Complementary Pathways in Murky Legal Waters: A Lost Cause or a Light in the End of the Tunnel?

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In the absence of effective legal means of entry in the EU, asylum seekers arrive spontaneously, a process that involves substantial dangers.\(^1\) Countries of protection, on the other hand, engage in deterrence and containment practices, whose compliance with international law can be debated.\(^2\) Still, there are serious challenges in qualifying these practices as being in breach of international law obligations.\(^3\) At the same time, another reaction that countries of protection have is organizing access to their territory via resettlement and other legal pathways. These other pathways are viewed as complementary to resettlement, which has justified the name ‘complementary pathways.’ They can be framed as ‘legal pathways’ since the person gains access to territory in compliance with the destination country’s legislation, in contrast to spontaneous arrivals. In this sense, the process that leads to entry is regulated.

Complementary pathways merit special attention for at least two reasons. First, the concept has been introduced in the New York Declaration of 2016\(^4\) and further in the UN Global Compact on Refugees of 2018.\(^5\) Both are authoritative soft-law instruments which can be seen to exert normative power by virtue of their political programmatic nature. UNHCR, being the main international actor involved in resettlement, keeps advocating for the expansion

\(^5\) UNGA, 73rd Session, Global Compact on Refugees, A/73/12 (Part II) para. 94 (2018).
of complementary pathways, and the same process is ongoing on an EU level via *inter alia* the Asylum, Migration and Integration Fund (2014–2020 and 2021–2027). This top-down focus on the promotion of complementary pathways calls for a need to unpack this particular concept. Secondly, ‘complementary pathways’ is not a stand-alone concept by default, because it complements already existing practices. Therefore, its relationship with other practices (some of them might be regulated by law, others not) deserves an in-depth analysis. Currently, as already suggested, the relationship with resettlement seems to be highlighted, while the relationship with territorial asylum (i.e., spontaneous arrivals) is barely discussed. Such a discussion would imply delving into the question whether complementary pathways are actually part of and/or serve to justify externalisation and containment practices that ultimately undermine territorial asylum.

In light of these developments, the objective of this special issue is two-fold: first, to enquire into the policy drivers and the actors behind these complementary pathways that might make them possibly successful; and second, to better understand their relationship with the law. The reason for the difficult relationship between complementary pathways and the legal order is two-fold. First, these pathways are discretionary. They themselves are not demanded by any international law obligations. Respectively, there is no right to a complementary pathway and their regulation remains a matter of state discretion. Second, their engagement with extraterritorial issues places them in an awkward position in an international legal regime formed in a neatly cut Westphalian territorial order. Does this mean that law is irrelevant in the discussion of complementary pathways, and they should be left entirely for the power-laden international relations context?6 If the answer is negative, how is law relevant? How do any relevant legal frameworks at international, regional and national level relate to complementary pathways? Does the relevant law encourage the establishment of complementary pathways? In the alternative, does it contain certain conditionalities that constitute obstacles? By engaging with these questions, the contributions in this special issue also seek to shed light on the international protection regime, including the protection regime established at the EU level, and on the place of complementary pathways within it.

The starting point is that especially after the adoption in 2018 of the Global Compact on Refugees the establishment of complementary pathways has

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been politically promoted. Important actors, such as the UNHCR and the EU, have been clearly encouraging States to initiate and support such pathways. In light of this development, the efforts to understand the pathways have been mainly channeled in two directions. The first one has aimed to achieve better understanding of the actual practices, i.e., what States actually do, what practical arrangements they have implemented and how these fit within the general concept of complementary pathways coined in the Global Compact. These efforts are important and they should continue given the novelty of some of the practices and that they remain in the realm of the discretionary, which also might pose difficulties in accessing relevant information.

In addition to such empirical studies, efforts have been also invested in the direction of understanding and evaluating the pathways from political and moral perspectives. These efforts are also important given the involvement of different actors each one with its own interests. So far, however, little has been said about the role of the law, including public international law, human rights law, EU law and national law.

The articles included in the special issue contribute to the policy and international-relations perspective and to better understanding the role of the law. The special issue starts with a contribution by Joanne van Selm that offers the policy and the international-relations perspective. This beginning is justifiable given that complementary pathways are still very much in the realm of the political. In her contribution, Joanne van Selm takes a favourable position to complementary pathways, acknowledging both their potential to live up to their promises to provide protection and solutions, and cautions against the potential pitfalls in implementing them. The author suggests that

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12 For an important exception see Foblets, M. and Leboeuf, L. (Eds) Humanitarian Admission to Europe. The Law between Promises and Constraints (Hart 2020).
complementary pathways are here to stay. Her claim is backed by the observation that governments are being encouraged through the Global Compact for Refugees as well as by UNHCR and the European Commission to develop or expand complementary pathways. This encouragement is framed as a ‘top-down’ approach to complementary pathways. Meanwhile, communities, academic institutions, and employers are asked under the various EU and other funding schemes, or partnership networks to initiate and develop complementary pathways. Joanne van Selm frames this as a ‘bottom-up’ approach and explains that this approach is an important distinguishing feature of complementary pathways, which might make them successful.

Despite her optimism which explains her focus on the ‘why’ and ‘how’ questions (i.e., why were complementary pathways developed and how can and/or should they be applied and developed in light of all the actors involved), Joanne van Selm is very clear that there are many issues left open and legal challenges that need to be addressed. While the ‘bottom-up’ approach of complementary pathways might be a key to their success, she highlights that States are ultimately ‘central for the administrative, status and legal issues surrounding complementary pathways.’ State authorities are also central for ensuring safeguards and proper regulation of all the actors involved. In addition, as she frames it ‘[a] top-down approach implies policy consistency, or at least the ability of (in this case) governments to maintain oversight and a rules-based approach to refugee admissions and protection/integration.’

The role of the law in the ‘the top-down’ approach is therefore crucial. Vladislava Stoyanova’s article aims to precisely investigate this role. While Stoyanova does not suggest that the concept of complementary pathways should be discarded because of its intrinsic contradictions, she does explain the definitional challenges given that the concept disrupts the existing legal categories for regulating migration. The ‘how’ question that was initially engaged with by Joanne van Selm from an international relations perspective, is addressed by Stoyanova from the perspective of human rights law and EU law. In particular, she asks how human rights law and EU law regulate movement across international borders and, more importantly, how complementary pathways fit within these regulations. She identifies multiple relevant questions worthy of future attention for understanding how complementary pathways fit. Her article then focuses on the right to leave, the right to non-refoulement, the right to family life and procedural rights, to explain the relationship between these rights and complementary pathways from the perspective of the European Convention on Human Rights, EU law and domestic law. Stoyanova concludes that this relationship exists and, as a consequence, the ECHR imposes certain restraints on States how to regulate admission of
family members. In particular, the assessment as to whether denial of admission is contrary to Article 8 ECHR, can include a combination of family-related and protection-related considerations, which demonstrates the relationship. As to EU law, Stoyanova identifies various complications that this legal framework causes, given its specific rationale. Yet, she highlights that the EU Charter facilitates flexibility in the interpretation of the requirements for family reunification, in this way possibly making the relevant EU law sensitive not only to considerations about family links, but also to the protection needs of the family members to be admitted.

The novelty of Bratanova van Harten’s article is that it shifts the perspective on the relationship between human rights law and complementary pathways. In contrast to Stoyanova who asks the question of how human rights law might regulate complementary pathways and, in this way, impose certain restraints on States’ discretionary policies and practices, Bratanova van Harten rather asks how human rights law might require the introduction of complementary pathways to start with. While the question whether human rights law directly imposes such a requirement must be answered in the negative, the existence of pathways is a relevant factor in the ECtHR's reasoning regarding the protection from collective expulsions. To demonstrate this, Bratanova van Harten investigates the meaning of ‘genuine and effective access to means of legal entry’ that is a factor invoked by the ECtHR to judge whether a collective expulsion as per Article 4 Protocol No. 4 ECHR has taken place. If there were such means of legal entry and the migrant did not take advantage of them without good reasons, no violation of ECHR will be found. This leads to the stark conclusion that the introduction of pathways has been utilized in the human rights law reasoning in a way that actually works to the detriment of migrants' interests. While human rights law imposes no positive obligation upon States to have complementary pathways, if such exist and are not made use of by the migrant, no violation of Article 4 Protocol No. 4 ECHR might be found. The risk is therefore that the establishment of pathways makes it easier to deprive migrants from the protection guaranteed by the prohibition of collective expulsions. This risk feeds the perception that complementary pathways, as mentioned above, favour externalization of migration control and legitimize a tough stance on immigration. This identification of this risk corresponds to Joanne van Selms’s conclusion that ‘there is a constant need for vigilance as to the relationship between complementary pathways and overall refugee policy: there are pitfalls as well as benefits.’ Having shown a very concrete pitfall, Bratanova van Harten notes in conclusion that there might be benefits if States feel encouraged by the ECtHR's reasoning to establish pathways. At this point we are back to the realm of the political and the discretionary.
The final article by Alezini Loxa engages with the policy choices made so far by the EU Commission regarding complementary pathways. To use Joanne van Selm's terminology, Loxa's article is about the ‘top-down approach’ to the pathways that, as van Selm explains, can bring consistency and ‘rule-based approach’. Paradoxically, however, Loxa shows that the top-down approach specifically by the Commission has brought anything but consistency and rule-based approach. Just the contrary. By investigating the Commission’s policy proposals regarding resettlement, other humanitarian admission schemes, family reunification, and pathways for work and education, Loxa demonstrates that these are merely declaratory with limited potential to offer protection. Importantly, there is no clarity how the existing EU legal frameworks would interact with these policy proposals. In addition, it is far from clear what might be the added value of EU law in this area in comparison to national law. This conclusion suggests that it might be more fruitful if the scholars' attention for the future is directed to the national level. This would imply investigating the national practices and the national regulation of the relevant issues, i.e. admission, stay, basis of the residence permits, conditions for prolongation of permits, conditions for changing the basis of permits, etc., as detailed in Stoyanova’s article.