



Jan Misiuna

SGH Warsaw School of Economics
Collegium of Socio-Economics
Department of Political Studies
jan.misiuna@sgh.waw.pl

Marta Pachocka

SGH Warsaw School of Economics
Collegium of Socio-Economics
Department of Political Studies
marta.pachocka@sgh.waw.pl

WHO COUNTS AS A FORCED MIGRANT? THE EU AND U.S. PERSPECTIVES¹

Summary: The scope of this paper focuses on the issues of forced migration. We aim to present the approaches of the European Union and the United States of America towards defining who is a forced migrant. Our analysis is based on official documents and other works published by the EU and U.S. federal government. This study is a continuation of our papers from 2016-2017 devoted to different aspects of complex migratory reality in the EU and U.S. We conclude that understanding of forced migration by both entities as expressed in the language used (and changed in time) differs, therefore prudence is necessary when comparing their policies in this field.

Keywords: European Union (EU), United States of America (USA), forced migrant, forced migration, refugees.

JEL Classification: F2, J1, K3.

Introduction

People are fleeing from different threats to their lives or livelihood arising from natural or man-made causes [Perruchoud and Redpath-Cross, eds., 2011, p. 39]. Forced migration is a global phenomenon that is behind among others the recent migration and refugee crisis in Europe. However, it is not only the EU that has to work out a comprehensive approach to this challenge. Similarly, in

¹ The article is based on J. Misiuna's research on *Immigration policy reform in the United States of America: genesis and the state of debate* (No. KES/BMN16/03/16) and M. Pachocka's research on *Comparative study of immigration policy in selected Member States of the European Union: conditions, solutions, consequences. Conclusions and recommendations for Poland. Part III* (No. KES/BMN16/04/16), both conducted at the Collegium of Socio-Economics of SGH Warsaw School of Economics.

recent years the U.S. has also been facing an increase in forced migration from the Middle East, Africa, South Asia, and from Central and South America. In this paper we aim to present the EU and the U.S. approaches towards defining who is a forced migrant. Our analysis is based on official documents and other works published by the EU and its different bodies as well as by U.S. governmental institutions. This study is a continuation of our co-authored papers from 2016-2017 devoted to the issue of the terminology used to describe selected segments of complex migratory reality in the EU and U.S. as well as its consequences for data gathering and policy design [Misiuna and Pachocka, 2016, 2017].

1. Who counts as a forced migrant in the EU?

Neither the Treaty on European Union (TEU) [EU, 2016a] nor the Treaty on the Functioning of the European Union (TFEU) [EU, 2016b] explicitly mention the terms such as ‘forced migrant(s)’ or ‘forced migration(s)’. It does not mean, however, that the issue of forced migration is not present in the EU law and its political documents or in the everyday activity of the EU and its institutions. On the contrary, it occurs, for example, in the content of such documents as: Joint Parliamentary Assembly of the Partnership Agreement concluded between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part – Resolution on the situation in Darfur [2007], Joint Parliamentary Assembly of the Partnership Agreement concluded between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Union and its Member States, of the other part – Minutes of the sitting of Wednesday, 15 June 2016 [2016] and Written questions by Members of the European Parliament and their answers given by a European Union institution [2014]. In addition, ‘forced migration’ is mentioned in many communications, opinions, reports, impact assessments and others mostly published by the European Commission (EC), the European Parliament (EP), the European Economic and Social Committee (EESC) and other EU bodies. With reference to the above-mentioned documents, the phenomenon of forced migration is discussed in the context of different subject matters, including EU external relations and foreign policy, EU immigration and asylum policy, EU development cooperation and assistance, environment and climate change, social provisions and human rights [EUR-Lex, s.a.].

It is useful to analyse the definitions of ‘forced migration’ and a ‘forced migrant’ provided in the *Asylum and Migration Glossary 3.0* [EMN, 2014] prepared by the European Migration Network (EMN). The first term is explained as: “A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine or development projects)” [EMN, 2014, p. 131]. This understanding is rooted in the *Glossary on Migration* of the International Organization for Migration (IOM) [Perruchoud and Redpath-Cross, eds., 2011, p. 39]. In this context, the EMN *Glossary* considers ‘migration’ a broader term and a ‘displacement’ a narrower one, while an ‘economic migrant’, a ‘forced migrant’ and ‘managed migration’ are classified as related terms [EMN, 2014, p. 131].

The second term discussed – a ‘forced migrant’ – is consistently defined as “A person subject to a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine or development projects)” [EMN, 2014, p. 131]. In this case, the narrower terms include a ‘displaced person’ and a ‘refugee’, while related ones encompass a ‘*de facto* refugee’, an ‘economic migrant’ and ‘forced migration’ [EMN, 2014, p. 131]. It is worth noting that IOM itself does not define a ‘forced migrant’ [Perruchoud and Redpath-Cross, eds., 2011].

So far, the EU *acquis* does not offer an official/legal definition of ‘forced migration’ or a ‘forced migrant’. However, both operational definitions are invoked by the EMN in its *Asylum and Migration Glossary 3.0* [EMN, 2014, p. 131], based on the IOM approach. Even though forced migration has been present in the EU acts of law and other documents for several decades now, the intensity of its occurrence has increased since the early 2000s [EUR-Lex, s.a.]. Indeed, the Union has been devoting much attention in its law and practice not to forced migration *per se*, but to the persons involved in forced migratory movements for various reasons. In this way, different groups of people could be considered as forced migrants, including asylum seekers, people in need of international protection, refugees, persons eligible for subsidiary protection, displaced persons. All these terms are used by the EU, some of them have their legal or operational definitions and even dedicated acts of law in the EU legal system (e.g. directives or regulations).

This is the case of a term ‘refugee’ which is mentioned both in the TFEU (art. 78(1) and Protocol (No. 24) on asylum for nationals of Member States of the European Union) and in the Charter of Fundamental Rights of the European Union (CFREU) [EU, 2012, art. 18] when the full name of the Geneva Convention of 28 July 1951 [UN General Assembly, 1951] and the Protocol of 31 January 1967 [UN General Assembly, 1967] relating to the status of refugees are invoked. This notion is explained in the Directive 2011/95/EU (Recast Qualification Directive), where a ‘refugee’ is understood as “a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply” [EU, 2011, art. 2(d)]. This definition is rooted in Art. 1A of the UN Geneva Convention of 1951 [UN General Assembly, 1951]. In addition, a ‘refugee status’ denotes “the recognition by a Member State of a third-country national or a stateless person as a refugee” [EU, 2011, art. 2(e)].

Another form of international protection available for applicants in the EU member states under the Common European Asylum System (CEAS) is a subsidiary protection. A person is eligible for it if he or she is “a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country” [EU, 2011, art. 2(f)]. By fulfilling these criteria, a person can be granted a ‘subsidiary protection status’ in an EU member state [EU, 2011, art. 2(g)].

The EU approaches forced migrants mostly through the prism of the issues of international protection and asylum what is well reflected in its asylum policy and the CEAS. EU does not provide any overall statistics on forced migration, but rather it collects the data on selected groups of those potentially falling into the category of forced migrants. Consequently, Eurostat offers data on asylum applications and decisions regarding them as well as ‘Dublin’ statistics associated with Regulation (EU) No. 604/2013 [EU, 2013]. However, the EU also

deals with the issue of forced migration (in this context often referred to as forced displacement) through humanitarian and development policy/interventions implemented in third countries. This external dimension of the EU approach to forced migration management (forced displacement) is not, nevertheless, the subject of discussion in this article, including applied terminology.

2. Who counts as a forced migrant in the USA?

To understand present U.S. migration law and policy towards forced migrants (at different times and due to their situation called asylees, refugees, displaced persons – DPs, escapees, German expellees [Daniels, 2002, p. 336], but strangely never ‘forced migrants’), it is necessary to restate the obvious: political context of legislation is of utmost importance. U.S. policy towards forced migrants was from the beginning shaped less by humanitarian concerns but rather by sets of prejudices, particularly anti-Semitism, and international policy concerns. Although many in Europe considered the United States as natural safe haven, its political class was reluctant to take up that role: the more so, as the popular attitude towards forced migrants was negative. Consequently “no refugee policy existed in statute law before World War II, and the first refugee law came only in 1948” [Daniels, 2002, p. 345]² and at the same time Department of State silently but extremely effectively opposed helping refugees who sought American visas to escape war in Europe [Daniels, 2002, p. 298].

Negative attitude towards refugees changed to certain extent with the beginning of the Cold War. In the late 1940s the U.S. opened its borders to the so-called ‘displaced persons’ who in fact, if not in name, were refugees primarily from East and Central Europe [Tichenor, 2002, pp. 181-188]. However, soon the term ‘refugee’ was introduced to the US law. Section 2 (a) of the Refugee Relief Act of 1953 stated that a ‘refugee’ is “any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation”. This definition clearly implied that a refugee had to escape from a communist country, therefore it was narrower than the 1951 definition of refugee elaborated by

² What is more until 1940s the US law “made no distinction between ‘immigrants’ and ‘refugees’” [Daniels, 2002, p. 296].

the Office of the United Nations High Commissioner for Refugees. The narrow Cold War definition of who is a refugee stayed in the books until 1980 [Gabaccia, 2012, p. 217] when the Refugee Act was signed into law.

The Refugee Act of 1980 (94 Stat. 102) was enacted to finally create a comprehensive regulation regarding forced migrants, particularly refugees and asylees. One of important and permanent changes to the U.S. immigration law introduced by the act was a new definition of a refugee that brought the U.S. regulation in line with the 1951 Geneva Convention [UN General Assembly, 1951] and the 1967 New York Protocol [UN General Assembly, 1967]. According to the Refugee Act of 1980 (Section 201) [1980], “the term ‘refugee’ means (...) any person who is outside any country of such person’s nationality (...) and who is unable or unwilling to return to (...) that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”, as well as women forced to or in danger of being forced to abort a pregnancy or sterilisation. It is necessary to stress that the definition of a refugee lists categories of people who cannot be considered refugees.

Although, the aim of the Congress was to create a modern law, one that is humanitarian and is not ideologically biased [Tichenor, 2002, p. 247], this is not exactly how it worked for the first decade since it came into force. “In practice, however, the United States continued during the two Reagan administrations to grant refugee status to escapees from communism, primarily from Southeast Asia and Eastern Europe, while making it difficult for others fleeing right-wing regimes, such as those of Guatemala and El Salvador” [Portes and Rumbaut, 2014, p. 43]. It was only after the fall of communism that forced migrants from those countries began to be recognised for what they were and were not considered economic migrants.

Section 208 of the Immigration and Naturalization Act [1965] provides definition of an ‘asylee’ and guidelines who can apply for asylum. Asylum can be granted to “any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status” if that alien fulfils criteria to become a refugee according to the Refugee Act of 1980. The U.S. Citizenship and Immigration Service’s *Glossary* of immigration terminology defines an asylee as “an alien in the United States or at a port of entry who is found to be unable or unwilling to return to his or her country of nationality, or to seek the protection of that country because of persecution or

a well-founded fear of persecution [...] based on the alien's race, religion, nationality, membership in a particular social group, or political opinion" [U.S. Citizenship and Immigration Service, s.a.]. In other words, "the difference between a refugee and an asylum seeker is based on location: a refugee lives outside both her homeland and the United States while an asylum seeker resides within American borders" [Tichenor, 2002, p. 347].

Another form of protection available to migrants within the United States is temporary protected status (TPS) which was established by Section 302 of the Immigration Act of 1990 (104 Stat. 4978) [1990]. "It is a temporary immigration status provided to nationals of specifically designated countries that are confronting an ongoing armed conflict, environmental disaster, or extraordinary and temporary conditions. It provides a work permit and stay of deportation to foreign nationals from those countries who are in the United States at the time the U.S. government makes the designation" [American Immigration Council, 2018]. The principal difference between TPS status and that of a refugee or asylee lies in fact that "TPS does not lead to lawful permanent resident status or give any other immigration status", however, it does deny the right to seek other forms of protection [U.S. Citizenship and Immigration Service, 2018]. When a designation of a country as TPS expires, a person protected from deportation because of TPS status reverts to his/her previous status. Presently, ten countries are designated as TPS, including South Sudan, Syria and Yemen [U.S. Citizenship and Immigration Service, 2018].

Conclusions

From historical perspective, one cannot speak on the development of modern approach towards forced migration (even if the term is not used neither in the EU nor U.S. laws) in Europe and the United States without stressing the mutual relationship of both. Both entities are characterised by different paths of evolution of their approaches in this field. So far, the EU does not offer a comprehensive, coherent and up-to-date approach to forced migration management, fully adopted to global and regional circumstances. However, the EU carries out activities in this area through various policies within its territory (through asylum policy to provide international protection to those third country nationals that require it) and beyond (through humanitarian and development assistance in third countries if necessary). The migration and refugee crisis in Europe accelerated the discussions on the CEAS reform within the framework of the EU asy-

lum policy and on the change of approach to forced migrants in their countries of origin within the external dimension of EU policies.

Historically, before and during II World War, the U.S. was not forthcoming towards refugees, and in subsequent period only towards those escaping communism. After the Cold War, the U.S. was generally open to refugees, accepting more resettlements than other countries. In response to the increase in the number of forced migrants, the Obama administration increased the limit for refugee resettlements and introduced several programs addressed to different groups in need of protection. The Trump administration decided to restrict the inflow of refugees: the annual limit for resettlements was lowered from 110,000 in 2017 to 45,000 in 2018 with further cuts expected.

The terms used to describe forced migrants in the EU and the U.S. have a common part since in both cases a word 'refugee' exists in law, and it is rooted in UN Geneva Convention of 1951. It does not change the fact that it can have a different scope and thus the context of application.

References

- American Immigration Council (2018), *Temporary Protected Status: An Overview*, <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview> (accessed: 14.09.2017).
- Daniels R. (2002), *Coming to America: A History of Immigration and Ethnicity in American Life*, Second edition, Harper Perennial, New York – London – Toronto – Sydney.
- EUR-Lex (s.a.), *Forced Migration*, Search Results, http://eur-lex.europa.eu/search.html?lang=en&SUBDOM_INIT=PRE_ACTS&DTS_DOM=EU_LAW&textScope0=ti-te&DTS_SUBDOM=PRE_ACTS&qid=1505137878216&type=advanced&andText0=%22forced+migration%22&sortOne=DD&sortOneOrder=desc (accessed: 14.09.2017).
- European Migration Network [EMN] (2014), *Asylum and Migration Glossary 3.0. A Tool for Better Comparability*, Brussels, October 2014.
- European Union [EU] (2011), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011.
- European Union [EU] (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

-
- European Union [EU] (2013), Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013.
- European Union [EU] (2016a), Consolidated Version of the Treaty on European Union, OJ C 202.
- European Union [EU] (2016b), Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 202.
- Gabaccia D.R. (2012), *Foreign Relations: American Immigration in Global Perspective*, Princeton University Press, Princeton, NJ.
- Immigration Act of 1990 (104 Stat. 4978).
- Immigration and Naturalization Act of 1965 (H.R. 2580; Pub.L. 89-236, 79 Stat. 911, enacted June 30, 1968).
- Refugee Act of 1980 (94 Stat. 102).
- Joint Parliamentary Assembly of the Partnership Agreement Concluded between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Community and its Member States, of the Other Part – Resolution on the Situation in Darfur (2007), OJ C 254, 26.10.2007.
- Joint Parliamentary Assembly of the Partnership Agreement Concluded between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Union and its Member States, of the Other Part – Minutes of the Sitting of Wednesday, 15 June 2016 (2016), OJ C 451, 2.12.2016.
- Misiuna J., Pachocka M. (2016), *Can U.S. Immigration Policy Inspire Solutions to the Immigrant Challenges in the EU?* “Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach”, nr 266, pp. 132-143.
- Misiuna J., Pachocka M. (2017), *Who Counts as an Unauthorized/Irregular/Illegal Immigrant? Comparative Analysis of the US and EU Perspectives.* “Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach”, nr 319, pp. 159-168.
- Perruchoud R., Redpath-Cross J., eds. (2011), *Glossary on Migration*, Second edition, International Migration Law, Series No. 25, International Organization for Migration, Geneva.
- Portes A., Rumbaut R.G. (2014), *Immigrant America: A Portrait*, Fourth edition, revised, updated, and expanded, University of California Press, Oakland, CA.
- Refugee Relief Act of 1953 (An Act for the Relief of Certain Refugees, and Orphans, and for Other Purposes (67 Stat. 400)).
- Tichenor D.J. (2002), *Dividing Lines: The Politics of Immigration Control in America*, Princeton University Press, Princeton, NJ.
- UN General Assembly (1951), Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189.

UN General Assembly (1967), Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606.

U.S. Citizenship and Immigration Service (s.a.), *Asylee*, Glossary, <https://www.uscis.gov/tools/glossary/asylee> (accessed: 14.09.2017).

U.S. Citizenship and Immigration Service (2018), *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status> (accessed: 14.09.2017).

Written questions by Members of the European Parliament and their answers given by a European Union institution (2014), 2014/C 216/01, OJ C 216, 9.7.2014.

KIM JEST MIGRANT PRZYMUSOWY? PODEJŚCIE UE I USA

Streszczenie: Ludzie uciekają przed różnymi zagrożeniami dla swojego życia i codziennej egzystencji, które mogą mieć podłoże zarówno w działaniach innych ludzi, jak i w czynnikach naturalnych. Migracje przymusowe są zjawiskiem globalnym, którego przejawem jest m.in. ostatni kryzys migracyjny i uchodźczy w Europie. Nie tylko UE musi wypracować kompleksowe podejście do migracji przymusowych. W podobnej sytuacji znajdują się również Stany Zjednoczone, które doświadczają rosnącej skali migracji przymusowych z Afryki, Bliskiego Wschodu, Azji Południowej oraz Ameryk Południowej i Środkowej. Celem niniejszego artykułu jest przedstawienie podejścia UE i USA do definiowania migranta przymusowego. W opracowaniu wykorzystano dorobek prawny i wybrane materiały publikowane przez UE i jej instytucje oraz przez amerykańskie instytucje rządowe pod kątem określonych pojęć wraz z ich definicjami, które odnoszą się do migracji przymusowych. Artykuł jest kontynuacją publikacji autorów z lat 2016-2017, poświęconych problematyce terminologii używanej do opisu poszczególnych wycinków rzeczywistości migracyjnej w UE i USA.

Słowa kluczowe: Unia Europejska (UE), Stany Zjednoczone Ameryki (USA), migrant przymusowy, migracje przymusowe, uchodźcy.