economic Origins and Outcomes of Residence by Investment Programmes in the EU*, 47 J. ETHNIC & MIGRATION STUD. 3367 (2021) (assessing the economic origins and outcomes of so-called Golden visa programmes in the European Union).

[117] *See* Marinos v. Marinos [2007] EWHC (Fam) 2047, [48]. There are of course other sub-classifications, such as habitual residence and "mere temporary presence" in the case of children under Articles 8 and 10 of Brussels II*bis*. *See* V v. V [2011] EWHC (Fam) 1190, [49]–[50]; Mercredi v. Chaffe [2011] EWCA (Civ) 272, [97]. Prior to the passing of Brussels II*bis,* multiple habitual residences were possible under English law, where a person divided their time between two or more countries and lived in all with a settled purpose. *See* Ikimi v. Ikimi [2001] EWCA (Civ) 873, [35]; Armstrong v. Armstrong [2003] EWHC (Fam) 777, [19].

not permanent.[118] English courts have developed a two-tier test for assessing habitual residence: a substantive test and a subjective test. The first is not easy to quantify, as it is premised on the "centre of someone's interests" whereupon "one [must have due] regard to context."[119] The second strand of the test concerns the true intention of the person in establishing his centre of interest in such a way that it may be characterised as habitual.[120] The subjective test was not arbitrarily imported by English courts, but has long been sustained by the ECJ's jurisprudence.[121]

The association of multiculturalism with immigration is quintessentially predicated on human rights and international law. There is no obligation under international law to embrace multiculturalism; at least none obliging states to admit aliens and force their integration against local sentiment. States are certainly under an obligation to protect the rights of all persons in their territory, whether nationals or aliens.[122] To the extent that multiculturalism requires positive or negative measures for the wellbeing of all persons in a given country, the state concerned is required to take such measures.[123] No compulsion to integrate or assimilate exists, however, with assimilation often being viewed as tantamount to a cultural genocide or stripping peoples from their distinct characteristics.[124]

International law sets certain limitations on the sovereign right of states to confer and remove nationality. At the most basic level, states are prohibited from rendering their own nationals stateless, particularly by stripping them of their nationality or forbidding them to return.[125] States, of course, can deny nationality or entry to persons with ancestral links,

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[118] L-K v. K [2006] EWHC (Fam) 153, [13].

[119] Marinos v. Marinos [2007] EWHC (Fam) 2047, [34].

[120] *See* Case C-90/97, Swaddling v. Adjudication Officer, 1999 E.C.R. I-1075, ¶ 26.

[121] *Id.* ¶ 29.

[122] *See generally* Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1540–42 (1991) (discussing how autonomy regimes find support in several prominent norms of the human rights movement).

[123] *See generally* Alexandra Xanthaki, *Multiculturalism and International Law: Discussing Universal Standards*, 32 HUM. RTS. Q. 21 (2010) (discussing the contribution of current international human rights law to the multicultural debate). Other authors have contended that the pursuit of cultural diversity, although in principle valuable, risks applying diversity in substitution of justiciable rights and principles of human rights law such as equality and non-discrimination. *See* Eleni Polymenopoulou, *"Cultural Diversity" from the Perspective of Human Rights, Media, and Trade Law: Cross-Fertilization or Conflict?*, 7 SANTANDER ART & CULTURE L. REV. 123, 143 (2021).

[124] *See generally* LAWRENCE DAVIDSON, CULTURAL GENOCIDE (2012) (examining mechanisms that may be used to combat today's cultural genocide).

[125] *See* Convention on the Reduction of Statelessness, *supra* note 20, art. 1 (applying the *jus soli* principle to persons that would otherwise find themselves stateless). *See also* Ilias Bantekas, *Repatriation as a Human Right under International Law and the Case of Bosnia*, 7 J. INT'L L. & PRAC. 53, 54–55 (1998); Ilias Bantekas, *Internationally Organized Elections and Communications: The Reality for Bosnia's Failed Repatriation*, 10 INT'L J. REFUGEE L. 199, 202–04 (1998).

and may even strip persons of their nationality as long as the person holds dual nationality.[126] This explains to some degree the vast divergence among developed nations in their employment of the *jus solis* and *jus sanguinis* principles.[127] Equally, states are naturally prohibited from forcing their nationals to abandon their home country and render themselves long-term refugees or stateless. The rationale here is twofold: on the one hand, stripping one's nationality deprives the protection afforded by the state under international human rights law, while on the other hand, such a situation creates an overwhelming burden on those other states receiving stateless persons.[128]

Moreover, when a state is broken up into multiple new entities, these new territories succeed to parts of the territory of the former unitary state. State succession is governed by a specific corpus of international law, which has developed over time to deal with such situations. The general rule is that the new (successor) state succeeds not only to the territory and assets of its predecessor, but also its obligations, including human rights treaty obligations.[129] As a result, all persons habitually resident on its territory at the time of succession are generally assured the nationality of the new state. In practice, the situation is slightly more complicated.[130] Following the break-up of the Soviet Union, a succession agreement was signed by all successors under the aegis of the Russian Federation (Alma Ata Accords).[131] Given that the USSR had fostered intra-migration—much of it enforced or otherwise against the wishes of the local population with a view to maintaining its grip on power—upon succession, significant ethnic Russian populations (up to ten per cent in most cases) were found residing in the successor states.[132] These new entities adopted nationality decrees that proceeded to grant nationality to all those habitually residing on their territory, but in practice excluded several ethnic groups by means of discrimination and on the basis that they had been transferred there arbitrarily by the previous regime.[133] Nonetheless, they provided an option to non-indigenous persons to declare within reasonable time that they did not wish to assume the nationality of the new state, in which they were entitled to the nationality

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[126] *See generally* Begum v. Sec'y of State for the Home Dep't [2021] UKSC 7 (deciding that it was lawful to strip a dual national of her citizenship by reason of the fact that she had joined ISIS).

[127] Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17, 17–32 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

[128] Laura van Waas, *The Children of Irregular Migrants: A Stateless Generation?*, 25 NETH. Q. HUM. RTS. 437, 438–39 (2007).

[129] Andreas Zimmermann, *Secession and the Law of State Succession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 208, 208–09 (Marcelo G. Kohen ed., 2006).

[130] *Id.* at 210–11.

[131] *See* Alma Ata Declaration, Dec. 21, 1991, 31 I.L.M. 148.

[132] *See* Nida M. Gelazis, *The European Union and the Statelessness Problem in the Baltic States*, 6 EUR. J. MIGRATION & L. 225, 235–38 (2004).

[133] *Id.* at 232.

of their choice, namely Russian. The Russian Federation at the time was not particularly desirous of mass returns of ethnic Russians, not only because of its poor financial situation, but also because maintaining significant minority populations throughout its former empire could interfere in domestic politics.[134] Ultimately, the number of returns to Russia was very low, particularly as compared to the persons that remained in the country of their habitual residence.[135]

It is queried whether the principle of non-discrimination, a fundamental human rights norm, can be applied to the nationality-granting discretion of states. Ordinarily, on the basis of general treaties such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and more specific ones such as the International Convention on the Elimination of All Forms of Racial Discrimination, states are obliged to treat all persons in the same or equal manner.[136] Article 14 of the ECHR (the general non-discrimination provision) has not given rise to significant litigation, given that the European Court of Human Rights (ECtHR) views the provision as entailing formal equality.[137] Nonetheless, the ECtHR has highlighted the position that different situations must be treated differently, thus endorsing positive action under such circumstances.[138] On the other hand, the jurisprudence of the UN Human Rights Committee clearly favours not only positive discrimination policies as such,[139] but also endorses compulsory positive action through Article 26 of the ICCPR.[140] Be this as it may, there is no suggestion that the non-discrimination principle applies in situations where a state confers nationality to a non-national in one case, but not to another in a similar case. Any suggestion to the contrary would, in fact, defeat the very essence of the sovereign nature of nationality and would remove the policy/political dimension of the discretion, which determines a state's immigration policy.[141] Thus, the

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[134] *See* Jeffery L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law*, 19 MICH. J. INT'L L. 1141, 1145 (1998).

[135] Timothy Heleniak, *Migration of the Russian Diaspora after the Breakup of the Soviet Union*, 57 J. INT'L AFFS. 99, 109 (2004) (arguing that the choice of return was predicated on a complex range of choices and ultimately the promise of an indefinitely available Russian nationality made worthwhile retaining one's livelihood in the vast diaspora).

[136] *See, e.g.*, UDHR, *supra* note 93, art. 2; ICCPR, *supra* note 24, arts. 2, 26; G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, art. 2(2) (Dec. 16, 1966) [hereinafter ICESCR]; U.N. Human Rights Committee (HRC), General Comment No. 18: Non-Discrimination ¶¶ 1, 13, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989).

[137] *See generally* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (George W. Keeton & Georg Schwarzenberger eds., 1979) (discussing the functions of nationality in international law).

[138] *See* Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R. 263, ¶¶ 41–44.

[139] HRC, General Comment No. 4: Article 3 ¶¶ 2–3, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

[140] ICCPR, *supra* note 24, art. 26.

[141] The UN Human Rights Committee, for example, has accepted that national security is a valid ground for denying an application for nationality. *See, e.g.*, Borzov v Estonia, HRC Communication, ¶ 7.3, UN Doc. CCPR/C/81/D/1136/2002 (Aug. 25, 2004).

state's right to confer nationality to aliens trumps the general equality and non-discrimination principle.[142] This takes us back to the discussion on multiculturalism. The USA, for example, which entrenched the *jus soli* rule as a constitutional principle through its Fourteenth Amendment, has taken distinctive measures to prevent the children of illegal immigrants from being naturalised and has made it more difficult for fathers to transmit their US nationality to children born abroad and out of wedlock.[143]

Given our comments so far, it is evident beyond any doubt, irrespective of one's theoretical stance on the matter, that there is no obligation for states to foster or enhance multiculturalism—other than by respecting all civil, political, socio-economic and cultural rights of persons on their territory. In fact, it is accepted that states are free to develop an immigration policy that is based on ethnic or cultural homogeneity. Australia, for example, admits only those immigrants that are more than likely to embrace the Australian way of life, thus consciously excluding persons of particular religions and convictions.[144]

VI. THE CONFERRAL OF NATIONALITY TO IMMIGRANTS UNDER GREEK LAW

The discussion in previous sections was meant to highlight not only the manner in which states are allowed to establish an immigration policy, but the latitude they are afforded under international law to confer their nationality to non-nationals. Save for the application of human rights to migrants and refugees, states have unlimited latitude in the conferral of nationality, even in discriminatory fashion (save between EU nationals), on account of the principle of sovereignty. Within this context, we will now turn to examine the rationale belying Greek immigration policies post-1990.

Up until the late 1990s, the immigration policy of Greece was non-existent (principally because it was never a destination country). In fact, mass expulsion was the main policy to deal with the phenomenon of irregular migration.[145] The first Greek regularisation program (which conferred temporary leave to stay) was launched in 1998, whereby illegal immigrants were given the opportunity to regularise their status in

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[142] *See* David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 250 (2006).

[143] *See, e.g.*, United States v. Flores-Villar*,* 497 F. Supp. 2d 1160, 1165 (S.D. Cal. 2007), *aff'd*, 536 F.3d 990 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011).

[144] Under the Australian Citizenship Act of 2007, a child born in Australia to aliens obtains nationality only following ten years of continuous residence. *Australian Citizenship Act 2007* (Cth) s 12. *See also* The Swiss Three Circles Policy (as codified in 2008) and more recently the Mass Immigration Initiative by way of referendum. ANTJE ELLERMANN, THE COMPARATIVE POLITICS OF IMMIGRATION, 107–11, 129–30 (2021).

[145] THANOS MAROUKIS, UNDOCUMENTED MIGRATION: COUNTING THE UNCOUNTABLE. DATA AND TRENDS ACROSS EUROPE, COUNTRY REPORT: GREECE § 2.5, at 26 (2009), https://www.eliamep.gr/wp-content/uploads/2017/12/clandestino_report_greece_final_3.pdf [https://perma.cc/2LA7-8N4K].

Greece.[146] Two more regularisation programmes were subsequently launched, one in 2001 and the other in 2005. Nevertheless, even regularised migrants were usually in a state of "semi-legality," as residence permits for migrants legally residing in Greece for less than ten years were renewed for up to one or two years. Due to the immense delay of the process, by the time the permit was issued, the migrants were forced to apply again for the renewal of their temporary residence for yet another period. Integration through naturalisation was made next to impossible, since the conferral of Greek nationality has predominantly been premised on the principle of *jus sanguinis*, and until March 2010, the naturalisation procedure was long, costly, and unpredictable,[147] even if all requirements had been met.[148] In March 2010, the Greek Parliament adopted Law No. 3838/2010 on citizenship and naturalisation, introducing for the first time a substantial element of *jus soli* into the concept of Greek citizenship.[149] One of its principal innovations (Article 1A) concerned the status of second generation migrants, notably children born in Greece of foreign parents or children born abroad of foreign parents, all of which, however, had completed at least six years of schooling in Greece and were still living in Greece.[150] This new law also lowered the temporal threshold for naturalisation from ten to seven years of residence, provided the migrant had already received the EU long-term resident status (which can be acquired after five years of legal residence).[151]

Furthermore, the 2010 law introduced political rights to vote and stand in municipal elections for foreign residents and those that have lived in Greece for five years or more.[152] In December 2012, this law was deemed unconstitutional and overruled by the Greek Supreme Administrative Court on the basis that it conflicted with the

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[146] *See* Achilles Skordas, *Developments: The New Refugee Legislation in Greece*, 11 INT'L J. REFUGEE L. 678, 678, 684–85 (1999).

[147] *See* Rita Theodorou Superman, Book Review, 27 INT'L J. REFUGEE L. 201, 202 (reviewing HEATH CABOT, ON THE DOORSTEP OF EUROPE: ASYLUM AND CITIZENSHIP IN GREECE (2015)).

[148] Article 5(2)(a) of the Greek Nationality Code requires, among others, residence of at least ten years in Greece, but the ultimate decision for the conferral of nationality rests in the discretion of the state—through a process of multiple layers of controls—and the decision rejecting one's application need not be justified, according to Article 8(2). Greek Nationality Code, Law 3284/2004, arts. 5(2), 8(2) (Nov. 10, 2004; *see also* Ruby Gropas & Anna Triandafyllidou, *Migrants and Political Life in Greece: Between Political Patronage and the Search for Inclusion*, 17 S. EUR. SOC'Y. & POL. 1, 11 (2012) (discussing Greek political life and the integration challenges that immigrants face).

[149] Nomos (2010:3838) Νόμος Υπ'Αριθ. 3838: Σύγχρονες Διατάξεις για την Ελληνική Ιθαγένεια και την Πολιτική Συμμετοχή Ομογενών και Νομίμως Διαμενόντων Μεταναστών και Άλλες Ρυθμίσεις [Current Provisions related to Greek Nationality and the Political Participation of Expatriates and Legally Residing Immigrants] Efimeris tis Kivernisseos [E.K.] 2010, A:49 (Greece) [hereinafter Law No. 3838/2010].

[150] *See* Law No. 3838/2010, *supra* note 150, art. 1(A); Gropas & Triandafyllidou, *supra* note 148, at 12.

[151] *See* Law No. 3838/2010, *supra* note 150.

[152] *Id.*

constitutionally circumscribed *jus sanguinis* principle.[153] In reality, the Constitution, and particularly Article 4, do not expressly reject *jus solis*, albeit this is implicit in Greece's constitutional history.[154] The Court made it clear that Article 1A of the 2010 law did not provide any guarantees that mere residence was enough to establish a genuine bond between the right-holder and Greece. As a result, there was a danger to the country's sovereignty.[155] The Court, following popular suggestion, implicitly held that the 2010 law belied political motives in the form of favours to would-be naturalised immigrants who in turn would become potential voters for the party enacting the legislation.[156] It is evident from this judgment that the Greek state continues to view naturalisation through the lens of ethnic cohesion, fearing that a mass application of the *jus solis* principle would lead to social strife and tension.[157] This is of little comfort to children born and/or raised in Greece by foreign migrants who know of no other language and culture, but who are not considered Greek.[158] In 2020, a reform to the 2013 immigration law (which had slightly been amended in 2015) took place.[159] Law No. 4735/2020 does not significantly depart from its predecessor in terms of the substantive and procedural requirements for naturalisation.[160] In practice, even if a person satisfies the various requirements, they may still be denied naturalisation on the basis that they have not adequately adapted to Greek culture and way of life. This fluid and highly subjective criterion will most probably turn out to be decisive where applications increase exponentially, resulting in the tightening of Greece's immigration policies.

The Greek legislature is acutely aware that the country is by no means a primary destination for immigrant (non-refugee) populations, because their ultimate aim is to use Greece as a platform to disperse further north and west. The problem for Greece, however, is manifold. Firstly, its borders are largely porous, in the sense that traffickers can smuggle people through its extensive maritime zones without being easily

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[153] Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 60/2013 (Greece) [hereinafter Judgment 60/2013].

[154] 2022 SYNTAGMA [SYN.] [CONSTITUTION] 4 (Greece).

[155] *See* Judgment 60/2013, *supra* note 154.

[156] *Id.*

[157] *Id.*

[158] In fact, one of the influencing factors favoring the conferral of nationality on migrant children born in Greece was Giannis Antetokounmpo's rise to NBA stardom, who was born and raised in Greece by illegal Nigerian immigrants. *See* Matthew La Corte & Jacob Czarnecki, *Giannis Antetokounmpo's Immigrant Story and the Internationalization of the NBA*, NISKANEN CTR. (July 20, 2021), https://www.niskanencenter.org/giannis-antetokounmpos-immigrant-story-and-the-internationalization-of-the-nba [https://perma.cc/P952-S3VN].

[159] *See* Code of Greek Citizenship, art. 5 (L. 3284/2004) *as amended by* Ministerial Decision No. 130181/6353/2018 (Gov. Gaz. 1208/02.04.2018).

[160] Ministerial Decision, Law No 4735/2020, art. 11 (amending the requirements set out in Article 5A of the Greek Nationality Code).

detected.[161] Secondly, upon entry said persons cannot be diffused throughout Europe, and if they do manage to cross to another European nation, they would have to be surrendered back to Greece on account of the Dublin II Regulation,[162] which was later amended by Dublin III.[163] This means that although Greece is merely the entry country, it is responsible for maintaining all immigrant populations, assessing their applications and ultimately deporting those it deems not qualified for asylum. However, given the inability of the Greek government to handle the increased flows of illegal immigrants and the significant social tensions such movements have caused throughout the Greek territory—not to mention financial and labour consequences—the EU decided to offer assistance in the form of establishing FRONTEX,[164] whose aim is to provide assistance in the effective patrolling of Europe's external borders.[165]

Despite efforts to stem the inward flow of immigrants, ongoing conflicts in the region (e.g., Syria and Libya), as well as instability in certain countries (e.g., Afghanistan) and generalised poverty in large parts of the globe, irregular immigration continues unabated.[166] It is not surprising that popular sentiment is overwhelmingly against naturalisations, irrespective of political affiliation.[167] Greeks fear that naturalisations—especially of persons who do not share or embrace Greek culture or religion—will culminate in demographics giving rise to segregation (as opposed to integration), conflict, and ultimately, to calls

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[161] Jonathan Zaragoza-Cristiani, *Fortress Europe? Porous Borders and EU Dependence on Neighbour Countries*, E-INT'L RELS. (Jan. 2, 2016), https://www.e-ir.info/2016/01/02/-europe-porous-borders-and-eu-dependence-on-neighbour-countries [https://perma.cc/6PZR-32J.

[162] Dublin II Regulation, *supra* note 34 (establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country).

[163] *See* Dublin III, *supra* note 2. In *M.S.S. v. Greece and Belgium*, the European Court of Human Rights emphasised that the transfer of an Afghan asylum seeker to Greece by Belgium, in accordance with the then Dublin II Regulation, exposed him to risks associated with deficient Greek asylum procedures and appalling detention conditions. M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 121, ¶¶ 133, 300, 367–68. As a result, Belgium, along with Greece, was held liable for a breach of Articles 3 and 13 of the ECHR. *Id.* ¶¶ 367–68, 401. As a result of these violations, Dublin III was adopted, with Article 3(2) thereof specifically addressing the issue. Dublin III, *supra* note 2.

[164] *See* Council Regulation 2007/2004, *supra* note 7 (establishing a European Agency for the management of operational cooperation).

[165] Efthymios Papastavridis, *'Fortress Europe' and FRONTEX: Within or Without International Law?*, 79 NORDIC J. INT'L L. 75, 76 (2010).

[166] Anna Triandafyllidou & Maurizio Ambrosini, *Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-Keeping Serving the Labour Market*, 13 EUR. J. MIGRATION & L. 251, 255–59 (2011).

[167] *See* Anna Triandafyllidou, *Immigration to Greece: Problems and Prospects*, *in* IMMIGRATION WORLDWIDE: POLICIES, PRACTICES, AND TRENDS 191, 191–92 (Uma A. Segal et al. eds., 2009).

for autonomy or secession.[168] According to a 2003 study conducted by the National Centre of Social Research (EKKE),[169] Greeks, among all other Europeans, appear to be presented as having the most negative perceptions and attitudes about immigrants.[170] These perceptions are associated to economic, ethnic, cultural, and quality-of-life reasons. This is what Castles refers to as "[t]he strength of nationalist and ethnocentric ideologies in immigration countries [that make] it easy to mobilize public opinion against immigration."[171]

EU's research on informal administration practices and shifting immigrant strategies in four European countries reports shows that, in Greece:

> A number of different groups saw immigrants and their presence as a major cultural *threat* to Greece's *homogenised* ethnic state principles. Immigrants have been presented as *polluters* and *intruders* of the supposedly *pure* and relatively homogenous Greek social identity. On the other hand, the Greek state perceived immigration both as a *political challenge* and as a *problem*.[172]

In practice, the relatively few naturalisations undertaken by the Greek government through its discretionary powers concerns mostly ethnic Greeks of other countries (Albania, Georgia, Ukraine, Kazakhstan).

The recent financial crisis has further exacerbated the aforementioned conditions. There is now widespread poverty in large segments of the Greek population, resulting in heightened resentment towards immigrants. The situation has impacted those immigrants in steady employment because the loss of employment automatically leads to the subsequent loss of their residence permit. This has resulted in large numbers remaining in Greece illegally given that they have formed strong familial, cultural, and financial links to the country, while on the other hand, other immigrants, especially Albanians, returned to Albania, risking their "good name" as successful emigrants to Greece. Those who still work legally in Greece are in a state of limbo, unable yet having to decide whether it is better to stay, return, or re-migrate. Those who returned left

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[168] This is no doubt echoed in political rhetoric. *See, e.g.*, *Migration Minister: Greece Will Not Become a Gateway for Illegal Migration*, SCHENGEN VISA NEWS (Aug. 24, 2021),

https://www.schengenvisainfo.com/news/migration-minister-greece-will-not-become-a-gateway-for-illegal-migration [https://perma.cc/R6MZ-XZXF].

[169] Apostolos Lakasas-Kathimerini, *Greeks Haven't Adjusted to the New Age*, EKATHIMERINI.COM (Nov. 10, 2003, 8:00 AM), https://www.ekathimerini.com/news/18459/greeks-haven-t-adjusted-to-the-new-age [https://perma.cc/2QFH-NSC4].

[170] *Id.*

[171] *See* Castles, *supra* note 70, at 867.

[172] EUR. COMM'N, EU RESEARCH ON SOCIAL SCIENCES AND HUMANITIES: DOES IMPLEMENTATION MATTER? INFORMAL ADMINISTRATION PRACTICES AND SHIFTING IMMIGRANT STRATEGIES IN FOUR MEMBER STATES 34 (2003), https://cordis.europa.eu/docs/projects/files/HPSE/HPSE-CT-1999-00001/82577091-6_en.pdf [https://perma.cc/7BPX-56J9].

their adult children behind because second-generation migrants are usually unwilling to follow their parents to their ancestral land.[173] For this generation, the economic crisis along with and the lack of the Greek citizenship become strong push factors leading to their re-migration either to another European country or overseas.

VII. CONCLUSION

Frontier countries such as Greece and Italy must not only contain the influx of irregular immigrants (and refugees) on their shores, but they must also contend with the reality that after several years of immigrants fruitlessly waiting to reach their dream destination, they and their children have effectively made frontier countries their home. It is these situations that this Article aims to capture. Frontier states are caught between two poles. The first pole suggests that states possess (almost) unlimited authority to dictate their migration and nationality policies. On the other hand, the second pole provides that those states have to abide by common standards under international law. Those standards require obliging states to respect the so-called minimum standards of treatment for aliens,[174] which encompass general international human rights law as well as other more specific manifestations, such as international refugee law.

Within this context, frontier and other states set out their migration policies, which are moreover painted by the voices, reactions, and political choices of the populations of immigrant host states.[175] Uncontrolled immigration, as is usually the case in frontier states, leads to the tightening of immigration laws and increased political rhetoric to qualm electorates fears, whether justified or not. When the immigrant community settles well and becomes adaptive to the local culture, especially when one of its offspring shoots to stardom, reception becomes much easier, as illustrated by the Greek paradigm in the last decade. There is ample reason to suggest that frontier states which serve as recipients of the initial waves of irregular migration flows should distance themselves from the politics of forced removal, or they become long-term detention camps that deprive migrants of hope and wellbeing. At present, immigration policies in Europe and the United States use frontier states as buffer zones and are content to simply throw money to such states with a view to preventing migration from flowing further

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[173] *See* Domna Michail, *Social Development and Transnational Households: Resilience and Motivation for Albanian Immigrants in Greece in the Era of Economic Crisis*, 13 J. S. EUR. & BLACK SEA STUD. 265, 271–73 (2013) (also noting that second generation migrant communities elsewhere regularly face abuse within the community); Ilias Bantekas, *English Courts and Transnational Islamic Divorces: What Role for Personal Liberty of Muslim Women?*, 12 U. MIA. RACE & SOC. JUST. L. REV. 1 (2022).

[174] *See* Edwin Borchard, "*The Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC. INT'L L. 51, 60–62 (1939).

[175] *See generally* Akira Igarashi & James Laurence, *How Does Immigration Affect Anti-Immigrant Sentiment, and Who is Affected Most? A Longitudinal Analysis of the UK and Japan Cases*, 9 COMPAR. MIGRATION STUD. 24 (2021) (drawing on longitudinal data to analyze how immigration shapes anti-immigration sentiment).

north.[176] This uncomfortable truth produces subsequent tragedies. Frontier states must generally address the many perils irregular migrants face as they traverse treacherous weather, rough seas in winter, as well as traffickers and smugglers who have little empathy for human life and the plight of migrants. Frontier states are stretched, even when they receive financial or other assistance,[177] or when small-scale resettlement is attempted.[178]

The Greek case exemplifies the premise that while robust immigration policies are important, frontier states can become "homes" for irregular migrants, whether short or long-term. This Article does not suggest that migrants should settle in the countries of first arrival, but rather that the burden-sharing commitment of states in the industrialized North should allow all regional states (e.g., all EU member states) to serve as frontier states. Were such an aim to materialize, there would be no need for buffer zones. Moreover, lengthy detentions would no longer persist. Such an outcome would allow a speedier determination of migrants' statuses, during which they would enjoy humane standards of living, including the possibility for children to attend school appropriate to their age and ability, and even migrant integration for some. Buffer zones can never serve such purposes.[179]

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[176] UNHCR, LEGAL CONSIDERATIONS ON THE RETURN OF ASYLUM-SEEKERS AND REFUGEES FROM GREECE TO TURKEY AS PART OF THE EU-TURKEY COOPERATION IN TACKLING THE MIGRATION CRISIS UNDER THE SAFE THIRD COUNTRY AND FIRST COUNTRY OF ASYLUM CONCEPT (2016), https://www.refworld.org/docid/56f3ee3f4.html [https://perma.cc/5W7P-HMZN].

[177] *See The EU Facility for Refugees in Turkey*, EUR. COMM'N, https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/negotiations-status/turkey/eu-facility-refugees-turkey_en [https://perma.cc/MD2X-68DG]; *The Emergency Social Safety Net (ESSN): Offering a Lifeline to Vulnerable Refugees in Turkey*, EUR. COMM'N, https://ec.europa.eu/echo/emergency-social-safety-net-essn-offering-lifeline-vulnerable-refugees-turkey_en [https://perma.cc/6F8K-7F2L].

[178] *See* Catarina Demony, *Portugal to Take in 500 Unaccompanied Migrant Children from Greek Camps*, REUTERS (May 12, 2020, 2:44 PM), https://www.reuters.com/article/us-health-coronavirus-portugal-migrants/30ortugal-to-take-in-500-unaccompanied-migrant-children-from-greek-camps-idUSKBN22O30 [https://perma.cc/52SX-DQ4N]; *Finland to Take 130 Refugees, Mostly Children, from Greece*, AP NEWS (Apr. 30, 2020), https://apnews.com/article/f1ed0e35d580a06db619fdb93a3e3bc6 [https://perma.cc/9LNV-DYJU] (discussing Finland's decision to take in young asylum-seekers from Greece).

[179] Covid has not made things any easier and buffer zones with over-crowded camps exacerbate the situation. *See MEPs Call for Solidarity and Measures to Prevent Covid19 Crisis in Refugee Camps*, EUR. PARLIAMENT (Apr. 3, 2020, 1:25 PM), https://www.europarl.europa.eu/news/en/headlines/world/20200402STO76413/meps-call-for-measures-to-prevent-covid19-crisis-in-refugee-camps [https://perma.cc/R8FA-Q9QT].